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Jens Velten

Screening Foreign Direct Investment in the EU

Political Rationale, Legal Limitations,
Legislative Options

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List of Abbreviations

AG	Advocate General at the ECJ
BIT	Bilateral Investment Treaty
CFIUS	Committee on Foreign Investment in the United States
Commission	European Commission
Council	Council of the European Union
CPC	UN Provisional Central Product Classification of 1990 (for more details, see Bibliography)
DSB	WTO Dispute Settlement Body
ECJ	European Court of Justice
EU	European Union
EU Schedule	Schedule of Specific Commitments in the GATS of the EU, GATS/SC/157
FATF	Financial Action Task Force
FDI	Foreign direct investment
FTA	Free trade agreement
Global Forum	Global Forum on Transparency and Exchange of Information for Tax Purposes
IEC	International Electrotechnical Commission
IMF	International Monetary Fund
IPA	Investment Protection Agreement
IPL	International Private Law
ISO	International Organization for Standardization
M&A	Merger and acquisition
MNE	Multinational enterprise
MFN	Most-favoured-nation treatment
NT	National treatment
OECD	Organisation for Economic Co-operation and Development
Parliament	European parliament
R&D	Research and Development
RTA	Regional trade agreement

Scheduling Guidelines	Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (see for more details List of WTO Documents)
Sectoral Classification List	Services Sectoral Classification List by WTO Group of Negotiations on Services (see for more details List of WTO Documents)
SOE	State-owned enterprise
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

Chapter 1

Introduction



Foreign Direct Investment ('FDI') from third countries—a desired investment form to boost the EU's economy or a threat to important EU and Member States interests that is to be defeated? The answer obviously depends on the concrete FDI at issue, but also differs on a more general level among the actors in the EU and Member States. While some tend to emphasize the economic advantages of FDI, others rather stress the risks FDI poses to certain societal interests. In any case, however, concerns vis-à-vis FDI in the EU have been rising and the screening of FDI has been identified as a key policy response.

To begin with, the EU and Member States concerns vis-à-vis foreign investors derive from a variety of major policy challenges. The most discussed challenge is the current shift in international relations towards a multipolar geoeconomic world order.¹ The power of countries like the United States and some European countries, which shaped the world order after World War II, is challenged by other countries—most importantly: China. Conflicts in this new multipolar world are increasingly permeating the economic field.² National interests and geopolitical goals are pursued by economic, rather than military instruments, and economic transactions are evaluated based on their effect on national interest.³ In line with this development, the EU is now seeking 'strategic autonomy',⁴ and is regarding China as a 'strategic

¹For the notion 'multipolar world order' see e.g. Commission, 'Reflection Paper on Harnessing Globalisation' COM (2017) 240 final, p. 12. See also Lippert et al. (2019), pp. 27–33. This book was written before Russia's invasion of Ukraine in February 2022. It does therefore not specifically discuss this event and its implications.

²Commission, COM (2017) 240 final (n. 1) p. 16, ('economic diplomacy'). Wigell (2016), pp. 135–136; Roberts et al. (2019), p. 657. With an analysis of China's emergence and its role in geoeconomics, Blackwill and Harris (2016), ch 4.

³For this definition of 'geoeconomic' see Blackwill and Harris (2016), p. 20.

⁴The notion 'strategic autonomy' is also used in EU, 'Shared Vision, Common Action: A Stronger Europe: A Global Strategy for the EU's Foreign and Security Policy' (28 June 2016), pp. 9, 19, 46;

competitor’ and ‘systemic rival’.⁵ As another result, foreign investors are increasingly perceived as agents of rivalling third-country governments.⁶ Again, this is particularly prevalent in the case of China, since its government is closely cooperating with Chinese companies⁷ to achieve ambitious industrial policy goals.⁸

Another important policy challenge to which FDI screening in the EU responds is digitalization. Digitalization is contributing to redistributing global technological and economic leadership. Economies that shaped the industrial era are challenged by emerging economies that embrace, foster, and promote new, fast changing digital solutions and services. In addition, the protection of private information, especially personal data, is gaining paramount importance.⁹ It is also against this background that EU actors promote technological and digital sovereignty.¹⁰

A very recent policy challenge is the Covid-19 crisis, which caused major disruptions in inter alia international relations. Exporters seized large parts of medical products, countries were supporting research activities of ‘their’ companies in search of a vaccine, and the amount of international trade generally dropped. As a result, many actors in the EU questioned the reliability of global value networks, in particular for the supply of vital medical products such as pharmaceuticals and hospital equipment.¹¹

Many trading partners of the EU responded to these three challenges—a shift in international relations, digitalization, and the Covid-19 crisis—by increasing

Council, ‘Council Conclusions on Security and Defence in the context of the EU Global Strategy’ 9178/17, pp. 5, 18; Commission and High Representative of the Union for Foreign Affairs and Security Policy, ‘EU-China - A Strategic outlook’ (Joint Communication) JOIN (2015), pp. 5, 8; Commission, ‘A New Industrial Strategy for Europe’ (Communication) COM (2020) 102 final, pp. 3, 13. Strategic autonomy may be defined as the ‘ability to set one’s own priorities and make one’s own decisions in matters of foreign policy and security’ as well as to be a rule-giver, rather than a rule-taker at the international level, see Lippert et al. (2019), p. 5.

⁵Commission and High Representative of the Union for Foreign Affairs and Security Policy, ‘EU-China - A Strategic outlook’ (Joint Communication) JOIN (2015), p. 5, reaffirmed by European Council, ‘Conclusions of European Council Meeting (1 and 2 October 2020)’ EUCO 13/20, para. 26.

⁶Accordingly, foreign ownership of domestic firms is under scrutiny, see Commission, ‘Foreign Direct Investment in the EU: Following up on the Commission Communication “Welcoming Foreign Direct Investment while Protecting Essential Interests” of 13 September 2017’ (Commission Staff Working Document) SWD (2019) 108 final, pp. 7–15.

⁷Wu (2016); Buckley et al. (2018), p. 14.

⁸Wübbecke et al. (2016). See in particular the Belt and Road Initiative; on this e.g. van der Putten et al. (2016); Chaisse and Matsushita (2018).

⁹See Cavelti (2019), who discusses this under the concept of ‘cyber-security’.

¹⁰See e.g. Commission, ‘A Union that Strives for More. My Agenda for Europe: Political Guidelines for the Next European Commission 2019-2024’ (16 July 2019), p. 13; Commission, ‘A European Strategy for Data’ (Communication) COM (2020) 66 final, 5, p. 16; European Parliamentary Research Service (2020).

¹¹Commission, ‘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)’ (Communication) COM (2020) 1981 final.

barriers to trade and investment.¹² This in turn gives rise to a fourth policy challenge for the EU. The success of many EU businesses depends on open markets abroad to export their products. The EU thus has a strong interest to keep foreign markets open and to further liberalize them. This is even more so, since the EU itself is relatively open to foreign investors, and hence demands a similar degree of openness from its trading partners. The importance of this policy goal for the EU is well illustrated by the recent compromise on a Comprehensive Agreement on Investment with China ('EU-China CAI'), which was reached despite major political differences.¹³ The EU-China CAI therefore remains significant even though its ratification is currently on hold in particular due to differences between EU and China over China's treatment of the Uyghur population.¹⁴

Finally, the EU is confronted with a crisis of multilateralism—a system to regulate globalization that the EU by nature cherishes and promotes,¹⁵ and of which it is benefitting largely. For example, multilateral responses to the above outlined policy challenges are often lacking. Instead, bi- and plurilateral agreements are surging,¹⁶ and trade policy is increasingly 'geopoliticized',¹⁷ inter alia by invoking security exceptions to exert national interests despite conflicting obligations of international law.¹⁸

In light of these major policy challenges, it is possible to identify four main concerns that the EU and Member States have vis-à-vis investors from third-countries (together 'EU and Member States concerns vis-à-vis foreign investors')—and which of course differ among the different actors in the EU. The concerns are related sometimes to the investors themselves, sometimes to their perceived role as representatives or even instruments of their home-country governments.¹⁹

¹²UNCTAD (2019), pp. 3–4; OECD (2020a), pp. 6–7; OECD (2020b), pp. 3–5.

¹³So far, the EU and China have agreed on the most important aspects, but the concrete scope of commitments remains uncertain, see Commission, 'EU-China Comprehensive Agreement on Investment: The Agreement in Principle' (30 December 2020) <https://trade.ec.europa.eu/doclib/cfm/doclib_section.cfm?sec=120> accessed 2 February 2022.

¹⁴See e.g. Ni (2021).

¹⁵Art 21(1) subpara. 2, (2)(h) TEU.

¹⁶WTO, 'Regional Trade Agreements: Database: "RTAs Currently in Force"' <<https://rtais.wto.org/UI/charts.aspx>> accessed 2 February 2022, which is based on Art XXIV GATT 1994 and Art V GATS, and shows an increase from 213 Regional Trade Agreements ('RTAs') in force in 2010 to 305 in 2020.

¹⁷Meunier and Nicolaidis (2019), pp. 105–109, with a critical review of literature on the 'politicization of trade'.

¹⁸See e.g. current WTO panel proceedings *US—Steel and Aluminium Products*, in which seven WTO members filed complaint against the US. The seven WTO members are Turkey (DS564), China (DS 544), the EU (DS 548), Norway (DS 552), Russia (DS 554), India (DS 547), and Switzerland (DS 556). Mexico (DS 551) and Canada (DS 550) found a mutual solution with the US, and thus dropped their complaint. Describing this development Prazeres (2020), pp. 142–144.

¹⁹For a different categorization of concerns see Moberg and Hindelang (2020), pp. 1430–1431, who omit a reference to competition and private information, but add general 'market economy

First, the EU and Member States are concerned that foreign investors may distort competition in the internal market. Namely, foreign investors might be subject to less stringent competition and state aid rules in their home countries than the EU imposes. Part of this concern is also that foreign governments might use state aid to facilitate investments in sectors that are of strategic importance in the current geoeconomic shift.

Second, the EU and Member States are increasingly reluctant to accord foreign investors a treatment that the investors' home countries do not reciprocate to EU investors.

Third, there is concern that the investor or her home-country government pursues an objective that may harm specific EU interests, which are crucial to defend given the above-outlined policy challenges. These EU interests seek to protect assets deemed particularly sensitive. They reach from narrow defence, to 'critical',²⁰ and most broadly 'strategic'²¹ assets.

Fourth, the foreign investor's investment may generally undermine the protection of EU citizens' private information, inter alia by information transfer to the investor's home country where the EU's data protection standards do not apply.

To meet the EU and Member States concerns vis-à-vis foreign investors, the EU has identified FDI screening mechanisms as a key policy response.²² In 2019 the EU adopted Regulation 2019/452 'establishing a framework for the screening of foreign direct investments into the Union' ('Screening Regulation').²³ In particular, the Screening Regulation provides a framework for mechanisms to screen investment on the grounds of 'security or public order' at Member State level. It entered into full effect on 11 October 2020. In addition, a new screening mechanism may already be underway: On 5 May 2021, the European Commission ('Commission') has submitted the 'Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market' ('Foreign Subsidies Regulation Proposal'), a mechanism specifically addressing investment in EU companies that

concerns' due to SOEs and the concern to render existing Member State screening mechanisms ineffective. See also Zwartkruis and de Jong (2020), pp. 450–453, based on different concepts of security.

²⁰The term 'critical' was first used in the EU to designate 'critical infrastructures' that needed particular protection vis-à-vis terroristic threats, see Council Directive 2008/114/EC of 8 December 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection (Critical Infrastructure Directive) [2008] OJ L 345/75.

²¹The notion 'strategic' stems from the EU's Foreign and security policy—namely, the concept of 'strategic autonomy'. 'Strategic' is e.g. used in Arts 22(1) subpara. 1, 26(1) subpara. 1 TEU. For the concept of 'strategic autonomy' see n. 4.

²²Other policy responses that focus on foreign investment are inter alia generally prohibiting investment in certain sectors, maintaining state monopolies or specific state rights in sensitive sectors, and ongoing risk assessment, see OECD (2020a), pp. 18–19; Zwartkruis and de Jong (2020), pp. 453–454.

²³Art 1(1) 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 (Screening Regulation) [2019] OJ L 79/I/1.

is facilitated by foreign subsidies.²⁴ Both mechanisms provide one main common and one different cornerstone.

Both screening mechanisms focus on Foreign *Direct* Investment (‘FDI’) through mergers and acquisitions (‘M&A’). This focus derives from the EU and Member States concerns vis-à-vis foreign investors. All four concerns focus on investors who obtain a certain level of influence on an EU company. This level of influence is well-described by the concept of FDI. Foreign *Direct* Investment offers effective participation in the management and control of the target, whereas the other main investment form, portfolio investment, only seeks short-term financial gain.²⁵ M&A FDI, as opposed to greenfield investment, is an investment into an *existing* domestic asset, and thus addresses the concerns’ focus on existing EU companies.

Both mechanisms, however, differ on the grounds on which they screen M&A FDI. The Foreign Subsidies Regulation Proposal specifically targets M&A FDI that is facilitated by foreign subsidies. The Screening Regulation, on the other hand, proposes to screen FDI on the rather imprecise, seemingly broad screening ground of ‘security or public order’.

Indeed, while the Foreign Subsidies Regulation Proposal may be a prelude to more interest-specific FDI screening mechanisms, the current landscape of investment screening in the EU after the Screening Regulation is still circling around the notions of security and public order. The Screening Regulation leaves essentially two legislative options to the Member States in order to meet their concerns vis-à-vis foreign investors through FDI screening: an FDI screening mechanism based on the Screening Regulation and its screening ground ‘security or public order’, or on the ground of exception to the freedom of capital movement ‘public policy or public security’ within the meaning of Art 65(1)(b) TFEU.²⁶

This gives rise to the question: If Member States choose to meet their concerns vis-à-vis foreign investors by screening FDI, are the available legislative options, FDI screening mechanisms on the grounds of ‘security or public order’ and ‘public policy or public security’, consistent with this political rationale? In other words, can EU and Member States in fact meet their concerns vis-à-vis foreign investors with screening mechanisms on these grounds? It will be argued that this is not the case, since these screening grounds come with major legal limitations pursuant to EU and International economic law.

As a result, the EU and Member States may be inclined to adopt alternative legislative options for FDI screening mechanisms that go beyond the screening grounds circling around the notions of security and public order. Yet, do the EU and Member States have the flexibility to adopt such broader FDI screening mechanisms? The legal limitations for broader legislative options are mainly determined

²⁴Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market’ COM (2021) 223 final.

²⁵Art 2(1) Screening Regulation.

²⁶Overall, there are four options, which will be discussed below. For a brief analysis see Velten (2020b).

by the EU's and Member States' obligations vis-à-vis third countries and foreign investors pursuant to EU primary law—namely, the freedoms of capital movement and establishment in Arts 63(1) and 49 TFEU—as well as International economic law, in particular the GATS.

This book will address both questions on current and alternative legislative options for FDI screening mechanisms based on a doctrinal analysis of the relevant laws, case law, and scholar contributions. Where necessary and appropriate to provide a conclusive answer, the following will submit new definitions and tests. This includes inter alia a definition of 'essential security interests' and 'public order' pursuant to Arts XIV**bis** and XIV(a) GATS, a test on the delimitation of the freedoms of capital movement and establishment, the interpretation of Art 64(2) and (3) TFEU, as well as the definition of several GATS notions in light of FDI as trade in services. As the questions suggest, the EU and Member States concerns vis-à-vis foreign investors will not be questioned, but become the theoretical framework through which the EU's and Member States' flexibility to screen FDI is assessed.

This book differs in mainly three ways from other scholar contributions on FDI screening and the related legal questions.²⁷

First, the book is written against the background of the recent Screening Regulation. The regulation not only adds another legislative option for FDI screening mechanisms, but also has significant implications on the EU's and Member States' flexibility to adopt broader FDI screening mechanisms pursuant to EU primary law.²⁸ Second, the book will answer both questions in light of not only EU law, but also International economic law, in particular WTO law. An in-depth analysis of International economic law in the context of FDI screening has, as far as known not been done so far.²⁹ The analysis will not only address the recent WTO panel reports on the WTO security exceptions—namely *Saudi Arabia—IPR Protection*³⁰ and *Russia—Traffic in Transit*,³¹ but also provide an overview of the consequences of the recent EU-UK Trade and Cooperation Agreement and a possible EU-China CAI. Third, the book is more policy-oriented than other legal scholar contributions. It will

²⁷ On the Screening Regulation see in particular Herrmann (2019), de Kok (2019), Korte (2019), Schill (2019), Bourgeois and Malathouni (2020), Cremona (2020), Fassion and Natens (2020), Moberg and Hindelang (2020), Hindelang and Moberg (2021).

²⁸ The above-cited contributions focus on analyzing the Screening Regulation, but mostly without looking at the Member States' implementation of the Screening Regulation or future mechanisms at EU level.

²⁹ Only Geiger (2013) provides a rather detailed analysis, but omits a discussion of WTO case law and of most available literature. With a brief WTO law analysis in the Screening Regulation's context, see Fassion and Natens (2020).

³⁰ *Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights*, Panel Report (16 June 2020) WT/DS567/R, WTO Online Database doc no 20-4200, on Art 73(b)(iii) TRIPS, the adoption of the report has been suspended by agreement of both parties, see communications from Saudi Arabia (WT/DS567/9) and Qatar (WT/DS567/9) both of 7 January 2022.

³¹ *Russia—Measures Concerning Traffic in Transit*, Panel Report (5 April 2019) WT/DS512/R, WTO Online Database doc no 19-2105, on Art XXI(b)(iii) GATT.

analyze the potential of FDI screening mechanisms as an appropriate policy means to meet the EU and Member States concerns vis-à-vis foreign investors. Accordingly, the book will determine the legal limitations of current options for FDI screening mechanisms and define alternative legislative options that comply with the limitations set by EU law and International economic law.

In concreto, this book will proceed in three parts.

Chapter 2 will set out the background of FDI screening in the EU from a political, economic, and legislative perspective. Section 2.1 will identify and further explain the four EU and Member States concerns vis-à-vis foreign investors. Section 2.2 will examine the economic background of FDI generally and, more concretely, of the FDI at focus of the EU and Member States concerns. This provides context to the political and legislative background, and already lays the basis for subsequent legal arguments, especially in the realm of the freedom of capital movement. Section 2.3 will map the legislative landscape of FDI screening in the EU. It will identify essentially two current options for screening grounds in FDI screening mechanisms at Member State level: either ‘security or public order’ within the meaning of the Screening Regulation, or ‘public policy or public security’ pursuant to Art 65(1) (b) TFEU. Finally, Sect. 2.4 translates the different perspectives into definitions of FDI, Foreign investor, and FDI Screening mechanism that will be the basis for the following analysis.

Chapters 3 and 4 of the book will deal with the two above-posed questions in turn: Can FDI screening mechanisms based on the currently available screening grounds meet the EU and Member States concerns vis-à-vis foreign investors? And if not, do the EU and Member States have the flexibility to adopt broader FDI screening mechanisms?

Accordingly, Chap. 3 will assess the Member States’ flexibility to screen FDI pursuant to the available screening grounds ‘security or public order’ and ‘public policy or public security’. Section 3.1 will interpret the Screening Regulation to argue that its screening ground ‘security or public order’ must be interpreted in accordance with Arts XIV**bis** and XIV(a) GATS. It will then conclude that a so interpreted screening ground fails to considerably meet the EU and Member States concerns vis-à-vis foreign investors.³² Section 3.2 will find that the second option for Member States, FDI screening on the grounds of ‘public policy or public security’ pursuant to Art 65(1)(b) TFEU, is even narrower than the Screening Regulation option. Hence, both current FDI screening options for Member States fail to significantly meet the EU and Member States concerns.

Chapter 4 will therefore assess whether the EU and Member States have the flexibility to adopt FDI screening mechanisms on broader grounds than ‘security or public order’. The assessment will be based on FDI Screening mechanisms as defined in Sect. 2.4 against the political, economic, and legal background of FDI screening in the EU.

³²Section 2.1 was in parts pre-published as Velten (2020a).

Section 4.1 will determine the competence for FDI Screening mechanisms on broader grounds than ‘security or public order’. Section 4.2 will then analyze the limits to such FDI Screening mechanisms pursuant to EU law—namely, the freedoms of capital movement and establishment, and Art 64 TFEU as a ground of exception. The limits deriving from International economic law will be assessed by Sect. 4.3. An overview of possible obligations will analyze a variety of different legal sources, including EU Free Trade Agreements (‘FTAs’), the EU-UK Trade and Cooperation Agreement, and a possible EU-China CAI. Nevertheless, the most relevant agreement for the theses submitted in this book remains the WTO’s GATS: Sect. 4.3 will therefore focus on the GATS’s scope, its obligations, and grounds of exception beyond Arts XIV*bis* and XIV(a) GATS. Both Sects. 4.2 and 4.3 will show that the EU’s flexibility to adopt FDI Screening mechanisms depends on their personal and substantial scope. Section 4.4 will therefore summarize the legislative options for FDI Screening mechanisms that ensure maximum flexibility to define a broader screening ground than ‘security or public order’.

Finally, Chap. 5 will summarize the main findings and recapitulate how these reflect the political and legislative background of FDI screening in the EU as well as the rationale of the uni-, bi-, pluri-, and multilateral obligations of EU and Member States to grant FDI and Foreign investors access to the internal market. On this basis, the book will also point to alternative policy means that may complement FDI Screening mechanisms to more effectively meet EU and Member States concerns vis-à-vis foreign investors.

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Chapter 2

Setting Out the Background of FDI Screening in the EU



Assessing the EU's and Member States' flexibility to screen FDI from a legal perspective requires to understand the broader background of FDI screening in the EU. Therefore, this chapter will start by setting out the political, economic, and legislative background of FDI screening in the EU (Sects. 2.1–2.3), before defining its key notions FDI and FDI Screening mechanism (Sect. 2.4).

Section 2.1 maps out the political background by identifying and further explaining the EU and Member States concerns vis-à-vis foreign investors. These concerns are the reasons for the recent shift in the EU towards a stricter stance on incoming FDI. Therefore, they serve as the theoretical framework through which this book assesses the EU's and Member States' flexibility to screen FDI.

To better understand the forms of FDI that are at the centre of the EU and Member States concerns vis-à-vis foreign investors, Sect. 2.2 will lay out the economics of FDI. In addition, the economic analysis will question an important argument that is often invoked when interpreting legal provisions, namely Fundamental freedoms: FDI generally contributes to economic growth and development, and thus deserves protection by any legal provisions that is intended to further economic growth and development. Based on this argument, some want to grant as much legal protection to FDI as possible.

Against the political and economic background, Sect. 2.3 will lay out the legislative background of FDI screening in the EU. It will present and explain the actions that the EU has taken so far in order to meet the concerns vis-à-vis foreign investors. This includes first and foremost the Screening Regulation that has become an important option for a legal basis for Member State FDI screening mechanisms. Section 2.3 will conclude that the currently available options for FDI screening

mechanisms in the EU all circle around the notions of security and public order as screening grounds.

Last, anticipating the shortcomings of such FDI screening mechanisms to meet the EU and Member States concerns vis-à-vis foreign investors that Chap. 3 will reveal, Sect. 2.4 will look beyond the Screening Regulation. It will therefore explore alternatives to central notions of FDI screening, deduced from the EU and Member States concerns vis-à-vis foreign investors. The accordingly defined notions of FDI, Foreign investor, and FDI Screening mechanisms will be used in Chap. 4 to assess the EU's and Member States' flexibility to screen FDI pursuant to EU and International economic law.

2.1 Political Background

The political rationale behind FDI screening in the EU is manifold and differs widely among the relevant actors; Commission, European Parliament ('Parliament'), and Council of the European Union ('Council'); as well as among and within Member States. For example, some put more emphasis on the economic advantages and are afraid that FDI screening may deter FDI they so urgently need. This is particularly true for capital scarce Member States.¹ Others rather stress the risks FDI poses to certain societal interests. The EU and Member States concerns as such are nevertheless, at least to some extent, shared among the relevant actors as was shown during the process to adopt the Screening Regulation. The discussions around the Screening Regulation allow to identify four main concerns vis-à-vis foreign investors. One may therefore conclude that, if the EU or Member States choose to screen FDI, it is to meet these concerns.

On this premise, the two central questions arise that this book seeks to answer: Do current FDI screening mechanisms, namely the Screening Regulation, allow the EU and Member States to meet the concerns vis-à-vis foreign investors? And if not, do the EU and Member States have the flexibility to adopt new FDI screening mechanisms that do meet these concerns? The EU and Member States concerns vis-à-vis foreign investors therefore become the benchmark for the legal assessment of the Screening Regulation and the EU's and Member States' flexibility to screen FDI generally.

Hence, Sect. 2.1 lays out the point of departure for this book. To identify the EU and Member States concerns vis-à-vis foreign investors, the following sections will analyze the political discussions around FDI screening. By linking the concerns vis-à-vis foreign investors to FDI screening, the EU and Member States themselves set these concerns as a benchmark for the effectiveness of FDI screening—at least to some extent. The following thus omits to question the concerns' validity, but will

¹Bismuth (2020), p. 106, lists Ireland, Spain, Portugal, Greece, and the 'Nordic countries'. For the mixed picture of FDI effects on host countries see Sect. 2.2.2.

only categorize the concerns in order to provide the political rationale behind the legislative and facilitate the legal assessment of the above two questions.²

The section will be divided according to the four main concerns vis-à-vis foreign investors: (1) foreign investors distorting competition in the EU (competition concern), (2) the foreign investors' home countries failing to accord EU investors a treatment similar to that the EU accords to 'their' investors (reciprocity concern), (3) foreign investors operating the FDI in a way that harms the EU and Member States interests (harmful investor concern), and (4) harm to EU citizens' private information (private information concern).³

2.1.1 Competition Concern

The first main concern of the EU and Member States that led to a stricter stance on FDI inflows is about foreign investors who may distort competition in the internal market. Generally, EU and Member States are concerned that foreign investors may not be subject to the same competition rules, especially regarding state aid, in the form of either direct subsidies, or indirect financial or non-financial support.⁴ Accordingly, the foreign investor may have an advantage vis-à-vis EU competitors who must respect the strict competition rules in the EU, namely the competition rules for public undertakings in Art 106 TFEU as well as the general prohibition of competition-distorting state aid in Art 107 TFEU. Naturally, this concern mostly relates to State-Owned Enterprises ('SOEs'), even though private firms may receive similar state support.⁵

More concretely, the competition concern may play out in two phases of FDI. The first phase is the undertaking of the FDI as such. With access to public funding an investor may have a competitive advantage over other investors. In particular, a subsidized foreign investor, whether an SOE or not, will be able and willing to pay a much higher prize for the FDI target than EU investors who are bound by EU competition rules. As a result, FDI deals are undertaken that would otherwise not have been possible. This does not only deprive other potential investors of FDI targets, but also risks to distort the efficient allocation of resources.⁶

²For the former see Sect. 2.3; for the latter see Chaps. 3 and 4.

³The following is in part based on Velten (2020a). Some authors suggest another categorization of concerns, see Chap. 1, n. 19.

⁴Parliament, 'Report on the Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union (COM (2017) 487)' A8-0198/2018, amendment 44; Commission, 'Welcoming Foreign Direct Investment while Protecting Essential Interests' (Communication) COM (2017) 494 final, p. 5.

⁵Miroudot and Ragoussis (2013), p. 60; Martini (2008), p. 316; Weller (2008), p. 858.

⁶Commission, 'White Paper on Levelling the Playing Field as regards Foreign Subsidies' COM (2020) 253 final, p. 7.

Similar risks occur in the phase after the FDI has taken place. A foreign investor who is not subject to rules similar to Arts 106 and 107 TFEU may provide the FDI target with means that would not be available under normal competitive conditions. Hence, the FDI target may use these additional means to the detriment of its competitors. In other words, EU firms and sectors that had been privatized or at least submitted to strict competition rules now risk to be re-nationalized or (re-) monopolized.⁷ Economic gains that privatization and strict competition rules were supposed to bring might thus get lost.

To address the competition concern, the EU and Member States may be inclined to screen FDI specifically from investors who are more likely to have received state support that would violate EU competition rules. An alternative may be to compare competition rules of the EU to those of other states. Investors from states that are found to provide less competition protection, namely regarding state aid, may be (more strictly) screened.

Both scenarios explain why the competition concern often focuses on investors from China and Russia, as well as the United Arab Emirates, Qatar, and Kuwait.⁸ The economies of all these states are characterized by governments that take a much more interventionist approach towards private business decisions than the EU or Member States, without having competition rules in place that are comparable to Arts 106, 107 TFEU.

Often this consideration is boiled down to focusing on foreign SOE investors.⁹ This reduction, however, neglects two aspects. First, in the EU SOEs also play a prominent role; the actual concern is about the lack of competition laws that prevent market distortions. Second, public ownership is the clearest and most obvious, but by far not the only form of government intervention on a company's business decisions. Informal networks of private businesses and the government can have the same competition distorting effect.¹⁰ These informal networks are particularly important in China where public-private relations are not necessarily a matter of ownership, but informal *lishu* relationships.¹¹

⁷Martini (2008), p. 322; Weller (2008), p. 858; Geiger (2013), p. 70.

⁸Commission, 'Foreign Direct Investment in the EU: Following up on the Commission Communication "Welcoming Foreign Direct Investment while Protecting Essential Interests" of 13 September 2017' (Commission Staff Working Document) SWD (2019) 108 final, pp. 56–57.

⁹Commission, 'Reflection Paper on Harnessing Globalisation' COM (2017) 240 final, p. 15; Commission, COM (2017) 494 final (n. 4), pp. 5, 6.

¹⁰See Commission, SWD (2019) 108 final (n. 8), p. 61, which first focuses on FDI of SOEs, before adding a paragraph on state influence generally, arguing that the influence could take place in state-owned and private companies.

¹¹Buckley et al. (2018), p. 14.