

WINNER (HG.)

# Kontrolle ausländischer Direktinvestitionen in Mittel- und Osteuropa



Nomos

facultas



# **Kontrolle ausländischer Direktinvestitionen in Mittel- und Osteuropa**

herausgegeben von

**Dr. Martin Winner**

Universitätsprofessor an der WU Wien

Wien 2022



**Nomos**

**facultas**

Unterstützt durch Fördergelder des Jubiläumsfonds der Oesterreichischen Nationalbank (Projektnummer: 18410), des Jubiläumsfonds der Stadt Wien für die WU, des Vereins zur Förderung des Forschungsinstituts für Mittel- und Osteuropäisches Wirtschaftsrecht und Fördermittel der Wirtschaftsuniversität Wien

### **Bibliografische Information Der Deutschen Nationalbibliothek**

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

© 2022 Facultas Verlags- und Buchhandels AG  
1050 Wien, Österreich

Alle Rechte, insbesondere das Recht der Vervielfältigung und der Verbreitung sowie der Übersetzung, sind vorbehalten.

Satz und Druck: Facultas AG  
Printed in Austria

Österreich: ISBN 978-3-7089-2289-8 (facultas)  
Deutschland: ISBN 978-3-8487-8797-5 (Nomos)

## Vorwort

Das Thema der rechtlichen Möglichkeiten zum Schutz nationaler Interessen bei ausländischen Direktinvestitionen wurde auf europäischer Ebene im Vorfeld der Verordnung (EU) 2019/452, mit der nationale Genehmigungsverfahren für Direktinvestitionen zum Schutz kritischer Infrastrukturen und Wissensvorsprünge besser koordiniert werden sollen, intensiv diskutiert. Dieser Diskurs gab im Jahr 2019 den Anlass zu dem diesem Sammelband zugrundeliegenden Forschungsprojekt. Im Zuge der aktuellen Entwicklungen aufgrund der COVID-19 Pandemie ist das Thema nach wie vor von hoher Aktualität. Einerseits führt die gegenwärtige Zunahme nationalistischer Tendenzen in Europa dazu, dass zunehmend lokale Interessen gegenüber Investoren aus dem Ausland geschützt werden. Andererseits hat die Pandemie uns allen die unmittelbare Bedeutung der kritischen Infrastruktur sehr deutlich vor Augen geführt. Die Umsetzung der Verordnung (EU) 2019/452 zur Verbesserung der Koordinierung der nationalen Prüfverfahren, um kritische Infrastrukturen und Wissen zu schützen, stellt dabei eine besondere Herausforderung dar.

Das vorliegende Buch präsentiert die Ergebnisse eines zweijährigen internationalen Forschungsprojekts des Forschungsinstituts für mittel- und osteuropäisches Wirtschaftsrecht (FOWI) an der Wirtschaftsuniversität Wien. Im Rahmen des Projektes wurde die Rechtslage hinsichtlich der Barrieren für Direktinvestitionen in sieben mittel- und osteuropäischen Ländern (Belarus, Polen, Tschechien, Slowakei, Serbien, Ungarn und Russland) analysiert. Als Bearbeitungsbasis wurde dazu die Rechtslage in Österreich herangezogen, die in einem eigenen Beitrag dargestellt wird. Diese Länderberichte werden ergänzt durch Beiträge zu den EU-primärrechtlichen Schranken, die sich aus den Binnenmarktgrundfreiheiten für mitgliedstaatliche Investitionsabwehr- bzw Investitionskontrollmaßnahmen ergeben, sowie zur Verordnung (EU) 2019/452, die am 11. Oktober 2020 in Kraft trat und unter anderem einen Rahmen für die EU-Kommission und die Mitgliedstaaten schafft, um ihre Maßnahmen im Zusammenhang mit ausländischen Direktinvestitionen zu koordinieren.

Im Zuge der Untersuchung wurden sowohl die nationalen Genehmigungsverfahren für ausländische Investitionen als auch andere, vor allem gesellschaftsrechtliche und branchenbezogene Mechanismen, die dem Staat Einfluss auf nationale Unternehmen ermöglichen, analysiert. Diese Mechanismen waren insbesondere in Ermangelung von speziellen Genehmigungsverfahren ein mehr oder weniger wirksamer Behelf, um die „Kronjuwelen“ des Landes und insbesondere die kritische Infrastruktur vor dem „Ausverkauf“ zu schützen. Das primäre Ziel war es dabei, ein möglichst umfassendes Bild der zur Verfügung stehenden Mittel in den untersuchten Rechtssystemen zu zeichnen.

Das Forschungsprojekt wurde aus Mitteln des Jubiläumsfonds der Österreichischen Nationalbank, des Jubiläumsfonds der Stadt Wien für die WU, des

Vereins zur Förderung des Forschungsinstituts für Mittel- und Osteuropäisches Wirtschaftsrecht und Fördermitteln der Wirtschaftsuniversität Wien finanziert. Wir danken den Fördergebern für die Ermöglichung des Projekts.

Wien, April 2022

Martin Winner

## Inhaltsübersicht

<b>EU Investment Screening: A Roadblock in a One-Way Street? .....</b>	<b>9</b>
<i>Sophie Bohnert</i>	
<b>EU-Grundfreiheiten und mitgliedstaatliche Investitionskontrolle .....</b>	<b>99</b>
<i>Erich Vranes</i>	
<b>Österreich .....</b>	<b>121</b>
<i>Martin Winner</i>	
<b>Belarus .....</b>	<b>177</b>
<i>Liudmila Tsarova</i>	
<b>Polen.....</b>	<b>211</b>
<i>Romana Cierpial-Magnor / Katarzyna Domańska-Moldawa / Joanna Głowacka</i>	
<b>Russische Föderation.....</b>	<b>259</b>
<i>Ingeborg Bauer-Mitterlehner</i>	
<b>Serbien .....</b>	<b>331</b>
<i>Mirjana Radović</i>	
<b>Slowakische Republik.....</b>	<b>383</b>
<i>Angelika Mašurová</i>	
<b>Tschechischen Republik .....</b>	<b>427</b>
<i>Angelika Mašurová</i>	
<b>Ungarn .....</b>	<b>479</b>
<i>Marc Vecsey</i>	
<b>Autorenverzeichnis.....</b>	<b>545</b>

# EU Investment Screening: A Roadblock in a One-Way Street?

*Sophie Bohnert*

## Inhaltsverzeichnis

<b>I. Introduction</b> .....	10
<b>II. Regulatory Background</b> .....	13
A. Geopolitics.....	13
B. Inbound FDI in the EU .....	15
C. Concerns over FDI.....	17
D. Impact of the COVID-19 Pandemic.....	19
<b>III. Regulatory Background</b> .....	20
A. The EU's Economic Order.....	20
B. Preconditions and Limits of Member State Action .....	22
C. Status Quo before the Adoption of the Screening Regulation.....	23
<b>IV. EU Screening Regulation</b> .....	26
A. Policy Debate at EU Level.....	26
B. Regulatory Objectives.....	30
C. Legal Basis.....	31
D. Main Features .....	33
E. Scope of Application.....	33
1. 'Screening' Covered .....	34
2. Foreign Direct Investment .....	34
3. Anti-Circumvention.....	41
F. Procedural Requirements for National Screening Mechanisms .....	42
1. Screening Mechanisms at Member State Level.....	42
2. Procedural Requirements in Detail .....	43
G. Decision-Making Authority and Screening Grounds .....	51
1. Decision-Making Authority.....	51
2. Security and Public Order as Screening Grounds.....	52
3. Screening Factors .....	53
4. Legal Effects and Analysis .....	57
H. Cooperation Mechanism .....	62
1. Rationale.....	62
2. Applicability .....	63
3. Cooperation Procedure and Information Requirements.....	66
4. Member State Obligations and Legal Consequences.....	71
5. Procedural Issues .....	78
I. Other Regulatory Aspects .....	79
1. Annual Reporting .....	79
2. Contact Points.....	80
3. Expert Group .....	81

4. International Cooperation.....	81
5. Review Clause.....	81
<b>V. Conclusion and Comment.....</b>	<b>82</b>
<b>Table of Abbreviations .....</b>	<b>86</b>
<b>Bibliography .....</b>	<b>87</b>
<b>Table of Legislation and Legal Materials .....</b>	<b>95</b>
EU .....	95
US .....	96
<b>Table of Cases .....</b>	<b>96</b>

## I. Introduction

The European Union (‘EU’) has championed free trade and foreign direct investment (‘FDI’) due to their economic benefits for the internal market<sup>1</sup> for the majority of the second half of the 20<sup>th</sup> century.<sup>2</sup> But the tide has changed. FDI has started to garner considerable scepticism at the end of the 1990s and the beginning of the 2000s in what appears to be a spectacular fall from grace. Novel trends and developments in FDI patterns, notably the sharp increase in investment from emerging economies,<sup>3</sup> have prompted countries all around the world to espouse more cautious, if not protectionist, policies.<sup>4</sup> Countries around the globe have put considerable effort into adopting or enhancing investment regulation,<sup>5</sup> including measures such as national security reviews

1 Diego Andreis, ‘One Voice of Europe?’ in Tim Wemmes and Walter Lohman (eds), *Chinese FDI in the EU and the US* (Palgrave Macmillan 2019) 70.

2 For information on the advantages and disadvantages of FDI, see point II.C. below and for the EU’s ‘reorientation’ as regards FDI, see point IV.A below.

3 Jacques Bourgeois and Eliza Malathouni, ‘The EU Regulation on Screening Foreign Direct Investment: Another Piece of the Puzzle’ in Jacques Bourgeois (ed), *EU Framework for Foreign Direct Investment Control* (Wolters Kluwer 2020) 172 (referring to the rise of ‘newcomers from emerging markets’); Markus Gerhard, ‘Mehr Schutz vor ausländischen Direktinvestitionen?’ (2018) 98 *Wirtschaftsdienst* 814, 815f.

4 Vinod Aggarwal and Andrew Reddie, ‘Economic Statecraft in the 21<sup>st</sup> Century: Implications for the Future of the Global Trade Regime’ (2021) 20 *World Trade Rev* 137, 137 (arguing for a renewed focus on economic statecraft); Rainer Bierwagen and Christian von Wistinghausen, ‘Novellierung des Außenwirtschaftsgesetzes aus europarechtlicher Perspektive’ (2020) 75 *BB* 1986, 1988 (citing global economic insecurity and political instability, the COVID-19 pandemic, the WTO crisis, and national security considerations as factors reinforcing worldwide protectionist tendencies); Jyrki Katainen, ‘Chinese Investments in the EU’ in Tim Wemmes and Walter Lohman (eds), *Chinese FDI in the EU and the US* (Palgrave Macmillan 2019) 18f; Stefano Riela and Peter Záborský, ‘Screening of Foreign Acquisitions and Trade in Critical Goods’ (2020) 18 *Asia Pacific J EU Stud* 55, 56.

5 Aggarwal and Reddie (n 4) 141f; Syed Tariq Anwar, ‘FDI Regimes, Investment Screening Process, and Institutional Frameworks: China versus Others in Global Business’ (2012) 46 *J World Trade* 213, 224 (arguing that ‘*FDI protectionism is on the rise because of rigid invest-*



and golden shares.<sup>6</sup> The United States of America ('US'), for instance, has recently ramped up its national review mechanism. In 2018, US Congress passed the Foreign Investment Risk Review Modernization Act ('FIRRMA')<sup>7</sup> to revamp the previous regime.<sup>8</sup> The Act strengthens the competent authority's powers to examine cross-border transactions, if, amongst others, '*critical US infrastructure*'<sup>9</sup> as well as '*emerging and foundational technology*'<sup>10</sup> are concerned. In April 2021, the United Kingdom's ('UK') National Security and Investment Act received Royal Assent. The Act expands the powers of the Secretary of State for Business, Energy, and Industrial Strategy to review and block FDI posing a threat to UK national security.<sup>11</sup> Germany has also repeatedly tightened its national security review regime over the past years, with the most recent amendment entering into force in May 2021.<sup>12</sup>

Against this background, the debate about the 'virtues and vices' of erecting barriers to ward off '*undesirable*'<sup>13</sup> or supposedly '*predatory*'<sup>14</sup> FDI is not an entirely new one. At the beginning of the 2000s, the focus had been on defence and security-related industries.<sup>15</sup> Nowadays, seemingly security- or pub-

---

*ment screening procedures, national security laws, and reluctance to share sensitive technologies*'); for a country-wise study, see Anshul Asri and Kriti Tuteja, 'Winds of Change: The Evolving Landscape of Foreign Investment Regimes in Trying Times' (2021) 22 Bus L Int'l 69, 72ff.

- 6 Golden shares carry special rights. They are frequently held by governments as a means of retaining control in formerly government-owned enterprises.
- 7 Foreign Investment Risk Review Modernization Act ('FIRRMA') of 2018 (US).
- 8 David R Allman, 'Scalpel or Sledgehammer: Blocking Predatory Foreign Investment with CFIUS or IEEPA' (2020) 10 Nat'l Sec L Brief 267; for more background information on the Committee on Foreign Investment in the United States, see Colin Stapleton, 'Global Colony: A Comparative Analysis of National Security-Based Foreign Investment Regimes in the Western Hemisphere' (2015) 92 Wash U L Rev 1647, 1647ff; for an overview of the legislative history of the Committee on Foreign Investment in the United States, see Jason Jacobs, 'Tiptoeing the Line Between National Security and Protectionism: A Comparative Approach to Foreign Direct Investment Screening in the United States and European Union' (2019) 47 Int'l J Legal Information 105, 108ff.
- 9 US Department of the Treasury, 'Summary of the Foreign Investment Risk Review Modernization Act of 2018' <<https://www.treasury.gov/resource-center/international/Documents/Summary-of-FIRRMA.pdf>> accessed 20 August 2021.
- 10 *ibid.*
- 11 UK Parliament, 'National Security and Investment Act 2021' <<https://bills.parliament.uk/bills/2801>> accessed 20 August 2021; for an analysis, see Nicholas Levy and others, 'The UK's Proposed New National Security Regime: A Sledgehammer to Crack a Nut' (2021) 20 Competition LJ 11, 11ff.
- 12 Matthias J Annweiler, 'Die 17. AWV-Novelle und ihre Bedeutung für M&A-Transaktionen' (2021) 13 GWR 241, 241ff.
- 13 Erich Vranes, 'State Measures Protecting Against "Undesirable" Foreign Investment' (2012) 67 ZÖR 639, 645.
- 14 Allman (n 8) 267.
- 15 On the evolving concept of 'risk' in investment screening, see Martin Nettesheim, 'Screening for What Threat: Preserving "Public Order and Security", Securing Reciprocity in International Trade, or Supporting Certain Social, Environmental, or Industrial Policies?' in Stef-

lic-order related concerns are brought up in connection with a broad range of industries. Indeed, ‘shopping sprees’ by third-country investors purchasing ‘*iconic European companies*’<sup>16</sup> have sparked diffuse fears among EU Member States (‘Member States’). Amongst others, there is the fear of cutting-edge technology (often with ‘*dual-use potential*’<sup>17</sup>) being siphoned off, resulting in a fatal blow to the EU’s competitiveness.<sup>18</sup> More broadly speaking, Member States seem to scramble for protecting know-how in general. Consequently, Member States are keen to protect their key technologies, critical infrastructure, and inputs, which are (supposedly) essential for security or the maintenance of public order.<sup>19</sup> In light of the above, the concept of security and public order is increasingly (mis)used as a proxy for strategic-economic, notably industrial, policy goals. As a consequence, the very concept is at risk of being alienated and may become a tool for tinkering with market mechanisms.<sup>20</sup>

With the adoption of Regulation (EU) 2019/452 of the European Parliament (‘EP’) and of the Council establishing a framework for the screening of foreign direct investments into the Union<sup>21</sup> (‘Screening Regulation’ or ‘Regulation’) on 19 March 2019 and its entry into force on 10 April 2019, the EU has entered this particular regulatory field as a new player. From the EU’s perspective, vetting FDI is largely uncharted territory, since the EU’s stance on FDI has until recently been characterised by a ‘*laissez faire*’<sup>22</sup> attitude. The Screening Regulation became fully operational on 11 October 2020 and establishes, amongst others, a framework for the EU Commission and the Member States to coordinate their FDI-related actions. On 25 March 2020, between the Screening Regulation’s entry into force and its full applicability, the EU Commission issued a Guidance Paper concerning FDI and free movement of capital from third countries, and the protection of Europe’s strategic assets (‘Guidance Paper’).<sup>23</sup>

---

fen Hindelang and Andreas Moberg (eds), *YSEC Yearbook of Socio-Economic Constitutions 2020* (Springer Nature Switzerland 2021) 489.

16 Sophie Meunier, “‘Beggars Can’t Be Choosers’: The European Crisis and Chinese Direct Investment in the European Union” (2014) 36 *J Eur Integr* 283, 284.

17 Aggarwal and Reddie (n 4) 138.

18 Sophie Meunier, ‘Divide and Conquer? China and the Cacophony of Foreign Investment Rules in the EU’ (2014) 21 *J Eur Public Policy* 996, 1000.

19 Matthias Lehmann and Marco Kretzschmar, ‘Investitionskontrolle in Europa – Zwischen wirtschaftlichem Zweck, politischem Nutzen und rechtlicher Machbarkeit’ (2020) *FIW-Policy Brief* 48 4f.

20 Nettesheim (n 15) 484f.

21 ‘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’ (2019) *OJ L* 79/1.

22 Steffen Hindelang, ‘Direktinvestitionen und die europäische Kapitalverkehrsfreiheit im Drittstaatenverhältnis’ (2009) 64 *JZ* 829, 829.

23 European 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)’ (2020) *OJ C* 99 I/1.

This contribution undertakes to provide an in-depth legal study of the Screening Regulation to see whether the EU is well-equipped to, on the one hand, continuously stand to benefit from FDI, and to afford the necessary protection to a broad array of EU and Member State interests, on the other.<sup>24</sup> As the analysis will show, the EU has to walk a tightrope. Section II will provide an insight into the Screening Regulation's regulatory background, including geopolitical considerations, recent trends and developments in the field of EU inward FDI, prominent concerns over FDI as well as the impact of the COVID-19 pandemic. Section III will shed light on the legal background, notably the EU's economic constitution as shaped by the EU Treaties and the status quo as regards national control mechanisms before the Screening Regulation's entry into force. The consecutive section is dedicated to the policy debate at EU level leading up to the adoption of the Screening Regulation. In addition, the section will touch upon the Screening Regulation's regulatory objectives as well as the controversy surrounding its legal basis. Subsequently, the section will shed light on all of the Screening Regulation's provisions separately. The last section concludes. It will, amongst others, undertake to identify possible future issues and a prognosis of what regulatory endeavours at EU level are possibly yet to come.

## II. Regulatory Background

### A. Geopolitics

While 'traditional' investors like the US, Switzerland, Norway, Canada, Australia, and Japan have continued to invest and hold assets in the EU, the EU Commission found that there were 'new' investors on the rise. These 'new' investors include emerging economies in general and the People's Republic of China ('China') as well as offshore financial centres in particular.<sup>25</sup> Even if the EU does not get tired of reaffirming that its recent endeavours to 'control' FDI do not target any specific country,<sup>26</sup> China undeniably is the '*elephant or, more*

24 Alec Berin, 'CFIUS or Sisyphus: Toward a European Framework for Foreign Direct Investment Review' (2019) 51 *Geo Wash Int'l L Rev* 701, 702; Bierwagen and von Wistinghausen (n 4) 1988.

25 European Commission, 'Commission Staff Working Document on Foreign Direct Investment in the EU Following up on the Commission Communication "Welcoming Foreign Direct Investment While Protecting Essential Interests" of 13 September 2017' SWD (2019) 108 final 7; see also Hindelang, 'Kapitalverkehrsfreiheit im Drittstaatsverhältnis' (n 22) 829; Jerónimo Maillo, 'New Screening of Foreign Direct Investment (FDI) in Europe: A First Step towards a New Paradigm?' (2020) 24 *SYbIL* 180, 183 (arguing that in a number of emerging economies, '*the role of the State is much stronger and more "dirigiste", raising questions about the purposes of the investments [...]*').

26 See, for instance, European Commission, 'FAQs on Regulation (EU) 2018/452 Establishing a Framework for the Screening of Foreign Direct Investments into the Union' (2021) 4 <[https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc\\_157945.pdf](https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157945.pdf)> accessed 7 July 2021.