

Foreign Direct Investment Screening Mechanisms in Europe and Beyond: Navigating Uncharted Territory

Editorial Comments

Pim Jansen*

1 Introduction

It is with great pleasure that I present this Special Issue of the *Erasmus Law Review*, focusing on Foreign Direct Investment (FDI) screening mechanisms in Europe and beyond.

The genesis of this issue lies in the growing concern over undesirable economic dependencies and strategic motivations behind acquisitions of control in undertakings within the Western hemisphere.¹ The global economic crisis of 2008 marked a significant turning point, and the COVID-19 pandemic further underscored the vulnerabilities inherent in our global supply chains. As a consequence, foreign investments, especially in sectors perceived vital to national security and public health, have undergone a re-evaluation. Geopolitical frictions, such as those between the United States and China, have further propelled the perceived need for FDI screening. The advent of digital technologies and data-centric industries has introduced new complexities. Control over data and technology infrastructure has become inextricably tied to national security, prompting more rigorous scrutiny of foreign investments in these sectors.

The call for articles for this Special Issue invited scholars and practitioners from diverse legal disciplines and countries to ponder upon a wide range of topics. The response was promising, and the submissions received were of exceptional quality. After a thorough selection and editing process, I am delighted to be able to publish six articles that can be broadly classified into three categories: national perspectives, implications for cybersecurity and international legal constraints.

* Pim Jansen is Associate Professor 'Innovation of Public Law' at Erasmus School of Law and a Senior Associate Lawyer at Van Doorne.

1 See also P. Jansen and W. Devroe, 'Industrial Policy, Competition Policy and Strategic Autonomy', in J.-C. Defraigne, J. Wouters, E. Traversa & D. Zurstrassen (eds.), *EU Industrial Policy in the Multipolar Economy* (2022) 80, at 80-86.

Of course, we had to make concessions, as FDI screening touches upon so many interesting topics and legal domains. However, this is not a drawback, but rather an opportunity for continued exploration and research in this captivating field for years to come.

Another notable omission in the special issue is the discussion on the economic benefits or political desirability of investment screening processes. As Delvoie and Fornoville insightfully articulated in their article:

[o]ne may lament the fact that we are now living in a world in which this new kind of protectionism is considered the reasonable thing to do, and that the surely significant economic costs are considered worth the price to pay, but this article is not the forum for that.

Not all would agree on that, by the way. In their recent article on 'Naïve no more: Foreign direct investment screening in the European Union', Bauerle Danzman and Meunier argue that:

[Investment Screening Mechanisms (ISMs)] have not been designed as protectionist instruments, even if they could be captured as such by politicians. On the contrary, given the potential for 'coercive' capital to undermine democratic institutions, European integration and economic liberalism through corruption, economic coercion and trade-distorting state aid, narrowly scoped investment screening may be necessary to prevent full-throated economic protectionism.²

Bauerle Danzman and Meunier's viewpoint resonates with me due to its emphasis on the crucial role of safeguards in preserving the stability and integrity of both economic and political systems. They propose that ISMs are not intrinsically protectionist. Instead, they serve as essential counterbalances, providing a line of defence against potential threats, thereby ensuring the health and resilience of these systems.

2 S. Bauerle Danzman and S. Meunier, 'Naïve No More: Foreign Direct Investment Screening in the European Union', 14(S3) *Global Policy*, London School of Economics and Political Science, 40, at 48 (2023).

Let me first build a metaphor to better understand the complexities and dynamics of FDI screening within the three categories before diving into the contents of the articles. Consider the world to be a big ocean, with each country depicted as an isolated island. These islands' bedrock, akin to national interests, provides a strong and secure base amidst the ebb and flow of global politics. The ports, which reflect the islands' economic openness, serve as the islands' interface with the surrounding oceans, accepting incoming waves of international investment via ships. The island's flora and fauna, which represent the data and technology infrastructure, are precious resources that fuel the islands' growth and prosperity. The population of the island, as well as its rules and regulations, symbolise the political structure and the laws of the land. Consider foreign entities to be ships approaching the island. These ships may carry useful trade products, fresh ideas and technologies that will help the island's prosperity. They may, however, bring exotic species, diseases or even malevolent intentions, which may upset the island's ecosystem and the harmony of its residents. In this scenario, the FDI screening processes serve as the island's pilot services, safely guiding certain ships to port while leaving others at sea.

2 National Perspectives

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Three pieces address the first theme, national perspectives. 'FDI Screening in Belgium: It Is Complicated' by Delvoie and Fornoville gives a timely and extensive review of Belgium's newly implemented FDI screening mechanism. Their work highlights the difficulties of adopting such mechanisms in countries with complex political and legal institutions. Belgium's political difficulties serve as a microcosm of the worldwide FDI environment, where varied political, economic and legal systems interact in complex ways.

In our island metaphor, Belgium can be seen as an island with a complex network of ports, each representing different political and legal structures. The introduction of an FDI screening mechanism is like establishing a pilot service in this multifaceted harbour system. The pilot service's task is not only to guide the ships (foreign investments) safely to the right port but also to navigate the intricate waterways that are shaped by the island's complex political and legal landscape. This requires a deep understanding of the local conditions and careful manoeuvring to ensure that the incoming ships do not disrupt the delicate balance of the island's ecosystem. The complexities of Belgium's political landscape, therefore, add an extra layer of challenge to the pilot service, making the task of guiding the ships safely to port a delicate and intricate process.

The article by Jalinous and Sensenig, in turn, offers a practitioner's perspective on the evolution of the Committee on Foreign Investment in the United States (CFIUS) and its interpretation of 'national security'. It pro-

vides valuable insights for European (legal) scholars into the evolution and functioning of the CFIUS, a key player in the regulation of FDI in the United States. The authors' detailed exploration of CFIUS's expanding jurisdiction and authority, particularly in areas such as technology, infrastructure, data and real estate, offers a comprehensive understanding of the U.S. approach to FDI screening.

The authors' exploration of CFIUS' evolving concept of 'national security' and its application to a wide range of sectors can educate European researchers, politicians and practitioners about the intricacies and difficulty of balancing economic openness with national security concerns. The article also discusses possible future extensions of CFIUS's involvement into fields such as higher education, agriculture and genetic data. These findings can assist European scholars in anticipating future areas of concern in their respective jurisdictions and informing the evolution of FDI screening processes. Furthermore, the authors' examination of the legal intricacies connected with CFIUS's role, as well as the requirement for transactional parties to be aware of its fluctuating interpretations, emphasises the significance of legal clarity and predictability in FDI screening systems.

In the context of our island analogy, the United States can be seen as a large island with a well-established and sophisticated network of ports, each representing different sectors of the economy. The introduction and evolution of the CFIUS can be likened to the development of a highly skilled pilot service. This pilot service does not just guide any ship (foreign investment) to any port (sector). Instead, it has the authority to determine which ships can dock at which ports based on a comprehensive understanding of 'national security'. This includes a broad range of sectors, from technology and infrastructure to data and real estate. The pilot service is continually evolving, expanding its jurisdiction and authority to cover more ports (sectors) and adjusting its strategies to effectively guide the ships (foreign investments) in the ever-changing tides of global politics and economy. The U.S. pilot service's role is not static but dynamic, adapting to the evolving interpretations of 'national security' and the emerging challenges in the global investment landscape. This highlights the importance of legal clarity and predictability in the operation of the pilot service, ensuring that the ships (foreign investors) are well-informed about the navigation rules and can safely reach their destinations (investment sectors).

Cheng Bian's article provides a critical examination of China's national security review of foreign investment, offering insights into one of the world's largest foreign markets. The article discusses ambiguities in China's review process, dividing them into strategic and procedural categories, and offers recommendations for future reform. In our island metaphor, China can be seen as a vast island with a rich array of ports, each representing different sectors of the economy. The introduction of China's national security review of foreign investment

can be likened to the establishment of a pilot service that is tasked with guiding foreign ships (investments) to the appropriate ports (sectors). However, the pilot service in China is operating in a complex and, sometimes, ambiguous environment. The strategic and procedural uncertainties in China's review process can be likened to a foggy weather condition that sometimes obscures the visibility of the pilot service. This fog represents the ambiguities that foreign ships (investors) encounter when they approach the island, making the navigation process challenging. Bian's recommendations for future reform, including more institutional clarity, streamlined review time frames, increased transparency, the possibility of judicial redress and the introduction of extraterritorial application to the national security review, can be seen as efforts to clear the fog. It is akin to installing advanced navigation systems and clear signposts to guide the incoming ships, making the navigation rules clearer and the journey safer. This understanding of China's approach can help European scholars and policymakers anticipate potential challenges and opportunities in their interactions with China and inform their own FDI screening mechanisms. Moreover, this understanding can contribute to more effective multilateral discussions on FDI screening, akin to islands coming together to establish common navigation rules and cooperation mechanisms, promoting greater international cooperation in this critical area.

3 Cybersecurity Implications

In the article 'Investment Screening Against Strategic Cyber Risks,' Wouter Scherpenisse, Evert Stamhuis and Alberto Quintavalla emphasise the need for an integrated regulatory response to the interconnected nature of digital networks. They highlight a critical gap in current legislation, which predominantly focuses on individual companies and overlooks the potential impact of supply chains and network effects.

Drawing upon our island analogy, the digital networks can be seen as the intricate web of life beneath the surface of the island, connecting all its flora and fauna. Just as the health of an island's ecosystem depends on the balance and interaction of all its elements, the security of a digital network depends on the integrity and interaction of all its components. The authors' emphasis on the interconnected nature of digital networks and the potential impact of supply chains and network effects is akin to recognising the importance of every species and their interactions within the island's ecosystem.

The authors commend the updated Network and Information Security Directive (NIS2 Directive) as an important step towards fostering a resilient EU digital economy. The expansion of the scope of entities covered by the NIS2 Directive addresses key vulnerabilities and strengthens minimum-security measures to counter cyber risks effectively. This is akin to expanding the island's conservation efforts to cover more species and

habitats, thereby strengthening the island's overall resilience.

The authors underscore the need for proactive risk management and the implementation of immediate termination clauses upon detection of potential risks. However, the authors identify a notable gap in the current FDI regime, stressing the need to incorporate supply chain security measures for a comprehensive risk management strategy.

In conclusion, the study underscores the pressing need for an integrated approach to tackle strategic cyber risks. This can be likened to the need for a holistic approach to conservation on the island, taking into account all aspects of the ecosystem and the interactions among them. Through comprehensive legislation, proactive risk management and robust supply chain security measures, the EU can bolster its digital resilience and effectively respond to the ever-evolving cyber landscape, just as the island can maintain its ecological balance and resilience in the face of changing environmental conditions.

4 International Legal Dimension

The articles 'A Legal Comparative Approach Towards the Screening of Outbound FDI' by Zamani and 'Sovereignty and Security: Constraints on Foreign Investment Control Arising from International Law' by Geraets and Gargne both delve into the complex landscape of FDI regulation, albeit from different angles.

Zamani's article underscores the importance of screening outbound FDI to prevent undesirable knowledge transfer and the relocation of production of vital goods and services to third countries. He argues that the EU should adopt a mechanism similar to the U.S. National Critical Capabilities Defense Act (NCCDA), which screens outbound FDI. Zamani suggests that the proposed EU mechanism should combine *ex-ante* and *ex-officio* screening with a notification obligation for parties involved in the transaction. This would ensure that all FDI transactions can be screened, contributing to legal certainty and preventing irreversible consequences. He further proposes that the mechanism should focus on FDI transactions in specific high-risk countries and a limited number of sectors, thereby reducing the authorities' workload and preventing unnecessary and disproportionate restriction of outbound FDI. Zamani's article provides a comprehensive analysis of the NCCDA and offers valuable insights into how a similar mechanism could be implemented in the EU.

In our island metaphor, Zamani's article can be seen as advocating for the establishment of a pilot service that not only guides incoming ships (inbound FDI) to the right ports (sectors) but also monitors the ships leaving the island (outbound FDI). He argues that this outbound pilot service is crucial to prevent the island's valuable

resources (knowledge and vital goods and services) from being transferred to other islands, especially those that might pose a risk to the island's stability and security. The pilot service would be equipped with a notification system, alerting the island's inhabitants about the departure of any ship, thereby ensuring transparency and legal certainty. The pilot service would focus its scrutiny on ships heading towards high-risk islands and carrying goods from specific sectors, thereby optimising its resources and preventing unnecessary restrictions on the island's trade activities.

On the other hand, Geraets and Gargne's article explores the potential conflicts between national security considerations and international obligations when countries implement ISMs. They analyse the implications of these mechanisms under the General Agreement on Trade in Services (GATS) and International Investment Agreements (IIAs). The authors highlight that while international law generally does not restrict the introduction of ISMs, conflicts may arise with specific commitments under GATS and IIAs. In our island metaphor, Geraets and Gargne's article explores the potential conflicts that might arise when the island's pilot service (ISM) operates within a larger archipelago (international community) bound by shared rules and agreements (GATS and IIAs). They highlight that while the pilot service is necessary for the island's security, its operation should not violate the island's commitments to the archipelago. To navigate these potential conflicts, they suggest several strategies for states to shield their ISMs from the application of IIAs. These include listing ISMs as Nonconforming Measures (NCMs) in the treaty, excluding specific sectors from the scope of the IIA, excluding ISMs from the scope of Investor-State Dispute Settlement (ISDS) and invoking General or Security Exceptions.

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5 Concluding Remarks

The *Erasmus Law Review's* special issue on FDI screening in Europe and beyond offers insightful perspectives on this complex legal landscape, using the analogy of nations as islands in a vast ocean, with FDI as ships and screening mechanisms serve as the island's pilot services.

The development of FDI screening mechanisms is a dynamic process, mirroring the ever-changing currents of global power, economic interdependence and technological advancements. Much like the pilot services in our analogy, these mechanisms are not static but are constantly adapting to the shifting tides of geopolitical, economic and technological changes.

Each contribution to this issue offers a unique perspective, adding depth and nuance to our understanding of FDI screening. As we navigate the intricate waters of FDI screening, these insightful and thought-provoking contributions serve as valuable navigational aids, guiding us through the complexities and challenges of this

field. It is my sincere hope that readers will find these contributions not only informative but also engaging.