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FOREIGN DIRECT INVESTMENT SCREENING IN THE EU – FUTURE PERSPECTIVES AND IMPLIED OBLIGATIONS

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Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union establishes a framework for the screening by Member States of foreign direct investments into the Union on the grounds of security or public order. In addition, it introduces two separate cooperation mechanisms, depending on whether the foreign direct investment is undergoing screening. Although it largely provides for non-controversial procedural requirements (relating to transparency, non-discrimination, relevant time frames, coordination, confidentiality, assistance and mutual communication), Regulation 2019/452 also contains specific implied obligations, which may prove to be especially burdensome for the Member States which have no foreign direct investment screening legislation. Regulation 2019/452 does not expressly oblige Member States to adopt a foreign direct investment screening mechanism. Nevertheless, the Commission's activities and communications seem to suggest that the ultimate goal sought to be achieved is to have all Member States introduce national foreign direct investment legislation in the foreseeable future.

Key words: *Regulation 2019/452, foreign direct investment, screening of foreign direct investment, security and public order, foreign direct investment screening mechanism*

1. INTRODUCTION

Activities pertaining to the screening of foreign direct investment (hereinafter: FDI), as a rule, always have strong political and economic undertones. This is the reason why the topic is often analyzed by referencing specific policy arguments and the prevailing geo-political setting.² The presence of these interlinked factors was expressly recognized in the process leading up to the adoption of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019

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² J. Jacobs, "Tiptoeing the Line Between National Security and Protectionism: A Comparative Approach to Foreign Direct Investment Screening in the United States and European Union", *International Journal of Legal Information* 47(2), 2019, pp. 105-117; OECD Secretariat, Investment Division in the Directorate for Financial and Enterprise Affairs, *Framework for Screening Foreign Direct Investment into the EU, Assessing effectiveness and efficiency*, 2022, p. 16 et seq.

establishing a framework for the screening of foreign direct investments into the Union (hereinafter: Regulation 2019/452)³. In its Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, the Commission recognized increasing concerns relating to the strategic acquisitions of European companies with key technologies, stressing that “the EU would not hesitate to act in order to protect its citizens and its industry when foreign countries or companies engage in unfair practices or raise concerns for security and public order”⁴. It effectively justified its legislative proposal by the need for the EU and the Member States to “be in a position to take determined and swift action where foreign direct investment may affect security or public order”⁵. Likewise, the COVID-19 epidemic, and its well recorded effects on both national and global economies, shed more light on the importance of safeguarding specific (particularly health-care related) industries.⁶ Finally, the Commission has recently, in light of the Russian invasion, warned that “there is a significantly heightened risk that FDI by Russian and Belarusian investors may pose a threat to security and public order”⁷ and called on the Member States to systematically check and very closely scrutinize precisely these FDIs.⁸

The search for an appropriate balance between an open market on the one, and public policy and security concerns on the other hand, has long been in the focus of the Commission’s endeavors. Nevertheless, it is hard to ignore that Regulation 2019/452 represents a thorough change in the Commission’s stance. Although an in-depth analysis of the evolution of the Commission’s stance (initially marked by infringement proceedings against the Member States which opted for FDI

³ Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ L 79 I/1, 21.3.2019, as amended by Commission Delegated Regulation (EU) 2020/1298 of 13 July 2020 amending the Annex to Regulation (EU) 2019/452 of the European Parliament and of the Council establishing a framework for the screening of foreign direct investments into the Union, OJ L 304/1, 18.9.2020.

⁴ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Welcoming Foreign Direct Investment while Protecting Essential Interests, COM(2017) 494 final, 13.9.2017, p. 2.

⁵ *Ibid.*, p. 12.

⁶ Communication from the Commission, Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe’s strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation), OJ C 99 I/1, 26.3.2020, p. 1.

⁷ Communication from the Commission, Guidance to the Member States concerning foreign direct investment from Russia and Belarus in view of the military aggression against Ukraine and the restrictive measures laid down in recent Council Regulations on sanctions, OJ C 151 I/1, 6.4.2022, p. 2. Communication primarily relates to Council Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia’s actions destabilizing the situation in Ukraine (OJ L 229, 31.7.2014, p. 1) and its amendments and Council Regulation (EC) No 765/2006 of 18 May 2006 concerning restrictive measures in view of the situation in Belarus (OJ L 134, 20.5.2006, p. 1) and its amendments.

⁸ *Ibid.*, pp. 2, 3, 10.

screening mechanisms)⁹ would certainly be interesting from both a political and an ideological standpoint, one can hardly dispute that Regulation 2019/452 represents a new chapter in its search for an “ideal” mix of globalization and protectionism. What originally started as the EU’s nominally proclaimed aim to contribute to the progressive abolition of restrictions on FDI¹⁰ is now slowly but surely being replaced by a framework which aims to detect potential threats and employ effective trade defense instruments.¹¹

The legislative process was initiated in 2017 with a proposal put forward by Germany, France and Italy. Stressing the importance of preventing *any damage to the economy through one-sided, strategic direct investment made by foreign buyers in areas sensitive to security or industrial policy*, Member States called for a European solution which would ensure reciprocity and a level playing-field.¹² To what extent Regulation 2019/452 indeed represents a satisfactory answer to voiced concerns remains open for debate.¹³ As the legislative process was burdened by divergent national legal approaches and opposing views advocated by different Member States,¹⁴ the number of sub-optimal solutions which found their way into the final text should not come as a surprise. However, more than three years of application seems to indicate that Regulation 2019/452 is used to indirectly promulgate goals which (at least at first sight) go well beyond its originally envisaged framework. Although one can only speculate how such a development may potentially affect future legislative initiatives, the analysis shows that the Commission has clearly taken the role of incentivizing all Member States to introduce national FDI screening mechanisms. This paper analyzes the effects of such an initiative in relation to the proclaimed authority of Member States to decide for themselves whether to adopt national FDI

⁹ R. Bismuth, “Reading Between the Lines of the EU Regulation Establishing a Framework for Screening FDI into the Union”, Chapter 7, in: J. H. J. Bourgeois (ed.), *EU Framework for Foreign Direct Investment Control*, 111 European Monographs, Wolters Kluwer, 2020 [Kindle Edition], §7.01 (Introduction), p. 158 and §7.02 (*Deciphering the European Commission’s New “Protective Narrative”*), p. 159. Author points to the infringement proceedings that the Commission initiated against France, Bulgaria, Hungary, Latvia, Lithuania and Slovakia relating to their laws which tended to restrict FDI in certain sectors.

¹⁰ Art. 206 of the Treaty on the Functioning of the European Union. See also Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Towards a Comprehensive European International Investment Policy, COM(2010)343 final, 7.7.2010, p. 3, where the Commission took an overwhelmingly, almost uncritical, positive stand towards FDI, noting merely that its negative effects may “arise on a sector-specific, geographical and/or individual basis”.

¹¹ S. Hindelang & A. Moberg, „The Art of Casting Political Dissent in Law: The EU’s Framework for the Screening of Foreign Direct Investment”, *Common Market Law Review* 50, 2020, p. 1429.

¹² “Proposal for ensuring an improved level playing field in trade and investment”, Berlin, Paris, Rome, February 2017, <https://www.blomstein.com/perch/resources/eckpunkt Papier-proposals-for-ensuring-an-improved-level-playing-field-in-trade-and-investment.pdf>, Internet address visited on January 2nd, 2023.

¹³ Bismuth, *supra* n. 9, [Kindle Edition], §7.02 (*Deciphering the European Commission’s New “Protective Narrative”*), p. 161. The author points out that the Commission’s proposal did not adequately address concerns voiced by Germany, France and Italy inasmuch as it did not deal with the issue of reciprocity, anti-competitive effects and subsidized acquisitions.

¹⁴ For divergent views of various Member States during the legislative process leading up to the adoption of Regulation 2019/452, *Ibid.*, p. 161. See also *infra* n. 135.

screening and/or monitoring mechanisms. As will be seen, the nominally relaxed framework for the screening of FDIs provided by Regulation 2019/452 contains more than one element which may be used in the process of setting up a close-knit EU FDI screening and monitoring scheme, characterized by the distinct obligations invariably imposed on all Member States and the Commission's *de facto* control over the system of foreign investments within the EU.

The paper firstly analyses specific solutions of Regulation 2019/452 (2.), depending on whether the Member State adopted national FDI screening legislation or not (2.1., 2.2.). Considering the results of this analysis, the third chapter evaluates the effects of Regulation 2019/452 in terms of harmonizing national screening mechanisms (3.). Special attention is given to elements which, within the existing EU screening framework, provide for implied obligations on the part of Member States which do not have FDI screening legislation (3.1.) and the Commission's expectations that all Member States introduce screening mechanisms in the foreseeable future (3.2.).

2. REGULATION 2019/452

Regulation 2019/452 entered into force on 10 April 2019 and became applicable from 11 October 2020,¹⁵ thus formally marking the beginning of cooperation between Member States and the Commission relating to FDI.¹⁶ Although it proclaims the importance of providing legal certainty for Member States' screening mechanisms on grounds of security and public order, the common framework it introduces is without prejudice to the sole responsibility of Member States for safeguarding their own national security.¹⁷ In accordance with Art. 4 (2) of the Treaty on European Union¹⁸ (hereinafter: TEU) and Art. 346 of the Treaty on the Functioning of the European Union¹⁹ (hereinafter: TFEU),²⁰ and as underlined by the Regulation's Preamble, "the decision on whether to set up a screening mechanism or to screen a particular foreign direct investment remains the sole responsibility of the Member State concerned"²¹. Consequently, Art. 1 (3), defining the subject matter and scope of Regulation 2019/452, provides that nothing in Regulation 2019/452 "shall limit the right of each Member State to decide whether or not to screen a particular

¹⁵ Art. 17 Regulation 2019/452.

¹⁶ Regulation 2019/452 has its basis in the field of the common commercial policy. See para. 6 Preamble, Regulation 2019/452. See also Art. 207 of the Treaty on the Functioning of the European Union. The paper does not address the issue of what should have been the proper EU Treaties legal basis for Regulation 2019/452 in terms of EU competences. For more on this issue, see: Hindelang & Moberg, *supra* n. 11, p. 1435 et seq.

¹⁷ Para. 7 Preamble, Regulation 2019/452.

¹⁸ Consolidated version of the Treaty on European Union, OJ C 326/13, 26.10.2012.

¹⁹ Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326/47, 26.10.2012.

²⁰ Art. 1 (2) Regulation 2019/452.

²¹ Para. 8 Preamble, Regulation 2019/452.

foreign direct investment within the framework of this Regulation”.²² As the Commission so eloquently stated in its Explanatory Memorandum, the objective of Regulation 2019/452 “is to create an enabling framework for Member States that already have or wish to put a screening mechanism in place, and to ensure that any such screening mechanism meets some basic requirements, such as the possibility of a judicial redress of decisions, non-discrimination between different third countries and transparency”²³.

As per its Art. 1 (1), Regulation 2019/452 aims to achieve two main goals: (1) to establish a framework for the screening by Member States of FDI into the Union on the grounds of security or public order, and (2) to establish a mechanism for cooperation between Member States, and between Member States and the Commission, regarding FDI likely to affect security or public order, including the possibility for the Commission to issue opinions on such investments. At the same time, although Regulation 2019/452 obviously does not impose an obligation on Member States to adopt an FDI screening mechanism, it does provide for a different set of specific steps which must be observed by all Member States. Depending on whether the Member State has national FDI screening legislation (2.1., 2.2.), the following part outlines those differences while simultaneously addressing each of the goals set out by Regulation 2019/452.

2.1. Member States with FDI screening legislation

As to the position of Member States that have FDI screening legislation, the following part firstly analyses the requirements which must be met to achieve the goal of establishing an EU framework for the screening of FDI into the Union on the grounds of security or public order (2.1.1.). It then turns to the specifics of the cooperation mechanism as provided for in Art. 6 of Regulation 2019/452 relating to FDI undergoing screening (2.1.2.).

2.1.1. EU framework for FDI screening

Art. 3 (1) of Regulation 2019/452 provides that Member States “may maintain, amend or adopt” FDI screening mechanisms to screen FDI in their territory on the grounds of security or public order. The use of the word “may” (instead of the word “shall”) clearly suggests a lack of an obligation on the part of the Member States. However, should the Member State choose to adopt, and then subsequently maintain or amend, a national FDI screening mechanism, it will have to meet the goals set by Regulation 2019/452 by transposing its key elements. Consequently,

²² For more on Art. 1 (3) Regulation 2019/452, see *infra* n. 102.

²³ Explanatory Memorandum, 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 [SWD(2017) 297 final], COM(2017) 487 final, 2017/0224(COD), 13.9.2017, p. 3.

national FDI screening legislation must be aligned with Regulation 2019/452 in the following manner:

- rules and procedures relating to screening mechanisms, including relevant timeframes, must be transparent and not discriminate between third countries;²⁴
- Member States must set out the circumstances triggering the screening, the grounds for screening and the applicable detailed procedural rules;²⁵
- a Member State must, under its national screening mechanism, apply timeframes;²⁶
- the screening mechanism must allow the Member State to consider the comments of other Member States²⁷ and the opinions of the Commission^{28;29}
- national legislation must be set up in order to protect confidential information, including commercially-sensitive information, made available to the Member State undertaking the screening;³⁰
- the foreign investors and undertakings concerned must have the possibility to seek recourse against screening decisions of national authorities;³¹
- Member States must maintain, amend or adopt measures which are necessary to identify and prevent circumvention of the screening mechanisms and screening decisions;³²
- Member States had to notify the Commission of its existing screening mechanisms by May 10th, 2019;³³
- Member States must notify the Commission of any amendment to an existing screening mechanism within 30 days of the entry into force of any amendment to an existing screening mechanism.³⁴

²⁴ Art. 3 (2) Regulation 2019/452.

²⁵ *Ibid.*

²⁶ Art. 3 (3) Regulation 2019/452.

²⁷ As referred to in Art. 6 and 7 of the Regulation 2019/452.

²⁸ As referred to in Art. 6, 7 and 8 of the Regulation 2019/452.

²⁹ Art. 3 (3) Regulation 2019/452.

³⁰ Art. 3 (4) Regulation 2019/452. As per Art. 10 (*Confidentiality of information transmitted*), information received as a result of the application of Regulation 2019/452 shall be used only for the purpose for which it was requested and Member States and the Commission must ensure the protection of confidential information acquired in accordance with Union and the respective national law. Finally, Member States and the Commission must ensure that classified information provided or exchanged under Regulation 2019/452 is not downgraded or declassified without the prior written consent of the originator.

³¹ Art. 3 (5) Regulation 2019/452.

³² Art. 3 (6) Regulation 2019/452. *Infra* n. 140.

³³ Art. 3 (7) Regulation 2019/452. Art. 3 (8) Regulation 2019/452 further on provides that no later than three months after having received the notifications referred to in Art. 3 (7), the Commission shall make publicly available a list of Member States' screening mechanisms and keep that list up to date. *Infra* n. 89.

³⁴ Art. 3 (7) Regulation 2019/452. This provision clearly underlines the Member State's autonomy in terms of amending (and then, by extension also both introducing) its own national FDI screening legislation, inasmuch as the Commission is not called on to give its input prior to the amendment's entry into force. See also Art. 3 (8) of the Regulation 2019/452. *Infra* n. 90.

Even though Regulation 2019/452 expressly refers to “Member States which have a screening mechanism in place” only once, in its Art. 3 (6), it is rather obvious that all the obligations mentioned in Art. 3 are equally applicable to all Member States which have national FDI screening mechanisms in place. After all, it follows from the provision’s own heading that it relates to *Screening mechanisms of Member States*. Moreover, all requirements outlined by Art. 3 must equally be respected by the Member States which already have (and/or are amending) their FDI screening legislation or are in the process of adopting new FDI screening legislation.

Although the list of requirements provided for in Art. 3 (2) to (7) of Regulation 2019/452 seems to represent a form of “light-touch” harmonization which aims to standardize diverging Member States’ screening mechanisms in a broad manner,³⁵ it has been rightly suggested that it hardly represents any real added value for Member States’ FDI screening mechanisms. More specifically, apart from the notification obligation provided for in Art. 3 (7), the list largely only reiterates the principles pertaining to the freedom of movement of capital already identified by the Court of Justice.³⁶ Consequently, it is more appropriate to view the Art. 3 requirements as the Commission’s attempt to “discipline and control” Member States which already have and maintain their own national FDI screening mechanisms.³⁷

In addition to the obligations set out in Art. 3 of Regulation 2019/452, Member States with an FDI screening mechanism must adhere to the special obligation relating to annual reporting. Art. 5 (1) of Regulation 2019/452 provides for a general obligation (relating to all Member States) to submit to the Commission, by March 31st of each year, an annual report covering the preceding calendar year, which shall include aggregated information on FDIs that took place in their territory, on the basis of information available to them, as well as aggregated information on the requests received from other Member States pursuant to Art. 6 (6)³⁸ and Art. 7(5) of Regulation 2019/452.^{39,40} In addition to that information, Member States that maintain FDI screening mechanisms must, for each reporting period, also provide aggregated information on the application of their screening mechanisms.⁴¹ As to the specific procedural requirement which must be met, Member States must also adhere to the special procedure provided by Art. 8 in situations where FDIs are likely to affect projects or programs of Union interest, which includes observing

³⁵ Hindelang & Moberg, *supra* n. 11, p. 1446.

³⁶ Bismuth, *supra* n. 9, [Kindle Edition], §7.03 (*A Limited Added Value for Member States’ Existing FDI Screening Mechanisms*), p. 161; W. Zwartkruis & B. de Jong, „The EU Regulation on Screening of Foreign Direct Investment: A Game Changer?”, *European Business Law Review* 2020, pp. 455-458, 466, where authors emphasize that most of the rules relating to minimum requirements for Member State screening mechanisms “can already be considered part of the current law on free movement [of capital and the freedom of establishment]”.

³⁷ Bismuth, *supra* n. 9, [Kindle Edition], §7.03 (*A Limited Added Value for Member States’ Existing FDI Screening Mechanisms*), p. 161.

³⁸ *Infra* n. 73.

³⁹ *Infra* n. 129.

⁴⁰ *Infra* n. 91.

⁴¹ Art. 5 (2) Regulation 2019/452.

information requirements as prescribed by Art. 9, using the information transmitted in line with the general confidentiality obligation as provided for by Art. 10 and processing personal data in line with Art. 14 of Regulation 2019/452.

Member States must also meet obligations prescribed by Art. 11 of Regulation 2019/452. As the provision seeks to institute an effective cooperation and direct exchange of information, it provides for an additional obligation on the part of all Member States. To be more specific, each Member State (as well as the Commission) must establish a contact point for the implementation of Regulation 2019/452.⁴² As to the details pertaining to contact points situated in Member States, Regulation 2019/452 provides further details in its Preamble by stating that they must be “appropriately placed within the respective administration and should have the qualified staff and the powers necessary to perform their functions under the coordination mechanism and to ensure a proper handling of confidential information”⁴³. Member States and the Commission are to involve these contact points on all issues which are relating to the implementation of Regulation 2019/452.⁴⁴

Finally, Member States which maintain national FDI screening legislation must adhere to the cooperation mechanism in relation to FDIs undergoing screening from Art. 6 of Regulation 2019/452. As will be shown in the following part, the scope of application of Art. 6 must be interpreted narrowly, to encompass situations when the Member State has its own national FDI screening legislation in place and applies it in the process of undertaking FDI screening on grounds of security or public order.⁴⁵

2.1.2. Cooperation mechanisms in relation to FDIs undergoing screening

If Art. 3 of Regulation 2019/452 aims to promote convergence of divergent national FDI screening mechanisms, albeit according to the criteria already established in European law, the rules relating to the cooperation mechanism and information exchange have been recognized as not only *globally unique* but also as the most valuable innovation over Member States’ past practices.⁴⁶ However, before going into the specifics of the envisaged cooperation mechanism, one must address the Regulation’s terminology from Art. 2, as it directly impacts the scope

⁴² Art. 11 (1) Regulation 2019/452.

⁴³ Para. 27 Preamble, Regulation 2019/452.

⁴⁴ Art. 11 (1) Regulation 2019/452. As per Art. 11 (2) Regulation 2019/452, a secure and encrypted system shall be provided by the Commission to support direct cooperation and exchange of information between the contact points.

⁴⁵ The analysis of the cooperation mechanisms provided for by Regulation 2019/452 shows that a Member State which maintains national FDI screening legislation may (depending on the circumstances of the case) also become the addressee of Art. 7 relating to FDIs not undergoing screening. Due to the specifics of the scope of application of Art. 7, these situations are analyzed within the heading relating to Member States which have no FDI national legislation. See *infra* 2.2.2. Cooperation mechanism in relation to FDIs not undergoing screening.

⁴⁶ OECD Secretariat, *supra* n. 2, p. 22.

of application of Art. 6 of Regulation 2019/452 which applies to the cooperation mechanism in relation to FDIs undergoing screening.

Regulation 2019/452 provides for different cooperation mechanisms depending on whether the FDI is undergoing screening. In that sense, Art. 6 applies to the cooperation mechanism in relation to FDIs *undergoing screening*, while Art. 7 applies to the cooperation mechanism in relation to FDIs *not undergoing screening*. At the same time, however, Art. 2 provides for three separate definitions which may prove to cause distinct interpretative problems.

Art. 2 of Regulation 2019/452 differentiates between the terms “screening mechanism” and “screening”. Art. 2 (1) (4) defines the term “screening mechanism” as “an instrument of general application, such as a law or regulation, and accompanying administrative requirements, implementing rules or guidelines, setting out the terms, conditions and procedures to assess, investigate, authorize, condition, prohibit or unwind foreign direct investments on grounds of security or public order”. This definition is complementary with Art. 3 (1) which provides that, in accordance with Regulation 2019/452, Member States may maintain, amend or adopt “mechanisms to screen foreign direct investments in their territory on the grounds of security or public order”. Art. 2 (1) (3) of the Regulation 2019/452, however, provides for an additional definition of the term “screening”, stating that it “means a procedure allowing to assess, investigate, authorize, condition, prohibit or unwind foreign direct investments”.

The mere fact that Art. 2 (*Definitions*) defines these two terms in a different manner clearly shows that the legislator’s intention was to attribute different meaning to them. To be specific, the term “screening mechanism” relates to the setting where the Member State undertakes the screening in accordance with a formal legal screening instrument of “general application”⁴⁷ (i.e. in accordance with its national FDI screening legislation), while at the same time such screening is being done “on grounds of security or public order”.⁴⁸ It thus follows that the process of FDI “screening” is wider in its scope than the process undertaken by the application of the “screening mechanism” inasmuch as it encompasses *any kind* of procedure for reviewing FDI irrespective of whether the Member State has national FDI screening legislation of general application, including screening that is being done on grounds other than security and public order.⁴⁹ Consequently, although *ad hoc* screening

⁴⁷ The above conclusion that the definition relates to a “legal” instrument of general application (i.e. a situation where Member State applies its national FDI screening legislation) follows more clearly from the German version of Art. 2 (1) (4) of the Regulation 2019/452, which states: „Überprüfungsmechanismus“ ein allgemein anwendbares Rechtsinstrument [emphasis added], beispielsweise ein Gesetz oder eine Vorschrift, und die damit zusammenhängenden verwaltungstechnischen Anforderungen, Durchführungsvorschriften oder -anleitungen, mit denen die Bestimmungen, Bedingungen und Verfahren für die Prüfung, Untersuchung, Genehmigung, Knüpfung an Bedingungen, Untersagung oder Rückabwicklung ausländischer Direktinvestitionen aus Gründen der Sicherheit oder der öffentlichen Ordnung festgelegt werden.

⁴⁸ Hindelang & Moberg, *supra* n. 11, p. 1455.

⁴⁹ *Ibid.* Although starting with proper delineation of definitions of the terms “screening” and “screening mechanism”, authors proceed to reach the wrong conclusion. See *infra* n. 51 and n. 61.

(which any Member State may undertake by means of a separate legal instrument tailor-made for a specific FDI transaction, irrespective of whether it has national FDI screening legislation which it otherwise generally applies) would constitute “screening”, such an instrument would not constitute a “screening mechanism” as it could not be qualified as a legal instrument of *general application*. The conclusion would be the same irrespective of the grounds for screening provided for by such an *ad hoc* screening instrument. Likewise, if a Member State has national FDI screening legislation of general application which provides for FDI screening on some other grounds (in addition to security and public order), than such legislation would be considered a “screening mechanism” only when the screening is undertaken on the grounds of either security or public order.⁵⁰

Turning back to Art. 6 of Regulation 2019/452, which applies to the cooperation mechanism in relation to FDIs undergoing *screening*, one might thus conclude that it automatically applies every time a Member State initiates any screening procedure, irrespective of whether that Member State has national screening legislation that it otherwise generally applies and irrespective of the actual screening grounds. As previously mentioned, such an interpretation would include situations where the Member State (which has national FDI screening legislation) undertakes the screening on grounds other than security and/or public order, as well as the situation involving an *ad hoc* screening⁵¹ (irrespective of whether the Member State has FDI screening legislation of general application). However, a close look at the third definition from Art. 2 (1) (5) of Regulation 2019/452 defies such a conclusion.

To be specific, apart from the definitions of the terms “screening” and “screening mechanism”, Art. 2 (1) (5) defines the term “FDI undergoing screening” as “FDI undergoing a formal assessment or investigation pursuant to a screening mechanism”. This somewhat circular definition, connecting the terms “FDI undergoing screening” and “screening mechanism”, underlines the fact that the application of Art. 6 is not merely dependent on whether FDI undergoes “screening” in terms of initiating any kind of procedure allowing to assess, investigate, authorize, condition, prohibit or unwind FDIs.⁵² Quite the contrary, the definition of the term “FDI undergoing screening”, which expressly relates to the application of an underlying “screening mechanism”, effectively narrows down the scope of application of Art. 6 of Regulation 2019/452, so that it only encompasses procedures based on *formal legal*

⁵⁰ In theory, one could also imagine the (unlikely) situation where a Member State has national FDI screening legislation which does not provide that screening is to be done on grounds of either security or public order, but rather on some other grounds. Such screening legislation, although of “general application”, would not meet the requirements of the Art. 2 (1) (4) definition for the term “screening mechanism”.

⁵¹ Hindelang & Moberg, *supra* n. 11, p. 1455. By contrasting the terms “screening” and “screening mechanism”, the authors conclude that a reporting duty provided for in Art. 6 of Regulation 2019/452 “includes any kind of ad hoc screening on a legal basis not specifically tailored towards FDI screening”. However, as will be shown, such a conclusion is to be rejected since the authors do not take into account the definition from Art. 2 (1) (5) of Regulation 2019/452. See *supra* n. 49 and *infra* n. 61.

⁵² Art. 2 (1) (3) Regulation 2019/452.

*instruments of general application*⁵³ where FDI screening is done on *grounds of security or public order*.⁵⁴

Possible confusion as to the scope of application of Art. 6 may be attributed to the Commission itself and the document “Frequently asked questions on the EU framework for FDI screening”, which it regularly updates on its official web site.⁵⁵ More specifically, in its answer to question no. 22 (*Does the Regulation apply to all EU Member States or only those who maintain a screening mechanism at national level?*), the Commission states that Regulation 2019/452 applies to all EU Member States, regardless of whether they have a screening mechanism. However, it goes on to explain that cooperation mechanisms between the Commission and Member States differ depending on whether an FDI is undergoing screening at the national level or not. Relating to FDIs undergoing screening, the Commission addresses the scope of application of Art. 6 in only one sentence, by stating that “if the investment is screened at national level, the Member State is obliged to notify the Commission and the other Member States by providing information on that transaction”⁵⁶. Moreover, the Commission only refers to the importance of potential screening grounds in regard to a situation where an FDI is likely to affect security or public order of another Member State (enabling it to issue a comment) and a situation where the Commission itself considers that a transaction is likely to affect security or public order in more than one Member State (enabling it to issue an opinion).⁵⁷ In other words, it remains silent as to whether Art. 6 of Regulation 2019/452 should be applied when a Member State, although it screens FDIs at the national level, does so on grounds other than either security or public order.

From this rather obscure explanation one could conclude that the Commission is of the opinion that Art. 6 of Regulation 2019/452 is indeed applied every time the screening procedure (of any kind) is initiated by a Member State. Such a conclusion seems to be reaffirmed by the fact that the distinction between FDIs undergoing screening (Art. 6) and FDIs not undergoing screening (Art. 7) was originally proposed by the Council, wanting to differentiate between the applicable cooperation proceedings irrespective of whether the Member State has a national FDI screening mechanism. It thus follows that the distinction found its way into the final text of Regulation 2019/452 because the application of the cooperation mechanism was (in the Council’s opinion) supposed to depend on whether an FDI screening procedure is initiated, rather than on whether the Member State initiating

⁵³ Art. 2 (1) (4) Regulation 2019/452.

⁵⁴ Art. 2 (1) (4) Regulation 2019/452.

⁵⁵ European Commission, “Frequently asked questions on Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union”, https://policy.trade.ec.europa.eu/enforcement-and-protection/investment-screening_en, Internet address visited on January 12th, 2023. Interestingly enough, the document contains a disclaimer that it provides “information on the FDI Screening Regulation, from the perspective of the Commission services” and that “only the Court of Justice of the EU can give an authoritative interpretation of Union legislation”.

⁵⁶ European Commission, *supra* n. 55, p. 12. Although the Commission in its answer does not mention Art. 6 (or Art. 7), it clearly follows from the overall context that it in fact refers to both provisions.

⁵⁷ *Ibid.*, p. 13. Both situations correspond to Art. 6 (2) and (3) respectively.

it actually has screening legislation.⁵⁸ More specifically, the operative trigger term was supposed to be “screening” and its definition from Art. 2 (1) (3) of Regulation 2019/452. Following this line of reasoning, Art. 6 would apply at the moment of initiation of any kind of FDI screening procedure, irrespective of whether the Member State undertaking the screening has a national FDI screening mechanism (legislation) in place and irrespective of whether the screening is done on grounds of security or public order. By extension, Art. 7 would then (presumably) apply each time a Member State does not initiate an FDI screening procedure of any kind.⁵⁹

However, such an interpretation is clearly *contra legem* as it effectively ignores the above-mentioned Art. 2 (1) (5) definition of the term “FDI undergoing screening”, which narrows the scope of application of Art. 6 only to the proceedings undertaken “pursuant to a screening mechanism”. As previously explained, Art. 6 must be interpreted so that its scope of application only encompasses situations where a Member State has and actually applies its own national FDI screening legislation and undertakes the screening on grounds of security or public order⁶⁰. Consequently, the cooperation mechanism from Art. 6 does not apply in a situation where a Member State has and applies its own national FDI legislation but conducts screening on grounds other than security or public order. Also, it does not apply when screening is done by virtue of an *ad hoc* tailored-made legal instrument, irrespective of whether the Member State has national FDI screening legislation of general application or not.⁶¹ Keeping these limitations in mind, the text further proceeds with an analysis of the cooperation mechanism provided for by Art. 6 of Regulation 2019/452.

When an FDI undergoes screening in the territory of a Member State, that Member State has an obligation to notify about it, as soon as possible, both the

⁵⁸ See A. Neergaard, “The Adoption of the Regulation Establishing a Framework for Screening of Foreign Direct Investments into the European Union”, Chapter 11, in: J. H. J. Bourgeois (ed.), *EU Framework for Foreign Direct Investment Control*, 111 European Monographs, Wolters Kluwer, 2020 [Kindle Edition], §11.04 (*Mechanism for Cooperation*) [A] (*Cooperation Between Member States*), p. 233.

⁵⁹ Art. 2 (1) (3) Regulation 2019/452.

⁶⁰ Art. 2 (1) (4) Regulation 2019/452.

⁶¹ *Supra* n. 49 and n. 51.

Commission and the other Member States by providing the information referred to in Article 9 (2)^{62, 63}

As a second step, another Member State or the Commission may react by way of providing, respectively, either duly justified⁶⁴ comments or opinion⁶⁵. However, the prerequisites for such a reaction are somewhat different. In fact, a Member State may provide comments (to the Member State undertaking the screening) where it considers that the FDI undergoing screening is likely to affect⁶⁶ its security or public order or has information relevant for such screening.⁶⁷ The Commission, on the other hand, may issue an opinion addressed to the Member State undertaking the screening where it considers that the FDI undergoing screening is likely to affect⁶⁸ security or public order in more than one Member State, or has relevant information in relation to that FDI.⁶⁹ That the Commission's role is qualitatively different, inasmuch as it is concerned with a potential FDI impact on the territory of the entire EU (and not the territory of just one Member State), also follows from the fact that it may issue an opinion irrespective of whether other Member States provided their comments, as well as from its authority to issue an opinion following comments from other Member States.⁷⁰ It is along those lines that one must understand the

⁶² Art. 9 (2) Regulation 2019/452 provides that the information includes: (a) the ownership structure of the foreign investor and of the undertaking in which the FDI is planned or has been completed, including information on the ultimate investor and participation in the capital; (b) the approximate value of the FDI; (c) the products, services and business operations of the foreign investor and of the undertaking in which the FDI is planned or has been completed; (d) the Member States in which the foreign investor and the undertaking in which the FDI is planned or has been completed conduct relevant business operations; (e) the funding of the investment and its source, on the basis of the best information available to the Member State; (f) the date when the FDI is planned to be completed or has been completed. See also *infra* n. 130.

⁶³ Art. 6 (1) Regulation 2019/452. A provision further on stipulates that the notification may include a list of Member States whose security or public order is deemed likely to be affected. In addition, as part of the notification (and where applicable) the Member State must endeavor to indicate whether it considers that the FDI undergoing screening is likely to fall within the scope of Regulation 139/2004. The latter seems to relate to the situation in which the Member State considers that the FDI undergoing screening in its territory is contrary to either security or public order. Again, one could conclude that the Art. 6 (1) obligation consequently applies every time a Member State initiates an FDI screening. After all, if the Member State must endeavor to indicate whether it considers that the FDI undergoing screening is likely to affect its own security or public order, it follows that it has an Art. 6 (1) obligation to notify of any FDI undergoing screening even when it is done on some other grounds. However, keeping in mind the previously explained scope of application of Art. 6 (1), which rests upon the clear and unambiguous definition contained in Art. 2 (1) (5), the inevitable conclusion is that this is yet another example of linguistic inconsistency within Regulation 2019/452.

⁶⁴ Art. 6 (5) Regulation 2019/452.

⁶⁵ The Commission's opinion is issued within the meaning of Article 288 TFEU and, accordingly, has no binding force. See para. 16 Preamble, Regulation 2019/452.

⁶⁶ As to the "likelihood" to affect a Member State's security or public order, Art. 4 of Regulation 2019/452 provides a non-exhaustive list of factors that may be taken into consideration by either Member States or the Commission.

⁶⁷ Art. 6 (2) Regulation 2019/452. The Member State providing comments must simultaneously send those comments to the Commission and the Commission must notify the other Member States that comments were provided.

⁶⁸ *Supra* n. 66.

⁶⁹ Art. 6 (3) Regulation 2019/452. The Commission must notify the other Member States that an opinion was issued.

⁷⁰ *Ibid.*

Commission's express obligation to issue an opinion, where justified, after at least one third of the Member States consider that an FDI is likely to affect their security or public order.⁷¹ Finally, a Member State which duly considers that an FDI in its territory is likely to affect⁷² its security or public order, may request the Commission to issue an opinion or other Member States to provide comments.⁷³

According to the express wording of Art. 6 (9) of Regulation 2019/452, although the Member State is to give "due consideration" to the comments of the other Member States and to the opinion of the Commission, the final screening decision is always taken by the Member State undertaking the screening. However, it must be stressed that the Member State's obligation to give "due consideration" is directly linked with the principle of sincere cooperation from TEU. In that regard, para. 17 of the Preamble provides that when a Member State receives either comments from other Member States or an opinion from the Commission, it must give such comments or opinion *due consideration* through, where appropriate, measures available under its national law, or in its broader policy-making, *in line with its duty of sincere cooperation laid down in Art. 4 (3) TEU*.⁷⁴ According to Art. 4 (3) TEU, both the EU and the Member States must, pursuant to the principle of sincere cooperation, and in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The provision further on clarifies that Member States must take any appropriate measure, either general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU. Also, they must facilitate the achievement of the EU's tasks and refrain from any measure which could jeopardize the attainment of the EU's objectives.

In other words, when an FDI undergoes screening in its territory, the Member State cannot uncritically dismiss or simply ignore either the comments provided to it by other Member States or the Commission's opinion.⁷⁵ However, although Art. 6 (9) suggests that the other Member States and the Commission can in such a way influence the outcome of the screening decision itself,⁷⁶ Regulation 2019/452 does not provide for Member States' obligation to give either an explanation or a justification of its final decision. Such a conclusion follows from the express wording of Regulation 2019/452.

⁷¹ Ibid.

⁷² *Supra* n. 66.

⁷³ Art. 6 (4) Regulation 2019/452. Art. 6 (6) and (7) provide for applicable timeframes. Art 6 (8) of Regulation 2019/452 additionally provides that, in the exceptional case where the Member State undertaking the screening considers that its security or public order requires immediate action, it shall notify the other Member States and the Commission of its intention to issue a screening decision before the timeframes referred to in Art. 6 (7) and duly justify the need for immediate action. The other Member States and the Commission shall endeavor to provide comments or to issue an opinion expeditiously.

⁷⁴ *Infra* n. 83. On potential problems of the application of the principle of sincere cooperation within the scope of Art. 7 Regulation 2019/452, see *infra* n. 124 et seq.

⁷⁵ See also Hindelang & Moberg, *supra* n. 11, p. 1456, where the authors state that the term "due consideration" thus "goes beyond the mere acknowledgement of the existence of the interests formulated in the comments and opinions".

⁷⁶ Ibid.

In fact, Art. 8 of Regulation 2019/452 (*FDIs likely to affect projects or programs of Union interest*) provides that, where the Commission considers that an FDI is likely to affect projects or programs of Union interest⁷⁷ on grounds of security or public order, it may issue an opinion⁷⁸ addressed to the Member State where the FDI is planned or has been completed.⁷⁹ The provision further stipulates that the procedures set out in Arts. 6 and 7 of Regulation 2019/452 apply subject to certain modifications.⁸⁰ One of the envisaged modifications directly relates to the procedure that must be followed by the Member State. It provides that the Member State where the FDI is planned or has been completed must take *utmost account* of the Commission's opinion and *provide an explanation* to the Commission if its opinion is not followed.⁸¹ Although one could argue that providing such an explanation (especially when the Member State undertakes the screening, after "due consideration", decides not to follow the other Member States' comments or the Commission's opinion) is always an obligation of the Member State which adheres to the principle of sincere cooperation laid down in Art. 4 (3) TEU,⁸² proper reading of Art. 8 suggests that it applies only in relation to FDIs likely to affect projects or programs of Union interest.⁸³ In addition, although Art. 6 (10) provides that cooperation is to take place through the contact points established in accordance with its Art. 11,⁸⁴ Regulation 2019/452 in no way addresses the Member State's duty to inform about its (negative or positive) FDI screening decision. In other words, apart from the obligation of the Member State to provide an explanation to

⁷⁷ As per Art. 8 (3) Regulation 2019/452, and for the purpose of Art. 8, projects or programs of Union interest shall include those projects and programs which involve a substantial amount or a significant share of Union funding, or which are covered by Union law regarding critical infrastructure, critical technologies or critical inputs which are essential for security or public order. The list of projects or programs of Union interest is set out in the Annex.

⁷⁸ *Supra* n. 65. Para. 19 Preamble, Regulation 2019/452.

⁷⁹ Art. 8 (1) Regulation 2019/452.

⁸⁰ Art. 8 (2) Regulation 2019/452.

⁸¹ Art. 8 (2) (c) Regulation 2019/452. The other two modifications provide that: (1) as part of the notification referred to in Art. 6 (1) or the comments referred to in Arts. 6 (2) and 7 (1), a Member State may indicate whether it considers that the FDI is likely to affect projects and programs of Union interest (Art. Art. 8 (2) (a) Regulation 2019/452); and (2) the opinion of the Commission shall be sent to the other Member States (Art. Art. 8 (2) (b) Regulation 2019/452). Art. 8 (2) also applies in relation to the procedure set out in Art. 7 of the Regulation 2019/452. See *infra* n. 126.

⁸² Para. 17 Preamble, Regulation 2019/452. *Supra* n. 74.

⁸³ Hindelang & Moberg, *supra* n. 11, p. 1456. Interestingly enough, para. 19 of the Preamble (which addresses FDIs likely to affect projects and programs of Union interest) uses conspicuously similar language as the previously mentioned para. 17 of the Preamble (which provides for the duty of the Member State to give *due consideration* in line with the principle of sincere cooperation from Art. 4 (3) TEU). *Supra* n. 74. More specifically, para. 19 of the Preamble, while stating that the Member State must take *utmost account* of the opinion received from the Commission through, where appropriate, measures available under its national law, or in its broader policy-making, *and provide an explanation to the Commission if it does not follow that opinion*, also expressly accentuates that it must do so *in line with its duty of sincere cooperation under Article 4(3) TEU*. Para. 19 Preamble, Regulation 2019/452 further on uses the exact same language as can be found in para. 17 Preamble, providing that the final decision in relation to any FDI undergoing screening or any measure taken in relation to an FDI not undergoing screening remains the sole responsibility of the Member State where the FDI is planned or completed.

⁸⁴ Same is provided by Art. 7 (9) Regulation 2019/452. See *supra* n. 42 – n. 44.

the Commission when its opinion is not followed (which applies only to FDIIs likely to affect projects or programs of Union interest),⁸⁵ the Member State is under no obligation to communicate its final decision to other interested Member States whose security or public order is likely to be affected. It has thus rightly been observed that this absence of informational feedback clearly indicates that Regulation 2019/452 in fact lacks an appropriate regulatory mechanism which enables a follow-up for the purposes of determining whether the Member State undertaking the screening actually gave due consideration to the comments of other Member States.⁸⁶

In conclusion, and not taking away from the rule according to which the final FDI screening decision is always taken by the Member State undertaking the screening,⁸⁷ it follows that the above analyzed omission has the potential of undermining the cooperation mechanism in its entirety. As previously stated, extending the obligation to provide an explanation and/or justification of its decision (which would then also imply an obligation to communicate its substance) would be in line with the Member State's duty of sincere cooperation laid down in Art. 4 (3) TEU.⁸⁸ Although one could theoretically advance an argument that such a solution would undoubtedly entail additional efforts and work on behalf of the Member State undertaking the FDI screening, it seems that potential advantages in terms of setting up a more efficient cooperation mechanism would outweigh potential criticism.

2.2. Member States with no FDI screening legislation

As to the position of Member States that have no FDI screening legislation, this chapter follows the blueprint set out in the previous one. The analysis is thus firstly focused on the goal of establishing an EU framework for the screening by Member States (2.2.1.), and then it turns to the specifics of the cooperation mechanism (2.2.2.)

2.2.1. EU framework for FDI screening

As previously pointed out, Regulation 2019/452 imposes no obligation on the Member States to either adopt national screening legislation or to screen a particular FDI within its territory. Nevertheless, Member States that do not have FDI screening legislation (and are maybe not even planning to adopt one) have several specific obligations designed to enable them to participate in the EU screening framework. Along those lines, all Member States (i.e. including those without FDI screening legislation) are required to:

⁸⁵ Art. 8 (2) (c) Regulation 2019/452. *Supra* n. 81.

⁸⁶ Hindelang & Moberg, *supra* n. 11, p. 1456. *Infra* n. 74.

⁸⁷ Art. 6 (9) Regulation 2019/452. *Supra* n. 81.

⁸⁸ *Supra* n. 82.

- notify the Commission of existing screening mechanisms by 10 May 2019 (inasmuch as this also relates to the obligation to notify of the lack of any screening mechanism);⁸⁹
- notify the Commission of any newly adopted screening mechanism within 30 days of the entry into force of the newly adopted screening mechanism;⁹⁰
- adhere to the annual reporting obligation;⁹¹
- follow the special procedure in situations where FDIIs are likely to affect projects and programs of Union interest;⁹²
- participate in the mechanism relating to the dissemination of information;⁹³
- observe the obligation of confidentiality of transmitted information and processing of personal data;⁹⁴
- establish a contact point for the implementation of Regulation 2019/452.⁹⁵

In addition to the outlined requirements, the Member State that does not maintain national FDI screening legislation must also adhere to the cooperation mechanism provided for in Art. 7 of Regulation 2019/452. This cooperation mechanism imposes additional requirements which are elaborated upon in the following part.

2.2.2. Cooperation mechanism in relation to FDIIs not undergoing screening

FDIIs not undergoing screening fall under the scope of Art. 7 of Regulation 2019/452.⁹⁶ Its proper scope of application, however, must be determined by reference to the previously analyzed scope of application of Art. 6.⁹⁷ As the analysis will show, the inadequate wording used by Regulation 2019/452 makes room for two different interpretations.

As previously explained, the scope of application of Art. 6 (*Cooperation mechanism in relation to FDIIs undergoing screening*) relates to situations where the Member State has and applies its own national FDI screening legislation and screens on grounds of security or public order.⁹⁸ At the same time, Art. 2 of Regulation 2019/452 does not provide for a definition of the term “FDIIs not undergoing screening”, crucial for a proper determination of the scope of application of Art.

⁸⁹ Art. 3 (7) Regulation 2019/452. *Supra* n. 33.

⁹⁰ *Ibid.* *Supra* n. 34.

⁹¹ Art. 5 (1) Regulation 2019/452. *Supra* n. 40.

⁹² Art. 8 Regulation 2019/452. *Supra* n. 77 et seq.

⁹³ Art. 9 Regulation 2019/452.

⁹⁴ Art. 10 and Art. 14 Regulation 2019/452.

⁹⁵ Art. 11 Regulation 2019/452. *Supra* n. 42 – n. 44.

⁹⁶ As per Art. 7 (10) Regulation 2019/452, Art. 7 shall not apply to FDIIs completed before April 10th, 2019.

⁹⁷ *Supra* 2.1.2. Cooperation mechanism in relation to FDIIs undergoing screening.

⁹⁸ Such a conclusion directly follows from the definition of the term “foreign direct investment undergoing screening” from Art. 2 (1) (5) of Regulation 2019/452, expressly stating that it relates to FDIIs undergoing “a formal assessment or investigation pursuant to a screening mechanism”, i.e. pursuant to a legal instrument of general application.

7.⁹⁹ However, as Art. 2 (1) (3) of Regulation 2019/452 does contain a definition of the term “screening” (relating to any procedure “allowing to assess, investigate, authorize, condition, prohibit or unwind foreign direct investments”), it follows that there are two possible interpretations of the term “foreign direct investment not undergoing screening”, which then directly reflects on the scope of application of Art. 7 of the Regulation 2019/452.

The first possibility takes into account that the legislator provided the definitions of the terms “FDIs undergoing screening” and “screening”, but not of the term “FDIs not undergoing screening”. It builds upon the previously noted fact that the apparent distinction between Art. 6 and Art. 7 was proposed by the Council, originally wanting to widen the scope of Art. 6 so as to include any situation where a Member State initiates the screening procedure, irrespective of whether it has national FDI screening legislation or not.¹⁰⁰ However, as the previous analysis has shown, such an interpretation is not viable in light of the Art. 2 (1) (5) definition of the term “FDIs undergoing screening”, which limits the scope of application of Art. 6.¹⁰¹ However, since Regulation 2019/452 does not contain a definition of the term “FDIs not undergoing screening”, one might argue that, in line with the original intention of the Council, the scope of application of Art. 7 is to be determined by reference to the Art. 2 (1) (3) definition providing that the term “screening” *means a procedure allowing to assess, investigate, authorize, condition, prohibit or unwind FDIs*. That would mean that Art. 7 applies when the Member State does not initiate FDI screening of any kind, irrespective of whether it has national FDI screening legislation or not. It would thus include the situation where the Member State has no national FDI screening legislation, as well as the situation where it has national screening legislation, but the screening of a particular FDI falls outside its scope of application.¹⁰² In other words, the crucial element pertinent to the application of Art. 7 would be that the Member State, although the FDI is either planned or completed in its territory, does not initiate a screening procedure of any kind. It seems that such an interpretation is also endorsed by the Commission.¹⁰³ In fact, in relation to Art. 7 and FDIs not undergoing screening, the Commission states that “this may be the

⁹⁹ At this instance, it is appropriate to remind the reader that the title of Art. 6 of Regulation 2019/452 is “Cooperation mechanism in relation to foreign direct investments undergoing screening”, while the title of Art. 7 is “Cooperation mechanism in relation to foreign direct investments not undergoing screening”.

¹⁰⁰ *Supra* n. 58 et seq.

¹⁰¹ *Supra* 2.1.2. Cooperation mechanism in relation to FDIs undergoing screening.

¹⁰² In addition, it would include all situations where the Member State has national FDI screening legislation, but it nevertheless (for whatever reason) decides not to initiate an FDI screening procedure. After all, Art. 1 (3) of Regulation 2019/452 itself provides that it does not limit the right of each Member State to decide whether or not to screen a particular FDI within the Regulation’s framework. This rather peculiar provision seems to suggest that the Member State, even if it has national FDI screening legislation which provides for screening on grounds of security or public order, still may reserve the right not to screen an FDI within the framework of Regulation 2019/452. As observed in legal theory, Regulation 2019/452 provides that it is not only within Member States’ authority to decide whether to have national FDI screening legislation (Art. 3 (1)), but also how to use it in relation to a specific transaction. See Neergaard, *supra* n. 58, §11.01 (*Objectives, Scope and Optional Nature*) [B] (*Optional Nature*), p. 230.

¹⁰³ European Commission, *supra* n. 55.

case for Member States without a screening mechanism, or investments that do not fall under the scope of the host Member State's national mechanism"¹⁰⁴, as well as the case where the Member State "decides not to screen a particular investment"¹⁰⁵.

Such an interpretation, however, suffers from obvious drawbacks. As already mentioned, any Member State (irrespective of whether it has screening legislation which it otherwise generally applies or not) may introduce an *ad hoc* FDI screening procedure as a separate legal source, tailor-made for a specific application. In addition, such an *ad hoc* screening may (or may not) be done on grounds of security or public order. If one is to apply the above interpretation, then such a situation would not fall under the scope of either Art. 6 (which applies only when the screening is done in accordance with national FDI screening legislation of general application on grounds of either security or public order) or Art. 7 (because the provision would apply only if no screening of any kind is initiated by the Member State). In addition, if the Member State has national FDI screening legislation which provides for a variety of different screening grounds (in addition to grounds relating to security or public order), then any screening it undertakes on grounds other than security or public order would also be excluded from the scope of both Art. 6 and Art. 7 of Regulation 2019/452.¹⁰⁶

This leads to somewhat peculiar results. More specifically, if Art. 7 provides for a cooperation mechanism which applies every time when the Member State does not undertake an FDI screening procedure (although an FDI is planned or completed in its territory), then it makes little to no sense to exclude the above-described situations (where Member States are screening FDIs) from the Regulation's scope of application altogether. In other words, if the consequence of absolute passivity of the Member State is that it is bound by the Art. 7 cooperation mechanism (in terms of specific obligations, as well as rights attributed to the Commission and other Member States that consider that the particular FDI is likely to affect their security and public order), then it would be logical to expect at least a comparable level of cooperation and information sharing in situations involving *ad hoc* FDI screenings (especially when they are done on grounds of security or public order) and/or screenings done in accordance with the Member State's national FDI screening legislation on grounds other than security or public order. As to the latter, it encompasses situations when one Member State screens an FDI on grounds other than security or public order, but some other Member State is nevertheless concerned that the FDI is likely to affect its own security or public order. Would that trigger the cooperation mechanism from Art. 7, i.e. could that Member State

¹⁰⁴ Ibid., p. 13.

¹⁰⁵ Ibid.

¹⁰⁶ As previously explained, Art. 2 (1) (4) defines the term "screening mechanism" as relating to an "instrument of general application, such as a law or regulation, and accompanying administrative requirements, implementing rules or guidelines, setting out the terms, conditions and procedures to assess, investigate, authorize, condition, prohibit or unwind foreign direct investments on grounds of security or public order". This however does not automatically mean that the Member State cannot have national screening legislation which, although it provides for screening on grounds of security and public order, also contains other additional screening grounds.

provide comments to the Member State where the FDI is planned or completed and ask for it to provide appropriate information referred to in Art. 9 of Regulation 2019/452?¹⁰⁷ Could the Commission take a pro-active role in terms of issuing an opinion and requesting information from the Member State where an FDI (formally screened on grounds other than security or public order) is planned or completed?¹⁰⁸ If one adheres to the interpretation according to which Art. 7 applies only when the Member State does not undertake any FDI screening at all, i.e. when it does not initiate any “procedure allowing to assess, investigate, authorize, condition, prohibit or unwind foreign direct investments”¹⁰⁹, then the answer is, unfortunately, negative. Any screening procedure, including one undertaken on grounds other than security or public order, would fall outside of the scope of the Art. 7 cooperation mechanism.

Such an interpretation runs against the intended purpose of Regulation 2019/452. After all, the presumed aim of both the Art. 6 and Art. 7 cooperation mechanisms is not to harmonize national FDI legislation, but to provide an efficient information exchange mechanism on specific FDI transactions.¹¹⁰ Focusing on individual FDI transactions, screened and evaluated on a case-by-case basis, Regulation 2019/452 in fact seeks to provide the basis for appropriate assessment of risks to security and public order within the EU’s territory.¹¹¹ In other words, the presumed idea is to apply a cooperation mechanism every time any Member State considers that a specific FDI may pose a threat to its own security or public order. And since the Art. 7 cooperation mechanism is clearly supposed to be triggered as soon as one Member State considers that an FDI represents a potential risk to its security or public order (even though it is neither planned nor completed in its own territory),¹¹² then it makes sense to apply the pertinent provision extensively i.e. not only when the Member State (where the FDI is planned or completed) does not undertake screening, but also when that same Member State undertakes an *ad hoc* screening procedure or screens the FDI on grounds other than security or public order. In these situations, the application of the Art. 7 cooperation mechanism would provide necessary information to the Member State which considers that the FDI might pose a threat to its own security or public order, irrespective of the fact that the Member State where the FDI is planned or completed obviously does not share the same apprehension and proceeds to screen the FDI on grounds other than security or public order (either by applying its national FDI screening legislation or an *ad hoc* screening procedure).

This leads to the second possible interpretation of the scope of application of Art. 7, which is based on the definition of the term “FDI undergoing screening” from Art. 2 (1) (5), previously used to determine the proper scope of application

¹⁰⁷ Art. 7 (1) and (5) Regulation 2019/452.

¹⁰⁸ Art. 7 (2) and (5) Regulation 2019/452.

¹⁰⁹ Art. 2 (1) (3) Regulation 2019/452.

¹¹⁰ OECD Secretariat, *supra* n. 2, p. 15.

¹¹¹ *Ibid.*, p. 20.

¹¹² Art. 7 (1) Regulation 2019/452.

of Art. 6 of Regulation 2019/452.¹¹³ As already explained, the term relates to FDIs “undergoing a formal assessment or investigation pursuant to a screening mechanism”. Consequently, the Art. 6 cooperation mechanism applies when the Member State has its own national screening legislation of general application and undertakes screening on grounds of security or public order. Interpretation of Art. 7 would then rest upon the application of the negative definition from Art. 2 (1) (5). More specifically, since the term “FDI undergoing screening” relates to an FDI “undergoing a formal assessment or investigation pursuant to a screening mechanism”, then the opposite term “FDI not undergoing screening” would relate to all situations not covered by the scope of application of Art. 6 of Regulation 2019/452.

This interpretation provides for a much broader application of the Art. 7 cooperation mechanism. In addition to obvious situations where the Member State has no national FDI screening legislation (which thus excludes the application of the Art. 6 cooperation mechanism), it would ensure that the Art. 7 cooperation mechanism applies in situations where the Member State screens pursuant to an *ad hoc* screening procedure. As such a screening would not be done in accordance with national screening legislation of general application,¹¹⁴ it would be considered as if that particular FDI is not screened at all, which would in turn trigger the application of Art. 7. In addition, the suggested interpretation would ensure that the Art. 7 cooperation mechanism applies in situations where the Member State (irrespective of whether it screens by virtue of its own national FDI screening legislation or an *ad hoc* screening instrument) undertakes FDI screening on grounds other than security or public order. By the same logic, such a screening would be perceived as if no FDI screening is undertaken by the Member State at all. It would thus once again trigger the application of Art. 7 and ensure that all other Member States (which consider that the FDI is likely to affect their own security or public order) are provided with necessary information.

The suggested interpretation obviously expands the scope of Art. 7 of Regulation 2019/452. However, it is submitted that such an expansion is necessary because the definition contained in Art. 2 (1) (5) of Regulation 2019/452 effectively narrowed the scope of application of Art. 6, leaving a number of potential relevant situations outside of the cooperation mechanisms envisaged by Regulation 2019/452 altogether. Consequently, the proposed interpretation of Art. 7, which ultimately ensures an appropriate level of information sharing, would be in line with the intended purpose of the cooperation mechanisms envisaged by both Art. 6 and Art. 7 of Regulation 2019/452.

Turning back to the Art. 7 cooperation mechanism, it generally follows the model set up for FDIs undergoing screening from Art. 6.¹¹⁵ When an FDI is not undergoing screening in the Member State where it is either planned or completed,

¹¹³ *Supra* 2.1.2. Cooperation mechanism in relation to FDIs undergoing screening.

¹¹⁴ Art. 2 (1) (4) Regulation 2019/452.

¹¹⁵ *Supra* 2.1.2. Cooperation mechanism in relation to FDIs undergoing screening.

but another Member State nevertheless considers that it is likely to affect its own security or public order (or has relevant information in relation to that FDI), then it may provide duly justified¹¹⁶ comments to the Member State where the FDI is planned or completed.¹¹⁷ In addition, a Member State which duly considers that an FDI in its territory is likely to affect its own security or public order may request the Commission to issue an opinion or other Member States to provide their comments.¹¹⁸

The Commission's role follows the one originally assigned to it within the framework of the Art. 6 cooperation mechanism. If it considers that an FDI is likely to affect security or public order in more than one Member State, or has relevant information in relation to that FDI, it may issue a duly justified¹¹⁹ opinion addressed to the Member State in which the FDI is planned or completed, irrespective of whether or not other Member States already provided their own comments.¹²⁰ The Commission may also issue a duly justified¹²¹ opinion following comments from other Member States, but has an obligation to issue such an opinion where justified, after at least one third of all Member States consider that the FDI is likely to affect their security or public order.¹²²

Potential problems which may arise in connection with the application of Art. 7 are twofold. As their full scale is most obvious once analyzed in relation to the obligations of Member States that do not have national FDI screening legislation, the following analysis focuses on those situations.

The first problem relates to the obligation of a Member State where an FDI is either planned or has been completed to give *due consideration* to the comments of the other Member States and to the opinion of the Commission.¹²³ At the very least, one can legitimately wonder how (if at all) such consideration is to be given on behalf of the Member State which has no FDI screening mechanism in the first place. To be more exact, since the obligation to *duly consider* comments and opinion of other Member States and the Commission, as previously explained, is interlinked with the principle of sincere cooperation,¹²⁴ the cooperation mechanism effectively

¹¹⁶ Art. 7 (4) Regulation 2019/452.

¹¹⁷ Art. 7 (1) Regulation 2019/452. The Member State providing comments must simultaneously send those comments to the Commission and the Commission must notify the other Member States that comments were provided.

¹¹⁸ Art. 7 (3) Regulation 2019/452. For applicable timeframes, see Art. 7 (6) and (8) of Regulation 2019/452. Art. 7 (9) of Regulation 2019/452 provides that cooperation is to take place through the contact points established in accordance with Art. 11 of Regulation 2019/452.

¹¹⁹ Art. 7 (4) Regulation 2019/452.

¹²⁰ Art. 7 (2) Regulation 2019/452. The Commission must notify the other Member States that an opinion was issued.

¹²¹ Art. 7 (4) Regulation 2019/452.

¹²² Art. 7 (2) Regulation 2019/452. The Commission must notify the other Member States that an opinion was issued. For applicable timeframes, see Art. 7 (6) and (8) of Regulation 2019/452. Art. 7 (9) of Regulation 2019/452 provides that cooperation is to take place through the contact points established in accordance with Art. 11 of Regulation 2019/452.

¹²³ Art. 7 (7) Regulation 2019/452.

¹²⁴ *Supra* n. 74 et seq.

prevents the Member State from ignoring and uncritically dismissing the input given by other Member States and the Commission.¹²⁵ In other words, the Member State where the FDI is planned or completed must engage in some form of substantial analysis of the comments and/or opinion it receives. And even though the Member State is under no formal obligation to communicate its reasoning,¹²⁶ it is only logical to conclude that such an analysis will require at least some form of legal framework / infrastructure (even a nascent one). The problem, as may be expected, becomes even more obvious in relation to the previously analyzed application of Art. 8 (2) (c) of Regulation 2019/452 which applies to FDIs likely to affect projects or programs of Union interest.¹²⁷ As the provision expressly stipulates that the Member State where the FDI is planned or has been completed must take *utmost account* of the Commission's opinion and *provide an explanation to the Commission if its opinion is not followed*, it obviously implies that the Member State is equipped with appropriate legislative tools which will enable it to undertake an (extensive) analysis required to meet its obligations. It is rather dubious to what extent Member States with no national FDI screening legislation can be expected to maintain such legislative apparatus.

The second problem is closely connected with the first one. To be specific, Art. 7 (5) of Regulation 2019/452 provides that where a Member State or the Commission considers that an FDI is likely to affect security or public order as referred to in Art. 7 (1) or (2),¹²⁸ it may request the Member State where the FDI is planned or completed the information referred to in Art. 9. The procedure functionally follows the one from Art. 6 (1), where a Member State must notify the Commission and other Member States of any FDI in their territory that is undergoing screening by providing the information referred to in Art. 9 (2) as soon as possible.¹²⁹ And although the task of gathering the information required by Art. 9 is generally not expected to present an insurmountable problem for the Member State which has an FDI screening mechanism in place (as one can assume that it will take advantage of various monitoring procedures that are already put in place as a part of national FDI screening legislation), it is again dubious how this obligation will be met by a Member State which has no national FDI screening legislation. Especially when one takes into account the complexity of information which is expected to be provided (e.g. the ownership structure of the foreign investor and of the undertaking in which the FDI is planned or has been completed, including information on the ultimate investor and participation in the capital, the approximate value of the FDI, funding of the investment and its source etc.).¹³⁰ In addition, Art. 9 (3) provides that Member States must endeavor to provide any information, if available, additional to that expressly outlined by Art. 9 (1) and (2). Although, Art. 7 (5) further on provides

¹²⁵ *Supra* n. 75.

¹²⁶ *Supra* n. 83.

¹²⁷ *Supra* n. 77 et seq. See also Hindelang & Moberg, *supra* n. 11, p. 1457.

¹²⁸ *Supra* n. 117 et seq.

¹²⁹ *Supra* n. 62.

¹³⁰ Art. 9 (2) Regulation 2019/452.

that any such request for information must be duly justified, limited to information necessary to provide comments pursuant to Art. 7 (1) or to issue an opinion pursuant to Art. 7 (2), proportionate to the purpose of the request and not unduly burdensome for the Member State where the FDI is planned or has been completed,¹³¹ the fact remains that the Member State will have to engage in a sophisticated and extensive FDI analysis. Finally, the extent of potential problems facing Member States with no national FDI screening legislation which must apply the Art. 7 cooperation mechanism is fully visible after further careful consideration of Art. 9 itself. More specifically, Art. 9 of Regulation 2019/452 prescribes a significant level of urgency inasmuch as it provides that the required information must be made available to the requesting Member States *without undue delay*.¹³² In addition, it provides that the Member State where the FDI is planned or has been completed may request the foreign investor or the undertaking in which the FDI is planned or has been completed to provide the information referred to in Art. 9 (2).¹³³ At the same time, Art. 9 (5) provides for a special procedure which must be followed if the Member State cannot provide the required information. It prescribes that the Member State must notify the Commission and the other Member States concerned, again *without delay*, if, in exceptional circumstances, it is unable, despite its best efforts, to obtain the information referred to in Art. 9 (1) of Regulation 2019/452. In that notification, the Member State must *duly justify* the reasons for not providing such information and *explain the best efforts undertaken* to obtain the requested information, including a request it addressed to the foreign investor or the undertaking in which the FDI is planned or has been completed.¹³⁴ There should be little doubt that any Member State which has no national FDI screening legislation (and does not anticipate to introduce one) will be faced with serious obstacles when it tries to meet the obligation required by the Art. 7 cooperation mechanism.

The next chapter analyzes how the enumerated problems may reflect on the overall screening framework, with special attention given to the fact that Regulation 2019/452 (nominally) does not oblige any Member State to introduce FDI screening legislation on the national level.

¹³¹ As per Art. 7 (5) of Regulation 2019/452, requests for information and replies provided by Member States must be simultaneously sent to the Commission.

¹³² Art. 9 (1) and (3) Regulation 2019/452.

¹³³ Art. 9 (4) Regulation 2019/452. The provision further on stipulates that the foreign investor or the undertaking concerned must in turn provide the information requested without undue delay.

¹³⁴ Art. 9 (5) of Regulation 2019/452 further on provides that if no information is provided, any comment issued by another Member State or any opinion issued by the Commission may be based on the information available to them.

3. REGULATION 2019/452 AND HARMONIZATION OF NATIONAL FDI SCREENING MECHANISMS

The legislative process leading to the adoption of Regulation 2019/452 showed that, when it comes to the complexities of FDI screening, Member States simply do not share a unified vision. Numerous obstacles (in terms of Member States' conflicting reactions to the legislative initiative, their expectations and diverging legislative solutions)¹³⁵ effectively left no room for a comprehensive unification effort. It seems that the existing differences were not only hard to overcome, but also had the potential to sabotage the entire legislative process. Consequently, rather than insisting on an extensive set of rules which would oblige Member States to follow an FDI screening model based on substantive unification on the EU level, the Commission settled for a flexible framework which furthers European common commercial policy and rests upon the harmonization of specific requirements which are predominantly procedural in their nature.

Nevertheless, one can observe that the actual goals sought to be achieved by Regulation 2019/452 go well beyond the formally proclaimed ones. This conclusion rests on two distinct, albeit closely interconnected levels. Firstly, the analysis will show that a number of procedures and solutions provided for in Regulation 2019/452 openly favor an approach which presupposes that all Member States adopt and maintain some form of FDI screening and/or monitoring legislation. Secondly, although Regulation 2019/452 provides for largely non-controversial requirements (relating to transparency, non-discrimination, relevant timeframes, coordination, confidentiality, assistance and mutual communication), it seems that the Commission is on an overt mission to actually attain goals which were simply not achievable through the legislative process. Both levels, and their respective roles in the process of such an (in)direct harmonization of Member States' national FDI screening legislation, are further analyzed in the following parts (3.1., 3.2.).

3.1. “Soft” harmonization through implied obligations

Analysis of Art. 7 relating to the cooperation mechanism in relation to FDIs not undergoing screening revealed potential problems which primarily arise for the Member States that do not have national FDI screening legislation.¹³⁶ More specifically, it was shown that those Member States, in accordance with Art. 7 (7), must give *due consideration* to the comments of the other Member States (which consider that the FDI in question is likely to affect their own security or public order) and to the opinion of the Commission.¹³⁷ In addition, similar problems were anticipated in relation to Art. 8 (2) (c) of Regulation 2019/452 (FDIs likely to affect projects or programs of Union interest), which provides that the Member

¹³⁵ *Supra* n. 14.

¹³⁶ *Supra* 2.2.2. Cooperation mechanism in relation to FDIs not undergoing screening.

¹³⁷ *Supra* n. 123 et seq.

State where the FDI is planned or has been completed must take *utmost account* of the Commission's opinion and *provide an explanation to the Commission if its opinion is not followed*.¹³⁸ Lastly, a problem was detected in relation to Art. 7 (5) of Regulation 2019/452 providing that when a Member State or the Commission considers that an FDI is likely to affect security or public order as referred to in Art. 7 (1) or (2), it may request that the Member State where the FDI is planned or completed provide extensive information referred to in Art. 9.¹³⁹ As these obligations obviously presuppose that the Member State in question employs some form of national legislative instrument designed for both the evaluation and monitoring of FDI's (no matter how rudimentary), it follows that Member States which have no national FDI screening legislation may face a very specific set of obstacles in the process of gathering and providing the required information.

Further analysis shows that comparable problems may also arise for Member States which have national FDI screening legislation. To be more specific, Art. 3 (6) of Regulation 2019/452 obliges all Member States that have FDI screening mechanisms in place (i.e. national FDI screening legislation) to maintain, amend or adopt measures necessary to both identify and prevent circumvention of the screening mechanisms and screening decisions.¹⁴⁰ Since Regulation 2019/452 concerns screening of FDI's made (or intended to be made) by foreign (i.e. non-EU) investors,¹⁴¹ the rule relating to anti-circumvention measures represents an important exception relating to situations which involve a company established in the EU and its (potential) investment within the EU territory. The classical scenario presupposes a non-EU established (foreign) company setting up a subsidiary company in a Member State which has no national FDI screening legislation. That subsidiary company may then take advantage of the freedom of establishment and set up its own subsidiary in another Member State which has national FDI screening legislation, thus hoping to avoid its application.¹⁴² To properly analyze the exact extent of a Member State's obligations pertaining to anti-circumvention provisions, one must duly consider the guidelines provided by Regulation 2019/452 itself. Although para. 10 of the Preamble emphasizes that application of Regulation 2019/452 is without prejudice to the freedom of establishment and the free movement of capital enshrined in TFEU, it also clarifies that Art. 3 (6) covers investments from within the Union by means of "artificial arrangements that do not reflect economic reality and circumvent the screening mechanisms and screening decisions, where the investor is ultimately owned or controlled by a natural person or an undertaking of a third country"¹⁴³.

¹³⁸ *Supra* n. 127.

¹³⁹ *Supra* n. 128 et seq.

¹⁴⁰ *Supra* n. 32.

¹⁴¹ Art. 2 (1) and (2) Regulation 2019/452.

¹⁴² J. H. J. Bourgeois & E. Malathouni, "The EU Regulation Establishing on Screening Foreign Direct Investment: Another Piece of the Puzzle", Chapter 12, in: J. H. J. Bourgeois (ed.), *EU Framework for Foreign Direct Investment Control*, 111 European Monographs, Wolters Kluwer, 2020 [Kindle Edition], §12.03 [5] (*Undertakings of a Third Country*), p. 268.

¹⁴³ Para. 10 Preamble, Regulation 2019/452.

In addition to the notoriously difficult issue of proving an intention to circumvent both screening mechanisms and screening decisions,¹⁴⁴ the core issue will thus be to determine whether the analyzed situation rests upon *artificial arrangements that do not reflect economic reality*. There should be little doubt that such an analysis will heavily rely on specific circumstances of each case. Demonstrated on the above given scenario, where a foreign non-EU entity first establishes its subsidiary in the Member State with no screening legislation, and then uses that subsidiary as leverage for the investment in the territory of the Member State which has FDI screening legislation, the latter Member State will have to show that the investment schematic is artificial and does not reflect economic reality. It will be able to do so only if it heavily relies on relevant facts pertaining to both the foreign entity (which made the initial investment) and its subsidiary (in the Member State which has no FDI screening legislation). In other words, all relevant facts will be predominantly obtainable by the Member State hosting the first subsidiary, as the lack of “economic reality” will be observable in its territory. And since that Member State has no national FDI screening legislation, it once again follows that it will have to rely on some form of national legislative instrument which will allow it to monitor and evaluate the relevant FDI. In addition, such instrument will have to provide for a procedure which will be set in motion once the Art. 3 (6) anti-circumvention inquiry is initiated, as such mechanism is simply not envisaged by Regulation 2019/452 itself. Regulation 2019/452 does not address any of the above issues. What meaning must then be attributed to the fact that Regulation 2019/452 at the same time obviously provides for a number of implied obligations that Member States with no FDI screening legislation must meet if they are to gather and share the required information?

The fact that Regulation 2019/452 does not provide for an adequate procedural framework relating to the above outlined problems hardly comes as a surprise. As Regulation 2019/452 does not provide that Member States are obliged to adopt national FDI screening legislation,¹⁴⁵ it does not provide for an obligatory monitoring procedure which would have to be followed by the Member State which ultimately opts not to adopt it. However, as it impliedly provides for very specific substantive obligations, the question of whether (and to what extent) Member States with no FDI screening mechanisms in place are adequately equipped to undertake extensive monitoring in order to provide the required information represents a key issue which reveals a serious and potentially detrimental omission within Regulation 2019/452 itself.

National FDI screening legislation typically provides for procedures which enable the Member State to monitor an FDI and gather all the relevant information pertaining to it, since the screening decision ultimately depends on thus acquired information. In other words, as rules relating to FDI monitoring naturally form part of the broader FDI screening mechanism, one can expect that various legislative

¹⁴⁴ Zwartkruis & de Jong, *supra* n. 36, pp. 465, 466.

¹⁴⁵ Art. 3 (1) Regulation 2019/452.

monitoring instruments (even when introduced separately and not as a part of the formalized national screening mechanism fully meeting the requirements set out by Art. 3) will ultimately lead towards the introduction of national FDI screening legislation.¹⁴⁶ It thus follows that the European framework for FDI screening is, intentionally or not, set up in a manner which requires active and constant approximation of national legislations, up to a point where every Member State is encouraged (if not outright pressured) to adopt comprehensive national FDI screening legislation in accordance with Regulation 2019/452. It is hard to argue that this kind of “soft” harmonization through implied obligations provided for by Regulation 2019/452 is in line with the proclaimed authority of all Member States to decide whether to introduce and maintain national FDI screening legislation. Nevertheless, as demonstrated in the following chapter, the Commission seems to openly advocate for precisely such a scenario.

3.2. The Commission’s expectations and the future of the European FDI screening framework

As already mentioned, Regulation 2019/452 is based on common commercial policy, which forms an area of exclusive competence of the EU.¹⁴⁷ At the same time, however, the authority to maintain, amend or adopt a national FDI screening mechanism remains firmly with each Member State.¹⁴⁸ As expressly prescribed by Art. 1 (2), Regulation 2019/452 is “without prejudice to each Member State having sole responsibility for its national security, as provided for in Article 4(2) TEU, and to the right of each Member State to protect its essential security interests in accordance with Article 346 TFEU”. Furthermore, nothing in Regulation 2019/452 limits the right of each Member State to decide whether or not to screen a particular FDI within its framework.¹⁴⁹ Keeping the aforementioned in mind, it follows that the primary goal of Regulation 2019/452 is not to achieve that all Member States adopt national FDI screening legislation, but rather to set up efficient rules which will implement and further the goals of common commercial policy.¹⁵⁰ This unambiguously follows from the subject matter and scope of Regulation 2019/452, as defined in its Art. 1 (1).¹⁵¹ In other words, Regulation 2019/452 provides for minimum procedural requirements which must be met by all Member States which have FDI screening mechanisms in place,¹⁵² and for specific rules relating to

¹⁴⁶ Hindelang & Moberg, *supra* n. 11, pp. 1457, 1458.

¹⁴⁷ *Supra* n. 16.

¹⁴⁸ Art. 2 Regulation 2019/452.

¹⁴⁹ Art. 1 (3) Regulation 2019/452.

¹⁵⁰ Art. 207 (1) and (2) TFEU. See also: Hindelang & Moberg, *supra* n. 11, p. 1428.

¹⁵¹ Art. 1 (1) of Regulation 2019/452 provides that it “establishes a framework for the screening by Member States of foreign direct investments into the Union on the grounds of security or public order and for a mechanism for cooperation between Member States, and between Member States and the Commission, with regard to foreign direct investments likely to affect security or public order”, including “the possibility for the Commission to issue opinions on such investments”.

¹⁵² Art. 3 Regulation 2019/452.

cooperation and information exchange between the Member State where the FDI is either planned or has been completed, other Member States if they consider that such FDI is likely to affect their security or public order and the Commission.¹⁵³ One would thus expect that the role of the Commission would primarily be limited to the functions of oversight and coordination. Along those lines, Regulation 2019/452, in addition to the role pertaining to notification, reporting, publication and overall coordination and exchange of information and data), gives the Commission the authority to issue non-binding opinions within the meaning of Art. 288 TFEU.¹⁵⁴

Nevertheless, the Commission has thus far (on more than one occasion) made it quite clear that it will use Regulation 2019/452 as a tool for incentivizing Member States to take a pro-active role in the field of FDI screening. Such aspirations were initially voiced by the Commission in its 2020 Communication, where it openly called for the Member States that have no national FDI screening legislation “to set up a full-fledged screening mechanism and in the meantime to use all other available options to address cases where the acquisition or control of a particular business, infrastructure or technology would create a risk to security or public order in the EU, including a risk to critical health infrastructures and supply of critical inputs”¹⁵⁵. The statement was reiterated in the Commission’s 2021 Communication relating to trade policy issues,¹⁵⁶ the First Annual Report on the screening of FDIs into the Union (hereinafter: First Annual Report)¹⁵⁷ and the Second Annual Report on the screening of FDIs into the Union (hereinafter: Second Annual Report), where the Commission expressly stated that it “firmly expects that additional Member States will very soon adopt and strengthen national FDI screening legislation and related mechanisms for potentially risky foreign investments”¹⁵⁸. The war in Ukraine, unsurprisingly, once again highlighted the Commission’s ambitions as it called on the Member States that currently do not have a FDI screening mechanism in place (or whose screening mechanism does not cover all relevant FDI transactions or does not allow for screening before investments are made) to “urgently set up a comprehensive FDI screening mechanism and in the meantime to use other suitable legal instruments to address cases where the acquisition or control of a particular business, infrastructure or technology would create a risk to security or public order in the EU”¹⁵⁹. As for those Member States that are still in the process

¹⁵³ Art. 6 Regulation 2019/452 et seq.

¹⁵⁴ Para. 16 Preamble, Regulation 2019/452.

¹⁵⁵ Communication from the Commission, *supra* n. 6, p. 2.

¹⁵⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Trade Policy Review - An Open, Sustainable and Assertive Trade Policy, COM(2021) 66 final, 18.2.2021, p. 20.

¹⁵⁷ First Annual Report on the screening of foreign direct investments into the Union {SWD(2021) 334 final}, COM(2021) 714 final, 23.11.2021, p. 6. The Report covers the period from 11 October 2020 to 30 June 2021, p. 7.

¹⁵⁸ Second Annual Report on the screening of foreign direct investments into the Union {SWD(2022) 219 final}, COM(2022) 433 final, 1.9.2022., p. 21. The Report covers the year 2021, with an overlap with the First Annual Report, *supra* n. 157.

¹⁵⁹ Communication from the Commission, *supra* n. 7, p. 3.

of setting up their screening mechanism, the Commission called on them “to accelerate its adoption and prepare its implementation, including supporting it with appropriate resources”¹⁶⁰. As it clearly follows, the primary focus has shifted from “the right of each Member State to protect its essential security interests”¹⁶¹ to the qualitatively more generalized obligation of all Member States to duly address the risk which FDI may create to security or public order of the EU.¹⁶² Leaving aside a potential (cynical) observation that the territory of each Member State is in fact the territory of the EU, it should suffice to remind that both the limits and the use of Union competences are respectively governed by the principles of conferral, subsidiarity and proportionality.¹⁶³ Although all Member States are obliged to facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardize the attainment of the Union’s objectives,¹⁶⁴ arguments trying to justify the Commission’s open and aggressive effort to influence the outcome of the decision which clearly falls within the exclusive authority of each Member State must inevitably fail as they run against the express provisions of Regulation 2019/452 itself.

As per Art. 5 (3), the Commission is obliged to provide an annual report on the implementation of Regulation 2019/452 to the European Parliament and to the Council. That report is made public. In return, the European Parliament may invite

¹⁶⁰ Ibid.

¹⁶¹ Art. 1 (2) Regulation 2019/452.

¹⁶² Considering the Commission’s aspirations to have FDI screening mechanisms in all Member States, it seems rather obvious that Croatia is also expected to adopt an appropriate legislative framework in line with the criteria envisaged by Regulation 2019/452. Unlike the Commission’s First Annual Report, which indicated that Croatia (together with Bulgaria and Cyprus) belonged to the group of Member States with no publicly reported initiative regarding an FDI screening mechanism underway (First Annual Report, *supra* n. 157, p. 9, 11), its Second Annual Report noted a slight improvement, placing Croatia (this time, together with Belgium, Estonia, Greece, Ireland, Luxembourg and Sweden) in the category of Member States with a consultative or legislative process expected to result in the adoption of a new mechanism (Second Annual Report, *supra* n. 158, p. 9). As these processes are still expected to take place, Croatia formally did not notify the Commission of any screening mechanism (Art. 3(7) of Regulation 2019/452). Croatia is thus not on the list which the Commission, pursuant to Art. 3 (8) of Regulation 2019/452 made publicly available. At the same time, the proclaimed urgency of Croatia’s future legislative efforts (in) directly follows from the Commission’s Working Document accompanying its Second Annual Report relating to the data concerning Russian shareholding in Europe (Commission Staff Working Document, Screening of FDI into the Union and its Member States, Accompanying the Document *Report from the Commission to the European Parliament and the Council*, Second Annual Report on the screening of foreign direct investments into the Union {COM(2022) 433 final}, SWD(2022) 219 final, 1.9.2022.). There the Commission, among other things, pointed out that Russia directly controls 36 EU companies in the Oil & Gas sector and 33 in the Electricity sector. Regarding the Electricity sector, it stressed, unfortunately without further explanation, that “seven controlled companies are in Germany and five in Latvia, while large minority stakes are present in another 36 EU firms mainly in Latvia, Croatia and Hungary” (Commission Staff Working Document, p. 17). It goes without saying that the lack of specific national screening legislation, to a certain extent, makes Croatia a potential target for FDI seeking to bypass existing national screening and sanctioning mechanisms. At the same time, one could (at least in theory) put forward an argument that Croatia’s lack of FDI screening legislation reflects specific political thinking. At the very least, one would hope that a prudent legislator would, prior to taking any definitive steps, undertake full and proper analysis before adopting legislative solutions which ultimately may harm its *status quo*.

¹⁶³ Art. 5 TEU.

¹⁶⁴ Art. 4 TEU.

the Commission to a meeting of its committee to present and explain systemic issues related to the implementation of Regulation 2019/452.¹⁶⁵ In addition, the Commission has, by virtue of Art. 15 (1), an obligation to evaluate the functioning and effectiveness of Regulation 2019/452 and present a report to the European Parliament and to the Council by 12 October 2023 and every five years thereafter. The provision further on stipulates that Member States shall be involved in this exercise and, if necessary, provide the Commission with additional information for the report's preparation. At the same time, Art. 15 (2) anticipates the possibility of the Commission to use that report to recommend amendments to Regulation 2019/452. Such a report may be accompanied by the appropriate legislative proposal. In light of the Commission's active role in the promulgation of the idea that every Member State should introduce national FDI screening legislation as soon as possible, and especially of the fact that there remain only two Member States (Bulgaria and Cyprus) which have publicly not reported any initiative to adopt national FDI screening legislation,¹⁶⁶ one can reasonably expect that the Commission's evaluation will further focus on the need to harmonize and align national FDI screening legislations of all Member States. Expressed in the Commission's own words, a "national screening mechanism in all 27 Member States is necessary to safeguard the Union against potentially risky foreign investments from third countries", as this ensures that Member States and the Commission protect "the collective security of the Member States and the Union, as well as the security of the Single Market and the very high level of economic integration which it allows"¹⁶⁷.

4. CONCLUSION

While confirming the positive sides of FDIs and the EU's commitment to uphold an open investment environment,¹⁶⁸ Regulation 2019/452 points towards a lack of a comprehensive EU screening framework, which is currently facing developed screening mechanisms adopted by the EU's major trading partners.¹⁶⁹ Regulation 2019/452 thus proclaims the importance of providing legal certainty for Member States' screening mechanisms on the grounds of security and public order, while at the same time ensuring Union-wide coordination and cooperation in the screening of FDIs likely to affect security or public order.¹⁷⁰ Consequently, although it does not expressly oblige Member States to adopt national FDI screening legislation,

¹⁶⁵ Art. 5 (4) Regulation 2019/452.

¹⁶⁶ Annual Reports on Strategic Trade & Investment Controls, Report on the screening of foreign direct investments into the Union and Report on the Union regime for the control of exports of dual-use items, file:///C:/Users/User/Downloads/Annual%20Reports%20on%20Strategic%20Trade%20and%20Investment%20Controls%20-%202022%20brochure.pdf, Internet address visited on January 23rd, 2023, p. 15.

¹⁶⁷ *Ibid.*, p. 13.

¹⁶⁸ Paras. 1-3 Preamble, Regulation 2019/452.

¹⁶⁹ Para. 5 Preamble, Regulation 2019/452.

¹⁷⁰ Para. 7 Preamble, Regulation 2019/452.

it does advise Member States which want to adopt it to “take into account the functioning, experiences and best practices” of existing mechanisms adopted by other Member States.¹⁷¹

By virtue of its Art. 1 (1), Regulation 2019/452 has two goals: to establish a framework for the screening by Member States of FDI into the Union on the grounds of security or public order, and to introduce a mechanism for cooperation between Member States, and between Member States and the Commission, relating to FDI likely to affect security or public order. However, expectation that all Member States will in the near future adopt national screening mechanisms, repeatedly voiced by the Commission itself, positions the proclaimed European ambitions in a slightly different setting. To that extent, the Commission’s activities (as well as its overt agenda) can hardly be perceived as merely providing an “incentive” for Member States to safeguard their essential security interests. The goal of “establishing a framework for the screening by Member States of FDI into the Union” thus takes an additional dimension, openly presupposing that the introduction of screening legislation on behalf of all Member States is a required prerequisite for the proper functioning and full effectiveness of Regulation 2019/452 itself. Such an idea is, at the very least, hard to reconcile with the rule according to which each Member State *may* (but is not obliged to) maintain, amend or adopt mechanisms to screen FDI in their territory on the grounds of security or public order.¹⁷² One thus cannot but wonder whether the Commission seeks to accomplish the goal which it was simply not able to formally regulate as part of Regulation 2019/452 i.e. the goal of establishing an EU screening framework where all 27 Member States have national FDI screening legislation.

That Member States recognized the Commission’s messaging clearly follows from its First Annual Report, which recognized that the adoption and implementation of Regulation 2019/452 ushered in a new era in terms of increasing the number of Member States with national screening mechanisms (from 11 to 18), leading to an “adjustment and broadening of the scope of existing mechanisms with Member State screening mechanisms increasingly reflecting, sometimes verbatim, key elements of the Regulation”¹⁷³. In addition, according to the Commission’s Second Annual Report, seven Member States had a consultative or legislative process expected to result in the adoption of a new screening mechanism, thus leaving only two Member States with no publicly reported initiative underway.¹⁷⁴

The previously noted change in the Commission’s attitude towards FDI, which initially started with an overwhelming support for open investment policies and progressive abolition of restrictions on FDI, undoubtedly reflects contemporary challenges faced in terms of global security. Nevertheless, it is not entirely clear whether the proclaimed urgency to step up and put in place national FDI screening

¹⁷¹ Para. 4 Preamble, Regulation 2019/452.

¹⁷² Art. 3 (1) Regulation 2019/452.

¹⁷³ First Annual Report, *supra* n. 157, p. 6.

¹⁷⁴ Second Annual Report, *supra* n. 158, p. 9.

mechanisms is to be contemplated exclusively within the scope of very specific and defined global threats or as an expression of the Commission's belief that the proper functioning of the single market presupposes, if not necessitates, effective curbing of FDIs in a globalized economy. This lack of clarity is potentially problematic not only for the Member States which still have to decide whether to adopt screening mechanisms, but also for the Member States that are in the process of amending their national FDI screening legislation. Should they give preference to the various degrees to which their respective economies are exposed to the specific threats accentuated by the Commission or simply fall in line and follow the Commission's advice notwithstanding potential economic and/or administrative impact their decision may exert on national level? The posed question seeks neither to minimize the threats indicated by the Commission nor to turn a blind eye to the harsh political reality. It is rather to recognize that each and every Member State has specific foreign investment policies which, as a rule, reflect the characteristics of its economic potentials and aspirations. Suffice it to say that the economically stronger Member States, which play a more significant role in global economic processes, have not only quantitatively, but also qualitatively, different exposure to FDIs. As Regulation 2019/452, in its present form, does not adequately consider the differences specific to various Member States, it is at the very least questionable whether its solutions should be uncritically used as a universal blueprint. While fully recognizing the potential benefits of national FDI screening legislations, especially in a complex geo-political setting which highlights the need for a comprehensive framework capable of functioning on the territory of the entire European Union, Member States must thus be careful not to succumb to ready-made solutions but rather strive to adopt solutions which are tailor-made for their specific needs.

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IZRAVNA STRANA ULAGANJA U EUROPSKU UNIJU – BUDUĆE PERSPEKTIVE I PREŠUTNE OBVEZE

Uredba (EU) 2019/452 Europskog Parlamenta i Vijeća od 19. ožujka 2019. o uspostavi okvira za provjeru izravnih stranih ulaganja u Uniji uspostavlja okvir za provjeru izravnih stranih ulaganja u Uniji koju države članice provode iz razloga sigurnosti ili javnog poretka. Povrh toga, uvodi dva odvojena mehanizma suradnje, ovisno o tome radi li se o izravnim stranim ulaganjima koja su u postupku provjere. Iako u bitnome propisuje nesporne postupne pretpostavke (koji se odnose na transparentnost, nediskriminaciju, relevantne vremenske okvire, suradnju, povjerljivost, pomoć i međusobnu komunikaciju), Uredba 2019/452 također predviđa posebne prešutne obveze koje se mogu pokazati kao osobito otegotne u odnosu na države članice koje nemaju posebno zakonodavstvo o provjeri izravnih stranih ulaganja. Uredba 2019/452 izričito ne predviđa obvezu država članica da usvoje mehanizme provjere izravnih stranih ulaganja. Neovisno o tome, čini se da iz aktivnosti i komunikacije Komisije proizlazi da se kao konačni cilj nastoji postići da sve države članice u predvidivoj budućnosti donesu zakone kojima se regulira provjera izravnih stranih ulaganja.

Ključne riječi: *Uredba 2019/452, izravno strano ulaganje, provjera izravnog stranog ulaganja, sigurnost i javni poredak, mehanizam provjere izravnog stranog ulaganja*