FDI SCREENING IN EUROPE: TIME FOR REVIEW?

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After around two years (or more) of intense activity in the emergence and upgrading of national foreign direct investment ("FDI") regimes in Europe, certain of the competent FDI authorities and ministries are becoming more established in their approach. In particular, the implementation of FDI review powers and enforcement practices are beginning to be revealed in the first reported annual statistics, including a report published in November 2021 by the European Commission upon one year of full application of the EU FDI Regulation ((EU) 2019/452). The first judicial challenges to FDI laws are also being heard through the courts or other procedural and regulatory interactions. Alongside this, the refinement of FDI laws and the addition of new FDI regimes continues among the European Union ("EU") Member States, within in the European Economic Area and across the wider European continent. In an effort to take stock, this article reports on the key trends and considers where the boundaries of national security or interest might lie in the context of the EU treaties and law.

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I. INTRODUCTION

The emergence, at pace, and broadening of foreign direct investment ("FDI") regulation across Europe (and in other jurisdictions globally) is widely known. National FDI screening procedures are now established in 18[2] of the Member States of the EU. Similarly, the United Kingdom ("UK") implemented its National Security and Investment Act ("NSIA") as of January 4, 2022. Accordingly, the assessment of (and compliance with) FDI filing requirements have become a comparatively routine considerations for M&A and other transactions.

As the European Commission and Member States begin to report on the implementation of their FDI screening regimes and as more decisional practice emerges, it becomes possible to reflect with (hopefully) greater clarity on the implications of FDI screening in practice. One trend is clear – that is, that an overwhelming majority of FDI filings are cleared quickly, and the "true" national security interest is much narrower than the scope of current filing requirements.

A picture emerges of FDI laws as, among other important purposes, an information gathering tool for national governments and local competent authorities with regard to investment in key sectors of their economies.[3] The breadth of FDI filing requirements is clearly influenced by the range and complexity of potential national security risks within modern economies. In addition, FDI screening tools have an important function to best position national governments to act proactively to address national security concerns before they can manifest.

For many investors, in practice, FDI filing requirements frequently present a timing hurdle to their investment plans and a compliance requirement, but without many other consequences. Taking one viewpoint, FDI authorities could be described acting in a fairly targeted manner in the application of their FDI powers, while clearly also being willing to use the significant powers available in the limited number of cases in which they see cause to do so. At the same time, some challenge to the scope and application of FDI powers is revealed from recent FDI matters in the public domain and the locus of national security interest is beginning to be defined.

II. FDI REGULATION REMAINS DYNAMIC

The adoption of the EU FDI Regulation[4] in 2019, and which came into force in October 2020, was an important steppingstone in the renewal and further development of FDI laws across Europe. The EU FDI Regulation provided a framework of basic requirements for Member State FDI regimes to operate in compliance with EU law. It also introduced a mechanism for EU-level information sharing and coordination in FDI.

The European Commission, while holding few powers of its own to tackle FDI, has actively encouraged Member States to adopt and implement FDI screening measures. The Commission openly addressed Member States regarding the importance of FDI powers in March 2020 at the outbreak of the COVID-19 pandemic. More recently, the invasion of Ukraine by the Russian Federation has provided further impetus for FDI law-making.

Following these important communications from the Commission, Member States have heeded the call to action and new FDI laws were adopted in the Netherlands and Romania in April 2022, while France, Italy and Austria continue to evaluate the scope of their FDI regimes. With FDI laws in contemplation in Belgium, Sweden, Portugal, and Ireland (among other countries, including EU neighbour Switzerland), FDI regulation looks set to continue evolving for some time yet to come. The European Commission has also launched its own comprehensive study to ensure that the EU Member State FDI screening mechanisms are effective and efficient.

III. FDI REGULATION IN PRACTICE: DATA ON FDI SCREENING AND DECISIONMAKING

The introduction of the EU cooperation mechanism was intended to assist the European Commission with one of the main purposes of their FDI screening regime — information gathering. This objective is clear as the EU FDI Regulation imposes notification and information requirements

2 Most recently, the Netherlands adopted a new FDI screening bill, Investments, Mergers and Acquisitions Security Screening Bill (Wet veiligheidstoets investeringen, fusies en overnames), after the majority of MPs voted in favour of the proposed legislation on April 19, 2022 and the Dutch Senate added its approval on May 22, 2022. Upon implementation of the law, the Netherlands will have a general FDI screening regime, as well as pre-existing regime relating to telecommunications.

3 Gathering additional data on FDI in Europe was among the policy objectives supporting the case for the EU FDI Regulation. Study and Commission Staff Working Document (SWD(2019) 108 final), March 13, 2019: https://trade.ec.europa.eu/doclib/docs/2019/march/tradoc_157724.pdf.

4 Regulation (EU) 2019/452 of the European Parliament and of the Council of March 19, 2019 establishing a framework for the screening of foreign direct investments into the Union, Accessible here: https://eur-lex.europa.eu/eli/reg/2019/452/oj.

under the cooperation mechanism as well as annual reporting obligations on Member States.[5] In particular, the annual reports must provide aggregated information on all the foreign direct investments that took place within the Member States' territory, as well as the application of their FDI rules. This is subsequently consolidated by the European Commission and published by way of an annual FDI report.[6]

In line with this reporting obligation, on November 23, 2021, the European Commission published its first annual report on the implementation of the EU FDI Regulation[7] — this was shortly followed up with the publication of individual Member State reports. Ultimately, the collected information and reports will feed into an in-depth assessment on the effectiveness of the EU FDI Regulation.[8]

In practice, the data indicates clearly that the number of FDI filings continue to rise in many jurisdictions. In France, there was a 31 percent increase in transactions filed for FDI screening in 2021 compared to 2020.[9] The number of German FDI cases almost doubled from 160 cases in 2020 to 306 cases in 2021.[10] Further, in the first year since the introduction of the Austria FDI control regime in July 2020, the Austrian government has reviewed a total of 50 requests for FDI approval, with a further 20 pending applications. Prior to the implementation of a comprehensive FDI screening regime, the Austrian government reviewed only 25 proceedings in the previous eight years.[11]

At the EU level, since the implementation of the EU cooperation mechanism in October 2020, there have been a total of 265 transactions notified to the European Commission ("Commission") between October 11, 2020 to June 30, 2021.[12] EU Member States have also expressed support for EU cooperation in relation to FDI, describing the Regulation *"very useful instrument" and noting that "the exchange of information allows Member States to detect potential risks from an FDI transaction at an earlier stage."*[13] Similar themes and comments are mentioned in the French FDI Report for 2021.[14]

The imperative to submit FDI filings is driven by the serious penalties that can be imposed within many FDI regimes for a failure to meet mandatory filing requirements.[15] Accordingly, there are plentiful anecdotal reports of transaction parties submitting FDI filings on a voluntary or precautionary basis, e.g. to obtain legal certainty (through holding a clearance decision) or where the application of filing requirements (such as sector definitions) is unclear. Having filed, transaction parties then encounter FDI authorities that are generally on an inquisitive footing and prepared to request information to obtain a clear picture of a proposed transaction before rendering any decision.

Beyond these factors and temporal hurdles, however, the available data indicates that the vast majority of transactions are cleared by national FDI authorities at an early stage and usually during phase one of the review process. In Germany and for the year 2021, 87 percent of all FDI filings were cleared by the BMWK within an initial two-month period, and only 13 percent of FDI reviews lasted longer than two-months.[16] Similarly, as part of the EU cooperation mechanism, 80 percent of the total 265 notifications submitted to the Commission were closed in just 15

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5 See e.g. Article 6 and 7 of the EU FDI Regulation with respect to the notification and information requirements required under the cooperation mechanism and Article 5 of the EU FDI Regulation for the annual reporting requirements.

6 Recital 32 and Art. 5, the EU FDI Regulation (2019/452).

7 European Commission, *First Annual Report on the screening of foreign direct investments into the Union* (COM(2021) 714), November 23, 2021, Accessible here: https://trade.ec.europa.eu/doclib/docs/2021/november/tradoc_159935.pdf.

8 Recitals 34 and Art. 15, the EU FDI Regulation (2019/452): The evaluation will take place by October 12, 2023 and every five years thereafter.

9 French Ministry of Economy, *Le contrôle des investissements étrangers en France en 2021*, 17 March 2022, Accessible in French here: https://www.tresor.economie.gouv.fr/Articles/9aa76183-24a8-49ba-9466-179c5b29f99c/files/47b9b032-3d2b-4779-8327-15d3400045ab.

10 German Federal Ministry for Economic Affairs and Climate Action ("BMWK"), Investment Screening in Germany: Facts & Figures, March 28, 2022, p. 9, Accessible here: https://www.bmwk.de/Redaktion/EN/Publikationen/Aussenwirtschaft/investment-screening-in-germany-facts-figures.pdf?__blob=publicationFile&v=6.

11 Federal Ministry Republic of Austria ("BMDW"), *Erster Tätigkeitsbericht der Investitionskontrolle*, February 10, 2022, Accessible in German here: https://www.bmdw.gv.at/dam/jcr:ae3779c1-76dd-442f-a3a0-1427649953ff/Investitionskontrolle_T%C3%A4tigkeitsbericht 2020_barrierefrei_v2.pdf.

12 European Commission, *First Annual Report on the screening of foreign direct investments into the Union* (COM(2021) 714), November 23, 2021, p. 12, Accessible here: https://trade.ec.europa.eu/doclib/docs/2021/november/tradoc_159935.pdf.

13 *Ibid*. p. 16.

14 French Ministry of Economy, *Le contrôle des investissements étrangers en France en 2021*, March 17, 2022, Accessible in French here: https://www.tresor.economie.gouv.fr/Articles/9aa76183-24a8-49ba-9466-179c5b29f99c/files/47b9b032-3d2b-4779-8327-15d3400045ab.

15 For example, under the UK NSIA, a business that fails to comply with mandatory filing requirements could be subject to the higher of 5 percent of the total value of the turnover of the business or £10 million.

16 BMWK, Investment Screening in Germany: Facts & Figures, March 28, 2022, p. 7, Accessible here: https://www.bmwk.de/Redaktion/EN/Publikationen/Aussenwirtschaft/investment-screening-in-germany-facts-figures.pdf?__blob=publicationFile&v=6.

days, within the first phase of its review process.[17] Since the introduction of the FDI control regime in Austria in July 2020, only two transactions were found to have raised national security issues that were subsequently addressed with remedies — no transactions have been blocked.[18] In Germany, measures, including prohibitions, conditions, public contracts and administrative requirements, were only taken in 2 percent of the FDI transactions reviewed in 2021 (although certain transactions subject to filings submitted during 2021 have been prohibited or the review period has elapsed during 2022, suggesting that the proportion of conditioned transactions may be higher overall).

At the same time, however it must be acknowledged that recently published FDI filing statistics for France stand a degree apart. The French Ministry of Economy approved 124 transactions for which FDI filings were submitted in 2021, however, in 67 of those transactions conditions were attached to the clearance decision.[19] More particularly, half of the FDI decisions relating to biotechnology sector provided for conditional clearance.[20] While the French FDI report remains silent on the reasons for its interventionist manner, there may be factors influencing this approach.

Not least, that France offers a filing pathway through which investors can seek guidance and request confirmation of whether their transaction is subject to FDI laws. As such, there is a procedural filter for filings that are out of scope of FDI laws, and the remainder of filings reviewed on substantive basis for FDI concerns are perhaps proportionately more likely to attach national security considerations.

In addition, there are reports that the mitigation requested by the French FDI authority may be comparatively light in some instances, for example, requiring to commitments for the maintenance of supply and requirements to notify any future changes of control or in business activities. Other countries may be achieving the later objective but by other means. For example, in Romania and Italy, FDI laws are being expanded to require notice and FDI clearance for a range of business developments (e.g. expansion into new activities/business units) relating to sensitive entities, and not just M&A events.[21]

IV. WHAT DOES NATIONAL SECURITY (AND OTHER NATIONAL/PUBLIC INTEREST) MEAN IN THE FDI CONTEXT?

Against this background, FDI filing requirements can be regarded as having fairly broad capture and from which FDI authorities must then discern the transactions, targets and investors of most interest. Many FDI cases will continue to turn on their own facts and circumstances — relevant to targets big and small and to investors allied and foreign (and sometimes even domestic)[22] — and it remains challenging to transfer precedents, which are also usually confidential, from one transaction to another. Nonetheless, it appears timely to reflect upon the overall legal landscape in which FDI laws exist, especially in Europe, and to consider the cases in which the scope of FDI review is being questioned.

A. "Legitimate Interest" and FDI Screening

The Treaty on the Functioning of the European Union ("TFEU" or "Treaty") establishes a number of fundamental freedoms underpinning the European project. Article 63 TFEU provides for the free movement of capital within the EU and extends this freedom to movements of capital from within the EU to third countries, and from third countries into the EU. Article 49 TFEU also protects the freedom of establishment of nationals of a Member State in another Member State.

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17 European Commission, *First Annual Report on the screening of foreign direct investments into the Union*, November 23, 2021, p. 12, Accessible here: https://trade.ec.europa.eu/doclib/docs/2021/november/tradoc_159935.pdf.

18 BMDW, *Erster Tätigkeitsbericht der Investitionskontrolle*, February 10, 2022, Accessible in German here: https://www.bmdw.gv.at/dam/jcr:ae3779c1-76dd-442f-a3a0-1427649953ff/Investitionskontrolle_T%C3%A4tigkeitsbericht 2020_barrierefrei_v2.pdf.

19 French Ministry of Economy, *Le contrôle des investissements étrangers en France en 2021*, March 17, 2022, Accessible in French here: https://www.tresor.economie.gouv.fr/Articles/9aa76183-24a8-49ba-9466-179c5b29f99c/files/47b9b032-3d2b-4779-8327-15d3400045ab.

20 *Ibid.*

21 For example, in Italy, in addition to M&A events, the following transactions would also fall within the scope of the FDI rules: Resolutions or transactions that lead to changes in the ownership, control or availability of the assets e.g. expansion, dissolution, modification of the company's purpose, transfer of subsidiaries or registered offices abroad, transfer of rights of use to assets etc.

22 The UK NSIA applies to all investors, including those from the UK. The new general FDI law in the Netherlands is understood to have similar scope of application (i.e. applicable to domestic investors).

The circumstances in which Member States can derogate from these fundamental freedoms are limited and have been subject to judicial scrutiny over time, including in the context of the EU Merger Regulation ("EUMR").[23] Specifically, EU Member States are permitted to take *"appropriate measures"* to protect their *"legitimate interests,"* only if these measures are compatible with EU law.[24] In relation to the EUMR, this means that Member States do not have to defer entirely to the competence of the European Commission to review the competition aspects of an investment or transaction with an EU dimension (Article 21, EUMR) if there are *"legitimate interests"* of the Member State at stake that create an overriding national interest.

The Court of Justice of the European Union ("ECJ") has set the bar high, applying narrow interpretation of what constitutes *"legitimate interests"* albeit alongside a broader interpretation of *"appropriate measures."*[25] For example, the grounds of national security or public order can be relied on to curtail free movement of capital if there is a genuine and sufficiently serious threat to a fundamental interest of society, but the restriction of freedom(s) will be closely circumscribed (e.g. to ensure a minimum supply or continuity of services in the public interest or for strategic services such as post, petroleum, electricity and telecommunications[26]). Even in cases involving these key sectors, any legislation relied upon must set out objective and non-discriminatory criteria for the application of the restrictive measure, ensuring legal certainty.[27] The ECJ has also determined that legitimate interests should not be purely economic.[28]

The Commission has previously stipulated four conditions for measures that restrict fundamental Treaty freedoms such as the free movement of capital and the freedom of establishment.[29] Measures such as prior administrative approval or authorisation procedures must: (1) be applied in a non-arbitrary and non-discriminatory manner; (2) be suitable and proportionate (justified by imperative requirements) to the objective pursued; (3) provide legal certainty, by being based on objective, non-discriminatory criteria known in advance to the undertakings concerned, with access to a legal remedy; and (4) follow transparent procedures, giving clear indication of specific, objective circumstances in which approval will be granted or withheld.[30]

Member State FDI laws and the framework established by the EU FDI Regulation are to be interpreted against this backdrop and pre-existing EU law, including case law. In particular, Recital 36 of the EU FDI Regulation provides that while the screening of foreign investment on the grounds of national security and public order is to be permitted, *"the notion of legitimate interests within the meaning of [the EUMR] should be interpreted in a coherent manner, without prejudice to the assessment of the compatibility of the national measures aimed at protecting those interests with the general principles and other provisions of Union law."* The EU FDI Regulation also supports the principle of legal certainty for investors, by requiring (similar to the EUMR) that Member States to notify the Commission of their existing, newly adopted and/or amended FDI screening measures within 30 days of implementation.[31]

B. Testing the Boundaries of FDI screening and Decision-making

1. FDI Screening and the EUMR

The recent case of *VIG/Aegon*[32] has added to our understanding of legitimate national security and public policy interests, and has allowed the Commission an opportunity to comment on the application of the Treaty principles and of the EUMR, for the first time in the era of the EU FDI Regulation. The case is also illuminating in terms of dynamics between Member States and the Commission in relation to FDI matters, particularly where these intersect with the application of the EUMR.

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23 Council Regulation (EC) No 139/2004 of January 20, 2004 on the control of concentrations between undertakings (the EC Merger Regulation), Official Journal L 24/1, Accessible here: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32004R0139.

24 Article 21(4), EUMR and as cross-referenced in Recital 36, the EU FDI Regulation (2019/452).

25 See e.g. Case C-503/99, Commission v. Belgium, 4 June 2002; Case C-54/99, Église de Scientologie, March 14, 2000.

26 See e.g. Case 367/98, Commission v. Portugal, June 4, 2002.

27 Case 483/99, Commission v. France, June 5, 2002.

28 Case C-463/00, Commission v. Spain, May 13, 2003.

29 See e.g. Commission Communication, *Intra-EU investment in the financial services' sector* (2005/C 293/02), November 25, 2005, Accessible here: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:293:0002:0007:EN:PDF.

30 European Commission, *Communication from the Commission Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation)* (2020/C 99 I/01), March 26, 2020, Accessible here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52020XC0326%2803%29.

31 Article 3(7), the EU FDI Regulation (2019/452).

32 Case M.10494, *VIG / Aegon*.

Aegon, a Dutch insurance company, had agreed in October 2020 to acquire certain insurance, pension fund and asset management businesses of Vienna Insurance Group ("VIG"), including in Hungary. While the European Commission had, in August 2021, unconditionally cleared the transaction on competition grounds under the EUMR, the transaction stalled for several months due to a Hungarian government veto made pursuant to temporary FDI rules. The Minister of the Interior considered that the transaction threatened Hungary's legitimate interest as set out in FDI rules introduced in connection with the COVID-19 pandemic and recently expanded to cover transactions in the insurance sector. The European Commission opened an investigation in October 2021 to consider whether Hungary's decision constituted a breach of the EUMR.

Having reviewed the case and in findings published earlier this year,[33] the Commission reasoned that Hungary's veto restricted, without sufficient cause, VIG's right to engage in a cross-border transaction and Hungary had failed to show that the restriction was *"justified, suitable and proportionate."*[34] As such, the Commission deemed the decision to also be incompatible with EU rules on the freedom of establishment (Articles 49-55, TFEU). The Commission expressed *"reasonable doubts"* about whether the veto had been properly aimed at protection Hungary's legitimate interests.[35] In addition, the temporary FDI rules should have been notified to the Commission prior to being implemented. The Commission was also "unclear" how the acquisition could pose a threat to a *"fundamental interest of society,"* given that the transaction parties were both *"well-established EU insurance companies with an existing presence in Hungary."*[36]

Following the publication of the Commission's conclusions, Hungary withdrew its FDI veto on March 18, 2022.[37] Notably, upon closing of the transaction, Hungary acquired a 45 percent interest in the combined business of the Hungarian subsidiaries of VIG and Aegon for consideration of close to €350 million.[38] The revised transaction structure and deal terms had been agreed in the interim and as compromise arrangement between VIG and the Hungarian government.

Leaving aside those eventualities, a key takeaway from the Commission's intervention in *VIG/Aegon*, is that it does not appear necessarily to depart from precedent relating to TFEU, the EUMR and Member States' foreign investment screening rules. In *BSCH/A. Champalimaud*, decided in 1999, Portugal prohibited a transaction with an EU dimension on the basis of a domestic law restricting foreign firms from acquiring more than 20 percent in domestic insurance firms, citing protection of national interests and strategic sectors but without notifying the Commission. The Commission found that Portugal had misapplied predecessor rules to EUMR and ordered suspension of the measures taken.[39] Similar outcomes (and in some cases infringement proceedings) have been taken in other cases brought by the Commission against Portugal,[40] Poland,[41] Italy,[42] and Spain.[43]

What Member States and investors will want to know is that the EU FDI Regulation has not changed the interplay of these different legislative measures and that, despite the extant concerns of the COVID-19 pandemic and the rapid emergence of new or expanded FDI legislation in many Member States, the underlying principles are unchanged. Restrictions on FDI are only permitted where a *"legitimate interest"* is at stake.

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33 European Commission Press Release, *Mergers: Commission preliminarily concludes Hungary breached Article 21 of the EU Merger Regulation by vetoing the acquisition of AEGON's Hungarian subsidiaries by VIG*, January 20, 2022, Accessible here: https://ec.europa.eu/commission/presscorner/detail/en/mex_22_442; European Commission Press release, *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*, February 21, 2022, Accessible here: https://ec.europa.eu/commission/presscorner/detail/en/IP_22_1258.

34 European Commission Press release, *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*, February 21, 2022, Accessible here: https://ec.europa.eu/commission/presscorner/detail/en/IP_22_1258.

35 *Ibid.*

36 *Ibid.*

37 VIG Press Release, *Vienna Insurance Group closes acquisition of Aegon companies in Hungary*, March 23, 2022, Accessible here: https://www.vig.com/en/press/press-releases/detail/vienna-insurance-group-closes-acquisition-of-aegon-companies-in-hungary.html.

38 Aegon Press Release, *VIG reaches agreement with Hungarian state holding Corvinus*, February 16, 2022, Accessible here: https://www.aegon.com/investors/press-releases/2022/vig-reaches-agreement-with-hungarian-state-holding-corvinus/.

39 Case No IV/M.1616, Commission Decision of BSCH / A. Champalimaud, July 20, 1999.

40 Case-42/01, Portugal v. Commission, June 22, 2004.

41 European Commission Press Release, *Mergers: Commission launches procedure against Poland for preventing Unicredit/HVB merger* (IP/06/277), March 8, 2006, Accessible here: https://ec.europa.eu/commission/presscorner/detail/en/IP_06_277; Case M.4125, Unicredit / HVB.

42 European Commission Press Release, *Mergers: Commission welcomes Italy's move to clarify authorisation procedures in toll motorway sector* (IP/07/1119), July 18, 2007, Accessible here: https://ec.europa.eu/commission/presscorner/detail/en/IP_07_1119.

43 Case M.4197, *E.on / Endesa*.

The Commission's investigation in the VIG/Aegon transaction shows that it is willing to test the boundaries of national FDI screening. In its published comments, the Commission emphasised that *VIG/Aegon "affirms the Commission's exclusive competence to examine concentrations with a Union dimension."*[44] As such, the Commission's decision serves as precedent to invoke Article 21 of the EUMR for overturning national FDI measures that it considers at odds with EU law, with the potential to simultaneously curtail the reach of national FDI regimes.

2. FDI Enforcement and Challenges from Investors

Investors at the forefront of FDI screening and facing the increased scope of FDI laws and a significant increase in their filing obligations (as outlined above) have also begun to question and challenge the application of FDI legislation in practice. Companies too are becoming aware of the additional challenges to securing investment and new ownership where FDI laws may apply to their activities. In particular — and while many FDI procedures remain confidential — in Italy, three recent court cases concerning the Italian government's use of its "golden power" rules can be noted in the public domain.

First, the acquisition of Verisem, a vegetable seed producer, by Chinese investor Syngenta, was blocked in October 2021 pursuant to Italy's "golden power" FDI rules. It was suggested that the transaction posed a national security risk and would have shifted the global balance in the control of seeds for the production of vegetables and aromatic herbs to Asia.[45] The parties disagreed. According to Syngenta, which acknowledged a degree of national security risk in connection with the transaction, its proposed undertakings would have been sufficient to ensure that the Italian national strategic interest in Verisem would be protected. As a result, Syngenta launched administrative court proceedings to challenge the decision made by the Italian government. Nonetheless, the Italian court determined that the Italian government's prohibition decision was properly reasoned.[46]

In two other instances, the Italian target companies are understood to have objected to the application of FDI laws to block planned investments or acquisitions. In 2021, LPE, a Milan-based producer of semi-conductor equipment, is understood to have appealed after Rome prevented it from being acquired by Chinese company Shenzhen Invenland Holdings Co Ltd.[47] More recently, Calvi Holdings was determined by FDI authorities to be unique in the steel sector in Italy such that an acquisition by Swiss company Montanstahl was blocked.[48] The Italian courts are reported to have declined to review an appeal by Calvi Holdings on the basis of inadmissibility for lack of interest after Montanstahl walked away from the transaction.[49]

V. LEGAL CERTAINTY IN FDI

It is to be expected that FDI laws will continue to develop, and transaction parties will be well advised to remain alive to monitoring and assessing the potential application of FDI screening to their proposed transactions. FDI rule making has continued in early 2022 (as mentioned) and the GlobalWafers takeover of Siltronic AG[50] is just one indication of the need to plan carefully after the transaction failed to receive FDI clearance in Germany prior to the contractual long-stop deadline for the transaction on January 31, 2022.

For parties looking for additional legal certainty concerning FDI activities, there are mixed signals but there have been some promising signs. Foremostly, for many investors and transactions – perhaps as great as 90 percent - compliance with FDI filing requirements is a matter

44 European Commission Press Release, *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*, February 21, 2022, Accessible here: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1258.

45 Reuters, *Chinese-owned Syngenta appeals Italy's veto of seed producer deal*, January 7, 2022, Accessible here: https://www.reuters.com/markets/deals/chinese-owned-syngenta-appeals-italys-veto-seed-producer-deal-sources-2022-01-07/.

46 Reuters, *Italian court rules veto of Syngenta purchase of seed producer is valid*, April 13, 2022, Accessible here: https://www.reuters.com/business/italian-court-rules-veto-chinese-purchase-seed-producer-is-valid-sources-2022-04-13/.

47 Reuters, *Italy vetoes takeover of semiconductor firm by Chinese company Shenzhen*, April 9, 2021, Accessible here: https://www.reuters.com/article/china-italy-semiconductors-idUSL8N2M22LS; Reuters, *Italy may compensate firms hit by anti-takeover powers, sources say*, 10 December 2021, Accessible here: https://www.reuters.com/markets/europe/italy-may-compensate-firms-hit-by-anti-takeover-powers-sources-say-2021-12-10/.

48 Decree of the President of the Council of Ministers (Decreto del Presidente del Consiglio dei ministri), April 24, 2021, Accessible here in Italian: https://www.senato.it/leg/18/BGT/Schede/docnonleg/42426.htm.

49 Case No. 06531/2021, Tribunale Amministrativo Regionale per il Lazio.

50 DGAP, *Siltronic AG: Public tender offer by GlobalWafers will not be completed as offer conditions have not been fulfilled within the applicable deadline*, February 1, 2022, Accessible here: https://www.dgap.de/dgap/News/adhoc/siltronic-public-tender-offer-globalwafers-will-not-completed-offer-conditions-have-not-been-fulfilled-within-the-applicable-deadline/?companyID=487&newsID=1508658.

of timing and acceptance of a degree of disclosure. Although there may be some direct cost involved to deal-making to complete the FDI review process, parties may not necessarily consider this to hinder their transaction plans once weighed in the overall balance. A longer period is likely to be required to understand the overall impact of FDI screening on FDI trends in Europe, given the impact of COVID-19 on deal-making and other factors such as strengthening of merger control enforcement in Europe and elsewhere.[51] That said, a consideration for national FDI authorities and policy makers could be, in due course, to implement post-closing, rather than pre-closing, FDI filing requirement for certain transactions.[52] Legislators considering such changes would need to carefully balance their need to know about transactions (at some point), the need to be positioned to act ex ante (where necessary) and their obligations not to discriminate. However, a move toward greater post-closing filings could be achieved through more tailored and clearer definitions of the sectors most in focus for FDI screening and a range of thresholds and/or exemptions.

Undoubtedly, for now and whatever the filing requirements of the future, the remaining "true" FDI interest has the capacity to loom large and the statistics will matter less (and perhaps not at all) when applied to individual and more complex FDI cases. Investors and companies in that category may be able to take some comfort from recent challenges to FDI decision-making by national FDI authorities. The Commission's intervention in VIG/Aegon has importance in terms of continuity and setting the overall tone for FDI review in Europe, potentially challenging governments and national FDI authorities to go further in contemplating the *"legitimate interest"* at stake. Indeed, in connection with another matter, Hungary has now requested a ruling on the validity of its emergency FDI laws.[53] It is significant that the Commission, alongside calls to adopt and apply FDI laws, has signalled clearly a corresponding expectation that the application of FDI laws will be robust.

What is left in the most difficult FDI transactions is a degree of unpredictability. Precedent remains scarce, and FDI authorities continue to develop their expectations and experience. FDI screening remains a case-by-case assessment, taking into account the specific facts of each transaction. National FDI regimes therefore leave broad discretionary powers to screening authorities and clearly open the door for political considerations. In this context, the safeguards for investors that balance enforcement powers and shape the boundaries for FDI screening are yet to be further defined.

51 Figures on FDI trends reflect a range of complex factors. *See*, for example. European Commission, *First Annual Report on the screening of foreign direct investments into the Union*, November 23, 2021, p. 6, Accessible here: https://trade.ec.europa.eu/doclib/docs/2021/november/tradoc_159935.pdf.

52 Both the CFIUS regime in the United States and the Investment Canada Act in Canada can be considered as good examples of FDI regulations that place greater emphasis on investor risk-assessment and filing incentives, together with intervention powers and mandatory filing obligations for certain transactions.

53 See C-106/22, *Request for a preliminary ruling by Xella Magyarország*, February 15, 2022.

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