

# Merger control meets FDI: the multi-stop shop expands

Alec Burnside\* and Adam Kidane†

**Abstract:** This article explores the interplay between the EU FDI Regulation and the EU Merger Regulation; and highlights how the lack of substantive and procedural convergence between the two regimes has exacerbated the challenges of managing the growing number of parallel regulatory reviews. The EU FDI Regulation created a mechanism for coordinating national screening of inward investments by foreign buyers. The adoption of the Regulation is part of a wider policy shift stemming from calls to preserve the EU's industrial base, which led to the launch of the EU Industrial Strategy. These developments have added a layer of complexity to the EU regulatory landscape: M&A transactions may now be subject to multiple FDI filings just as they may qualify for merger control review in several jurisdictions. This article focuses in particular on the interplay between the 'legitimate interest' exception under the EU Merger Regulation and FDI controls.

**Keywords:** merger control, EUMR, FDI, FDI screening, FDI Regulation, legitimate interest, Article 21 EUMR, EU industrial strategy

## 1. Introduction

The EU is in the process of revamping its regulatory toolkit to address global imbalances and increase the resilience of the single market. Notably, the emergence of China as a global economic power in recent years has sparked wide-ranging discussions and debates which have been primarily centred on perceptions of unfair competition and an absence of reciprocity in the EU-China trade relationship.<sup>1</sup> In parallel, the bloc's unpreparedness for digitalization – underlined by the fact that leading businesses in the sector including tech platforms tend to be American and increasingly Chinese – triggered soul-searching as to the comparative lack of EU industrial success. These simmering tensions were brought to the boil when the European Commission (Commission) vetoed the combination of the rail businesses of Siemens and Alstom.<sup>2</sup> This merger

of equals was conceived as a solution to confront the emerging competitive threat from China Railway Rolling Stock Corporation (CRRC), the world's largest rail business and itself the result of a merger of two leading domestic players.<sup>3</sup> The merger had been heavily backed by the French and German governments, and Brussels' decision to block it, scuppering plans for the creation of a European champion, triggered a considerable political backlash.<sup>4</sup>

Led by the Franco-German axis, the clamour for the EU to adopt a comprehensive industrial strategy grew stronger in the lead-up to the Commission's decision to prohibit *Siemens/Alstom*.<sup>5</sup> Those calls reached fever pitch in the aftermath of the decision, and the Commission was roundly criticized from some quarters for sacrificing Europe's industrial base on the altar of

\* Alec Burnside, Partner, Dechert LLP, Brussels, Belgium.

† Adam Kidane, Senior Associate, Dechert LLP, Brussels, Belgium.

1 See, e.g., T. Hanemann and M. Huotari, 'EU-China FDI: Working Towards Reciprocity in Investment Relations' (2018) 3 Merics Papers on China, Rhodium Group and Mercator Institute for China Studies, MERICS.

2 Case COMP/M.8677 *Siemens/Alstom* (*Siemens/Alstom*).

3 Siemens and Alstom, 'Siemens and Alstom join forces to create a European Champion in Mobility' (26 September 2017), available at: <https://press.siemens.com/global/en/pressrelease/siemens-and-alstom-join-forces-create-european-champion-mobility> (accessed 11 July 2022). Although CRRC was not specifically mentioned by name, Joe Kaeser, President and CEO of Siemens, pointed out that the emergence of 'a dominant player in Asia' had 'changed global market dynamics'; and underlined that the global footprint of the combined business would enable it to access growth markets (ibid).

4 See, e.g., A. Rinke, 'Merkel says German government would support Siemens-Alstom tie-up' (*Reuters*, 10 May 2014), available at: <https://www.reuters.com/article/us-france-germany-alstom-idUKBREA4902N20140510> (accessed 11 July 2022); and A.-S. Chassany and D. Keohane, 'France backs Alstom-Siemens train merger' *Financial Times* (Paris, 26 September 2017), available at: <https://www.ft.com/content/0ee2336c-64f8-3935-ab92-ada64851b8e1> (accessed 11 July 2022).

5 Friends of Industry, 'Joint Statement by France, Austria, Croatia, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, Netherlands, Poland, Romania, Slovakia, Spain France' (6th Ministerial Meeting, Paris, 18 December 2018), available at: [https://www.gouvernement.fr/sites/default/files/locale/piece-jointe/2018/12/929\\_-\\_declaration\\_finale\\_-\\_6eme\\_reunion\\_des\\_amis\\_de\\_lindustrie-en.pdf](https://www.gouvernement.fr/sites/default/files/locale/piece-jointe/2018/12/929_-_declaration_finale_-_6eme_reunion_des_amis_de_lindustrie-en.pdf) (accessed 11 July 2022).

competition orthodoxy.<sup>6</sup> The industrial policy proposals put forward by Member States – notably the Franco-German manifesto – included the wholesale reform of EU competition policy.<sup>7</sup> It was against this backdrop that the Commission published the EU-China Strategic Outlook in March 2019.<sup>8</sup> The paper marked a paradigm shift in EU policy towards China. For the first time, China was declared a ‘systemic rival’, and the paper advocated ‘a flexible and pragmatic whole-of-EU approach enabling a principled defence of interests and values’.<sup>9</sup>

One of the key thrusts of the EU-China Strategic Outlook was that the ‘EU itself needs to adapt to changing economic realities and strengthen its own domestic policies and industrial base’.<sup>10</sup> To that end, the paper strongly advocated for the strengthening of the security of Europe’s critical infrastructure and technological base. The proposal for a Regulation establishing a framework for the screening of foreign direct investments into the EU (EU FDI Regulation),<sup>11</sup> then under discussion, was considered instrumental to achieving this objective.<sup>12</sup> In particular, the Commission viewed it as a ‘powerful tool’ to raise awareness of foreign investment in critical assets, technologies and infrastructure; and collectively identify and address threats to public order and security posed by acquisitions of sensitive targets. Moreover, the EU-China Strategic Outlook urged Member States to use the period between the entry into force and the start of application of the FDI Regulation to ‘make the necessary changes to their national domestic practices and legislation and put in place the administrative structures to ensure effective cooperation at EU level with the Commission in accordance with the established mechanisms’.<sup>13</sup> The adoption of the EU FDI Regulation in October 2019 preceded the launch of ‘A New Industrial Strategy for Europe’ (EU 2020 Industrial Strategy) in

March 2020, and was presented as an important constituent part of the EU’s renewed industrial policy.<sup>14</sup>

The COVID-19 pandemic further reinforced the political imperative to preserve Europe’s industrial base and represented an inflection point in the evolution and development of FDI review in the EU. In particular, the Commission has actively encouraged Member States to set up FDI screening regimes and make use of the existing rules, in particular to impede opportunistic buyouts of strategic European assets in the difficult economic circumstances resulting from the pandemic.<sup>15</sup> Member States have heeded those calls: in addition to an increase in the adoption of FDI screening regimes, several Member States have enhanced existing regimes. At the time of writing, 18 of the 27 EU Member States have FDI screening regulations in place and it is the Commission’s strong expectation that all 27 EU Member States will adopt some form of FDI screening.<sup>16</sup> This marks a volte-face from the response to the 2008 financial crisis when new capital, notably from China, was welcomed in view of the lack of liquidity in Western capital markets.

*The adoption of FDI controls preceded the COVID-19 pandemic but was accelerated by it*

## 2. Practical implications

The increase in the number of FDI screening regimes is reminiscent of the proliferation of merger control regimes in the years after adoption of the first iteration of the EU Merger Regulation (EUMR) (then the ECMR).<sup>17</sup> In this

6 See, e.g., Reuters Staff, ‘Germany presses for changes in EU competition rules after Siemens/Alstom deal blocked’ (*Reuters*, 6 February 2019), available at: <https://www.reuters.com/article/us-alstom-m-a-siemens-eu-germany-idUSKCN1PV1BO> (accessed 11 July 2022); and H. Agnew, ‘EU blocks Siemens-Alstom rail merger, Le Maire says’ *Financial Times* (Paris, 6 February 2019), available at: <https://www.ft.com/content/cd35e760-29f5-11e9-a5ab-ff8ef2b976c7> (accessed 11 July 2022).

7 Bundesministerium für Wirtschaft und Energie and Ministère de l’Économie et des Finances, ‘A Franco-German Manifesto for a European industrial policy fit for the 21st Century’ (Franco-German Manifesto) (Paris, 19 February 2019), available at: [https://www.gouvernement.fr/sites/default/files/locale/piece-jointe/2019/02/1043\\_-\\_a\\_franco-german\\_manifesto\\_for\\_a\\_european\\_industrial\\_policy\\_fit\\_for\\_the\\_21st\\_century.pdf](https://www.gouvernement.fr/sites/default/files/locale/piece-jointe/2019/02/1043_-_a_franco-german_manifesto_for_a_european_industrial_policy_fit_for_the_21st_century.pdf) (accessed 11 July 2022). The Franco-German Manifesto controversially included a demand for a veto by the Council over Commission merger decisions.

8 Commission and High Representative of the Union for Foreign Affairs and Security Policy, ‘EU-China – A strategic outlook’ JOIN (2019) 5 final (EU-China Strategic Outlook).

9 *ibid.* 1.

10 *ibid.* 2.

11 Regulation (EU) 2019/452 of the European Parliament and the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

12 EU-China Strategic Outlook (fn 8) 10: ‘It will provide a powerful instrument to detect and raise awareness of foreign investment in critical assets, technologies and infrastructure.’

13 *ibid.*

14 Commission, ‘A New Industrial Strategy for Europe’ COM (2020) 102 final, p. 13: ‘Europe thrives on an open investment environment which allows others to invest in Europe’s competitiveness. But it must also be more strategic in the way it looks at risk associated to foreign investment. The framework for the screening of foreign direct investment that will be fully applicable in October 2020 will safeguard Europe’s interests on the grounds of security and public order. The Commission will make proposals to further strengthen this tool.’

15 See, e.g., Commission, ‘Trade Policy Review – An Open, Sustainable and Assertive Trade Policy’ COM (2021) 66 final.

16 Commission, ‘First Annual Report on the screening of foreign direct investments into the Union’ COM (2021) 714 final (EU FDI Report) 8.

17 The proliferation dates from Council Regulation (EEC) 4064/89 on the control of concentrations between undertakings [1990] OJ L 257/13 (ECMR), now replaced by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24 (EUMR).

regard, OECD statistics reflect a policy shift since 2016, with Member Countries increasingly abandoning their ‘essentially unconditional openness to foreign investment’ in favour of acquisition or ownership-related policies intended to safeguard national security and public order.<sup>18</sup> The adoption of FDI controls preceded the COVID-19 pandemic but was accelerated by it, and the unprecedented level of policy-making in this area has resulted in a fluid and ever-evolving regulatory environment, not least in the EU.<sup>19</sup> These developments have undoubtedly added a layer of complexity to cross-border transactions and could have profound effects on global deal-making.

Despite the tightening of inbound FDI controls, the Commission and Member States have repeatedly underlined that the bloc is open to FDI and that the EU remains one of the world’s top destinations for FDI.<sup>20</sup> However, in practice investors and their advisers must now navigate an increasingly obstacle-strewn regulatory landscape given the recent surge in the number of FDI screening regimes. It is already a daily reality that M&A transactions may be subject to a multiplicity of possible FDI filings, just as they may also qualify for merger control review in multiple jurisdictions. And the landscape will before long be further complicated by the proposed Regulation on foreign subsidies distorting the internal market (Foreign Subsidies Regulation),<sup>21</sup> a further component of the EU 2020 Industrial Strategy. As if the gamut of merger control and FDI filings were not enough, acquisitions of businesses may need to be notified under the incoming Foreign Subsidies Regulation. All of these will be inevitable conditions precedent in deal documentation. And even if most deals will be uncontroversial and will find their way to clearance, the reality is that the bureaucracy and timing implications of so many parallel procedures must heavily impact deal execution.<sup>22</sup> More than that, the anticipation of multiple procedures may influence

the primary commercial selection of an acquirer, in cases where a vendor has multiple options.

These challenges might to some extent be moderated if there were some integration between the different regulatory regimes, but in reality are likely exacerbated by a lack of substantive and procedural convergence, even if in reality the reviews overlap. We explore these issues further below.

Before moving to that topic, it may be worth briefly advert to statistics indicating that the EU has now been overtaken by China and the US in terms of FDI inflows.<sup>23</sup> It goes beyond the scope of this contribution to delve further into that topic, but one possibility is that FDI regimes may be deterring investors. Whether these are deals that would have failed scrutiny, or simply ones where parties are deterred by the need to navigate multiple regulatory hurdles, may be a matter for further consideration.

### *The interplay between Article 21 EUMR and the FDI Regulation gives rise to uncertainty*

### 3. Substantive convergence

EU merger control is an established discipline, and the Commission has emerged as one of the foremost anti-trust regulators in the globe. In order to safeguard the coherence of the EU merger control regime, it is critical that the conceptual relationship between the EUMR and the FDI Regulation be framed clearly at the outset. This is necessary to ensure that the regulations fit seamlessly together and into the wider EU regulatory ecosystem. Nevertheless, an examination of the FDI Regulation reveals a degree of ambiguity. In particular, the interplay

18 OECD, ‘Transparency, Predictability and Accountability for investment screening mechanisms’ (Research note by the OECD Secretariat, Paris, 27 May 2021) 5, available at: <https://www.oecd.org/daf/inv/investment-policy/2009-Guidelines-webinar-May-2021-background-note.pdf> (accessed 11 July 2022).

19 *ibid.*

20 See, e.g., Commission, ‘EU foreign investment screening mechanism becomes fully operational’ (9 October 2020), available at: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1867](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1867) (accessed 11 July 2022). See also Élysee, ‘Des emplois créés avec Choose France’ (20 January 2020), available at: <https://www.elysee.fr/emmanuel-macron/2020/01/20/500-000-emplois-avec-choose-france> (accessed 11 July 2022); and Die Bundesregierung, ‘Investitionsprüfung überarbeitet’ (27 April 2021), available at: <https://www.bundesregierung.de/breg-de/suche/aussenwirtschaftsverordnung-1897742> (accessed 11 July 2022).

21 Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market’ COM (2021) 223 final. At the time of writing, the European Parliament and European Council (Council) reached a provisional political agreement on the draft

Regulation. The provisional agreement is subject to approval by the Council and the European Parliament, before going through the formal steps of the adoption procedure (Council, ‘Foreign subsidies distorting the internal market: provisional political agreement between the Council and the European Parliament’ (30 June 2022), available at: <https://www.consilium.europa.eu/en/press/press-releases/2022/06/30/foreign-subsidies-regulation-political-agreement/> (accessed 14 July 2022)).

22 EU FDI Report (fn 16) 10. Statistics show that investors and their advisers have been cautious as they familiarize themselves with nascent FDI regimes with 80% of the 1,793 notifications received by Member States subject to no formal screening. This was either because the investments fell outside the scope of the FDI regime or due to an evident lack of impact on security or public order. Member States approved 91% of the cases with 79% cleared unconditionally and 12% subject to conditions. Only 2% of investments were prohibited. The remaining 7% were aborted and thus did not require a decision.

23 OECD, ‘FDI in Figures’ (April 2022), available at: <https://www.oecd.org/investment/investment-policy/FDI-in-Figures-April-2022.pdf> (accessed 11 July 2022).

between Article 21 EUMR and the FDI Regulation gives rise to uncertainty.<sup>24</sup>

Notwithstanding the exclusive jurisdiction of the Commission over concentrations that are notifiable under the EUMR, Article 21(4) EUMR recognizes that Member States may take appropriate measures to protect interests other than competition, provided the measures are compatible with 'general principles and other provisions' of EU law (so-called 'legitimate interests'). The article allows Member States to block mergers cleared at EU level or to impose additional conditions, but Member States cannot allow a merger that was blocked by the Commission to proceed, nor waive commitments imposed by the Commission. The EUMR groups legitimate interests into two categories.

The first category consists of legitimate interests that are explicitly recognized by the EUMR, namely: public security, media plurality and prudential rules.<sup>25</sup> Measures which genuinely aim to protect recognized legitimate interests do not require prior notification to the Commission, provided they are 'clearly in compliance with the principles of proportionality and non discrimination'.<sup>26</sup> The second category comprises all other candidate legitimate interests. Article 21(4) EUMR provides that measures to protect 'any other public interest' must be communicated to the Commission by the Member State concerned prior to their implementation. The Commission has 25 working days following the notification of a measure to assess its compatibility with general principles and other provisions of EU law (see above) including non-discrimination and proportionality. In the event a Member State does not notify a measure, the Commission may bring infringement proceedings or issue a decision on the legality of the measure requiring the Member State to withdraw the measure (if necessary).<sup>27</sup>

The EU FDI Regulation provides limited guidance as to how it will interact with Article 21(4) EUMR beyond

a requirement that the notion of legitimate interest under Article 21(4) EUMR and the screening grounds provided for in the EU FDI Regulation, i.e. security or public order, 'should be interpreted in a coherent manner'.<sup>28</sup> This is in line with Article 7 of the Treaty on the Functioning of the European Union (TFEU) which establishes an obligation to ensure consistency between EU policies and activities 'taking all of its objectives into account and in accordance with the principle of conferral of powers'.<sup>29</sup> However, this still leaves a significant margin of appreciation and thus creates legal uncertainty.<sup>30</sup>

The simplest approach would be the de facto treatment of the notification of new or amended FDI screening mechanisms (as required by Article 3(7) of the EU FDI Regulation) as the notification of new candidate legitimate interests within the meaning of the EUMR, in respect of substantive criteria going beyond the first category of recognized legitimate interests.<sup>31</sup> However, in formal terms, the two regulations must in practice be operated as separate instruments by the Commission. This would result in Member States notifying DG Trade of their screening mechanisms under the EU FDI Regulation, and in parallel applying to DG COMP for recognition of the relevant screening grounds as EUMR legitimate interests. In line with Article 21(4) EUMR, the dialogue with DG COMP would technically need to take place before the national FDI rules may be applied to a concentration which qualifies for review under the EUMR. Such an approach would be cumbersome to apply in practice and seems unnecessarily burdensome. There is an obvious interest in ensuring the coherent application of the regulations and this could potentially entail a de facto widening of the notion of legitimate interest under the EUMR. Otherwise a Member State may find itself being urged to intervene for purposes of the EU FDI Regulation, e.g. for transactions

24 A. Burnside, M. De Backer and D. Strohl, 'Can Environmental Interests Trump An EUMR Decision?' in S. Holmes, D. Middelschulte and M. Snoep (eds), *Competition Law, Climate Change & Environmental Sustainability* (Concurrences, 2021).

25 EUMR, Article 21(4).

26 Case COMP/M.4197 *E.ON/Endesa* (Art. 21), para 25. Conversely, the Commission considers that Member States are required to notify measures where there are 'reasonable doubts' as to whether the national measures 'genuinely' aim to protect a recognized interest and/or complies with the principles of proportionality and non-discrimination (ibid para 27).

27 The Commission is also able to adopt an interim decision ordering the suspension of a contested measure.

28 EU FDI Regulation (fn 11), recital 36: 'To the extent that the respective scope of application of those two regulations overlap, the grounds for screening set out in Article 1 of this Regulation and the notion of legitimate interests within the meaning of the third paragraph of Article 21 (4) of Regulation (EC) No 139/2004 should be interpreted in a coherent manner, without prejudice to the assessment of the compatibility of the

national measures aimed at protecting those interests with the general principles and other provisions of Union law.'

29 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47. cf the German principle of *Einheit der Rechtsordnung*, i.e. the need for all laws forming part of the same legal system to be interpreted coherently.

30 The Commission examined the application of Article 7 TFEU in a merger control context for the first time in *Bayer/Monsanto* (Case COMP/M.8084 *Bayer/Monsanto*, paras 3011-3022). It acknowledged that Article 7 TFEU and Recital 23 EUMR do create a requirement to factor in the fundamental objectives as part of its competitive assessment. However, the Commission noted that the EUMR was adopted on the basis of Article 83 (now Article 103 TFEU) and Article 308 of the EC Treaty (now Article 352 TFEU) as a 'specific legal instrument', in order to achieve, and 'not go beyond', the objective of ensuring that competition in the internal market is not distorted. Accordingly, it concluded that factoring in non-competition considerations (e.g. environmental and product safety concerns), would exceed the bounds of its powers under the EUMR.

31 Burnside, De Backer and Strohl (fn 24) 150.

impacting a project of Union importance,<sup>32</sup> but prevented from doing so under the EUMR.<sup>33</sup>

There are however practical challenges to applying this approach across the board since Member State FDI interventions may go far beyond the legitimate interests capable of recognition under the EUMR. Certain national regimes are notably broad, e.g. Hungary, where the law may apply to wholesale and retail<sup>34</sup> or France, where the regime applies to agriculture, fishing, and forestry.<sup>35</sup> In addition, there are multiple EU Member States where the acquisition of equity interests in a publicly listed company beyond a given threshold automatically qualifies for review, irrespective of the sector in which it is active, e.g. France and Poland.<sup>36</sup> This lack of convergence over screening grounds is in itself problematic from a transaction-planning standpoint (discussed below).

Indeed, these issues were recently brought to the fore when the Commission found that Hungary's decision to invoke its FDI screening rules to veto the acquisition of the Hungarian subsidiaries of Aegon by Vienna Insurance Group AG Wiener Versicherung Gruppe (VIG) contravened Article 21 EUMR.<sup>37</sup> The transaction, which was notifiable under EUMR,<sup>38</sup> involved the acquisition of the Hungarian, Polish, Romanian and Turkish entities of Aegon, a Dutch multinational insurance group, by VIG, an Austria-headquartered international insurance group. The transaction was cleared unconditionally by the Commission in phase I, but the Hungarian Government blocked the acquisition of the Hungarian entities a few months prior to the adoption of the clearance decision claiming it was harmful to its legitimate interests.<sup>39</sup> In

doing so, the Government cited Hungary's revised FDI rules, which were amended in response to the COVID-19 pandemic.<sup>40</sup> Following the opening of an investigation in October 2021, the Commission concluded that there were reasonable doubts as to how a transaction between two EU businesses could 'pose a threat to a fundamental interest of society'.<sup>41</sup> Accordingly, Hungary's failure to communicate the veto to the Commission prior to its implementation constituted a breach of Article 21 EUMR. This effectively confirms the formal position that Member States are required to notify measures intended to protect legitimate interests which are not explicitly recognized by the EUMR.

The Commission decision carried with it the threat of infringement proceedings if Hungary failed to withdraw its veto.<sup>42</sup> Hungary withdrew its veto, but it was able to negotiate the acquisition of a 45% interest in the Hungarian business of VIG via the state holding company Corvinus thus sparing the Government its blushes.<sup>43</sup> The Commission is to be lauded for intervening against a measure that breached EU law and endangered the 'one-stop-shop principle' under the EUMR. There is also comfort to be drawn from the fact that the Commission confirmed its exclusive competence to examine concentrations with an EU dimension and is willing to face down heavy-handed FDI enforcement by Member States.<sup>44</sup> This episode, however, raises a number of issues. Notably, it calls into question the legality of Member State FDI rules which protect interests outside the recognized categories of legitimate interests. It also suggests that piecemeal interventions will be required to resolve future conflicts. This means that investors face

32 EU FDI Regulation (fn 11) Article 8(3).

33 Burnside, De Backer and Strohl (fn 24) 151.

34 Act LVIII of 2020 on Transitional Rules related to the Termination of State of Danger and on Epidemiological Preparedness (Act LVIII of 2020).

35 Decree n° 2019-1590 of 31 December 2019.

36 The French Government adopted Decree n° 2020-892 of 22 July 2020 (Decree n° 2020-892) which lowered the control threshold that requires prior governmental review of a foreign acquisition of shares in listed companies from 25% to 10%. The measures introduced by Decree n° 2020-892 were prolonged from 31 December 2020 until 31 December 2021 by Decree n° 2020-1729 of 29 December 2020; and further extended until 31 December 2022 by Decree n° 2021-1758 of 22 December 2021.

The Polish Act of 24 July 2015 on the control of certain investments was overhauled and extended significantly by an amendment which was enacted 24 July 2020 (Amendment). All investments by non-EEA and non-OECD natural and legal persons in listed companies require approval where the shares or rights acquired exceed 20% of the total number of votes at the shareholders' meeting or share capital, respectively. The additional restrictions introduced by the Amendment were put in place for 24 months following its entry into force.

37 Commission, 'Mergers: Commission finds that Hungary's veto over the acquisition of AEGON's Hungarian subsidiaries by VIG breached Article 21 of the EU Merger Regulation' (21 February 2022), available at: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_1258](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1258) (accessed 11 July 2022). In addition, the Commission also found that the veto blocked VIG's right to engage in a cross-border transaction and was thus

incompatible with EU rules on the freedom of establishment. The interaction between the FDI Regulation and the four freedoms warrants further consideration, but falls outside the scope of this contribution.

38 Case COMP/M.10494 VIG/Aegon.

39 Commission, 'Mergers: Commission preliminarily concludes Hungary breached Article 21 of the EU Merger Regulation by vetoing the acquisition of AEGON's Hungarian subsidiaries by VIG' (20 January 2022), available at: [https://ec.europa.eu/commission/presscorner/detail/en/mex\\_22\\_442](https://ec.europa.eu/commission/presscorner/detail/en/mex_22_442) (accessed 11 July 2022). The Hungarian Government vetoed the concentration on 6 April 2021; and the Commission clearance decision was adopted on 12 August 2021.

40 Act LVIII of 2020 (fn 34).

41 Commission, 'Mergers: Commission finds that Hungary's veto over the acquisition of AEGON's Hungarian subsidiaries by VIG breached Article 21 of the EU Merger Regulation' (fn 37).

42 *ibid.*

43 VIG, 'Vienna Insurance Group closes acquisition of Aegon companies in Hungary' (23 March 2022), available at: <https://www.vig.com/en/press/press-releases/detail/vienna-insurance-group-closes-acquisition-of-aegon-companies-in-hungary.html> (accessed 11 July 2022).

44 Commission, 'Mergers: Commission finds that Hungary's veto over the acquisition of AEGON's Hungarian subsidiaries by VIG breached Article 21 of the EU Merger Regulation' (fn 37): 'the Commission has exclusive competence to examine concentrations with a Union dimension and Member States may only take measures to protect legitimate interests under certain conditions'.

potentially significant delays to their transaction timelines if similar EU-Member State stand-offs arise. Beyond that, the outcome leaves a lot to be desired since Hungary was able to sidestep infringement proceedings (and all the consequences of an adverse judgment) while securing a significant stake in VIG's local business.

Notwithstanding the above, the importance of coherence between the FDI Regulation and other policy instruments is not lost on the Commission or Member States. This is reflected in the Commission's first annual report on FDI screening in the EU (EU FDI Report)<sup>45</sup> which was published in November 2021. One Member State noted the FDI Regulation would have 'an increased added-value if synergies could be created' with 'other current or future tools'.<sup>46</sup> This view was shared by the Commission, with the EU FDI Report concluding that there is scope for further discussion within the Expert Group on the 'more exact interplay between the Regulation and other policy instruments and regulators' including merger control.<sup>47</sup> Although the proposed Foreign Subsidies Regulation was not specifically mentioned in the EU FDI Report, it is incumbent on the Commission and Member States to ensure that it is also factored into those discussions. Those discussions should ideally generate additional guidance, and it is reassuring that the Commission has already signalled that it will give the matter 'serious consideration' in due course.<sup>48</sup>

As outlined above, screening grounds vary across Member States. The EU FDI Regulation helpfully identifies several (albeit fairly obvious) categories where FDI is likely to warrant an examination by the Commission and Member States. These include, inter alia, critical infrastructure and critical technologies in multiple sectors such as aerospace, defence and energy<sup>49</sup> as well as certain projects/programmes of 'Union interest', notably involving infrastructure.<sup>50</sup> In March 2020 the Commission

issued a Communication with Guidance to Member States on FDI (March FDI Communication)<sup>51</sup> in response to the COVID-19 pandemic. In particular, the March FDI Communication expands the areas of focus to include 'critical healthcare infrastructures' and reiterates the need for Member States to factor in risks to the supply of critical inputs. But the guidance in the FDI Regulation and the March FDI Communication is not binding, leaving Member States free to determine the scope of their FDI screening regimes, including the sectors of the economy (and by extension the assets/entities) that are captured by their rules.

Concerns regarding the variance and divergence of screening grounds are shared by multiple Member States who have called out a 'perceived inconsistency of what is notified' under the FDI Regulation.<sup>52</sup> In particular, it was suggested that 'too many FDI transactions are notified' including those with 'no relevance for, or impact on, other EU Member State, thereby tying up resources'.<sup>53</sup> However, the Commission has resisted calls for common limiting factors or filtering criteria, noting that 'what may not seem to be a sensitive transaction to one Member State could well be sensitive to another'.<sup>54</sup> This is problematic when viewed against the Commission's decision to intervene in *VIF/Aegon* since it leaves Member States and investors alike in the dark as to whether a given FDI intervention by Member States will attract Commission scrutiny. Moreover, it does not spare investors and their advisers the travails of preparing an FDI notification and undergoing the rigours of a review which may ultimately be found to fall foul of EU law.

Differences in trigger events further muddy the picture. For instance, acquisitions of shareholdings in domestic companies in excess of 10% of the share capital may qualify for review in Italy and Spain;<sup>55</sup> whereas the Portuguese and Romanian regimes are framed by reference to acquisitions of control.<sup>56</sup> Jurisdictional thresholds also differ as

45 Commission, 'First Annual Report on the screening of foreign direct investments into the Union' COM (2021) 714 final.

46 *ibid* 17.

47 *ibid* 18.

48 *ibid* 19.

49 FDI Regulation, Article 4.

50 *ibid* Article 8(3).

51 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)' C (2020) 1981 final.

52 EU FDI Report (fn 16) 16.

53 *ibid*.

54 *ibid* 18.

55 The Italian Government adopted Decree-Law 8 April 2020, No. 23/23 (Decree-Law 23/2020) which was converted into law by the Law of 5 June 2020, No. 40. Decree-Law 23/2020 expanded the scope of the FDI regime so that acquisitions exceeding 10% of the share capital of Italian

companies in certain industries are subject to approval where the value of investment exceeds EUR 1 million.

In Spain, the Royal Decree-Law No. 8/2020 of 17 March 2020 on extraordinary urgent measures to face the economic and social impact of COVID-19 entered into force on 18 March 2020. Foreign investors from outside the EU require prior governmental authorization to acquire 10% or more of the share capital or an effective management or control of a Spanish company engaged in certain sectors. Those measures have been extended until the end of 2022 by Royal Decree-Law No. 27/2021 of 24 November 2021.

56 The Portuguese FDI screening mechanism is found in Decree-Law No. 138/2014. Jurisdiction is triggered if a non-EU investor acquires direct or indirect control over strategic assets.

In Romania, Emergency Ordinance No 46/2022 on measures implementing Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 (Emergency Ordinance No 46/2002) captures investments by non-EU nationals in designated areas of the economy resulting in the change of control of an enterprise whose value exceeds the EUR 2 million.

to the types of interests which are captured: the FDI screening regimes in France and Germany screen the acquisition of voting rights; whereas acquisitions of share capital are caught by the thresholds in Italy and Spain. Moreover, there are varying local nexus requirements. Although the bulk of Member States' FDI regimes require the acquisition of interests in a domestic target, local sales may be sufficient for a transaction to fall within the scope of the FDI screening regimes in Italy and Romania.<sup>57</sup>

It seems that the Commission is walking a tightrope and wary of appearing too prescriptive, in order to avoid perceptions or indeed outright accusations of regulatory overreach at a time when its role is merely advisory. Given the current political climate and heightened sensitivities around national security, the Commission may indeed have good reasons for charting a prudent course and adopting a piano piano approach, so as not to risk confrontations with Member States. Nevertheless, this situation provides no succour for investors and their advisers who may need to plot a course through a multitude of FDI regimes with varying screening grounds and trigger events, in addition to obtaining merger control clearance in multiple jurisdictions. As Member States build up their FDI enforcement experience and settle on best practices, there may be further refinements to their screening regimes and this may result in a form of informal coalescence around appropriate screening grounds and trigger events, e.g. via the Expert Group. That has been the experience in the field of merger control, both among EU Member States and indeed globally.<sup>58</sup> This is however unlikely to happen in the near future and the Commission is for now reluctant to intervene.

#### 4. Procedural convergence

The policy decision to opt for an FDI framework that is separate from the EU merger control regime – each administered by a separate branch of the Commission – invites the question of some form of cross-Directorate General procedural coordination. It is true of course that all decisions are taken ultimately in the name of the

College of Commissioners, but that formal statement of position is very far from ensuring coherent outcomes. DG COMP is famously an island of sorts within the Commission, zealously (and quite properly) guarding the confidentiality of parties' information and its processes, and involving other arms of the administration to defined limited extents.

Security reviews will by their nature involve concerns of equal and indeed greater sensitivity, and the experience of national FDI procedures indeed tends to confirm that these operate as black boxes. The FDI Regulation is entirely silent in this regard and makes no provision for a formal coordination mechanism between DG COMP and DG Trade. This suggests an onus on achieving procedural coordination through informal channels, somehow safeguarding the procedural requirements of each regime. Despite this glaring need, there have been no statements or proposals as to how that may be achieved beyond the recognition in the EU FDI Report that further discussions are needed on the interplay between the FDI Regulation and other EU policy instruments (see above).

In the context of procedural coordination, of course one quickly tips over into coordination of substantive outcomes in a given case. It is easy to conceive of inconsistent outcomes, for example inconsistent remedies, or indeed authorization versus prohibition. The scale of the challenge only grows when one stops to realize that the Commission does not decide cases as it does under the EUMR, but only seeks to coordinate national FDI reviews.

From an organizational standpoint, as Executive Vice President for 'A Europe fit for the Digital Age', Margrethe Vestager exercises a coordination and oversight function over the work of a number of Directorates General. In particular, the Commissioner for the Internal Market, Thierry Breton reports to Vestager in his mission to guarantee 'A future-ready European industry and single market' which covers, inter alia, the EU's long-term industrial strategy, the new SME strategy and the establishment of a level playing field.<sup>59</sup> In theory, the design of the Commission's policy reporting structures should therefore allow for some degree of informal

57 Decree-Law 23/2020 (fn 55) and Emergency Ordinance No 46/2002 (fn 56).

58 This convergence should not be overstated, but nevertheless principles of good practice have emerged from the various fora where competition agencies meet. Notably, the EU Merger Working Group was established in 2010 with a view to fostering 'increased consistency, convergence and cooperation among EU merger jurisdictions'. At a global level, the International Competition Network (ICN), which was established in 2001, has served the same purpose (Federal Trade Commission, 'U.S. and Foreign Antitrust Officials Launch International Competition Network' (25 October 2001), available at: <https://www.ftc.gov/news-events/press-releases/2001/10/us-and-foreign-antitrust-officials-launch-international> (accessed 11 July 2022)). See also <https://www.internationalcompetitionnetwork.org/> (accessed 11 July 2022).

59 Mission Letter from Ursula von der Leyen, President of the European Commission, to Thierry Breton, 'Commissioner for Internal Market' (1 December 2019), available at: [https://ec.europa.eu/commission/commissioners/sites/default/files/commissioner\\_mission\\_letters/president-elect\\_von\\_der\\_leyen\\_mission\\_letter\\_to\\_thierry\\_breton.pdf](https://ec.europa.eu/commission/commissioners/sites/default/files/commissioner_mission_letters/president-elect_von_der_leyen_mission_letter_to_thierry_breton.pdf) (accessed 11 July 2022). Under the heading 'The digital economy and society', Breton's mission includes working closely with Vestager in connection with artificial intelligence, a European strategy on data, a new Digital Services Act and digital taxation.

See also Mission Letter from Ursula von der Leyen, President of the European Commission, to Margrethe Vestager, 'Executive Vice-President for A Europe fit for the Digital Age' (1 December 2019), available at: [https://ec.europa.eu/commission/commissioners/sites/default/files/commissioner\\_mission\\_letters/mission-letter-margrethe-vestager\\_2019\\_en.pdf](https://ec.europa.eu/commission/commissioners/sites/default/files/commissioner_mission_letters/mission-letter-margrethe-vestager_2019_en.pdf) (accessed 11 July 2022).

coordination. It is unclear whether this is taking place in practice and reported difficulties in the working relationship between Vestager and Breton do not augur well.<sup>60</sup> This may be partly attributable to the inherent tension between the objective of maintaining a level playing field and that of strengthening the bloc's industrial base thus laying the ground for fundamental policy disagreements as to how to reconcile the two objectives.

Beyond that, the coordination required is between DG COMP and DG Trade, which is outside of Vestager's immediate oversight function. So matters converge ultimately, at least in a formal sense, at the level of the College. Matters may at least be easier in relation to the proposed new Foreign Subsidies Regulation, for which the expectation is that its enforcement will reside in DG COMP. Even then of course officials will need to be meticulous in their application of distinct procedural and substantive requirements.

Logically, as a first step towards addressing the interplay between various EU policy instruments, the immediate challenge for the Commission and Member States is to iron out the wrinkles in the EU FDI framework. Whilst the EU FDI Regulation does not create a one-stop shop in the same vein as the EU Merger Regulation, one of the FDI Regulation's key features is the establishment of a cooperation framework between the Commission and Member States. This has been achieved through two channels: (i) the facilitation of information sharing between Member States including information on active cases; and (ii) a cooperation mechanism for the Commission and Member States to provide their views and opinions to the Member State(s) screening the FDI.<sup>61</sup> Although Member States are all in agreement that the cooperation mechanism has served as a 'very valuable tool', significant 'procedural issues' were highlighted by the EU FDI Report.<sup>62</sup> Teething problems are to be expected with any nascent regulatory framework. However, the issues encountered with the cooperation mechanism undeniably add to the scale of the challenge of achieving convergent outcomes in EUMR and the FDI reviews.

The difficulties reported in EU FDI Report include, inter alia, multiple Member States noting that the statutory timelines in the FDI Regulation are too short and provide insufficient time to assess complex transactions and ask

questions or make comments.<sup>63</sup> This issue is compounded by different timelines between Member States' FDI screening regimes and the EU FDI Regulation, which is even more problematic in transactions involving multi-jurisdictional FDI notifications. Indeed, one Member State suggested putting in place joint notifications for transactions subject to FDI screening in more than one Member State. The Commission is alive to these obstacles and indicated that coordination on multi-jurisdictional FDI transactions across EU Member States 'warrants careful consideration in the future' noting that the issue is not explicitly addressed in the FDI Regulation.<sup>64</sup> In doing so, it conceded that differing timelines under different national legislation may prevent the synchronization of notifications and assessment under the EU FDI Regulation. The importance of improved procedural coordination is most clearly underscored by the fact that multi-jurisdictional FDI transactions account for 29% of transactions notified to the Commission under the FDI Regulation.<sup>65</sup>

The experiences gained through the EU FDI Regulation have already shown that there is scope for closer informal coordination between Member States and the Commission. In this regard, the EU FDI Report points to the cooperation mechanism as well as formal and informal contacts as a means to help minimize the 'unintentional consequences' of differing review timelines.<sup>66</sup> However, the Commission recognizes that as the number of Member States with FDI screening regimes increases, it will have to turn its attention to streamlining its processes to account for the expected uptick in notifications under the EU FDI Regulation.<sup>67</sup> A move towards a more centralized system of EU FDI enforcement seems on the cards and would effectively resolve the procedural snags. The March FDI Communication already revealed that the Commission harbours ambitions to take a greater lead in shaping the development of FDI screening in the bloc. Those guidelines went beyond providing advice in specific cases and sought to stimulate the adoption and development of Member State FDI screening regimes. Moreover, the EU FDI Report hints at support for joint notifications with the Commission tabling the possibility of aligning notifications by two or more Member States.

Despite the Commission's openness to the EU adopting a more central role, it remains cautious and has stressed that

60 T. Langer, M. Scott, L. Kayali and N. Vinocur, 'Inside the EU's divisions on how to go after Big Tech' (*Politico*, 14 December 2020), available at: <https://www.politico.eu/article/margrethe-vestager-thierry-breton-europe-big-tech-regulation-digital-services-markets-act/> (accessed 11 July 2022).

61 EU FDI Regulation, Article 6.

62 EU FDI Report (fn 16) 15–16.

63 *ibid.* Member States also suggested that the coordination mechanism lacks transparency noting there is no visibility of the content of comments provided by other Member States (including the identity of the Member State

providing comments). In addition, there is no obligation for the notifying Member State to explain how the comments it received have been taken into account (if at all).

64 *ibid.* 18.

65 *ibid.* 14.

66 *ibid.* 18.

67 *ibid.* 19.



it is still early days to consider amending the EU FDI Regulation. Article 15 of the EU FDI Regulation provides that the Commission is under an obligation to present a report to the European Parliament and Council by 12 October 2023 on the functioning and the effectiveness of the Regulation; and recommend amendments, where required.<sup>68</sup> It is therefore unlikely that there will be any material procedural changes since that would require a change to the EU FDI Regulation, albeit there is a commitment to ‘consider enhancing the cooperation mechanism’. The fact that the Commission has heeded calls for increased procedural convergence is nonetheless encouraging. The rationalization of the EU FDI framework (whether formally or informally) should be welcomed and will no doubt pave the way for greater procedural convergence between the EUMR and the EU FDI Regulation. But time is ticking and the Commission would do well to make some headway, before it has to turn its attention to the implementation of the Foreign Subsidies Regulation.

*The proliferation of FDI controls represents an inflection point in international M&A, with likely profound consequences*

## 5. Outlook

The proliferation of FDI controls represents an inflection point in international M&A, with likely profound consequences.

There is some sense of déjà vu here, with strong echoes of the spread of merger review since the 1990s. Whereas in 1990 US review of mergers was the established regime, and the adoption of the ECMR/EUMR propelled the Commission to prominence, so too established CFIUS procedures are now paralleled by a startlingly large array of FDI regimes, with the Commission sitting uncomfortably astride a large number of distinct national regimes.

In the merger control context it was 10 years after the ECMR entered into force that the ICN was launched, with its mandate to bring some coherence to the multiplying instances of merger review.<sup>69</sup> The need for parallel efforts in the world of FDI is very evident – in its own right, and because the FDI controls come on top of the multiplicity of international merger controls.

<sup>68</sup> *ibid.* The Commission has launched a comprehensive study of the EU FDI framework. Its objectives include, inter alia, an overview of existing legislation; a review of how national legislation and the EU FDI Screening Regulation regulate the interaction between national authorities and the

European Commission; and ways to ensure the administrative burden is proportionate.  
<sup>69</sup> ‘U.S. and Foreign Antitrust Officials Launch International Competition Network’ (fn 58).