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Regulation on foreign direct investments and emergency discipline

Critical annotations and alternative proposals

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Executive summary

- The Treaty on the Functioning of the European Union prevents Member States from handing out discretionary financial aid to domestic businesses. State aid can only be granted in exceptional circumstances. Furthermore, national governments must notify state aid measures to the European Commission, which is in charge of assessing its compliance with the Treaty.
- The ban on state aid was instrumental to creating a level playing field between firms established in the EU as well as to promote the integration of the several EU's national markets.
- In the past few years, the discipline of state aid has been strongly criticized by several Member States – including France, Germany, Italy, and others – on at least two different plans. On the one hand, the Commission was accused of being too harsh in enforcing the rules on state aid, hence obstructing the Member States' plan to pursue their industrial policy. On the other hand, it has been argued that the state aid ban only applies to European firms, whereas foreign firms may (and often do) benefit of aid from their own governments, thereby outcompeting their European peers.
- To be fair, the second issue is a most relevant one, particularly when investors from countries that do not fully comply with the rule of law (such as China, Russia, and others) invest in infrastructures or assets that may have implications for Europe's or its Member States' national security. In these cases, differently from companies from liberal-democracies, it may well happen that firms aim to maximize not just (or not at all) their profits, but also (or mostly) the political goals of their governments.
- With the purported goal of addressing this issue, several Member States introduced legal frameworks to control foreign investments, with regard to investments from third countries.

Later, the EU Commission adopted a common Regulation aimed at coordinating these decisions of the Member States and share information.

- In 2020, in reaction to the Covid-19 outbreak, the EU Commission introduced a temporary framework on state aid (which is supposed to be phased out by late 2021 as this paper is being written) which de facto suspends the state aid discipline and leaves much discretion to national governments insofar as providing financial aid to domestic firms is concerned. In the meantime, further regulations are being proposed in order to allow a deeper scrutiny on investments from third countries.
- This paper investigates the EU as well as national regulations on foreign investment controls, and develops a case study on the Italian rules (the so-called "golden power"). The paper argues that foreign investment control regulations, despite their stated intent, are often used as protectionist tools to protect domestic firms, rather than protecting the national interest or critical infrastructures or assets.
- A further contention is that such regulations are often framed in vague terms, that allow a large degree of discretion to national governments. This can be seen, for example, in the tendency of defining entire industries, rather than specific assets, as strategic.
- By the same token, the proposed tools at the EU level to scrutinize foreign firms may fall short of their objectives and, indeed, may result in perverse consequences: for example, a number of commercial partners of the EU (such as the UK and the US) are more transparent than others (such as Russia and China). Consequently, there is a risk that businesses from more transparent jurisdictions are more easily blocked, as their status of recipient of domestic aid is clearly documented, than firms (possibly state-owned) from less transparent jurisdictions.
- The discretion of national governments is even greater as long as the temporary framework on state aid is in force: in fact, national governments will be able, at the same time, to provide aid to domestic firms, and stop the operations (including greenfield or brownfield investments, mergers, acquisitions, and the participation in public tenders) of foreign firms, regardless to the degree of transparency, economic freedom, and rule of law in the home country.
- The paper proposes to phase out the temporary framework as well as the existing controls on foreign investments, by adopting a more comprehensive framework based on the following features:
    - Assess the relevant markets and only apply foreign investment regulations to transactions above a certain threshold, depending on the size of the market itself as well as on the existence of infrastructures and assets (identified ex ante) that are deemed as critical for the sake of national security;

- Remove any barrier or control on investments from firms that are established in a Member State, and define at the EU level the cases where national authorities may interfere with investments or business transactions;
- Run periodical assessments of state aid regimes in foreign countries – particularly the most significant commercial partners in the EU and those where most investors in strategic assets and infrastructures come from – and introduce a two-tier system, whereby firms from countries that share the same institutional settings as Europe (such as the NATO or OECD Member States) enjoy a presumption of being on a level playing field with EU firms, while companies from non-democratic countries (such as China and Russia) are more closely scrutinized.

1. Premise

The creation of the European Union internal market and the progressive integration of the national markets of the Member States represent, at the same time, an objective, and a condition for the full realization of the EU integrated structure. In this perspective, the European competition policy and the State aid discipline have been two essential and permanent mainstays, which, despite the many changes of the European Commission orientation, and of the political climate, have had a coherent evolution over the decades.

Preventing (or sanctioning) abusive behaviours in the market, and keeping the Member States from getting involved in the economy with distortive effects on competition and/or causing harm to the intra-European trade is instrumental in avoiding segmentation of the market itself, which would happen at the expense of the free circulation of goods, capitals and services (three of the four fundamental freedoms at the bedrock of the European house, the fourth being the free circulation of people).

Over time, though, the limitations of this approach have also become apparent. In particular, the policy makers have been presented with at least two pain points, which have not always been confronted in the most effective way, or that, in some cases, even turned out to be "Trojan horses" serving ulterior political motives.

Firstly, while the discipline of State aid has been very effective in preventing European governments from interfering in the competition game, it has not been as effective in guaranteeing the application of the same conditions of fairness and transparency to enterprises coming from third countries. The rationale of the discipline is, in fact, to prevent the companies of each Member State from benefitting from the aid of their respective governments against other companies. However, no norm can discern, among non-European companies, those that benefit from State aid by foreign governments

from those that do not and that, therefore, actually compete on an equal footing with EU based companies.

This problem becomes even more relevant when considering that many companies hailing from foreign countries – including non-democratic ones – are controlled, directly or indirectly, by the State itself, and operate with great opacity in regard to the sources of their financing. In other cases, foreign companies enjoy in their home countries forms of monopoly or legal protection, through which they are able to subsidize their European operations, again leading to unfair competition.

Secondly, over the years some of the Member States have implemented norms finalized to foreign investment screening. These norms, sometimes resulting from the evolution of pre-existing ones, are often intended to protect national security, and regard with a varying degree of precision industries or assets defined as "strategic". In several instances said norms have been determined to be incompatible with the European Treaty at the end of complex legal disputes due to their applicability to European companies as well as to extra-EU ones, and they have plainly been conceived (or at any rate used) either to protectionist ends, or to make up for the lack of a discipline against State aid for extra-EU companies.

These issues have led not only the Member States, but the European Commission itself to put forward reform proposals going from a mechanism of coordination and information-sharing to an attempt to introduce an *ad hoc* discipline to contrast the subsidies provided by third-party States. The normative evolution in this direction has suddenly and messily accelerated with the spread of the pandemic. The economic crisis caused by Covid-19 has, in fact, both depressed the market valuations of companies, at least initially, as well as compromised the stability of their balance sheets. The Commission and the governments have then intervened, on the one side with the substantial suspension of the State aid discipline; on the other reinforcing the special powers for the control (and contrast) of foreign investments, in some cases extending their effect even to intra-European investments.

This is then the context for Regulation (EU) 2019/452 on the control of foreign direct investment (from now on "Regulation"), which has then been taken as the reference point for the recent renewal of the Italian *golden power*.[1]

1. Though the considerations expressed in the work are shared by both authors, paragraphs 1., 2., 4.2., 6.3 should be attributed to Carlo Stagnaro, while paragraphs 2.1., 3., 4.1, 5., 6., 6.1., 6.2. should be attributed to Federico Riganti. The conclusions at par. 7 should instead be attributed to both authors. For a precise and extended examination of the Regulation (EU) 2019/452 refer to, among all, Aa. Vv., *Foreign Direct Investment Screening. Il controllo sugli investimenti esteri diretti*, edited by Napolitano, Bologna, 2019, as well as, Napolitano, "Il regolamento sul controllo degli investimenti esteri diretti: alla ricerca di una sovranità europea nell'arena economica glo-

This work sets out to offer an analysis of this European discipline, with the intent of highlighting its efficiency profiles as well as the possible negative side effects deriving from certain choices, some even downright terminological, hypothetically apt to produce an undefined reference framework, by definition detrimental to trade and exchanges. Such a framework is only partially compensated for by the national disciplines tied in different ways to the Regulation[2] itself; and within said framework, from a doctrinal point of view, takes shape and manifests itself with increasing strength the return of a conception of the State as a Customs officer[3] and/or entrepreneur.[4]

The work concludes with a proposal aimed at striking a balance between the national security needs and the need to maintain a fair competitive framework for the European enterprises.

2. The reference context

When defining the reference context in which the discipline for the screening of foreign investments developed, it is necessary to keep in mind that this has already been subject to numerous interventions, both in Italy and elsewhere. Italy, for instance, seemed to have settled a long-lasting dispute back in 2012, when the investment control framework was reformed in response to an infringement procedure from the EU Commission. The new framework, though, was changed soon: between 2017 and 2019, new interventions gradually enlarged the powers of intervention of the government. With the Covid-19 emergency, then, more provisions have been added, formally on a temporary basis – but that are still in force as this paper is written, about one year and a half after the outbreak in early 2020.

Also in regard to the discipline of State aid, Member States have been calling for a revision for a long time. In 2019, a coalition was formed – led by France and Germany, and later joined by Italy without any substantial discontinuity between the Gentiloni, Conte-1 and Conte-2 governments – demanding a less strict discipline and the return to a more assertive and muscular industrial policy.[5] The Draghi administration, that took power in early 2021, has not yet taken a clear stand on the issue as this paper is being written.

bale", in *Riv. della regolazione dei mercati*, 2019, 1; and, more recently, Rescigno, "Il nuovo Regolamento UE 2019/452 sul controllo degli investimenti esteri diretti: integrazione dei mercati, sistemi nazionali e ruolo dell'Europa", in *Giur. comm.*, 2020, I, p. 847 and following.

2. Which are outside of the scope of this work

3. See, on this, Napolitano, "L'irresistibile ascesa del *golden power* e la rinascita dello Stato doganiere", in *Giorn. dir. amm.*, 2019, 5, p. 549 and following.

4. On the topic, allow me to refer to my own Riganti, "Se torna lo Stato nell'economia. Qualche nota critica a margine della recente disciplina emergenziale", in Istituto Bruno Leoni, *Briefing Paper*, 2020, 188: https://bit.ly/3rRsoal.

5. Allow us to refer to Saravalle and Stagnaro, *Contro il sovranismo economico*, Milano, 2020.

The Covid-19 crisis latched on to these pressures, leading to the adoption of a "temporary framework" at the EU level – subject to several postponements – which at the time of writing is supposed to expire in September 2021.[6] Furthermore, the Commission has put forward several proposals related to the verification of subsidies received by foreign companies, which until now though have not given way to legislative initiatives.[7] The present study concentrates on the control of foreign direct investments but, while doing so, it is important to keep in mind that the political and normative evolutions in this field cannot be separated from those related to State aid, in reference to both the emergency measures for Covid-19 and the more general tendencies.

2.1. THE NEW GEOPOLITICAL SCENARIOS

The reference context in which the Regulation was built is important when trying to understand its objectives, even more so when aiming at evaluating its reception[8] in the domestic regulations of each Member State. Nevertheless, it is fundamental to correctly position the provision under analysis on the timeline of recent events, if nothing else to avoid a misunderstanding: the Regulation was *not* introduced to answer to the Covid-19 pandemic and the correlated risks – *in primis* those of predatory behaviours by foreign and hostile players – tied to the weakening of the European economic structures, particularly during the health and economic crisis. In fact the Regulation was developed well before the coronavirus, even though the pandemics created a perfect storm for its rapid adoption and the introduction of stronger controls in the national frameworks.

For the sake of a systematic approach we need to mention that, on the one hand, it is true that the Regulation, as well as the national legislations variously adopted by each nation, has offered the chance and the instrument to resolve the aforementioned issue also – and above all – during the health crisis (as we said, becoming the reference point for the reinforcement of golden powers); on the other hand, it has been thought and conceived in a time still unaware of the virus, but already characterized by critical situations of particular gravity.[9]

6. See https://bit.ly/3ya5Nb3

7. European Commission, *White Paper on levelling the playing field as regards foreign subsidies, COM(2020) 253 final.*

8. This is obviously understood in an a-technical sense, it being a regulatory source and as such self-executing.

9. On the subject, see the careful analysis by Capriglione, "La finanza UE al tempo del coronavirus," in *Riv. trim. dir. econ*, 2020, 1, p. 1 and following.; and – on other profiles, though still tied to it, and touched on in the conclusions of this work about the European "construction"– Id., "Covid-19. Quale solidarietà, quale coesione nell'UE? Incognite e timori", ivi, 2020, 2, p. 167 and following.

It must thus be highlighted that the Regulation was born with a much larger (hence also more inclusive) aim than offering a solution to a pandemic crisis, which certainly exasperated the critical issues the Regulation set out to solve,[10] as *(i)* the necessity of balancing often antagonist principles (economic freedom *vs* increase in vigilance and control) – a direct consequence of distinct economic and political approaches towards the free market (libertarian *vs* protectionist) –; *(ii)* the need to tidy up an international "chessboard" involving "pieces" once almost unconceivable (China, Russia, India, etc.), both private and public (just think of the case of sovereign funds); *(iii)* the definitive realization of a new industrial and technological revolution, heralding *inter alia* renewed paradigms and correlated unanswered questions (beginning with the ever-changing concepts of security, public order, national interest and strategical importance)

In other words, the Regulation, more than other provisions, was thought with the first and foremost intent to coordinate (though not to uniform) different positions – those of the European Member States – on issues distinct from the health crisis. Positions often "confusedly" stated and in need of a systematic tune up, and intended to address a type of concern – hostile foreign investments – which, because of the perhaps unmatched quantitative and qualitative complexities embedded, could not be solved in any other way than through the adoption of shared measures.[11] A tune up needed thus not because of the pandemic, but definitely made more pressing by it.

It is thus downstream of the context that initially inspired the Regulation that we find the Covid-19 emergency.[12] An event that, to be honest, seems

10. A subject already deserving of notice is that, while in the political debate the emphasis has indeed been on the investments coming from countries where the border between private and State owned is less clear and often devoid of a real democratic framework, in the legislative action this distinction has been lost (and probably it could not be otherwise). Thus, the risk is that the measures of protection adopted will end up biting the most the companies coming from more transparent countries, though traditional allies, like the United States or other OECD and NATO countries. The same issue, in some way in even bigger proportions, will present itself again for what concerns the proposed measures to contrast foreign State aid.

11. The eighth *Whereas clause* is particularly clear on this point, specifying that "The framework for the screening of foreign direct investments and for cooperation should provide Member States and the Commission with the means to address risks to security or public order in a comprehensive manner, and to adapt to changing circumstances, while maintaining the necessary flexibility for Member States to screen foreign direct investments on grounds of security and public order taking into account their individual situations and national specificities. The decision on whether to set up a screening mechanism or to screen a particular foreign direct investment remains the sole responsibility of the Member State concerned."

12. The logical sequence seems to be confirmed by the Communication of the European

to have lost its "emergency" character to transform into – at least for what concerns the present and future economic consequences – a persistent feature of the regulatory framework, one powerful enough to suggest to regulators an equally incisive turn towards measures of control and vigilance already provisioned for by the Regulation under examination.[13]

3. The Regulation (EU) 2019/452: framing the objectives

The Regulation's primary objective is to provide a European framework for the control of foreign direct investments from third countries, due to reasons of security and public order.

To that end, notwithstanding the attention of the EU to foreign investments[14] on the one hand and – on the other hand – the fact that similar screening mechanisms[15] are already operational in extra-EU countries (with their natural consequences from the point of view of competition between different legal systems), the Regulation establishes several measures, among which we would like to point out the following: *(i)* the faculty for EU countries to set up mechanisms to review foreign direct investments (also indicated as "FDIs") because of security or public order reasons; *(ii)* the provision for

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Commission of March 26th 2020 *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), affirms* that "The COVID-19 related emergency is having pervasive effects on the economy of the European Union. As part of the overall response, the Commission also singled out the issue of foreign direct investment screening. Among the possible consequences of the current economic shock is an increased potential risk to strategic industries, in particular but by no means limited to healthcare-related industries. The resilience of these industries and their capacity to continue to respond to the needs of EU citizens should be at the forefront of the combined efforts both at European Union and at Member States level."

13. See the Guidance to the Member States of the European Commission. The one just quoted and the one instead dated March 20th, 2020.

14. In fact, to avoid easy and dangerous misunderstandings, as per the Communication of the European Commission: "The European Union is open to foreign investment, which is essential for our economic growth, competitiveness, employment and innovation. Many European companies are fully integrated in global supply chains, which need to be kept functioning. The EU wants to and will remain an attractive destination for foreign direct investment (FDI)." The principle is also clearly stated in the first *Whereas clause* of the Regulation, where it is pointed out that "foreign direct investment contributes to the Union's growth by enhancing its competitiveness, creating jobs and economies of scale, bringing in capital, technologies, innovation, expertise, and by opening new markets for the Union's exports. It supports the objectives of the Investment Plan for Europe and contributes to other Union projects and programmes.".

15. Even just considering, *mutatis mutandis*, the activity of the *Committee on Foreign Investment in the United States* (CFIUS).

the setup of cooperative procedures among countries and European Commission regarding those FDIs that can impact security and public order; *(iii)* the faculty of the European Commission to release opinions on said investments.

In particular, with reference to point *(i)*, while EU countries are free to adopt or not adopt screening mechanisms on the matter, they still need to guarantee high (if not total) transparency in their setup, with the purpose of *a)* avoiding discrimination among third countries, *b)* protecting sensitive and confidential commercial information, and – most importantly – *c)* guaranteeing a right of appeal against the screening decisions[16] – in line with the communitarian teachings (normative as well as jurisprudential) and in a context characterized by a constant information flow towards the European Commission and cooperation among Member States.

Regarding the other topics mentioned under points *(ii)* and *(iii)*, in case a EU Country adopts an FDI control mechanism, the mechanism of cooperation among Member States requires the predisposition of an adequate exchange of information, synthetically divided in the following logical-operational sequence: fast communication by the country that operates a screening to the European Commission and the other EU countries; possible formulation of observations by the Commission and member states in case supranational issues concerning security and public order related to the FDI under examination were to be raised; possible opinion of the European Commission in case the FDI in question could impact security and public order in more than one EU Country; in any case: maximum cooperation of everyone involved.

4. The merits of the Regulation: preliminary considerations around the concept of foreign direct investment

4.1. THE CONCEPT OF FDI IN THE REGULATION

Regarding the Regulation itself, it is clear that there are some pivotal key words whose mediatic impact is inversely proportional to their level of clarity and (necessary) objectivity. These key words are: *(i)* foreign direct investment (i.e. the core of the norm); *(ii)* security; *(iii)* public order.[17] These words require here a more attentive examination of both form and substance.

Regarding the first concept, by law (and for the regulatory purposes we are analysing) any investment of any kind[18] qualifies as an FDI if: *(a)* made by

16. See in this regard the brief but useful official presentation available at the following link: https://bit.ly/3rCYINM.

17. See art. 3 of the Regulation.

18. In fact, the ninth *Considering* mentions “a broad range of investments”.

a foreign investor – either a person or a legal entity from a third country –, *(b)* it is directed to establish or maintain durable and direct ties between the foreign investor and the enterprise or entrepreneur to whom capital is made available in order to perform an economic activity in a EU Member State. This definition also includes investments that allow an effective participation in the management and control of a company that performs an economic activity (cfr. art.2 of the Regulation).

The provision, whose high degree of indeterminacy seems instrumental in facilitating adaptation to the normative frameworks of the individual Member States – as set out below – raises some difficult questions for the interpreter, especially in relation to the correct identification of a category that is certainly complex and ever-changing.[19]

More specifically, as pointed out in doctrine, the absence of objective parameters, such as those of quantitative (e.g. investment ≥ *x* million euros) or qualitative nature (e.g. investments coming from countries x, y, z; a practical solution, of course, though possibly politically incorrect and of difficult provision in a globalized market), confirms the need to conduct, in this matter, a double (and as such questionable) interpretative exam, aimed at verifying *(a)* whether the investment falls under the category of FDI and *(b)* its relevance/pertinence to one or more critical sectors.

Such an examination, by no means simple and, what is more, "dumped" on the shoulders of the operators – with the resulting foreseeable increase in the related legal and, more generally, transactional costs – does not find an adequate support in the Regulation, especially with reference to point (a), in relation to which it is not easy, at least from a legal standpoint, to reconcile the different defining elements of the FDI concept.

Nevertheless, if on the one hand it seems possible to understand the rationale of a norm generally aimed at raising a large-spectrum defence against sizeable investments, in certain sectors, by foreign investors, on the other hand it cannot but be underlined how the wording used by the regulator "maintain lasting and direct links" – other than being, perhaps, used recklessly[20]– necessarily requires a careful translation in legal categories that, in the case of legal entity investors and even more so in the face of the second part of the norm – with the mention of the "effective participation in the management or control of a company" – should be declined, at least as far as Italy is concerned, into those ruling the matter of control *ex* art. 2359 of the Italian Civil Code and those that discipline the subject of groups.

And thus, with more specific reference to the latter, i.e. to that activity of

19. This is well pointed out by Rescigno, *op. cit.*, 857.

20. As pointed out in the literature, financial investments would in fact be excluded from the scope of the regulation. Equally excluded would be "spot" transactions or those limited to a short period of time, which are potentially equally dangerous.

"direction and coordination" which, in the case in point (and beyond the possible relevance, in the matter under examination, of both a "simple" control separated from the management,[21] as well as of non-controlling but still "qualified" participations[22])[23] should also be evaluated from a potential standpoint, i.e. keeping into consideration not only the state of affairs occurring at the time of the screening, but also the possible developments, sometimes already contractually provisioned for, that might impact management and control a few years down the line.[24] An evaluation, of course, that needs to keep in mind the subjective characteristics of the investor, adding further complexity to the exercise.

The above remark does not conclude the criticism, as there are further limits of the definition we are examining. Among these, it is useful to mention *inter alia*: *(a)* the express reference to economic activity, since direct investments in activities that are not profit-oriented, but are nonetheless important from a socio-economic point of view can also be considered dangerous; *(b)* the need for said economic activity to be performed in a Member State (with difficulty in coordinating a response were, for example, the investment in Europe is a fraction of a more complex operation regarding also other relevant jurisdictions where the activity was performed); in general, *(c)* the "suggestion" to look – in terms of application and also as an anti-elusion measure[25] – more at the substance (and thus at the "danger", real or potential) of each case rather than at the form.[26] A perhaps understandable and even applicable suggestion from the standpoint of those tasked with performing the control, but one that risks depriving the operators of those normative safeguards as well as of those elements of certainty that are fundamental in the matter at hand, in order not to create confusion and

21. Once again, however, the interpreter has the burden of proving that control does not correspond to direction and coordination of the acquired European company.

22. Even more so in the regulated sectors, including the banking sector.

23. For a careful analysis of the - not easy - subject see Rescigno, *op. cit*., p. 857.

24. It would otherwise be easy to elude control at the point of entry.

25. The tenth *Whereas clause* specifies, in fact, that "the necessary measures (...) should cover investments from within the Union by means of artificial arrangements that do not reflect economic reality and circumvent the screening mechanisms and screening decisions, where the investor is ultimately owned or controlled by a natural person or an undertaking of a third country. This is without prejudice to the freedom of establishment and the free movement of capital enshrined in the TFEU".

26. Where it is of paramount importance to consider, during the screening procedure, "the context and circumstances of the foreign direct investment, in particular whether a foreign investor is controlled directly or indirectly, for example through significant funding, including subsidies, by the government of a third country or is pursuing State-led outward projects or programmes." (see thirteenth *Whereas clause*).

regulatory distortions.[27]

With reference, instead, to the categories of *(ii)* security and *(iii)* public order, please refer mainly to the considerations set out in the following paragraphs. Nevertheless, it is already useful to point out that the Regulation, far from defining their contents – and in doing so creating the several practical problems we are going to talk about – focuses mostly on the definition of those factors that can be taken into considerations by the Member States in the evaluation process.

These factors, enucleated in a manner that one might call illustrative rather than exhaustive (even more so in light of the wording choices of the Regulation and the operative framework in which the norm has been devised), focus on the effects, even potential ones, of certain FDIs on some sectors, determined to be of strategic relevance for the Member States and, *a fortiori*, for the Union.

Specifically and from an objective standpoint, the list includes the *(a)* critical infrastructures, be them physical or virtual, among which are energy, transportation, water, healthcare, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructures, sensitive facilities, as well as investments in land and real estate necessary for the utilization of said infrastructures; *(b)* critical technologies and dual use products – as defined in art. 2, point 1 of Regulation (EC) n.428/2009 of the Council[28] – including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace technologies, defence, energy storage technologies, quantum and nuclear technologies, as well as nanotechnologies and biotechnologies; (*c*) the security of supply of critical production inputs, as energy and raw materials, as well as food stock security; (*d*) the access to – or ability to control – sensitive information, including personal data; and *(e)* the freedom and pluralism of media.

To the above list – which, as we will say, is not free from issues – an additional evaluation parameter should be added, this time of a subjective nature. As a matter of fact, the norm in question specifies that for the purposes of determining whether an FDI can impact or not security and public order, the Member States and the Commission shall also keep into account whether, in particular, *(a)* the foreign investor is directly or indirectly controlled, through its property structure or through sizeable financing, by the public

27. Such as, for example, those given by a generic and precautionary use of a discipline which, instead, should intervene only in presence of precise objective indicators.

28. With the purpose of establishing a communitarian framework for the control of export, transfer, brokering and transit of dual-use items, and intended to specify, in its art. 2, point 1, the definition of dual-use items as "items, including software and technology, which can be used for both civil and military purposes", including "all goods which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices".

administration of a third party country, including State organisations and armed forces; (b) the foreign investor has already been involved in activities affecting security or public order in a Member State; or (c) there is a high risk that the investor will endeavour in illegal of criminal activities.

4.2. THE SUBJECT OF STATE AID

It is worth remembering that the framework for the screening of foreign investments also intersects, as mentioned in the opening of this work, with the measures proposed for the extension of the European discipline on State aid to companies from third party countries. In the above mentioned white paper,[29] the Commission identifies four potentially relevant categories: *(i)* subsidies of any kind granted by foreign countries to companies established or operating in the EU, liable to create distortions in the internal market; *(ii)* subsidies from foreign countries that facilitate the acquisition of EU companies; *(iii)* foreign subsidies distortive of the public procurement open bid procedures; and *(iv)* foreign subsidies in the context of European financing. In light of these risks, several procedures are hypothesized – which we will not detail here since they are still mere hypotheses – with the aim of ascertaining the existence of a subsidy and, in that case, imposing corrective measures or even blocking the entry of a foreign company in the European market, the acquisition of European targets or the participation to European or Member State public procurement procedures.

The problem is that these hypotheses, though apparently reasonable, lack both explicit justification and procedural credibility. Firstly, the European document offers neither a quantitative estimate of the size of the problem nor concrete examples. Secondly, ascertaining the existence of potentially distortive subsidies inevitably depends on the level of transparency in the countries of origin of foreign companies, or on self-declarations by the latter. The paradox, then, would be that just those countries that are most transparent (and traditionally allies of Europe, linked to it by closer ties and trade agreements) risk being exposed to more intense and severe scrutiny than that applicable to clearly “hostile” countries.

This would lead not only to an easily foreseeable explosion of administrative litigation, but also to an additional degree of separation between the alleged political *objectives* and their *normative* translation. Moreover, also in this case the scope of application and the boundary between administrative action and political intervention would remain undefined, leaving room to an interpretation as an opening towards discretionary measures, motivated by geopolitical reasons or even by reasons of industrials policy, to the detriment of competition inside and outside European markets.

With this in mind, it is then useful to go back to the discipline of investment

29. European Commission, *White Paper on levelling the playing field as regards foreign subsidies, COM(2020) 253 final, cit.*

screening, showcasing in greater detail the case study of Italian norms.

5. A quick focus on the Italian regulatory framework: a few (updated) annotations around domestic golden powers

For the purpose a more complete view, it seems useful to dwell a moment on the importance attained by the art. 4 of the Regulation on the domestic discipline of the Member States, and in particular of Italy, where the provision has been taken as the reference parameter for the reinvigoration of the domestic golden power, which took place through the d.l. n. 23 dated April 8, 2020, so called *Decreto Liquidità*.[30]

Beyond a detailed analysis of the profile, for which is necessary to refer to the careful doctrinal analysis that has recently come to stratify on the subject[31] (with particular interest, it should be noted, with regard to the topic of financial infrastructures[32]), we need to highlight here that the Italian decrees/d.p.c.m.'s implementing the primary discipline – moving within the framework outlined by the relevant sectors named in the aforementioned art. 4 of the Regulation, with the Italian specification regarding the inclusion, in the financial sector, also of the credit and insurance sectors – have surely given content to the more general provisions of the European legislation under comment (thus helping the operators to grasp not only its meaning but also its general message), however, they have not yet freed the interpreter from major doubts regarding its implementation.

Specifically, despite a very high degree of detail (which could very well function as a real *passpartout* for the Government as a mean to the end of

30. So called *Decreto Liquidità*, containing urgent measures regarding access to credit and tax obligations for companies, special powers in strategic sectors, as well as measures regarding health and work, extension of administrative and procedural terms, converted with amendments by Law no. 40 of June 5, 2020. In particular, see art. 15 of the *Decreto Liquidità*.

31. On the subject, see Alvaro, Lamandini and Tarola, "La nuova via della seta e gli investimenti esteri diretti in settori ad alta intensità tecnologica. I *golden power* dello stato italiano e le infrastrutture finanziarie," in *Quaderni giuridici Consob*, 2019, 20; Lener, "*Golden powers* e investimenti esteri nelle infrastrutture finanziarie," in *Riv. trim. dir. econ*., 2020, 2, p. 228 and following; Napolitano, *op. ult. cit*.; Sacco Ginevri, "L'espansione dei *golden powers* tra sovranismo e globalizzazione," in *Riv. trim. dir. econ*., 2019, 1, p. 151 and following. For a general overview of the subject, let us refer to the recent Riganti, "I *Golden powers* italiani tra «vecchie» privatizzazioni e «nuova» disciplina emergenziale," in *Nuove leggi civ. comm*., 2020, 4, p. 867 and following, where extensive bibliographical references and indications on the various problematic profiles of the new discipline are provided.

32. On these profiles see, in particular, Annunziata, "Infrastrutture finanziarie e controllo degli investimenti esteri," in Aa. Vv., *Foreign Direct Investment Screening. Il controllo sugli investimenti esteri diretti*, cit., p. 110 and following, and Lener, *op. ult. cit*.

reinforcing its position in entrepreneurial economic dynamics, as such by definition pertaining to the private sector), there still seems to be a feeling of dissatisfaction around the real scope of the notification obligations in question, for example if related to activities indirectly connected – for example because merely instrumental – to the sectors indicated as strategic, but nevertheless not specifically provisioned for by the norm. What we just mentioned also carries the risk, already denounced above, of operational confusions which – even when founded on a precautionary approach for which, when in doubt, it would seem prudent to proceed through full disclosure of the investment to the State, even in cases where that was not relevant – would definitely be detrimental to the free market conditions.

As for a related but not less relevant aspect, in the past we have denounced the tendential inhomogeneity of an attitude that, on the one hand, takes aplenty from the European list of the Regulation but that, on the other hand, raises barriers against the other European countries[33],[34]. The point is of paramount importance because it reveals a heterogony of ends in the regulatory provisionns in question, which although created to erect a common and well-coordinated line of defence around Member States against third party countries, are instead used to enact undue verifications of certain operations even if they took place inside the European area.

Such circumstance is not acceptable and, though at first somewhat tolerable if limited to the emergency period, is now even less so in the face of the six (or more!) months extension of the present state of emergency (with consequent application of the relative special measures).

This extension, we would like to highlight it, would seem to testify to a substantial mistrust between Member States, which could be the harbinger of a fragmented conception even of those concepts of security and public order that constitute the primary asset of the regulation, but that perhaps are still far from having reached a deeply shared vision among European countries.[35]

33. See Riganti, *op. cit*., p. 898.

34. See again art. 15 of the *Decreto Liquidità*.

35. As for the timeline (a topic that is obviously central also from the point of view of (in) certainty of law), in a brief article I wrote last spring – "Se torna in auge il *golden power* a difesa delle aziende", published on *Lavoce.info* on May 6 2020 and available at the following link: https://bit.ly/3j06ugG – I had pointed out how, with reference to the temporal profile, it was not "to be excluded that the deadline [would be] extended due to the continuation of the crisis or even only to confirm the strength of the powers of intervention of the state, the scope of which would otherwise already be weakened at the end of the year (as if, from January 2021, the danger of "attacks" on Italy's strategic sectors were to disappear), with the consequent substantial futility of the measures now in place (which are, in fact, provisional)". This prediction, unfortunately, is correct, given the current postponement of the deadline on special powers - also with regard to European subjects - to June 30, 2021

6. Critiques, negative side-effects, and alternative models

Coming back to the general analysis of the Regulation,some critiques are necessary, aimed at highlighting the potential contraindications of the norm and, therefore, suggesting the adoption of an interpretation capable of provisioning for different models and reference parameters – if necessary also from the perspective of the integration of the communitarian discipline.

6.1.CRITIQUES AND NEGATIVE SIDE-EFFECTS

Proceeding sequentially, and thus examining first of all the critical aspects, we need to highlight – in reference to what was introduced in the opening of this work – that these translate mainly to *(i)* wording choices lacking the necessary degree of objectivity, *(ii)* an identification of "*dangerous*" FDIs offered, however, without useful quantitative indications, as well as *(iii)* a regulatory provision which, while surely inspired by and aiming to achieve (these are the *desiderata*) efficient and transparent information flows among the different actors of the screening, seems instead capable of implying the creation of new administrative-bureaucratic superstructures, harbingers of (almost certain) operational inefficiency (by definition hostile to any kind of investment).

With regard to the first point, it useful to remember that both the concept of public order as well as that of security are characterized by such an elasticity as to be elusive even or, in any case, slippery and dangerously prone to meta-legal interpretations – and therefore applications – as such detached from a necessary degree of objectivity.

As recalled in doctrine, as a matter of fact, it is known that notwithstanding the earnest reconnaissance and reconstructive efforts, the notion of public order which is our subject, still presents a remarkable variety of contents, "which is manifest in the changing at times of the area of application (administrative, constitutional, criminal, civil, international, communitarian), at times of the legal or political foundation, at times of the nature of the notion itself, which is characterized by polysemy."[36] Polisemy which, on closer inspection, is not attenuated but on the contrary emphasised if compared to the European architecture, where it would perhaps be more correct to speak of "national public orders, recognized and protected in the communitarian space, but also evaluated and reinterpreted within the communitarian legal order."[37]

More specifically, given the present regulatory framework, we should ask

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(unless extended, of course!).

36. See, in this regard, the careful and accurate analysis by Angelini, "Ordine pubblico nel diritto comunitario," in *Digesto delle discipline pubblicistiche, Aggiornamento*, Torino, 2005, p. 503 and following.

37. Angelini, *ibid*.

ourselves to which declination of the category in question the interpreter should refer to. A question, this, of no easy solution, if only one takes into account those reconstructions that (although to be related to a distinct context, insofar as they concern a dialogue among European countries) could even "exclude the economic interest of member states among the reasons which make recourse to reservations for reasons of public order legitimate"[38] given that, according to an agreeable communitarian logic, at least at first "to admit (…) forms of reservation of sovereignty in economic matters, as well as on those of public order, would have coincided" – and, we could say, would still coincide – "with the admission of exceptions to the very process of integration, with the effect of slowing its progress."[39]

It follows that the terminology used by the Regulation lends itself to possible misunderstandings, as a diversity and, therefore, an asymmetry often recurs between the interests and the economic public orders of the different EU countries and thus, even more, between those and the ones of the Union as a whole (which is different than just the sum of its parts).

This circumstance is definitely relevant and perhaps less apparent where one treats a subject – that of "security" – regarding which is instead easier and more comprehensible to share a common and uniform approach, which legitimates the primacy of the concept in question.[40]

Coming, then, to the last critical aspect raised in the opening of this paragraph (concerning potential supervision superstructures) one point is clear: even more so in face of the introduction of the financial infrastructures among the critical ones (among which, it must be kept in mind, the Italian legal system includes the banking and insurance sectors) a reference framework is outlined on the horizon composed by different authorities by sector and by kind of supervision that, each in its jurisdiction, but hopefully in a coordinated manner and following a common design, will have to supervise (also) the matter of FDIs.

A framework that requires a coordinating act and that, as such, imposes not only that all instruments be properly "in tune" with each other but also, and most importantly, that there should be an "orchestral" direction which, at present and at least with reference to Italy, does not appear sufficiently outlined and clear, even being aware of the key role played by the Commission

38. Angelini, *ibid*.

39. Angelini, *ibid*.

40. With reference to the subject of security, it is worth recalling the words of Napolitano in *Il regolamento* (*The regulation*), cit., according to which "the regulation offers a model of control on foreign investments which is apparently limited in terms of its purpose. The number of interests protected is, in fact, limited to security and public order. The aim is to avoid that the control on foreign investments is improperly transformed into an instrument of industrial, corporate or, worse still, clientelist policy. The attempt, however, is difficult when one considers the latitude and indeterminacy of the notion of security".

at a supra-national level.

In other words, notwithstanding the provisions of the Regulation regarding the connection between Member States and the Commission, the internal organization of said Member States results unconvincing, where to a clear stiffening and sophistication of the internal regulation around FDIs – and that correlated to it (e.g. regarding the golden powers) – concretely risk to correspond dangerous regulatory overlaps, harbingers of the equally dangerous uncertainty on the markets quoted in the introduction.

Markets in which, therefore, as mentioned above, we will likely see not only an increase in costs, starting with the legal ones, for the foreign operators, even in the case of FDIs eventually judged as not dangerous (and regarding which, in doubt, the investor has complied with the complicated national notification procedures), but also to a progressive reinforcement of that potentially (and historically) critical mix between a concept of a regulatory (and supervising) State and an idea of an entrepreneurial State (also with respect to the supervised subjects). All of this, including the clear conflict of interest, is not exactly in line with the European and communitarian teachings.

6.2.ALTERNATIVE MODELS?

In the face of such premises, it is correct to ask whether solutions can be envisaged to ensure an adequate (equal or superior) degree of vigilance on FDIs, characterized however by a high degree of objectiveness, which must necessarily guide the matter under consideration. On this point, it seems we could outline some considerations as follows.

Now then, notwithstanding the necessary reference to concepts that are – as we said – in evolution, and as such not suitable to receive a crystal clear and uniform interpretation (which – on the contrary – could actually prove harmful, as it could be capable to relegate the terms under examination to eventually surpassed historically contexts, thus making them substantially inadequate), it is necessary to highlight that the European approach to the subject of discussion is characterized by some fragilities. These concern *(i)* the direction aimed to coordinate – and not instead to uniform – the European system of defence against hostile FDIs; and *(ii)* the setup of that system according to a mostly *ex ante* framework, though founded on *ex ante* criteria which are not easily identifiable. In addition, there is the evolution of the discipline of State aid that in any case mostly pursues similar objectives, and that as such should be kept into consideration and integrated in the foreign investments control framework.

Regarding the first profile, it must be pointed out that the decision to limit the European intervention to the coordination of the various national defence instruments against dangerous FDIs and not to offer, *tout court*, a uniform and shared defence mechanism, translates the weaknesses of a still fragmented context which is thus characterized by a puzzle of interests and

hypotheses conflicting with each other.

The subject of foreign direct investments, in fact, if on the one hand can evidently hide measures aimed at ensuring undue interferences of foreign countries in the EU ones, even more so in this historical moment, on the other hand and with the same emphasis should be considered as a central factor of the economic recovery of the EU Member States, especially of some of those, that, following a balancing of interests (political more than legal), could prove to be excessively permissive and generous towards FDIs that were even partially "hostile" or coming from "non-congenial" countries – with hypothetically harmful chain consequences for the whole communitarian market.

In other words, given the generic nature of the concepts used above and, even more so, their necessary correlation to other equally important "assets", a uniform path to deal with FDIs, shared among all Member States would have guaranteed with greater certainty the ability of the European line of defence to hold, otherwise risking dependence on individual behaviours, easily inspired by even opportunistic attitudes, even more reinforced by populists and neo-nationalist movements.

With reference, instead, to the second profile, as anticipated, the regulatory choice of basing the control on FDIs mostly at their point of entry, and thus *ex ante* but without identifiable objective *ex ante* criteria, is not fully convincing.

In this regard, we need to highlight that, in fact, the very nature of the economic dynamics – by definition ever changing – can easily elude preliminary selection criteria, which therefore risk to resolve in applicative short-circuits and obvious frictions between regulatory provisions (static) and evolution of trade (dynamic). In the face of what we just mentioned, it would therefore seem more appropriate in this subject a screening mechanism which – possibly in a softer and surely friendlier way toward investments (which, we should remember, are a unique engine of development), especially if from certain countries (see *infra*) – would put beside a more "limited" control at the point of entry a more efficient constant control during the "permanence" of the investment. The latter, moreover, could be demanded, in certain strategic markets and with the aim of a more efficient management of the procedures, to the supervisory authorities of each sector, according to the structures already in place in Europe,[41] with the help of the competent European authorities (e.g. European Banking Authority, European Securities and Markets Authority, European Insurance and Occupational Pensions Authority).

41. Thus, by way of example, control may be requested from the ECB in the case of an FDI with which a stake in a very significant bank has been acquired and from the national authorities in the case of an FDI with which a stake in a less significant bank has been acquired.

The issue of the objectivity of the requirements to be kept into consideration during the FDIs screening procedure deserves a final comment, as if it is true on the one hand that a rigid definition of said requirements can lead to clear contraindications, on the other we cannot forget that some reference parameters, aimed at making a country more or less "appreciated" in the eyes of the Regulation, could well be identified.

Reference is made to certain themes and qualities that are central today and that could carry out the important double function of *(i)* instrument and testimony of "good standing" for the foreign investors and, therefore, *(ii)* incentive for these to reach certain indexes considered, in Europe as well as elsewhere, particularly important and deserving of consideration.

The examples are numerous, and, among them, the respect for human rights, the fight on terrorism and corruption, the achievement of adequate solutions around *climate change*, the fight on child labour and so on, are good representatives, in the opinion of the authors, of those that should be part of a list of requirements that virtuous foreign countries – and as such deserving of a lower degree of screening – should possess. This is undoubtedly a definitely progressive and market-empowering solution, but it may perhaps be capable to deal with a "harsh reality": that which, on the other side of the coin, sees at least some European countries themselves make important trade agreements with foreign countries characterized by notoriously liberticide and unacceptable policies.

The path is therefore long, but starting the discussion on alternative screening and supervision models could be a good way to outline, on the horizon, a virtuous path capable of striking a balance between increased rigor, economic reasons as well as other key aspects of the human person.

6.3. A FEW PRACTICAL PROPOSALS

First of all, it is still advisable to identify precise quantitative thresholds in this area, which may be updated annually, capable of triggering the screening on the part of Member States on foreign investments potentially considered harmful. In particular, these thresholds should be also parameterized to each single relevant market, so to constitute a system that in its diversity finds its strength.

This set up is, in the opinion of the authors, optimal insofar as it is applicable objectively as well as irrespective of a clear-cut identification – that of the strategic sectors – which, as mentioned above, reveals some weak points right from its first applications, specifically with reference to those assets and those goods not easy to place and qualify, at least univocally, because for instance instrumental to more than one relevant category.

Secondly, the need to bring the Regulation back within its initial boundaries clearly emerges, in order to ensure for it a more strict and crystal-clear compliance by means of a "strict" interpretation – and consequent applica-

tion – to the institutive treaties of the communitarian and then European architecture.

In other words, the concurrent pandemic emergency brought about, as it is apparent, a new rise of the economic borders between the Member States, based on a disposition (the Regulation) however conceived with a different purpose, i.e. to raise a common and coordinated (though not uniform) barrier against third party countries. Hence the appropriateness of a "corrective" intervention, hopefully already at a regulatory level and in any case at a supranational level, aimed at identifying all cases in which the Regulation would be applicable between Member States. Cases that should obviously be extremely limited but in which, however, should always be included all the activities impacted by the Regulation if undertaken by companies – European and not – controlled or participated by public administrations (State *et similia*), who, in fact, could use them for "predatory" purposes.

The latter circumstance leads us to the third and last order of considerations, intended to question the appropriateness of always performing a precise due diligence on an investor with specific reference to State aid. What we just mentioned intended to provide for mitigated measures and procedures for "congenial" and virtuous Countries (e.g. OECD or NATO members, or at any rate those that already have – reciprocal – transparency obligation towards other EU Countries) and, instead, stricter measures and procedures for other countries, like Russia, Iran, North Korea, China, etc., also in order to evaluate the requirement of adopting compensatory measures and, in any case, of promoting the use of the above mentioned "dual-track" mechanism.

7. Conclusions

If it is true that we are living in a time of crisis, it is just as true that the term crisis has a precise etymology (from the Latin *crisis*, Greek κρίσις *"choice, decision, decisive point in the progress of a disease"*, derived from κρίνω "*distinguish, judge*"),[42] which requires to act with transparency and to take decisions in order to overcome the present historical parenthesis through an – improving – change of our economic and legal paradigms.

The subject of FDIs seems to offer this opportunity, both with reference to the possibility of reaching a framework in which, without uncertainties and beyond rather *démodé* sovereigntists, the values on which the European community is founded can be considered fully shared. And regarding a rethinking of Europe's position on the international chess board, and even more so with reference to some third-party Countries that can constitute a clear danger for our national security or the proper development of competition in the European and world market, since, in a nutshell, they offer a model of life dangerously similar (if not equal) to that of a dictatorship. It is

42. Source Treccani online vocabulary.

the investments coming from these Countries that should perhaps require, before others, the strict control by the European Union, and not those coming from Countries that are historically tied to the Union by a commonality that is not only political but also cultural, and generally characterized by a higher degree of transparency, guarantee of the rule of law and, in any case, by ties and commercial agreements such as to allow a level playing field.

From the Trojan Horse to the covert financing to the Italian political parties during the Cold War, both Myth and History are abundant with more or less successful intrusion attempts, performed through money flows or other instruments (more or less technologically advanced[43]), to which the utmost attention must be paid.

A high degree of vigilance can undoubtedly be guaranteed by the Regulation, which today, however, seems deserving of some "corrective interpretations" aimed at giving it a final satisfactory – because efficient – disposition. All of this, of course, in the – almost obvious – awareness that the law cannot offer the only useful solution in the matter, although it can, certainly, lead to the design of a framework of uniform regulations, capable of filtering behaviours that are abnormal and potentially harmful for the hold of the democratic structure and the "free" market economies.

43. Think, for example, of the topical issue of 5G, on which we recommend the considerations by Clarich, "La disciplina del *golden power* in Italia e l'estensione dei poteri speciali alle reti 5G," in Aa. Vv., *Foreign Direct Investment Screening. Il controllo sugli investimenti esteri diretti*, cit., p. 118 and following.

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Cosa Vogliamo

La nostra filosofia è conosciuta sotto molte etichette: "liberale", "liberista", "individualista", "libertaria". I nomi non contano. Ciò che importa è che a orientare la nostra azione è la fedeltà a quello che Lord Acton ha definito "il fine politico supremo": la libertà individuale. In un'epoca nella quale i nemici della libertà sembrano acquistare nuovo vigore, l'IBL vuole promuovere le ragioni della libertà attraverso studi e ricerche puntuali e rigorosi, ma al contempo scevri da ogni tecnicismo.

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