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Article

From economic security to legal uncertainty: exploring the impact of the FDI screening regulation and foreign subsidies regulation on mergers and acquisitions in the EU

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Key Points

- **FDI and Economic Growth vs. Security Concerns:** Foreign Direct Investment (FDI) plays a significant role in economic growth, but it also raises security concerns for host countries, particularly regarding the public security of strategic sectors like defense, technology, and energy.
- **EU's Strategic Autonomy and Chinese FDI:** the European Union's concern over China's increasing outward FDI, particularly from State-Owned Enterprises, has heightened fears of market distortions and security risks in key sectors, fueling the EU's push for protective regulations.
- **Introduction of FDI Screening and Foreign Subsidies Regulations:** in response to these concerns, the EU introduced the FDI Screening Regulation and the Foreign Subsidies Regulation to address security risks and competitive distortions, complementing the pre-existing Merger Regulation.
- **Negative Impact on Legal Certainty:** although these new regulations strengthen the EU's ability to control foreign investment and to limit distortions to the internal market, they also create additional legal uncertainty for firms pursuing mergers and acquisitions in the EU, potentially deterring future FDI.

1. Introduction

International investment is recognised to be one of the main factors promoting economic growth, alongside international trade.[1] It predominantly takes the form of Foreign Direct Investment (FDI), namely when residents of one country (source) acquire ownership of a firm's assets in another country (host), for the purposes of controlling the firm's production, distribution, or other activities.[2] FDI is generally associated with economic growth: the increase in industrial productivity, capital liquidity, social welfare, as well as other positive externalities stemming from FDI are widely recognised in literature, and that is why countries attempt setting up an attractive environment for foreign investors.[3] However, in recent years, several states have increasingly been wary of the potential drawbacks of FDI, specifically in relation to the public security of strategic sectors. In fact, foreign control of firms in critical sectors, such as defence, technology, and energy, may undermine essential interests of host countries. In particular, many host states have established regulatory mechanisms aimed at preventing the security threats of inbound FDI.[4]

Within such a landscape, the tension between attracting FDI and protecting national security can be identified within the European Union (EU), as part of the larger policy of 'strategic

[1] Cheng Bian, *National Security Review of Foreign Investment* (Routledge 2020), 1.

[2] Imad A Moosa, *Foreign Direct Investment: Theory, Evidence and Practice* (Palgrave 2002), 1.

[3] Theodore H. Moran, Edward M. Graham, and Magnus Blomström, 'Conclusions and Implications for FDI Policy in Developing Countries, New Methods of Research, and a Future Research Agenda', in Moran, Graham, and Blomström (eds.), Does Foreign Direct Investment Promote Development? (Washington, DC: Peterson Institute for International Economics, 2005) 375, 376.

[4] Bian (n 1), 1

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autonomy'.[5] While the discussion on strategic autonomy is broad and entangled between geopolitics and economics, a paramount factor in the EU's protective attitude can be found in China's assertive external economic policy. In fact, especially in the aftermath of the financial crisis, China's outward FDI to the EU has dramatically increased. The EU is not only concerned with the security of its strategic sectors due to China's ownership, but it is also worried about the distortions of the competitive landscape in the internal market: in fact, Chinese companies engaged in FDI are often State-Owned or Controlled Enterprises (SOEs), thereby enjoying large state funding.[6] Such state aid allows Chinese companies seeking for a merger or acquisition in the EU to have a competitive advantage *vis-à-vis* other EU or third State companies in making that investment, thereby risking distorting competition in the internal market. The concerns for public security of strategic sectors and distortions of competition following FDI in the form of mergers and acquisitions are what led the EU to adopt, respectively, the FDI Screening Regulation in 2019[7] and the Foreign Subsidies Regulation in 2022.[8] Such legislative acts add further controls and procedures to conclude a merger or acquisition in the EU, in addition to the pre-existing Merger Control Regulation.[9]

The present paper will investigate how do the Foreign Subsidies Regulation and FDI Screening Regulation change the existing Merger control regime of the EU. It will argue that the Foreign Subsidies Regulation and the FDI Screening Regulation, although positively complementing the Merger Regulation's deficiencies, are liable to increase legal uncertainty for firms pursuing a merger or acquisition in the EU. Particularly, the Foreign Subsidies Regulation makes up for the Merger Regulation's lack of consideration of subsidisation of state-owned enterprises when assessing a merger. Furthermore, the FDI Regulation addresses Member States' concerns for public security that are not sufficiently protected by the Merger Regulation. However, this enhanced regulatory context increases the legal obstacles for companies pursuing an investment in the EU, which may ultimately hinder incoming FDI flow to the EU.

To warrant such a conclusion, the present paper will first lay down the underlying tension between economic security and market openness with specific reference to the EU (Chapter II), and it will discuss the Merger Regulation's treatment of state-owned enterprises and its deficiencies (Chapter III). On those bases, Chapter IV and V will discuss, respectively, the Foreign Subsidies Regulation and FDI Screening Regulation's complementarity to the Merger Regulation. Particularly, sub-chapters IV(a) and IV(a-b) will explore the instruments' different objectives and how the Foreign Subsidies Regulation and FDI Regulation make up for the Merger Regulation's deficiencies in assessing state-owned enterprises' mergers and acquisitions. Sub-chapters IV(b) and V(c), instead, will discuss the legal certainty issues for companies arising from the interrelations between, respectively, the Foreign Subsidies Regulation and Merger control, and between the FDI Regulation and Merger control.

2. Economic security and market openness

A. *Securitisation of foreign direct investment*

In general economic literature, FDI is defined as investment by a foreign entity that results in ownership and control by the foreign company of the assets in which it has invested in the host country.[10] This differs from portfolio investment, which entails investing in stock and bonds without exercising control, therefore not participating in the management of the host state's company.[11] The discerning feature of FDI, therefore, is control: while there is no common definition of 'controlling interest', generally a 10% shareholding is regarded as allowing the foreign firm to exert significant influence, possibly amounting to control.[12] A further distinction is made between 'greenfield' and 'mergers and acquisitions' as forms of FDI. The first notion refers to investing in new assets in the host country, such as the establishment of a new subsidiary; mergers or acquisitions, instead, entail acquiring existing assets or merging with an existing entity in the host country—the latter form being the main object of this paper.[13] From the host country perspective, FDI has been found to boost price competitiveness of local firms,[14] increase productivity, technology transfer, and skills development,[15] as well as limitedly improving employment and salaries.[16] Research has also found a bi-directional causality between FDI growth and Gross Domestic Product growth,[17] supporting the claim that foreign investment contributes to economic growth more than national investment.[18] While there is no uniform consensus on a defined positive relationship between FDI and economic growth, there is a growing view that FDI is positively correlated with economic growth, at least in industrial countries.[19]

Economic literature, however, is divided on the effects that economic growth stemming from FDI have on the environment. Particularly, while some authors argue that the quality of the environment is degraded through economic growth stemming

5 For a discussion on strategic autonomy, see: Niklas Helwig and Ville Sinkkonen, 'Strategic Autonomy and the EU as a Global Actor: The Evolution, Debate and Theory of a Contested Term' (2022) 27 European Foreign Affairs Review 1.

6 Directorate for Financial and Enterprise Affairs Competition Committee, 'The Relationship between FDI Screening and Merger Control Reviews – Note by BIAC' (OECD 2022), 5.

7 Regulation 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 L79 I/1 (FDI Regulation).

8 Regulation 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market [2022] OJ L330/1 (FSR).

9 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1 (EUMR).

10 Moosa (n 2), 1.

11 Md Saiful Islam, 'Positive and Negative Impact of FDI (Foreign Direct Investment) on a Country's Economic Development' (*papers.ssrn.com* 31 January 2014) < https://ssrn.com/abstract = 3,614,019 > accessed 28 March 2025, 3.

12 Moosa (n 2), 1.

13 Norman Loayza, César A Calderón and Luis Servén, 'Greenfield Foreign Direct Investment and Mergers and Acquisitions: Feedback and Macroeconomic Effects' (*Social Science Research Network* 1 January 2004) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id = 636,612 > accessed 28 March 2025, 1.

14 Blomstrom, M., R. Lipsey and M. Zegan, 'What explains developing country growth?' (1994) NBER Working Paper No. 4132 National Bureau for Economic Research, Cambridge, Massachusetts <https://www.nber.org/system/files/working_papers/w4132/w4132.pdf > accessed 28 March 2025, 23.

15 Richard E. Caves, 'Multinational Enterprise and Economic Analysis' in Caves (ed) *Multinational Enterprise and Economic Analysis* (Cambridge University Press 2007), 31.

16 Moosa (n 2), 77.

17 Abdur Chowdhury and George Mavrotas, 'FDI and Growth: What Causes What?' (2006) 29 The World Economy 9 < https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1467-9701.2006.00755.x > accessed 28 March 2025, 18.

18 Eduardo Borensztein, Jose de Gregorio and Jong-Wha Lee, 'How Does Foreign Direct Investment Affect Economic Growth?' (1994) 45 SSRN Electronic Journal, 18.

19 Heshmati Almas and Rhona Davis, 'The Determinants of Foreign Direct Investment Flows to the Federal Region of Kurdistan' [2023] Ssrn.com < https://papers.ssrn.com/sol3/papers.cfm?abstract_id = 1,136,380 > accessed 28 March 2025, 39.

from FDI,[20] others posit that an improvement of environment protection is achieved by multinational firms encouraging dissemination of environmentally clean technologies.[21] Further, recent meta-economic has found that FDI flow in developing countries is associated with a reduction in emissions, while FDI flow into more developed countries is correlated with an increase in emissions.[22] Therefore, whilst outside the scope of this paper, the effect of economic growth resulting from FDI may have differentiated outcomes.

The security implications of FDI are another concern that has risen in the recent years. Particularly, states have grown wary of the potentially adverse effect of FDI on national security, driven from the idea that substantial foreign ownership gives rise to a loss of sovereignty and compromise on security matters.[23] This is based on the assumption that foreign control over domestic companies in 'strategic' sectors may endanger the security of the State.[24] In such a situation, repercussions may occur on the availability of critical technologies, infrastructure, inputs, or sensitive information. That is especially the case if the foreign investor is owned or controlled by a third state, as it may allow the latter to use the acquired assets not only against the host country's technological advancement, but also against its public order.[25] State-owned enterprises' investments become particularly problematic, therefore, due to the mixed commercial and political motives behind it, as well as for the resulting distortions of competition.[26] Particularly, firms' state subsidisation distorts the level playing field in the target market, causing competitive concerns.[27] The increasing regulatory control over FDI has also been influenced by broader factors, such as a worldwide resort to protectionism, a strengthened protection of supply chains, the rise of state-owned enterprises' investments, and concerns on cybersecurity,[28] as well as the unstable geopolitical context, and the need to protect local vulnerable firms from takeovers in the aftermath of COVID-19.[29]

From the perspective of the EU and individual Member States, the high influx of Chinese FDI has been seen as problematic. In fact, it has surged from €700 million in 2008 to €35 billion in 2016,[30] then dropping to €7.9 billion in 2022[31]—and it is predominantly based on mergers and acquisitions rather than greenfield FDI.[32] Despite the downward trend, Chinese FDI is still in the top six sources of FDI to the EU,[33] and it is prevalent in the automotive (electric vehicles) and infrastructure sectors.[34] Particularly, state-owned investors account for a large share of China's total FDI to the EU, namely 70% in 2015,[35] with the transportation, automotive, and utilities sectors being the main targets—also in light of the Chinese Belt and Road Initiative.[36] Main instances of particularly critical mergers and acquisitions in the latter sector are the purchase of the Greek port of Piraeus in 2010, the UK Thames Waterwork in 2012, [37] and the acquisition of the Italian tyres brand Pirelli in 2015.[38] Concerning innovation-driven sectors, instead, the acquisition of the German robotics company Kuka in 2016,[39] and several investments made in the battery and semi-conductor sector have raised public security concerns.[40]

B. *EU economic security vs EU market openness*

Such developments have influenced a policy shift in the EU, leading to the introduction of the Regulations object of this paper. FDI is an exclusive competence of the EU under the Common Commercial Policy,[41] as confirmed by the Court of Justice of the European Union (CJEU) in *Opinion 2/15*.[42] Therefore, its regulation should follow the principles of art. 206 TFEU on the Union's external action, namely contributing to the progressive abolition of restrictions on international trade and foreign direct investment.[43] This treaty obligation to promote multilateralism and international trade and investment has been, and still is, at the core of the EU's external action. Instances of the EU's resort to multilateralism are its activity in reforming the World Trade Organisation (WTO),[44] the EU's attempt to set up a multilateral investment court,[45] and its stern reactions to protective policies

20 Nemat Shafik, 'Economic Development and Environmental Quality: An Econometric Analysis' (1994) 46 Oxford Economic Papers 757, 757–773.

21 Stephen S. Golub, Céline Kauffman and Philip Yeres, 'Defining and Measuring Green FDI: An Exploratory Review of Existing Work and Evidence' (2011) OECD Working Papers on International Investment No. 2011/02, 13.

22 Binyam Afewerk Demena and Sylvanus Kwaku Afesorgbor, 'The Effect of FDI on Environmental Emissions: Evidence from a Meta-Analysis' (2019) 138 Energy Policy 111,192 < https://www.sciencedirect.com/science/article/pii/S0301421519307773 > accessed 28 March 2025, 12.

23 Moosa (n 2), 3.

24 Bian (n 1), 1.

25 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Welcoming Foreign Direct Investment while Protecting Essential Interests [2017] COM(2017) 494 final, 5.

26 Ondrej Svoboda, 'The End of European Naivety: Difficult Times Ahead for SCEs/SOEs Investing in the European Union?' in Chaisse, Gòrski et al (eds), *Regulation of State-Controlled Enterprises* (Springer Nature 2022), 547.

27 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 Hindelang and Moberg (eds), *YSEC Yearbook of Socio-Economic Constitutions 2020 A Common European Law on Investment Screening* (Springer 2020), 499.

28 Directorate for Financial and Enterprise Affairs Competition Committee (n 6), 4.

29 Bas J de Jong, 'The EU Foreign Direct Investment Screening Regulation: In Search of a Clear Concept of FDI' [2021] SSRN Electronic Journal, 1.

30 Thilo Hanemann and Mikko Huotari, 'EU-China FDI: Working Towards Reciprocity in Investment Relations' (2020) MERICS Papers on China <https://merics.org/sites/default/files/2020–04/180723_MERICS-COFDI-Update_final_0.pdf > accessed 28 March 2025, 29.

31 Agatha Kratz, 'Chinese FDI in Europe: 2022 Update' (*Rhodium Group* 9 May 2023) < https://rhg.com/research/chinese-fdi-in-europe-2022-update/> accessed 28 March 2025, 5.

32 Haiyan Zhang and Daniel Van Den Bulcke, 'China's Direct Investment in the European Union: A New Regulatory Challenge?' [2014] Asia Europe Journal, 161.

33 HKTDC Research, 'EU Foreign Direct Investment Screening Annual Report Published; Chinese Mainland among Top Six Sources' (*research.hktdc.com* 15 November 2023) < https://research.hktdc.com/en/article/MTUzNzMyNzYwMw> accessed 28 March 2025.

34 Kratz (n 31), 11–14.

35 Svoboda (n 26), 550.

36 For an overview of the Belt and Road Initiative, see: James McBride, Noah Berman and Andrew Chatzky, 'China's Massive Belt and Road Initiative' (*Council on Foreign Relations* 2 February 2023) < https://www.cfr.org/backgrounder/chinas-massive-belt-and-road-initiative> accessed 28 March 2025.

37 Zhang and Van Den Bulcke (n 32), 162.

38 Valbona Zeneli, 'Mapping China's Investments in Europe' (*Thediplomat.com* 14 March 2019) < https://thediplomat.com/2019/03/mapping-chinas-investments-in-europe/> accessed 28 March 2025.

39 Papiya Basu, 'Midea Completes Acquisition of German Robot Maker Kuka' (*www.spglobal.com* 8 January 2017) < https://www.spglobal.com/marketintelligence/en/news-insights/trending/gjozjwvrkhepx0jql2sshw2 > accessed 28 March 2025.

40 Belén Carreño, 'EU risks depending on China for batteries after quitting Russian energy' (Reuters, 18 September 2023) < https://www.reuters.com/business/energy/eu-may-become-hooked-china-batteries-it-was-russian-energy-paper-2023-09-17/> accessed 28 March 2025.

41 Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C 202/1 (TFEU), art. 207.

42 Opinion 2/15 *Free Trade Agreement between the European Union and the Republic of Singapore* [2015] ECLI:EU:C:2017:376, 81–84.

43 TFEU (n 38), art. 206.

44 For an overview of the EU's position on WTO reform, see: European Commission, 'EU Calls for WTO to Address Current Policy Challenges through Focused Deliberation' (*policy.trade.ec.europa.eu* 22 February 2023) < https://policy.trade.ec.europa.eu/news/eu-calls-wto-address-current-policy-challenges-through-focused-deliberation-2023-02-22_en > accessed 28 March 2025.

45 For an overview of the multilateral investment court project, see: European Commission, 'Multilateral Investment Court Project' (*policy.trade.ec.europa.eu*) < https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en > accessed 28 March 2025.

of other countries.[46] Recently, however, several economic and geopolitical occurrences have led the EU to seek its own 'open strategic autonomy'. Within the discussion on 'open strategic autonomy', the EU has delineated a new strategy of economic security[47] and a review of its trade policy approach.[48]

The policy shift from market openness and promotion of multilateral trade to economic security and unilateral trade defences is illustrated by several new instruments, mainly related to the Common Commercial Policy. To counter unfair trading practices, the EU revised its Anti-Subsidy[49] and Anti-Dumping instruments,[50] it adopted an International Procurement Instrument to tackle discriminatory access for EU companies in other countries' public procurement,[51] and it established the Anti-Coercion Instrument to tackle coercive third-state behaviour.[52]

In such a context, the FDI Screening Regulation and the Foreign Subsidies Regulation were adopted. The first Regulation's legal basis is art. 207 TFEU, and it applies to Member States' screening mechanisms, regulating the procedures for assessing, prohibiting, and conditioning FDI on grounds of public order and security—especially in critical infrastructure, technologies, and input, as well as in the media sector.[53] It does not make it mandatory for Member States to set up a screening mechanism, but it obliges Member States that have one to cooperate with others and with the Commission, by means of notifications and opinions on transactions.[54] Ultimately, the competence to halt a transaction solely resides with the Member States, given that public security is their exclusive competence.[55] This Regulation applies to all extra-EU FDI, therefore also to companies from the EU's main partners, such as the United States (US) and United Kingdom (UK), and not only China.

The Foreign Subsidies Regulation, instead, has its legal basis both in art. 207 TFEU and art. 114 TFEU,[56] underlining its goals not only related to trade, but also to prevent distortions in the internal market. It applies to all undertakings economically active in the EU, and establishes criteria for subsidies liable to cause distortions in the internal market.[57] Particularly, it establishes an *ex officio* assessment by the Commission of foreign subsidies in concentrations.[58] Whenever a concentration, as defined by the Merger Regulation, is notified to the Commission, the latter assesses and either approves, rejects, or conditions the concentration based on the distortions caused by the subsidies involved.[59] This procedure is additional, and not substitutive of, the concentration assessment under the Merger Regulation. This instrument applies to all companies subsidised by third States, regardless of their origin, therefore even to companies established in the EU or any third State.

The EU's resort to unilateralism and departure from a multilateral approach to trade and investment may be criticised as potentially not being consistent with the art. 206 TFEU objectives of progressively abolishing restrictions to foreign direct investment. Nonetheless, the EU is not the only global actor stepping up its FDI defence against China, but it is accompanied in this global trend. In fact, firstly, the FDI Screening Regulation emerged as a coordinating mechanism between the various Member States' investment screening systems, which were updated or established during the surge of Chinese FDI in the EU.[60] Moreover, the UK[61] and US[62] also reviewed their FDI scrutiny instruments: this trend has been criticised for pointing at surge protectionism in investments, that could ultimately cause a downward FDI inflow.[63] Furthermore, the increased regulatory complexity for a non-EU company pursuing a transaction in the EU has to be stressed: they could potentially, depending on the company's turnover, sector, and subsidisation, incur in the application of the Merger Regulation, FDI Screening Regulation, and Foreign Subsidies Regulation. The following Chapters will shed light on how the two instruments complement the Merger Regulation—specifically concerning Chinese state-owned enterprises.

3. Merger Regulation's objectives and treatment of state-owned enterprises

A. *Merger regulation and single economic unit*

When two companies merge, one company acquires another, or two or more companies establish a joint venture on a lasting basis,[64] the European Commission assesses and either approves, rejects, or conditions such concentration—provided that the companies' EU turnover meets the threshold.[65] The EU merger assessment operates on the principle of non-discrimination, meaning that private and state-owned undertakings enjoy the same treatment.[66] This leads to the Commission's legal test of 'single economic unit', whereby a company, even if state-owned, is considered as an independent undertaking for the purposes of merger control if it constitutes an economic unit with independent power of decision. Establishing whether a state-owned enterprise pursuing a merger is a 'single economic unit' is

46 For an instance, see: Maria Demertzis and Gustav Fredriksson, 'The EU Response to US Trade Tariffs - Intereconomics' (*www.intereconomics.eu* 2018) < https://www.intereconomics.eu/contents/year/2018/number/5/article/the-eu-response-to-us-trade-tariffs.html> accessed 28 March 2025.

47 Joint Communication to the European Parliament, the European Council and the Council on 'European Economic Security Strategy' [2023] JOIN(2023) 20 final.

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

49 Consolidated text of the Regulation 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union [2016] OJ L176/55.

50 Consolidated text of the Regulation 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union [2016] OJ L176/21.

51 Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument – IPI) [2022] OJ L173/1.

52 Regulation 2023/2675 of the European Parliament and of the Council of 22 November 2023 on the protection of the Union and its Member States from economic coercion by third countries [2023] OJ L 7.12.2023.

53 FDI Regulation (n 7), art. 4(1).

54 *Idem*, art. 6.

55 *Idem*, recital 8.

56 TFEU (n 41), art. 114.

57 FSR (n 8), art. 4–5.

58 *Idem*, art. 19.

59 *Idem*, art. 20–26.

60 Bian (n 1), 4–5. See also, to that effect, the joint letter by Germany, France, and Italy to the European Commission in 2017 on investment screening, available at: <https://www.bmwk.de/Redaktion/DE/Downloads/S-T/schreiben-de-fr-it-an-malmstroem.pdf?__blob = publicationFile&v = 5 > accessed 28 March 2025.

61 UK Government, 'National Security and Investment Act 2021' (*GOV.UK* 11 November 2020) < https://www.gov.uk/government/collections/national-security-and-investment-act> accessed 28 March 2025.

62 White & Case, 'Foreign Direct Investment Reviews 2023: United States | White & Case LLP' (*www.whitecase.com* 20 March 2023) < https://www.whitecase.com/insight-our-thinking/foreign-direct-investment-reviews-2023-united-states> accessed 28 March 2025.

63 Bian (n 1), 6.

64 EUMR (n 9), art. 3.

65 EUMR (n 9), art. 1(2–3).

66 EUMR (n 9), recital 22; art. 106 TFEU.

crucial to assess the jurisdictional threshold and the substantive anti-competitive effects of the merger.[67]

Regarding the jurisdictional threshold, if a state-owned enterprise is independent of other state-controlled firms, the turnover of the companies is not aggregated for the purposes of merger control.[68] Conversely, if the state-owned enterprise falls under the same 'independent centre of commercial decision-making' as other state-controlled firms, then their turnovers are aggregated for the calculations under art. 1(2–3) Merger Regulation.[69]

Should the transaction pass the required threshold, the Commission also assesses the substantive anti-competitive effects of the merger. Such effects can derive from possible coordination among state-controlled enterprises from the same country, and the market foreclosure scenarios that may arise from said coordination.[70] Particularly, the power to direct the company's commercial strategy and to organise state-owned firms' commercial conduct can lead to group coordination, hampering effective competition.[71] In such regards, the extent of operational autonomy of the involved firm is also relevant to establish the possible market power following the planned merger. Such market power would be higher if the state-owned firm is part of a 'single economic unit' with other state-owned firms from the same country.[72] Hence, ascertaining the nature of a state-owned firm's 'economic unit' is relevant for both jurisdictional and substantive assessment under the Merger Regulation.

To establish if an undertaking is a 'single economic unit' by itself or in conjunction with other firms, the Commission analyses whether the public controlling entity is able to exercise decision-making on the merging/acquiring state-owned firm. Particularly, the analysis focusses on decisions concerning management appointment, financial plans, investments, technology, and product development.[73] Notice must be had that the Merger Regulation does not take into account how the transaction is being financed, and whether—for such purpose—state subsidies have been made available.[74]

B. *Single economic unit and Chinese state-owned enterprises*

The increasing investment of Chinese state-owned firms in the EU market led the Commission to further develop the 'single economic unit' doctrine as a response.[75] However, the concrete results of this methodology have been contested. In the *Bluestar/Elkmeg* case,[76] the Commission attempted to establish that the Chinese Bluestar was under the same 'single economic unit' as the Chinese public entity controlling state-owned firms. The lack of substantive information on the links between Bluestar and the controlling entity, however, did not allow the Commission to conclude whether or not Bluestar's ultimate decision-maker was the public entity, and thereby carry out an in-depth assessment of possible resulting foreclosure scenarios.[77] However, the concentration was cleared due to Bluestar's limited EU market position.[78] In *DSM/Sinochem/JV*, the Commission—after analysing extensively China's legislation[79]—could not reach a conclusion on whether Sinochem had independent power of decision, partly due to the absence of Chinese representation.[80] However, given that the turnover threshold was passed, jurisdiction was still established—and it was concluded that setting up the joint venture would not raise any significant competition concerns, regardless of whether or not Sinochem's market position was considered together with other Chinese state-owned firms.[81] The Commission's inability to conclude whether a Chinese firm has independent decision-making power and is, therefore, a single economic unit was further evident in the *CNCR/Pirelli* acquisition. In the latter case, the China National Tyre & Rubber Co (CNCR) acquired control of the Italian tyres champion Pirelli—a transaction that gave rise to both national security and competition concerns. Despite further analysis, the Commission again did not ascertain whether CNRC was a single economic unit with the Chinese controlling entity, or other state-owned firms, as the jurisdictional threshold was already reached by counting CNRC's turnover alone.[82] The Commission also further examined the vertical and horizontal overlaps of the undertakings' activities, and cleared the merger; in fact, even if all state-owned firms were accounted for, the transaction was deemed unlikely to raise competitive concerns.[83]

The apparent indecisiveness of the Commission over the treatment of Chinese state-owned firms took a turn in 2016 with the *EDF/CGN/NNB* decision, where joint investments in UK nuclear power plants were cleared. However, the Chinese firm did not have sufficient turnover by itself to fall under the Merger Regulation's scope.[84] Taking into account the energy sector's specific characteristics, the Commission analysed the firm's autonomy from China in deciding its strategy and business plan, and the possibility for the controlling entity to coordinate state-owned firms' conduct.[85] Ultimately, it found that CGN, the state-owned firm, did not have independent decision-making, and therefore its turnover was aggregated with other state-owned firms for jurisdictional purposes.[86] While it remains unclear whether this approach can be adopted for other industrial sectors,[87] some authors have

[67] Alexandr Svetlicinii, *Chinese State Owned Enterprises and EU Merger Control* (Routledge 2021), 12.

[68] Morten P Broberg, *Broberg on the European Commission's Jurisdiction to Scrutinise Mergers* (Kluwer Law International 2013), 121.

[69] Tanisha James and Howard Morse, 'Regulatory hurdles facing mergers with Chinese State-owned enterprises in the United States and the European Union' [2017] China Antitrust Law Journal 1, 20.

[70] Svetlicinii, *Chinese State Owned Enterprises and EU Merger Control* (n 67), 16.

[71] *China National Bluestar/Elkem* (COMP/M.6082) Commission Decision of 17 September 2011 [2011] OJ C274/7, 10–12.

[72] James and Morse (n 69), 20.

[73] Alexandr Svetlicinii, 'The Acquisitions of the Chinese State-Owned Enterprises under the National Merger Control Regimes of the EU Member States: Searching for a Coherent Approach' (2019) 2 Market and Competition Law Review 99, 103.

[74] Filip Krenek and Eddy De Smijter, 'From a White Paper to a Proposal for a Regulation on Foreign Subsidies: Filling a Regulatory Gap in Protecting the EU Internal Market' [2021] Asian Yearbook of International Economic Law 129, 136.

[75] Alessandro Spano, 'EU Merger Control and China's State-Owned Enterprises: Is Ownership Really Separate from Control?', in Chaisse, Gòrski et al (eds.) *Regulation of State-Controlled Enterprises* (Springer 2022), 196.

[76] *China National Bluestar/Elkem* (n 71).

[77] Frederic Depoortere, 'The EU Commission Clears in Phase I a Merger in the Silicon Sector after Examining Possible Coordination of Chinese State-Owned Companies' Market Behavior by the Chinese State (China National Bluestar / Elkem)' [2011] e-Competitions Bulletin <https://www.concurrences.com/en/bulletin/news-issues/march-2011/The-EU-Commission-clears-in-phase> accessed 28 March 2025.

[78] Alexandr Svetlicinii, 'The Interactions of Competition Law and Investment Law: The Case of Chinese State-Owned Enterprises and EU Merger Control Regime', in Chaisse, Choukroune et al (eds.) *Handbook of International Investment Law and Policy* (Springer 2021), 2061.

[79] Svetlicinii, 'The Acquisitions of the Chinese State-Owned Enterprises under the National Merger Control Regimes of the EU Member States: Searching for a Coherent Approach' (n 73), 105.

[80] *DSM/Sinochem/JV* (COMP/M.6113) Commission Decision of 19 May 2011 [2011] OJ C177/1, 16.

[81] *Idem*, 13–16 and 24–26.

[82] Spano (n 75), 198.

[83] *CNRC/Pirelli* (COMP/M.7643) Commission Decision of 1 July 2015 [2015] OJ C233/2, 8–18.

[84] James and Morse (n 69), 22.

[85] *EDF/CGN/NNB Group of Companies* (COMP/M.7850) Commission Decision of 10 March 2016 [2016] OJ C151/1, 30.

[86] *Idem*, 49.

[87] Svetlicinii, 'The Acquisitions of the Chinese State-Owned Enterprises under the National Merger Control Regimes of the EU Member States: Searching for a Coherent Approach' (n 73), 106.

welcomed this stance as indicative of the end of a 'narrow' approach.[88] However, others were critical of this outcome, deeming it unnecessarily broad and not in line with the reality of the energy sector[89] or of the Chinese state.[90] Others suggested that the Commission's determination of a 'single economic unit' in this case was pursued solely to establish jurisdiction over the merger—which would have not reached an EU dimension otherwise.[91] This conclusion seems to be warranted by the further Commission decision in *ChemChina/Sygenta*. Once again, the regulator refrained from concluding whether ChemChina was a single economic unit, as such a decision would not have had an impact on the competitive assessment.[92] Rather, the Commission left the question open and considered the 'worst case scenario':[93] it analysed competitive concerns in the most restrictive scenario possible, under which ChemChina was regarded as one economic entity together with other Chinese state-owned enterprises.[94]

The Commission's approach can be described as unwilling to engage in precedent setting in merger control of Chinese state-owned enterprises.[95] This indecisiveness contrasts with the Commission's own report on market distortions in China, which recognises the state's high level of control over the economy.[96] The 'single economic unit' approach is arguably problematic due to the Commission's difficulties in ascertaining the nature of the relationship between Chinese state-owned firms, and thereby failing to adequately address the anti-competitive concerns arising from the mergers—evidenced by the clearance of all the aforementioned transactions. The indecisive and diverging Commission practice provides few guidance to companies engaged in mergers and acquisitions, leaving legal uncertainty surrounding the proper apprehension of the 'single economic unit' criterion.[97]

4. Foreign subsidies regulation and merger regulation

A. *Interaction of objectives*

The Commission's treatment of Chinese state-owned enterprises revolves around assessing 'independent decision-making'. However, such assessment has been problematic, especially due to the practical impossibilities of ascertaining the real links between Chinese state organs and firms: this requires an extensive analysis of Chinese law which, without genuine support from Chinese authorities, appears to be complicated.[98] An additional issue stems from the fact that informal arrangements and personal links between firms and the Chinese Communist Party augment the level of control beyond what is foreseeable.[99] Ultimately, this may lead to an inaccurate result under the 'single economic unit' test.[100]

The inability to ascertain the nature of control over state-owned enterprises becomes altogether more problematic when coupled with the Merger Regulation's neutrality towards the financing of transactions. Not only does the Merger Regulation not assess the value of the transaction as a relevant jurisdictional criterion, but it also does not account for how parties finance the transaction as a potentially anti-competitive element.[101] However, economic literature has found that Chinese subsidies stimulate outward FDI: not only are Chinese firms advantaged in successfully completing a merger or acquisition, but the subsidies also enhance the resulting entity's performance in terms of productivity and innovation capacity.[102] Regardless of the types of subsidies used, which may vary, the results point consistently at a definite advantage of state-subsidised firms engaging in cross-border mergers and acquisitions.[103]

For these reasons, it can be said that the Merger Regulation does not sufficiently protect competitive neutrality, namely the principle providing all enterprises a level-playing field with respect to state ownership, regulation, or activity in the market.[104] The Merger Regulation's failure to address the financing of a merger or acquisition and the precise state-subsidised nature of a firm negatively impact competitive neutrality. In fact, non-state-financed firms are disadvantaged compared to state-subsidised firms on the market for corporate control or market for mergers and acquisition. Such undue competitive advantages help state-owned firms in financing cross-border mergers and acquisitions by outbidding firms that do not benefit from state support.[105] That is exemplified by the *CNRC/Pirelli* case: although the merger transaction was approved, the Commission investigated it further in the context of countervailing duties in trade.[106] This investigation found meaningful state influence in support of the Chinese company prior to the merger, which favoured Pirelli's acquisition.[107] While the Merger Regulation considers the state-support element in assessing post-merger competitive effects, the anti-competitive effects of subsidies before the transaction are not duly taken into account.

Against this backdrop, the Foreign Subsidies Regulation complements the Merger Regulation's failure to address state-owned

[88] Alan Riley, 'Nuking Misconceptions: Hinkley Point, Chinese SOEs and EU Merger Law' [2016] SSRN Electronic Journal, 324.

[89] Angela Huyue Zhang, 'The Antitrust Paradox of China Inc.' (2017) 50 New York University Journal of International Law and Politics (JILP) 159, 198.

[90] Julien Briguet, 'The State's Invisible Hand: Chinese SOEs Facing EU Antitrust Law' (2018) 52 Journal of World Trade 839, 853.

[91] Svetlicinii, *Chinese State Owned Enterprises and EU Merger Control* (n 67), 64.

[92] *ChemChina/Sygenta* (COMP/M.7962) Commission Decision of 5 April 2017 [2017] OJ C186/8, 84–87.

[93] Svetlicinii, 'The Acquisitions of the Chinese State-Owned Enterprises under the National Merger Control Regimes of the EU Member States: Searching for a Coherent Approach' (n 73), 107.

[94] *ChemChina/Sygenta* (n 92), 88.

[95] Svetlicinii, 'The Interactions of Competition Law and Investment Law: The Case of Chinese State-Owned Enterprises and EU Merger Control Regime' (n 78), 2065.

[96] European Commission, 'The EU's New Trade Defence Rules and First Country Report' (*European Commission* 20 December 2017) < https://ec.europa.eu/commission/presscorner/detail/en/MEMO_17_5377 > accessed 28 March 2025.

[97] Broberg (n 65), 119.

[98] See, to that effect, *DSM/Sinochem/JV* (n 77), 12–16.

[99] Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China for the Purposes of Trade Defence Investigations [2017] SWD(2017) 483 final/2, 86.

[100] Svetlicinii, *Chinese State Owned Enterprises and EU Merger Control* (n 67), 68–69.

[101] Krenek and De Smijter (n 74), 196.

[102] Siqi Li and Mengdi Sun, 'Spillover Effects of Government Subsidies on Outward Foreign Direct Investment: Evidence from China' [2024] Review of international economics, 31.

[103] Qiuyang Gu, Chunhua Ju and Fuguang Bao, 'The Cross-Border Mergers and Acquisitions of Local State-Owned Enterprises: The Role of Home Country Government Involvement' (2020) 12 Sustainability 3020, 19–20.

[104] OECD, 'Recommendations of the Council on Competitive neutrality' OECD/LEGAL/0462 (2021), 5.

[105] Jeffrey Gordon and Curtis Milhaupt, 'China as a "National Strategic Buyer": Toward a Multilateral Regime for Cross-Border M&A' (2019) 2019 Colum. Bus. L. Rev. 192, 247.

[106] Commission Implementing Regulation 2018/1690 of 9 November 2018 imposing definitive countervailing duties on imports of certain pneumatic tyres, new or retreaded, of rubber, of a kind used for buses or lorries and with a load index exceeding 121 originating in the People's Republic of China and amending Commission Implementing Regulation (EU) 2018/1579 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain pneumatic tyres, new or retreaded, of rubber, of a kind used for buses or lorries, with a load index exceeding 121 originating in the People's Republic of China and repealing Implementing Regulation (EU) 2018/163 [2018] OJ L283/1.

[107] *Idem*, 335–339.

enterprises' nature. In fact, the Foreign Subsidies Regulation foresees an *ex officio* review of notifiable concentrations that pass the relevant threshold.[108] This mechanism, supplementary to the Merger Regulation, shifts the paradigm in merger control: rather than assessing 'independent decision-making' as the discerning element, the procedure merely looks at the amount of financial contributions received from a State—applying a broad definition of subsidies.[109] This allows the Commission to apprehend the concrete level of advantage granted to the merging or acquiring entity *vis-à-vis* non-state-financed firms on the market for corporate control. Not only does this approach cover both state-owned and non-state-owned firms that receive subsidies, but it also brings the advantage of avoiding the analysis of Chinese (or other third country) legal regimes and their level of control over the firms, by merely looking at the disclosed financial contributions. In such a way, 'worst case' assumptions, seen in *ChemChina/Sygenta*, will no longer be needed, and it will be possible to assess the anti-competitive effects of subsidies on a financial basis. This apprehension improves competitive neutrality within the internal market: state-owned enterprises benefitting from subsidies will be scrutinised more than non-state-financed firms when engaging in a merger or acquisition, ultimately countering the unduly advantageous position of Chinese state-owned firms in the market for corporate control. However, the Foreign Subsidies Regulation does not assess the possible coordinating effects between state-owned enterprises post-merger, thus leaving it to be addressed by the Merger Regulation.

B. *Foreign subsidies regulation, practical issues, and legal certainty*

While the Foreign Subsidies Regulation positively complements the Merger Regulation's failures in addressing state-owned enterprises' nature, a discussion is in order on the additional burdens brought by the new regulation for companies pursuing mergers and acquisitions. This particularly concerns the timeframes, jurisdictional overlaps, regulating entities, transaction costs, and the possible resulting legal uncertainty.

As the new procedure is supplementary to merger control, the Commission attempted to streamline the timeframes of the two investigations.[110] This may facilitate the merger review, as remedies under the Foreign Subsidies Regulation may be similar to remedies necessary under the Merger Regulation.[111] However, the jurisdictional scope of the two instruments differ: while an in-depth jurisdictional study is beyond the scope of the present paper, a *prima facie* analysis shows that the Foreign Subsidies Regulation has a more restrictive scope than the Merger Regulation.[112] The review of mergers, furthermore, can also be conducted at national level, applying different thresholds—and the Merger Regulation includes the possibility for Member States to refer cases to the Commission.[113] Consequently, a company pursuing a merger or acquisition may be subject to the Foreign Subsidies Regulation proceedings, under the Commission's scrutiny, and the Merger Regulation proceedings, either under the Commission's scrutiny or under one or more Member States' national laws.

This procedure poses an additional burden on a company wishing to pursue mergers and acquisitions in the EU, a factor that will be substantially considered in the firm's expansion strategy. Not only can the additional procedure extend the standstill period before the merger is cleared, but it can also increase transaction costs. Such costs stem from legal fees, from the costs of different proceedings with different regulating entities, and from the firm's internal processes. Companies, in fact, will have to assess the subsidies received, identify the subsidies most likely to be prohibited by the Foreign Subsidies Regulation, and gather information on all other reportable subsidies, possibly also including its subsidiaries.[114] Cognisant of the EU's objective of '*striking a balance between the effective protection of the internal market and the need to limit the administrative burden on undertakings*',[115] the question arises whether the EU was successful in doing so.

Furthermore, besides the aforementioned costs, firms are influenced by the uncertainty surrounding the interpretation of the Foreign Subsidies Regulation. In fact, the Foreign Subsidies Regulation prohibits subsidies likely to cause the 'distortion of competition in the internal market'.[116] Such legal test appears to be different from the substantive test under EU state aid law. The Commission Staff Working Document on the FSR Guidelines clarifies that, while under EU state aid law a subsidy granting an advantage is generally considered distortive, under the Foreign Subsidies Regulation the Commission will assess case-by-case indicators, such as amount and nature of the subsidy, market situation, evolution of the economic activity, and purpose of the subsidy.[117] In addition, a subsidy 'directly facilitating' a concentration would be found likely to distort the internal market.[118] The Commission has clarified that the internal market must be distorted '*by the foreign subsidy through the market*'.[119] These uncertainties stem also from the little extent of working practice so far, as also mentioned by the Commission: '*At this early stage of implementation, the Commission has not yet gathered substantial experience on the application and interpretation of the balancing test*'.[120] In fact, despite 92 transactions having been notified at the time of writing,[121] the European Commission only took one decision under the Regulation, conditionally approving the acquisition of PPF, a Czech telecom company, by e&, a United Arab Emirates (UAE), state-controlled entity.

The recently published decision provides guidance on the characterisation of foreign subsidies, on the Commission's approach to competitive distortion, and to the balancing test.[122] Whilst a complete analysis of the Commission's decision falls outside the scope of the present paper, relevant considerations on the functioning of the Foreign Subsidies Regulation can be drawn.

108 FSR (n 8), art. 20(3).
109 *Idem*, art. 3. For an overview of the Regulation's definition of subsidies, see: Morris Schonberg, 'The EU Foreign Subsidies Regulation: Substantive Assessment and Open Questions' (2022) 21 European State Aid Law Quarterly 143, 144.
110 Jan Blockx, 'The Proposal for an EU Regulation on Foreign Subsidies Distorting the Internal Market: How Will It Impact Corporate Mergers and Acquisitions?' [2021] SSRN Electronic Journal, 8.
111 *Ibid*.
112 For reference: EUMR (n 9), art. 1(2–3); FSR (n 8), art. 20(3).
113 EUMR (n 9), art. 22.
114 Vanessa Van Weelden, Justyna Smela Wolski and Fabian Bickel, 'The Foreign Subsidies Regulation's Impact on M&a Transactions – the Third Wheel of Regulatory Reviews' (2024) 1 Mededingingsrecht in de Praktijk 18, 21–22.
115 FSR (n 8), recital 35.
116 *Idem*, art. 4.
117 Commission Staff Working Document on initial clarifications on the application of Article 4(1), Article 6 and Article 27(1) of Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market [2024] SWD(2024) 201 final, 2; see also Schonberg (n 109), 146–147.
118 FSR (n 8), art. 5(1d).
119 Commission Staff Working Document (n 117), 5.
120 *Idem*, 6.
121 European Commission, Competition Cases Database, Foreign Subsidies <https://competition-cases.ec.europa.eu/search?caseInstrument= InstrumentFS&caseTypesFS=FSConcentration&sortField = caseLastDecisionDate&sortOrder = DESC> accessed 28 March 2025.
122 *e&/PPF Telecom Group* (FS.100011) Commission Decision of 24.9.2024 [2024] C(2024) 6745 final.

In this case, the Commission identified two forms of state support from the UAE: an unlimited guarantee to e&, arising out of the company's statutory immunity from UAE bankruptcy law, and a term loan from a banking syndicate including state-owned lenders.[123] The Commission found that bankruptcy immunity effectively removed e&'s exposure to standard creditor remedies and created investors' expectations that the UAE would cover possible company debt, thereby constituting an unlimited guarantee within the meaning of art. 3(2d) FSR.[124] Concerning the term loan from state-controlled banks, instead, the Commission could not find a 'benefit' being conferred to e& in comparison to similar transactions, thereby not finding it within the scope of art. 3 FSR.[125] This confirms the fundamental notion that a subsidy requires a 'benefit' with respect to market terms.

The Commission's assessment of whether a subsidy is distortive under art. 4 FSR confirms that the instrument's main goal is that of levelling the playing field.[126] In the analysis, it first needs to be found a relationship between the foreign subsidy and the activities of the undertaking in the internal market,[127] and then it is assessed whether the subsidy is 'most likely to distort the internal market'.[128] Particularly, the Commission assesses distortion both in the acquisition process and in the post-acquisition scenario. No distortion was found in the market for corporate control because there were no other bidders, the acquisition price reflected market valuation, and e& did not require state support to finance the bid.[129] While assessing whether the 'outcome of the acquisition process'[130] was altered by the foreign subsidy could be relative straightforward if there are no other bidders, it is uncertain how this analysis would be conducted when multiple bids are present. This assessment could have a chilling effect on M&A activity if an offer at premium can be considered 'distortive' on the corporate control market merely due to the presence of foreign subsidies. In fact, a buyer's may have high incentives to conclude the transaction at premium due several factors, such as the prospective of private benefits of control or synergies. This could result in its ability to offer a higher premium than other bidders.[131] Precisely, the case-by-case specific characteristics of bidders, other than the availability of subsidies, may allow them to outbid other offers: it will need to be ascertained whether further Commission practice clarifies this point. Concerning the post-transactional distortion, instead, the Commission held that the unlimited guarantee reduced e&'s financial risk and cost of capital, thereby giving it an unfair advantage over EU rivals post-acquisition and being a distortive subsidy.[132]

The Commission further assesses whether there are positive contributions that can outweigh the negative effects of the foreign subsidy under art. 6(2) FSR. While some infrastructure investment benefits and improved service provision were foreseen, the Commission clarifies that there must be a causal link between such positive effects and the foreign subsidy to the extent that, without the subsidy, no such positive effects could occur.[133] This was not the case in the transaction, and the Commission accepted commitments from e& to address such competitive distortions. Namely, e& will be subject to regular UAE bankruptcy law and will provide financing to the acquired entity on market terms, to insulate the EU market form the effect of foreign subsidies.[134]

While this decision clarifies several concepts inherent to the Foreign Subsidies Regulation, further Commission practice is expected to consolidate the notions, as well as the outcome of public consultation on guidelines, which are expected to be published in 2026.[135] Drawing on all the above, it can be questioned whether an additional instrument was really necessary, or whether the financial backing element of mergers and acquisitions could have also been addressed within the Merger Regulation's regime.[136] Instead of creating another notification-based system which places an additional burden on private companies, strengthening the Merger Regulation could have both provided a compromise more suitable to protect the internal market and avoided administrative burdens for companies.[137] This approach was already adopted by the German Competition Authority, which, in the *CRRC/Vossloh* merger, considered the fact that the Chinese firm enjoyed substantial state subsidies as a relevant factor in the competitive assessment.[138] The Commission addressed this possibility in the 2020 White Paper on Foreign Subsidies, by explaining that a new instrument would be needed because the Merger Regulation analyses the impediments to competition *ex-post* the merger.[139] However, it is posited that analysing a firm's competitive advantage in the market for corporate control due to a subsidy utilised to finance the transaction is also relevant to further a presumption of anti-competitive effects on the market post-merger.

Therefore, while the Foreign Subsidies Regulation addresses competitive neutrality and ensures a more streamlined treatment of state-owned enterprises, the Regulation poses substantial burdens and costs on companies engaged in mergers and acquisitions, increasing legal uncertainty—also considering the Commission's broad discretion for investigations. Specifically, non-EU firms will have to adapt to the FSR standards in order to pursue mergers and acquisitions in the EU, pending the non-approval of the transaction.[140] Ultimately, it remains questionable

123 *Idem*, paras. 49, 99.
124 *Idem*, para. 115.
125 *Idem*, para. 73.
126 See, to that effect: Lena Hornkohl and Pierfrancesco Mattiolo, 'Learnings from the First FSR Phase II Merger Decision: The Commission Publishes a Provisional Public Version of the Commitment Decision in E&/PPF - Kluwer Competition Law Blog' (*Kluwer Competition Law Blog* 15 April 2025) < https://competitionlawblog.kluwercompetitionlaw.com/2025/04/15/learnings-from-the-first-fsr-phase-ii-merger-decision-the-commission-publishes-a-provisional-public-version-of-the-commitment-decision-in-e-ppf/> accessed 30 April 2025.
127 *e&/PPF Telecom Group* (n 122), para. 256.
128 *Idem*, paras. 267, 305.
129 *Idem*, paras. 282–284.
130 *Idem*, para. 278.
131 See, to that effect, Schuster's theory on efficient control transactions due to private benefits of control and synergies in: Edmund-Philipp Schuster, 'The Mandatory Bid Rule: Efficient, after All?' (2013) 76 The Modern Law Review 529, 546–554.
132 *e&/PPF Telecom Group* (n 122), para. 354–356.
133 *Idem*, para. 375.
134 *Idem*, para. 386, 387; see also, to that effect: Sullivan & Cromwell LLP, 'EU Foreign Subsidies Regulation EU Commission Publishes Its First Merger Decision under the Foreign Subsidies Regulation in E&/PPF Telecom Group' (2025) < https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/EU-Foreign-Subsidies-Regulation-First-Phase-2-Merger-Control-Decision.pdf > accessed 30 April 2025.
135 European Commission, 'Commission Launches Consultations on Guidelines under the Foreign Subsidies Regulation' (*European Commission* 2025) < https://ec.europa.eu/commission/presscorner/detail/en/ip_25_685 > accessed 28 March 2025.
136 Lena Hornkohl, 'The EU Foreign Subsidy Regulation: Why, What and How?' in Pohl, Papadopoulos, Wiesenthal et al (eds.) *Weaponising Investments—Volume II* (Springer 2024), 33.
137 *Ibid*.
138 Bundeskartellamt, Decision of April 27, 2020, Case B4–115/19—CRRC v Vossloh, 350 et seq.
139 Commission White Paper on levelling the playing field as regards foreign subsidies [2020] COM(2020) 253 final, 40.
140 Tongle Si, 'View of Navigating Legal Barriers: The Impact of Foreign Subsidies Regulation on Chinese SOEs in EU Public Procurement' (*Unsri.ac.id* 2025) < https://journal.fh.unsri.ac.id/index.php/sriwijayalawreview/article/view/3048/pdf > accessed 28 March 2025, 128.

whether the adoption of a new regulation was the correct approach to address the Merger Regulation's deficiencies.

5. FDI screening regulation and merger regulation

A. *Interaction of objectives*

The Merger Regulation's objectives are very different from those of the FDI Screening Regulation.[141] Merger control's legal basis is art. 103 TFEU[142]—namely, competition law—and it is aimed at ensuring that competition in the internal market is not distorted as a result of a merger.[143] Therefore, the Commission's scrutiny mainly pertains to the anti-competitive effects of the merger or acquisition on the market and, ultimately, on consumer welfare. The FDI Screening Regulation, instead, has its legal basis in the common commercial policy,[144] and it is aimed at ensuring cooperation between Member States and the Commission for screening investments, and providing legal certainty in the assessment.[145]

Already from this notion, it can be evident how the Commission's treatment of state-owned enterprises in merger cases, based on the non-discrimination principle, does not suffice to achieve the FDI Regulation's goal. In fact, state-owned enterprises entering a market often act not merely out of their own economic interest, but pursuing specific national interests—that may ultimately hinder the host county's public security.[146] Consequently, the 'ownership neutral' approach of the Merger Regulation does not suffice to address public security concerns, taking into account the Commission's difficulties in assessing Chinese state-owned enterprises' single economic unit. Given a state-owned firm's possible alignment with their own national interest, the firm's country of origin is a relevant factor for a Member State's public security—being irreconcilable with the Merger Regulation's ownership-neutrality. The failure of the latter to address state-owned enterprises' peculiarities was also openly recognised by the Commission.[147] Such concern is, in fact, addressed in art. 4(2a) FDI Regulation, that allows Member States to consider whether or not the foreign investor is controlled by a third State's government as a relevant factor in ascertaining the existence of a threat to public security.[148] As a matter of fact, a Member State may be more concerned by an investment stemming from China, a geopolitical rival, than from the US. Thus, it can be said that considering the firm's origin or state-backing in the FDI Regulation makes up for the Merger Regulation's ownership-neutral approach.

However, the Merger Regulation already includes a mechanism allowing Member States to protect legitimate interests 'other than those taken into account by the Regulation'—namely, art. 21(4).[149] This allows Member States to impose additional conditions to, or block, previously approved mergers,[150] but it does not allow them to clear a concentration that was previously prohibited by the Commission.[151] Art. 21(4) lists some 'legitimate interests' that are explicitly allowed as a ground to impose conditions, namely public security, plurality of the media, and prudential rules. Measures adopted by Member States under these interests do not need to be notified to the Commission in advance, provided they are 'clearly in compliance with the principles of proportionality and non-discrimination'.[152] Conversely, Member States can also use 'other public interests' reasons as a ground for imposing measures or block a merger, subject to prior approval of the Commission. The following analysis will first attempt to discern between 'public security' and 'other legitimate interests' as protected by the Merger Regulation, and how they are protected under the FDI Regulation.

Case law on mergers aids to discern the remits of the 'public security' notion in the Merger Regulation. Accepted public security grounds include the field of arms trade and defence industry[153]—while more discussed grounds are 'protection of national interests in strategic sectors' and 'security of supply'. In the *BSCH/A*[154] and in the *Secil/Holderbank/Cimpor* merger cases[155] the Commission did not accept Portugal's further measures on the grounds of protecting the national interest in strategic sectors as part of public security—an approach upheld by the CJEU.[156] This restrictive interpretation of 'public security' was reiterated in the *E.ON/Endesa* case, where Spain attempted imposing on Endesa capitalisation, debt, and divestment obligations on the basis of protecting national interest in the strategic energy sector. This was not approved by the Commission as 'public security can be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society'[157]—once again, upheld by the CJEU[158] and confirmed in *ENEL/Acciona/Endesa*.[159] 'Security of supply', instead, was upheld in some cases as a ground for Member States to impose additional merger conditions. This notion refers to ensuring that a certain critical input remains available to a country, without threats as to its disappearance due to foreign ownership, to ensure there is sufficient capacity to meet future demand.[160] Particularly, in *Lyonnaise des Eaux/Northumbrian Water* the Commission recognised the UK's public security interest in ensuring that a sufficient number of independent water suppliers were present in their market.[161] Furthermore, in the *EdF/London Electricity* case, the UK's security of supply argumentation was recognised as legitimate by the Commission, but not upheld in the substance as there was no need to modify the decision *in casu*.[162]

[141] Directorate for Financial and Enterprise Affairs Competition Committee (n 6), 8.
[142] TFEU (n 41), art. 103.
[143] EUMR (n 9), recital 2.
[144] TFEU (n 41), art. 207.
[145] FDI Regulation (n 7), recital 7.
[146] Stephan F. Wernicke, 'Investment Screening: The Return to Protectionism? A Business Perspective' in Hindelang and Moberg (eds.), *YSEC Yearbook of Socio-Economic Constitutions 2020* (Springer 2020), 32.
[147] Joint Communication to the European Parliament, the European Council, and the Council EU-China – A strategic outlook [2019] JOIN(2019) 5 final, 8.
[148] FDI Regulation (n 7), art. 4(2a).
[149] EUMR (n 9), art. 21(4).
[150] Alec Burnside and Adam Kidane, 'Merger Control Meets FDI: The Multi-Stop Shop Expands' (2022) 7 Competition Law & Policy Debate, 71.
[151] Svetlicinii, 'The Interactions of Competition Law and Investment Law: The Case of Chinese State-Owned Enterprises and EU Merger Control Regime' (n 78), 2066.
[152] *E.ON/Endesa* (COMP/M.4197) Commission Decision of 26 September 2006 [2006], 25.
[153] See, for reference: *Thomson-CSF/Racal (II)* (COMP/M.1858) Commission Decision of 15 June 2000 [2000]; *General Dynamics/Alvis* (COMP/ M.3418) Commission Decision of 26 May 2004 [2004]; *Finmeccanica/Augusta-Westland* (COMP/M.3559) Commission Decision of 20 September 2004 [2004]; *BAES/AMS* (COMP/M.3720) Commission Decision of 14 March 2005 [2005]; *GE/Smiths Aerospace* (COMP/M.4561) Commission Decision of 23 April 2007 [2007].
[154] *BSCH/A* (IV/M.1616) Commission Decision of 20 July 1999 [1999].
[155] *Secil/Holderbank/Cimpor* (COMP/M.2054) Commission Decision of 22 November 2000 [2000].
[156] Case C-42/01 *Portuguese Republic v Commission* [2004] ECR 2004 I-06079.
[157] *E.ON/Endesa* (n 152), 61.
[158] Case C-196/07 *Commission v Kingdom of Spain* [2008] ECR 2008 I-00041.
[159] *ENEL/Acciona/Endesa* (COMP/M.4685) Commission Decision of 5 December 2007 [2007] OJ C212/2.
[160] Carmen Vázquez, Michel Rivier and Ignacio J Pérez-Arriaga, 'A Market Approach to Long-Term Security of Supply' (2002) 17 IEEE Transactions on Power Systems 349, 349.
[161] *Lyonnaise des Eaux/Northumbrian Water* (IV/M.567) Commission Decision of 21 December 1995 [1995] OJ C11.
[162] *EdF/London Electricity* (IV/M.1346) Commission Decision of 27 January 1999 [1999] OJ C92.

Concerning 'other legitimate interests', the Commission has been found to strictly oppose Member States' potentially protectionist measures that could interfere with fundamental freedoms or contradict merger assessments.[163] For instance, in *UNICREDITO/HVB* the Commission did not accept 'national rules on privatisation' as a legitimate interest,[164] while in *Abertis/Autostrade* it rejected the Italian government's concern on the maintenance of the highway infrastructure as a 'legitimate interest'.[165] When Italy argued for 'national economic interest' as a legitimate interest to block two mergers in the banking sector, as the regulatory authority would have preferred national consolidation of the entities, the Commission—once again—rejected that line of argumentation.[166]

B. *A coherent interpretation of the merger regulation and FDI screening regulation?*

It follows that the Commission's practice and interpretation of 'public security' and 'other legitimate interests' as valid basis to block a merger or adopt further conditions by Member States under art. 21(4) Merger Regulation is particularly restrictive. This is relevant when ascertaining the concept of public security in the FDI Regulation; despite being the core concept in the latter Regulation,[167] no definition is provided for. While a discussion on the meaning of public security in light of broader EU law is beyond the scope of this paper,[168] the absence of a common definition relates to Member States' ultimate competence to determine whether a foreign investment threatens their public order and security. However, recital 36 prescribes that—when FDI constitutes a concentration within the meaning of the Merger Regulation—the grounds for screening of the FDI Regulation and the notion of legitimate interest in art. 21(4) should be interpreted in a coherent manner.[169] At the same time, questions arise as to the proper apprehension and interpretation of the same notion of 'public security' and 'legitimate interests' by Member States when screening FDI. Specifically, the FDI's ownership focus in assessing public security threats seems irreconcilable with the ownership-neutral approach of the Merger Regulation, rendering it impossible to demarcate a coherent assessment between the two instruments. Furthermore, it is unclear whether the jurisprudence on art. 21(4) Merger Regulation could be applicable to Member State's FDI review under 'public security' concerns.[170] That would be particularly difficult given Member States' ultimate competence to approve, condition, or reject a transaction—and the consequent absence of review of such decisions by the CJEU. In such a way, Member States would be able to rely on a broader basis of public security to halt or condition a merger than it would be allowed under the Merger Regulation, even for transactions that fall under the scope of both instruments and do not 'threaten a fundamental interest of society'. This was exemplified by the *VIG/Aegon* merger case:[171] despite being cleared by the Commission, Hungary blocked the transaction as it threatened its public security, leading to infringement proceedings being launched.[172] The possible divergences between the Merger Regulation and FDI Regulation can, as exemplified, lead to legal uncertainty for the conclusions of transactions. Therefore, it is relevant to ascertain how Member States have apprehended the notion of 'public security' in their investment screenings, particularly with reference to Chinese state-owned firms. Notice must be had that, due to the secrecy of the information involved, it is oftentimes not possible to access the official screening decisions—therefore, reference to indirect sources will be used.

In 2021, the Italian government blocked the Chinese company Shenzhen from acquiring LPE, an Italian semiconductor company.[173] The reasoning on the basis of public security was outlined by former Prime Minister Mr. Draghi, namely '*the shortage of semiconductors forced many automotive manufacturers to slow down production last year. This sector is deemed of strategic importance*'.[174] Without prejudice to the fact that the semiconductor sector can be considered as a 'critical input' within the meaning of art. 4(1c) FDI Regulation, the justification provided vaguely resembles the 'security of supply' ground under the Merger Regulation.[175] While the concrete situation on the semiconductor market remains to be ascertained, the notion of public security provided by Italy in the *LPE/Shenzhen* transaction appears to be broader than that allowed under the Merger Regulation. In fact, doubts arise as to the extent of 'security of supply' considerations *vis-à-vis* the necessity to ramp up Italian (and EU) production of semiconductors in an effort to confront China's primacy in the sector. The latter possible motive behind 'security of supply' makes it liable to become a ground resembling 'national economic interest'—and therefore, excluded from the 'public security' merger justification. A further case concerning the semiconductor sector is the German cabinet prohibiting the acquisition of Elmost Semiconductor by Swedish Silex, a subsidiary of a Chinese company, in 2022.[176] The reasoning published states that there is a risk that technology will transfer across borders to buyers from non-EU countries—a liability to Germany's and Europe's technological sovereignty in the semiconductor industry.[177] Much as this argument can

163 Svetlicinii, 'The Interactions of Competition Law and Investment Law: The Case of Chinese State-Owned Enterprises and EU Merger Control Regime' (n 78), 2068.

164 *UNICREDITO/HVB* (COMP/M.3894) Commission Decision of 18 October 2005 [2005].

165 *Abertis/Autostrade* (COMP/M.4249) Commission Decision of 22 September 2006 [2006].

166 *BBVA/BNL* (COMP/M.3768) Commission Decision of 27 April 2005 [2005]; *ABN AMRO/Banca Antonveneta* (COMP/M.3780) Commission Decision of 27 April 2005 [2005]. See, for an overview, Rym Ayadi and Georges Pujals, 'Banking Mergers and Acquisitions in the EU: Overview, Assessment and Prospects' (2005) < https://www.econstor.eu/bitstream/10419/163468/1/suerf-study-2005-3.pdf > accessed 28 March 2025, 56.

167 FDI Regulation (n 7), art. 1.

168 See, for an overview: Jens Velten, *Screening Foreign Direct Investment in the EU Political Rationale, Legal Limitations, Legislative Options* (Springer 2021), 57.

169 FDI Regulation (n 7), recital 36.

170 Wernicke (n 146), 34.

171 *VIG/Aegon* (COMP/M.10494) Commission Decision of 21 February 2022 [2022] OJ C/2024/578.

172 European 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' (*European Commission* 21 February 2022) < https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1258 > accessed 28 March 2025.

173 Giuseppe Fonte, 'Italy vetoes takeover of semiconductor firm by Chinese company Shenzhen' (Reuters 9 April 2021) < https://www.reuters.com/article/idUSL8N2M22LS/> accessed 28 March 2025.

174 la Repubblica, 'Il Governo Draghi Usa per La Prima Volta Il Golden Power: Bloccata l'Acquisizione Cinese Di Un'azienda Lombarda Dei Semiconduttori' (*la Repubblica* 9 April 2021) < https://www.repubblica.it/economia/2021/04/09/news/golden_power_dis-295,721,717/> accessed 28 March 2025.

175 Bruno Paolo Amicarelli, 'I Poteri Speciali Del Governo Di Unità Nazionale: Tra Sicurezza E Integrazione Della Politica Industriale – Lab-IP' (*Laboratorio per l'innovazione pubblica* 5 May 2021) < http://www.lab-ip.net/i-poteri-speciali-del-governo-di-unita-nazionale-tra-sicurezza-e-integrazione-della-politica-industriale/> accessed 28 March 2025.

176 Orion Berg, Tobias Heinrich and Farhad Jalinous, 'Germany Prohibits Sale of Two Companies to Chinese Investors – FDI Scrutiny in Full Swing | White & Case LLP' (*www.whitecase.com* 16 November 2022) < https://www.whitecase.com/insight-alert/germany-prohibits-sale-two-companies-chinese-investors-fdi-scrutiny-full-swing> accessed 28 March 2025.

177 BMWK-Federal Ministry for Economic Affairs and Climate Action, 'Elmos Chip Factory Cannot Be Sold to Chinese Investor – Cabinet Blocks Sale' (*www.bmwk.de* 9 November 2022) < https://www.bmwk.de/Redaktion/EN/Pressemitteilungen/2022/11/20221109-elmos-chip-factory-cannot-be-sold-to-chinese-investor-cabinet-blocks-sale.html#:~:text = The%20federal%20cabinet%20agreed%20today > accessed 28 March 2025.

be considered in line with the EU's open strategic autonomy, it appears not to be a 'genuine and sufficiently serious threat to a fundamental interest of society': while prominence in the semiconductor industry is an essential national economic interest, it may be far-fetched to consider it a fundamental interest of society. Therefore, this decision appears to be taken out of the remits of 'public security' as defined in the Merger Regulation, showing the broader notion encompassed in the FDI Regulation and national screening frameworks.

This apprehension is further warranted by the Italian government's veto of Venigem's acquisition by Syngenta in 2021, the latter being controlled by a Chinese company active in the seeds market. While none of the companies was Italian, Venigem held some Italian subsidiaries—which sufficed to scrutinise the transaction.[178] Although no official statement was provided, information sources point at a necessity to prevent shifting the flow of the seeds market towards China.[179] Following administrative appeals, this case reached the Italian Council of State in 2023—being the country's highest administrative court—that elaborated on the concept of 'public security' also in light of the FDI Regulation. It expressed that such notion is open and hardly capable of definition, giving the government an ample margin of discretion to take measures therein.[180] Due to the characteristics of the administrative act in question, the Court was not capable of intrinsic review[181]—thereby leaving a wide governmental discretion to coin the notion of public security.

Ascertaining from the cases analysed, it appears evident how the notion of 'public security' in the FDI Regulation is broader—in practice—than that enshrined in art. 21(4) Merger Regulation. Member States seem to be willing to forego the narrow approach to public security adopted by the Merger Regulation, and in general by free movement law, in favour of a broader public security notion which protects national sovereignty in critical sectors. Therefore, the FDI Screening Regulation in conjunction with the national investment screenings compensate for the Merger Regulation's restricted possibility for Member States to protect their national interests in merger proceeding, due to the broad understanding of public security.

C. *FDI screening regulation and legal uncertainty*

The different regimes of control under the Merger Regulation and the FDI Regulation are liable to cause legal uncertainty for companies pursuing a merger or acquisition in the EU.[182] Factors contributing to legal uncertainty for businesses lie in the FDI Regulation's level of harmonisation, its different public security notion than the Merger Regulation, the different Member States' system of merger review and FDI screening, and the complex system of cooperation enshrined therein.

Firstly, the FDI Regulation does not entail an all-encompassing harmonisation of Member States' investment screening regimes—as, in fact, approval resides under Member States' sole competence. Therefore, the minimum consideration it provides for the assessment, namely art. 4(1–2), are non-exhaustive.[183] This entails that also transactions not pertaining to the critical sectors identified by the Commission, or not fulfilling the relevant criteria, may be caught by national investment screening frameworks.[184] Hence, companies may not properly ascertain the likelihood of the transaction falling under the screening procedure.

Furthermore, the diverging public security notion under the different Member States' investment screening regimes, the FDI Regulation, and the Merger Regulation does not make it sufficiently foreseeable for companies to determine whether a transaction would be cleared. Companies, therefore, will be uncertain on whether they should invest the time and resources to conclude the transaction. As further evidenced by the *VIG/Aegon* case,[185] the outcome of the Merger Regulation proceedings and national investment screening proceedings may be different—resulting in a transaction being cleared at EU-level but not approved at national level. This renders it complicated for companies to navigate the regulatory obstacles with sufficient certainty, and possibly obtain an *ex-post* remedy for diverging screening results.

In particular, companies not only need to be wary of the different public security interpretations between the two EU Regulations, but also between the different Member States' merger controls and investment screening frameworks. In fact, when transactions do not reach the EU threshold for merger, they may be subject to merger review in more than one Member State and to investment screening in different Member States as well. Such a divergence in the notion of public security, and the absence of specific Commission guidance, increases uncertainty and regulatory complexity.[186] That becomes especially the case when different Member States are more prone to defending their national interests in certain economic sectors with respect to others. In fact, decisions on investment screening are, in most cases, taken at governmental level.[187] Thus, what Member States may consider as relevant for public security may vary from country to country, depending on their specific national interests, and may vary over time. In fact, the political direction of a government may be more or less favourable towards investment from certain countries than others—with Hungary being the main example of a Member State open to Chinese investment.[188]

Furthermore, despite the attempt to coordinate the national investment screening and the Merger Regulation timeframes, the convergence of different proceedings by different institutions is liable to cause significant delays in the approval of a transaction, and in the consequent business decisions for the companies involved.[189] For instance, when a transaction does not require screening under a Member States' framework, other Member States may comment and issue opinions on it up to fifteen

178 Daniel Joseph Giuliano and Francesco Portolano, 'Italian Government Vetoes Acquisition of Italian Seeds Producer by Chinese Multinational Group - Portolano Cavallo' (*portolano.it* 15 November 2021) < https://portolano.it/en/newsletter/portolano-cavallo-inform-corporate/italian-government-vetoes-acquisition-of-italian-seeds-producer-by-chinese-multinational-group> accessed 28 March 2025.

179 Pier Paolo Albricci, 'Verisem, Il Governo Blocca La Vendita a Syngenta (ChemChina)' (*classxhsilkroad.it* 27 October 2021) < https://www.classxhsilkroad.it/news/azienda-finanza/verisem-il-governo-blocca-la-vendita-a-syngenta-chemchina-202,110,271,630,378,450 > accessed 28 March 2025.

180 Consiglio di Stato, Sez. IV, 9/1/2023 n. 289 sull'esercizio dei poteri speciali ex d.l.n. 21/ 2012, 18.2–18.3.

181 De Berti Jacchia Franchini Forlani Studio Legale-Roberto A Jacchia, 'Exercise of Golden Powers by the Italian Government in the "Cyber Sensors" Case against the 2023 Geopolitical Background' (*Lexology* 20 June 2023) < https://www.lexology.com/library/detail.aspx?g = d74bc70d-50b5-4e5c-9a75-c5bdfffc70f8 > accessed 28 March 2025.

182 Burnside and Kidane (n 150), 71.

183 FDI Regulation (n 7), art. 4(1) and Recital 12.

184 Bas de Jong and Wolf Zwartkruis, 'The EU Regulation on Screening of Foreign Direct Investment: A Game Changer?' (2020) 31 European Business Law Review 447, 464.

185 *VIG/Aegon* (n 171).

186 Svetlicinii, *Chinese State Owned Enterprises and EU Merger Control* (n 67), 90.

187 See Bian (n 1), 126–127, 155–156, 176–177, 196–197, 214–215.

188 See, to that effect: James Kynge, 'China Makes Hungary a Model for Diplomatic Ties in Europe' (*www.ft.com* 11 May 2024) < https://www.ft.com/content/5b55ef85-b884-449a-8ccc-c9273cc5e9ff > accessed 28 March 2025.

189 Wernicke (n 146), 37.

months following the merger or acquisition. This would possibly require national authorities to reconsider, thereby exposing firms to future uncertainties.[190] That becomes altogether more problematic as the FDI Regulation identifies FDI as requiring a 'direct and lasting link' in the investment. While a discussion on the notion is beyond the scope of the paper, the different national screening thresholds determining when an investment is 'direct and lasting' are likely to decrease legal certainty.[191] The insecurity over the outcome of FDI Screening results in cautiousness in business behaviour, which is evidenced by the high number of notified transaction—including many not requiring notification.[192] In 2023, in fact, only 1% of the notified transactions were blocked by Member States.[193]

From such an analysis, it appears that the FDI Regulation positively complements the Merger Regulation in addressing state-owned enterprises' ownership and financing, which the latter fails to address. However, the interactions between the FDI Regulation and the Merger Regulation, in particular the different notions of public security and the differential treatment of public security between Member States, appear to create legal uncertainty for non-EU companies pursuing a merger or acquisition in the EU. This issue may ultimately decrease the inflow of FDI, particularly as mergers and acquisitions, in the EU.

6. Conclusions

This paper has explored the interrelations between the Merger Regulation, Foreign Subsidies Regulation, and FDI Screening Regulation, especially concerning their impact on mergers and acquisitions. The adoption of the two new instruments occurred in a context of global increasing regulatory scrutiny on FDI, due to rising concerns on foreign control of strategic sectors. Specifically for the EU, the augmented inflow of Chinese FDI and the subsidisation of its state-owned firms have been a motive for concern. While incoming FDI is generally associated with economic growth, Member States are increasingly wary of the security implications of Chinese state-owned firms controlling particularly critical sectors, and the anti-competitive effect of their subsidies.

Against such backdrop, the Merger Regulation does not suffice to address the concerns for the internal market arising out of state-owned firms' mergers and acquisitions. In fact, the Commission's treatment of Chinese state-owned firms under the Merger Regulation focusses on establishing whether they are a 'single economic unit', for jurisdictional and substantive assessment purposes. However, due to the Merger Regulation's ownership-neutrality the Commission has been indecisive in determining the level of control that China exerts on its state-owned firms. Consequently, it has failed to consider the undue advantage that Chinese firms have due to subsidisation. The Foreign Subsidies Regulation, instead, completely changes the assessment's paradigm, shifting from determining a 'single economic unit' to assessing the 'financial contributions' as part of a concentration review. This change positively complements the Merger Regulation's deficiency in treating Chinese state-owned firms due to its ownership-neutrality. However, the adoption of the Foreign Subsidies Regulation is also liable to increase legal uncertainty for companies pursuing mergers or acquisition in the EU: the increased costs of proceedings and the lack of clarity on the Regulation's interpretation leads to uncertainty, which would result in cautious business behaviour and adoption of EU standards by non-EU firms.

Ownership-neutrality in the Commission's merger assessment is also problematic for Member States' public security concerns. In fact, the Merger Regulation has limited grounds to include Member States' individual public interest under art. 21(4). Such limitation, coupled with the growing FDI in strategic sectors, does not allow Member States to fully consider a firm's ownership as a relevant criterion in merger assessment. That paradigm is reversed in the FDI Regulation, which identifies ownership of the firm pursuing FDI as a relevant criterion. Member States' exclusive competence to halt a transaction under the FDI Regulation allows them to apply an interpretation of public security which, in practice, is broader than public security under art. 21(4) of the Merger Regulation. While the FDI Regulation positively complements the Merger Regulation's failure to sufficiently protect Member States' national interest, it may be liable to increase legal uncertainty for businesses. In fact, the diverging notions of public security, the interactions between national merger and investment screening thresholds, and the political component of public security do not allow companies to sufficiently foresee whether a transaction will be cleared.

The increased regulatory scrutiny over mergers and acquisitions with non-EU entities is part of a global stepping up of FDI and subsidies defences, emerged as a response to China's assertive economic policy. While the Foreign Subsidies Regulation and the FDI Regulation address firm subsidisation and ownership—which are not foreseen by the Merger Regulation—they increase regulatory scrutiny, transaction costs, and ultimately legal uncertainty for businesses. It remains to be seen whether such lack of clarity will cause a decrease in FDI inflow to the EU, especially from China. However, the increased burden will affect all companies, also from partner countries, pursuing a merger or acquisition in the EU. Further Commission and Member States' practice will reveal in-depth the legal effects of the interrelations between the Merger Regulation, Foreign Subsidies Regulation, and FDI Regulation. In the meantime, the EU should be wary to observe whether and how this regulatory change affects investments in the EU, and ultimately economic growth—and further analyse how to balance FDI's positive and negative effects, including environmental and security concerns.

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190 FDI Regulation (n 7), art. 7(8); Svetlicinii, *Chinese State Owned Enterprises and EU Merger Control* (n 67), 95.
191 de Jong (n 29), 2–4.
192 Burnside and Kidane (n 150), 73.
193 Report from the Commission to the European Parliament and the Council - Third Annual Report on the screening of foreign direct investments into the Union [2023] COM (2023) 590 final, 14.

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