KRISTIJAN POLJANEC[1], TOMISLAV JAKŠIĆ[2]

Safeguarding Croatian Strategic Industries Within the Scope of the EU Foreign Direct Investment Regime

ABSTRACT: *A European Union (EU)-wide screening regime entered into force in October 2020, marking the turning point in the Member States' investment relations with third countries, most notably, the emerging economies of the Far East. Most Central and Eastern European (CEE) states have recently embraced novel screening solutions; some legislative proposals are still pending in a few states. These regulatory changes are the result of the socio-economic turmoil caused by the COVID-19 epidemic, which threatens a major fire sale of resources that are deemed critical for the Member States' national security and public order. In this paper, the authors examine the existing screening mechanisms regarding foreign direct investment (FDI) in five EU countries: Austria, Germany, Hungary, Slovenia, and Poland. Given the apparent lack of comprehensive FDI screening mechanisms in Croatia, the authors consider that the findings of this comparative analysis could help Croatian legislator establish a comprehensive legal regime for FDI pouring into Croatian strategic industries. This paper argues that Croatia should introduce novel screening mechanisms along the lines of the Germanic legal tradition, most notably, the CEE and the German foreign trade and payments law. The authors suggest potential solutions de lege ferenda that would fit the scope and objectives of the screening regulation. Following the introduction, the second section of the paper glances through FDI screening mechanisms in four CEE countries. In the third section, the paper revisits the existing Croatian legislation on FDI control. The fourth section considers possible amendments thereof within the context of the German foreign trade and payments law. The fifth section summarises and concludes the paper.*

KEYWORDS: European Union, Foreign Direct Investment, Regulation (EU) 2019/452, Screening Mechanisms, CEE countries, Croatia, Foreign Trade and Payments Act.

1 Postdoctoral Researcher, Department of Law, Faculty of Economics and Business, University of Zagreb, Croatia, kpoljanec@efzg.hr, ORCID: 0000–0002–4912–1335.

2 Assistant Professor, Department of Commercial Law and Company Law, Faculty of Law, University of Zagreb, Croatia, tomislav.jaksic@pravo.hr, ORCID: 0000–0002–8798–2208.

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1. Introduction

Before the adoption of the Treaty on the Functioning of the European Union (TFEU),[3] regulation of foreign direct investment (FDI) coming into the European Union (EU) belonged to the shared competences of the EU and its Member States.[4] TFEU introduced a significant change in the division of powers. The regulation of FDI has become an exclusive competence of the EU, within a broader area of common commercial policy.[5] Therefore, the EU has sole authority to adopt legally binding acts regulating all aspects of FDI,[6] including the permission of FDI inflows into the EU.[7] Over the last ten years, the EU has witnessed a continuous influx of investment (most notably, a significant increase in Chinese FDI) into strategically important European companies.[8] As such investments are often the result of state-controlled enterprises, the EU had to conduct prompt and comprehensive legal action to protect critical industrial sectors against investments that could threaten Member States' national security.[9] Following a fierce debate,[10] in March

3 Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 1-344. Herein referred to as TFEU.

4 Moskvan, 2017, p. 244. FDI was considered a type of capital movement. Esplugues, 2018, p. 6. According to the Explanatory Note to the Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ L 178, 8.7.1988, pp. 5–18) FDI covers 'investments of all kinds by natural persons or commercial, industrial, or financial undertakings, and which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom (or the undertaking to which) the capital is made available, in order to carry on an economic activity. Such understanding was confirmed by the EU Court of Justice (hereinafter referred to as CJEU), which stressed that shareholding that enables the shareholder 'to participate effectively in the management of that company or in its control' should be understood as direct investment. See Opinion 2/18 of the Court (Full Court) of 16 May 2017, EU:C:2017:376, para. 80; Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue, C- 446/04, EU:C:2006:774, paras. 181 and 182.

5 Art. 207, para. 1 in conjunction with art. 3 (e) TFEU.

6 Art. 2, para. 1 TFEU. See also Esplugues, 2018, p. 11.

7 Opinion 2/18, para. 87.

8 Commission Staff Working Document on Foreign Investment in the EU. Following up on the Commission Communication 'Welcoming Foreign Direct Investment while Protecting Essential Interests' on 13 September 2017, Brussels, 13.3.2019, SWD (2019) 108 final, p. 2. Hereinafter referred to as SWD Foreign Investment. US and Canada are leading investors in the EU, both in terms of control over EU's large companies' and their assets. They are followed by European Free Trade Agreement countries (hereinafter referred to as EFTA) and Offshore Financial Centres. China, Hong Kong, and Macao are emerging investors into the EU. Russia, however, lags behind, especially in terms of controlling assets. Ibid., pp. 10-11.

9 Esplugues, 2018, pp. 17-18; Berin, 2019, p. 715; Kao, 2019, p. 174; Gadocha, 2020, p. 37.

10 The leading advocates of the common European FDI control were Germany, France, and Italy. Southern EU Member States (e.g. Portugal, Spain, and Greece) felt reluctant to support such initiative, as they received vast Chinese financial aid during the 2008 financial crisis. See more in Esplugues, 2018, pp. 15-18; Kao, 2019, p. 178; Zwartkruis and de Jong, 2020, pp. 4-5.

2019, the EU issued the Regulation 2019/452 establishing a framework for the screening of FDI into the Union.[11]

In spite of the title and scope, the Regulation (EU) 2019/452 neither outlines an EU-wide legal framework for the establishment of national screening mechanisms for FDI,[12] nor imposes legally binding screening mechanisms on Member States.[13] It allows Member States to decide whether to introduce, maintain, or amend screening mechanisms or leave inward capital flows free of any public scrutiny.[14] The Regulation (EU) 2019/452, however, imposes an obligation on the Member States and the Commission to establish information and cooperation mechanisms in the event that FDI affects more than one Member State, irrespective of the fact that FDI may not be subject to screening in the recipient Member State.[15] As the Regulation (EU) 2019/452 does not prejudice the application of TFEU provisions on the free movement of capital,[16] Member States' screening mechanisms should meet the well-established requirements of justified restrictions on capital inflows[17] (i.e., principles of proportionality, non-discrimination,[18] non-protectionism, and legal certainty).[19] Screening and cooperation mechanisms may only be imposed on the basis of security and public order,[20] leaving

11 OJ L 79I, 21.3.2019, pp. 1-14. Hereinafter referred to as Regulation (EU) 2019/452. The fact that the screening regulation was enacted under the EU's exclusive competence makes it, as some argue, an EU 'weapon' in trade talks with the USA and China, forcing two countries to introduce reciprocity in trade relations with the European counterpart. Schill, 2019, p. 21; Zwartkruis and de Jong, 2020, p. 16; Gadocha, 2020, p. 38.

12 Dimitropoulos, 2020, p. 24. Art. 2, para. 1 Regulation (EU) 2019/452 defines FDI as 'an investment of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in a Member State, including investments that enable effective participation in the management or control of a company carrying out an economic activity.'

13 Esplugues, 2018, p. 19; Kao, 2019, p. 182; Dimitropoulos, 2020, p. 24; Gadocha, 2020, p. 38.

14 Art. 3, para. 1 Regulation (EU) 2019/452.

15 Ibid., arts. 6-7. Dimitropoulos, 2020, p. 24.

16 Arg. ex recitals 4 and 10 Regulation (EU) 2019/452. See Ruohong and Kociubiński, 2019, p. 5; Gadocha, 2020, p. 58.

17 Art. 65, para 3. TFEU. Zwartkruis and de Jong, 2020, p. 8.

18 The CJEU provided for a possibility for a Member State to demonstrate that a restriction on capital movements to or from non-member countries is justified for a particular reason in circumstances where that reason would not, on the other hand, constitute a valid justification for a restriction on capital movements between Member States. See case Test Claimants, para. 171. However, a Member State that subjects an FDI to the screening mechanism shall not discriminate among third countries (Regulation (EU) 2019/452, art. 3 para. 2). Zwartkruis and de Jong, 2020, p. 17.

19 Berin, 2019, p. 709. A rather loose language of the Regulation (EU) 2019/452, alongside high level of regulatory discretion on the Member States' side, may jeopardise full attainment of these principles. For the critical review of the proposal of the screening regulation, which also holds true for the final text, see Berin, 2019, pp. 721-727.

20 Arg. ex recital 18 and arts. 1 and 3 Regulation (EU) 2019/452. Dimitropoulos, 2020, p. 32.

other grounds for justified restriction of inward FDI within the general scope of Article 65, para 1. TFEU,[21] and CJEU case law.

Western European countries established their screening mechanisms years ago,[22] while significant regulatory activity has taken place only recently in Central and Eastern European (CEE) countries. CEE countries had almost no mechanisms for screening FDI.[23] However, in the aftermath of the economic turmoil caused by the COVID-19 epidemic, which has threatened critical European industries (most notably, the health infrastructure),[24] the majority of CEE countries have decided to establish comprehensive solutions to control FDI.[25] Unfortunately, Croatia has not followed suit. While the Croatian Government introduced a by-law implementing the Regulation (EU) 2019/452,[26] its text merely contains provisions on the establishment of a national point of contact and inter-ministerial cooperation.[27] The underlying objective of the EU legal framework was to induce Member States to introduce a full-fledged screening mechanism, as a legal shield against economic risks caused by the epidemic.[28] However, the framework was not given due consideration, making the Croatian solution a truncated piece of legislation. Given this regulatory loophole, this study analyses the existing Croatian legislation to identify whether Croatia already has available means for controlling inward FDI.[29] The study argues that Croatia should introduce screening mechanisms along the lines of the Germanic legal tradition, most notably, the CEE and German FDI law. The authors

21 Member States can restrict capital movements, so as to address policy aims regarding different taxpayers, to prevent infringement of national laws (in particular, tax and financial laws), and to collect statistical and administrative information.

22 Spain, France, Romania, and the Netherlands have had screening systems in place since the late 1990s and early 2000s, respectively. Member States, such as Germany, Italy, Denmark, Austria, Portugal, and Finland, set out their screening mechanisms during the last financial crisis (in 2011, 2012, and 2013, respectively). For the full list of screening mechanisms notified by Member States see https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf, last updated on 4 November 2020 (Accessed: 18 November 2020).

23 See https://knowledge.schoenherr.eu/pg/foreign-direct-investment-screening/ (Accessed: 1 October 2020).

24 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), Brussels, 25.3.2020, C(2020) 1981 final, p. 1. Hereinafter referred to as Communication. The Commission asked Member States to be particularly careful to avoid that the health crisis caused by the COVID-19 outbreak results in a 'sell-off of Europe's business and industrial actors, including SMEs'. See ibid., Annex, p. 1.

25 The following CEE countries have notified the Commission about their screening mechanisms (state on 4 November 2020): Hungary, Latvia, Lithuania, Austria, Slovenia, and Poland.

26 Government Ordinance on the Implementation of the Regulation (EU) 2019/452 of the European Parliament and the Council of 19 March 2019 on the establishing a framework for the screening of foreign direct investments into the Union. Hereinafter referred to as Ordinance.

27 Ibid., art. 3.

28 Communication, p. 2.

29 Until a Member State establishes a complete screening mechanism, it should use other available means to deal with FDI cases that could create a risk to public order and security in the EU, including risks to the health sector and supply of key inputs (e.g., medical products). Communication, p. 2.

suggest potential solutions *de lege ferenda* that would fit the scope and objectives of the Regulation (EU) 2019/452. Following the introduction, the second section of the study glances through FDI screening mechanisms in four CEE countries to find a 'common core' of the CEE FDI regulation. The third section revisits the existing Croatian legislation on FDI control. The fourth section considers possible amendments based on the CEE law and its German role model. The fifth section summarises and concludes the study.

2. FDI screening mechanisms in CEE countries

The following section provides a brief overview of national screening legislation in four CEE countries: Hungary,[30] Slovenia,[31] Austria,[32] and Poland.[33] At the time of writing, these four countries are the only CEE countries that have introduced FDI control mechanisms in light of the Regulation (EU) 2019/452.[34] This makes their legislative solutions a good reference point for regional comparative studies and, arguably, a valuable benchmark for drafting processes in remaining CEE countries. Moreover, Croatia and the CEE countries share a basis in Germanic legal tradition, making CEE solutions a suitable model for further reflections about Croatian screening legislation. From a macroeconomic point of view, three neighbouring CEE countries (Austria, Hungary, and Slovenia) are ranked among the top nine EU-domiciled investors into Croatia; Austria is the leading investor.[35] Poland holds a rather high place (23rd) on the list. Companies with their seats in those jurisdictions, including companies with a third-country ultimate beneficial owner,[36] significantly contribute to the strategic sectors of the Croatian

30 Act LVII of 2018 on Controlling Foreign Investments Violating Hungary's Security Interests, Official Gazette, Nr. 157/2018 (hereinafter referred to as Act LVII) and Act LVIII of 2020 on the Transitional Rules related to the End of the State of Danger and Pandemic Preparedness, Official Gazette, Nr. 144/2020 (hereinafter referred to as Act LVIII).

31 Act on Intervention Measures to Mitigate and Eliminate the Consequences of the COVID-19 Epidemic, Official Gazette, 80/20. Hereinafter referred to as the COVID-19 Epidemic Act.

32 Investment Control Act, Federal Gazette, Nr. 87/2020. Hereinafter referred to ICA.

33 Act of 24 July 2015, on Control of Certain Investments, Official Gazette, 117/2020, as amended by the Act of 19 June 2020 on Subsidies on Interest on Bank Loans Granted to Entrepreneurs Affected by COVID-19 and on the Simplified Procedure for the Approval of Arrangements in Connection with COVID-19 ('Anti-Crisis Shield Act'), Official Gazette, 1086/2020. Hereinafter referred to as CCI.

34 For Czech Republic see https://www.cliffordchance.com/briefings/2020/06/new-czech-foreign-investment-screening-regime.html) (Accessed: 1 October 2020). For Romania see https://knowledge.schoenherr.eu/pg/foreign-direct-investment-screening/ (Accessed: 1 October 2020).

35 See Table U5, Net investments, Net incurrence of liabilities (by country), last modified on July 10, 2020. Available at https://www.hnb.hr/en/statistics/statistical-data/rest-of-the-world/foreign-direct-investments (Accessed: 1 October 2020).

36 E.g. Sberbank Croatia d.d. is part of Sberbank Europe AG, an Austrian-based company fully owned by state-owned Sberbank Russia, the largest Russian bank. See more at https://www.sberbank.at/ (Accessed: 1 October 2020). In July 2018 Sberbank and VTB, another Russian state-owned bank, acquired significant shareholdings in Agrokor (a Croatian leading company in agricultural, food and retail sectors) through debt-equity swap. See SWD Foreign Investment, p. 54.

economy, including financial services, wholesale, real estate, retail, manufacturing of petroleum-based products, and manufacturing of pharmaceuticals.[37] As deeper analysis goes beyond the aim and scope of this paper, the following overview shall only provide an outline of national screening mechanisms: types of investment undergoing screening, financial thresholds and grounds for screening, targeted sectors, procedural steps, and sanctions. Following the comparative analysis, key remarks on the FDI CEE regulation will be given.

■ *2.1. Investments covered*

Screening mechanisms refer primarily to long-term investments made by third-country entities (i.e., natural persons or legal entities with their residence/seat outside the EU, the European Economic Area (EEA), and Switzerland), that invest capital into undertakings in the recipient Member State.[38] Also, Member States have introduced an anti-circumvention clause. The clause aims to encompass investments made by local investors or investors from another EU Member State, EEA state, or Switzerland, whose ultimate owner is an entity or resident of a third country.[39] Screening mechanisms cover both greenfield (i.e., establishment of new economic entities and branches, expanding existing economic entities, diversification of production portfolio)[40] and brownfield (acquisition of share or bond ownership, significant assets, voting rights, dominant influence, proprietary rights, status changes)[41] investments.

■ *2.2. Thresholds*

The minimum threshold usually equals or exceeds 10 percent of the shareholding in the target company.[42] This follows the National Account methodology, where the same

37 See Table U6, Net investments, Net incurrence of liabilities (by activity), last modified on July 10, 2020. Available at https://www.hnb.hr/en/statistics/statistical-data/rest-of-the-world/foreign-direct-investments (Accessed: 1 October 2020).

38 Art. 1, para. 1., subpara. 1 (a) Act LVII; Art. 85, para. 276, subpara. 2 (b) Act LVIII; art. 69 COVID-19 Epidemic Act; §1, point 2 ICA; art. 12a, para. 1, subpara. 1 (a) CCI in conjunction with art. 12c, para. 1, subpara. 5 and art. 14c CCI.

39 Art. 1, para. 1. subpara. 1 (b) Act LVII; Art. 85, para. 276, subpara. 2 Act LVIII; Art. 69 in conjunction with art. 71, para. 4, subpara. 5 COVID-19 Epidemic Act; Art. 12c, para. 6 CCI. Yet, it seems that Austria has not introduced a similar rule, as FDI has to involve at least one foreign investor, i.e., a natural person without EU, EEA, or Swiss citizenship, or a legal person having its seat or central administration outside the EU, EEA, or Switzerland. See §1, para. 6 ICA.

40 Art. 1, para. 2. Act LVII; Art. 71, para. 1 COVID-19 Epidemic Act.

41 Art. 1, para. 2. Act LVII; Art. 85, para. 277, subpara. 1 Act LVIII; Art. 70 and 71, para. 3 COVID-19 Epidemic Act; §1, point 3 ICA; art. 12c, para. 1, subpara. 1 (a)-(c) and para. 8 CCI.

42 There are, however, transaction considered less significant, and hence exempted from the screening procedures. This usually refers to interests below 20 percent threshold (in Poland, art, 12c, para. 1, subpara. 1 CCI), or start-ups having less than 10 employees, annual turnover or balance sheet total less than 2 million euros (in Austria, §2, subpara. 2 ICA). Nonetheless, even investments not undergoing screening shall be subject to cooperation and information scheme. See art. 7 Regulation (EU) 2019/452.

level of shareholding qualifies as FDI.[43] However, not all countries apply the 'ten (plus)' percent shareholding in the same fashion. Austria takes 10, 25, and, 50 percent of the share of voting rights for investments in six sensitive areas (i.e., defence, critical energetics, critical IT infrastructure, water, data collection, and medical infrastructure);[44] other, less sensitive areas remain subject to a 25 or 50 percent threshold.[45] In Hungary, under Act LVII of the general screening regime, all companies are subject to a '25 (plus)' percent threshold.[46] However, the 'ten (plus)' percent threshold will trigger screening for Hungarian public limited companies.[47] Irrespective of the threshold, Hungary will initiate the screening procedure when an investor seeks to acquire dominant influence over the target company.[48] On the other hand, within the provisional, 'counter-pandemic' regime under Act LVIII, all investments meeting the 'ten (plus)' percent threshold (and one million euros) are subject to screening,[49] while the 25 percent threshold is reserved for cases when more than one foreign investor acquires the target company.[50] Likewise, in Slovenia, all FDI resulting in 'ten (plus)' interest in nominal capital or voting rights is subject to screening under the provisional, counter-pandemic regime.[51] In Poland, however, the triggering threshold has been set as a combination of the percentage of significant participation in the target company[52] and the annual turnover thereof.[53]

■ *2.3. Grounds for screening*

The wording of the Regulation (EU) 2019/452 differs from the wording of art. 65, para. 1 (b) of the TFEU. The Regulation (EU) 2019/452 employs concepts of 'security' and 'public order.' The TFEU concept of security implies the existence of 'a genuine and sufficiently serious threat to a fundamental interest of society', which 'must not be misapplied so as, in fact, to serve purely economic ends'.[54] The concept of public order, on the other

43 SWD Foreign Investment, p. 68. Shareholding amounting less is considered an investment for pure financial gains, and hence qualified as portfolio investment. Ibid.

44 §4, subpara. 1 in conjunction with Annex, pt. 1 ICA.

45 Ibid., §4, subpara. 2.

46 Art. 2, para. 2, subpara. 1 (a) Act LVII. If the individual acquisition does not exceed 25 percent threshold, but the overall percentage of foreign ownership would exceed that percentage following the individual acquisition, the mandatory screening procedure should take place. Ibid., art. 2, para. 2 subpara. 2(a).

47 Ibid., art. 2, para. 2, subpara. 1 (a).

48 Ibid. For the definition of dominant influence see section 8:2, para. 2 (a)-(b) of the Act V on the Civil Code of the Republic of Hungary, Official Gazette, 31/2013, available at http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/96512/114273/F720272867/Civil_Code.pdf (Accessed: 11 October 2020).

49 Art. 85, para. 277, subpara. 2 (b) Act LVIII.

50 Ibid., art. 85, para. 277, subpara. 3. Moreover, 15, 20, or 50 percent apply irrespective of the value of the investment. Ibid.

51 Art. 70 COVID-19 Epidemic Act.

52 20 percent and 40 percent, respectively, of the total voting rights, target entity's share capital, or profit shall be deemed a significant participation. Art. 12c, para. 5, subpara. 2 CCI.

53 Within Poland, the turnover from sales and services must exceed the equivalent of 10,000,000 euros in any of the two preceding financial years.

54 C-54/99, Association Eglise de scientologie de Paris and Scientology International Reserves Trust v The Prime Minister, EU:C:2000:124, para. 17, and case law cited therein.

hand, implies securing a continuous supply and maintenance of essential goods and services.[55]

It seems that TFEU concepts refer to the protection of non-economic and non-military interests.[56] As the Regulation (EU) 2019/452 aims to protect Member States' security,[57] the notion of security could be interpreted to encompass 'national security' and related non-economic concepts as well. Indeed, the CEE countries refer to national 'security interest',[58] 'state interest', public security or public policy',[59] 'state security',[60] 'public order',[61] 'security and public order',[62] or 'public health'[63].' However, it is left entirely to the Member States to assign true meaning to these vague terms. As originally proposed by the advocates of the common EU FDI control,[64] the concept of security could include both national defence and economic security. Such an interpretation has received criticism,[65] as it might encourage national bodies to legitimise market protections– a notorious foe of free trade and capital movement. However, the proposed interpretation has merit and is supported by the recent statement from the highest ranks of EU politics, in which the concept of 'economic security' has become a top priority under the umbrella of 'strategic autonomy'.[66]

■ *2.4. Sectors*

The mandatory notification procedure concerns investments in economic activities and entities that are considered strategically important for maintaining national security interests, e.g., production of defence equipment, dual use products, intelligence devices, financial and payment services, energy (electricity, natural gas, and water supply), informational-communications technology, media pluralism, data processing or storage, land infrastructure, and food technology.[67]

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55 C- 72/83, Campus Oil Limited and others v Minister for Industry and Energy and others, EU:C:1984:256, para. 35. See also Esplugues, 2018, p. 14.

56 Dimitropoulos, 2020, p. 15.

57 Arg. ex art. 1, paras. 1-2; art. 3, para. 1; art. 6, paras. 1-3; art. 7, paras. 1-3 Regulation (EU) 2019/452.

58 Art. 3, para. 6, subpara. 3 Act LVII.

59 Art. 85, para. 283, subpara. 1 (b) Act LVIII; art. 12j, para. 1, subpara. 3 CCI.

60 Art. 72, para. 1 COVID-19 Epidemic Act.

61 Ibid.

62 §3, subpara. 1 ICA.

63 Art. 12j, para. 1, subpara. 3 CCI.

64 Dimitropoulos, 2020, p. 36.

65 Zuokui, 2018, p. 164; Zwartkruis and de Jong, 2020, p. 16.

66 Strategic autonomy for Europe – the aim of our generation – speech by President Charles Michel to the Bruegel think tank, paras. 25-26, available at https://www.consilium.europa.eu/en/press/press-releases/2020/09/28/l-autonomie-strategique-europeenne-est-l-objectif-de-notre-generation-discours-du-president-charles-michel-au-groupe-de-reflexion-bruegel/ (Accessed: 1 October 2020).

67 Art. 2, para. 2., subpara. 4 Act LVII; Art. 85, para. 276, subpara. 3 Act LVIII; Art. 72, para. 3 COVID-19 Epidemic Act; Annex to ICA, pts. 1-2; art. 12d, para. 2 CCI.

■ *2.5. Procedure, outcomes, and remedies*

CEE states have introduced mandatory, *ex ante* approval from government bodies, usually ministries of economics or finance.[68] The submission of notification is due before[69] or after the signing of the contract or publication of the takeover bid.[70] The responsibility for filing the application rests with the foreign investor,[71] its local subsidiary,[72] or the target company.[73] Authorities are allowed to initiate the procedure on their own (*ex officio*).[74] Moreover, in Slovenia and Poland, the competent authority may revise a particular foreign investment up to five years after the respective legal transaction has concluded.[75] The screening procedures usually take two months.[76] Rather long time frames for the assessment might be particularly cumbersome for pending investors in CEE countries that have introduced a standstill clause, forcing the investor to refrain from performing any actions until after the timeframe allowed for the clearance decision has lapsed.[77] Unless the competent authority finds a threat to national security or policy interests, it shall provide clearance (acknowledgement).[78] In line with the possibilities set out by the Regulation (EU) 2019/452, Slovenia and Austria provide for conditional clearance[79] (i.e., a decision mandating mitigating measures (structural[80] or behavioural[81]) on a foreign investor, so as to remove the negative

68 Save for Hungarian general screening procedure, which is administered before the Ministry of Interior, and Poland, where the screening procedure is administered by President of the Office of Competition and Consumer Protection.

69 Art. 12f, para. 5 CCI.

70 Art. 3, para. 3. of the Government Decree 246/2018. (XII. 17.) on the Implementation of Act LVII of 2018 on Controlling Foreign Investments Violating Hungary's Security Interests, National Gazzette, 157/2018 (hereinafter referred to as Decree 246/2018); Art. 85, para. 277, subpara. 1 Act LVIII; Art. 71, para. 1 COVID-19 Epidemic Act; §6, para. 3 ICA; art. 12d, paras. 2-3 CCI.

71 Art. 2, para. 2 subpara. 5 Art LVII; Art. 85, para. 278, subpara. 3 Act LVIII; Art. 71, para. 1 COVID-19 Epidemic Act; §6, para. 1 ICA; art. 12e, para. 1 CCI.

72 Art. 71, para. 2-3 COVID-19 Epidemic Act; art. 12f, para. 3 CCI.

73 Art. 71, para. 1 COVID-19 Epidemic Act; §6, para. 2 ICA; art. 12f, para. 4 CCI.

74 Art. 5, para. 9 subpara. 2 Act LVII; Art. 85, para. 278, subpara. 1 Act LVIII; arg. ex. art. 72, para. 1 COVID-19 Epidemic Act; §8 ICA; art. 12e, para. 2 CCI.

75 Art. 72, para. 2 COVID-19 Epidemic Act; art. 12e, para. 2 CCI.

76 Art. 3 para. 6, subpara. 4 Act LVII; art. 74, para. 2 COVID-19 Epidemic Act; §7, subpara. 3, point 1 ICA. According to the Hungarian provisional regime this timeframe is significantly shorter – 30 days (in exceptional cases, 45 days). See Art. 85, para. 283, subpara. 2-3 Act LVIII. In Austria and Poland, the procedure is two-phased. First, preliminary assessment takes a month (for Poland see art. 12h, para. 5 CCI; for Austria §7, subpara. 2 ICA). If the competent authority finds reasons justifying more detailed assessment from the point of view of public security/order, it shall initiate further examination proceedings and bring the prohibition/clearance decision within 120 calendar days in the case of Poland (art. 12h, para. 8 CCI) and two months in the case of Austria (§7, subpara. 3 ICA).

77 Art. 5, para. 8 subparas. 1-3 Act LVII; Art. 85 para. 290, subpara. 1 Act LVIII; art. 12h, para. 11 CCI.

78 Art. 3, para. 6 subpara. 4 Act LVII; Art. 74, para. 1 COVID-19 Epidemic Act; art. 12j, para. 1, subpara. 3 CCI.

79 Art. 74, para. 1 COVID-19 Epidemic Act; §7, subpara. 3, point 2 (a) ICA.

80 E.g. dissolving a branch office or transferring a sensitive part of the economic activity to an entity controlled by the recipient state.

81 E.g. making a promise not to discontinue operating a vital economic activity, at least awhile.

implications of the proposed transaction on the protected interests of the recipient state). Foreign investors and the target companies should have the option to seek remedies against prohibiting decisions (refusal) by national authorities.[82] Decisions brought before national authorities are subject to appeal before local courts. If the court finds the prohibiting decision unlawful on procedural or substantive grounds, it shall dismiss the decision and mandate reopening of the case before the responsible authority.[83]

■ *2.6. Sanctions*

In case of breach of the mandatory screening requirements, the CEE countries provide for administrative sanctions (fines),[84] civil sanctions (*ex lege* nullification of the unreported transaction),[85] and criminal sanctions (imprisonment).[86] However, in Slovenia and Austria, nullification of the unreported transaction would not occur *ex lege et ex tunc*, but rather following an *ex post* prohibiting decision declaring the executed FDI harmful to the protected interest of the recipient state (*ex lege sed sub conditione pendente*).[87]

■ *2.7. Remarks*

CEE countries' solutions are the closest regarding target investments, protected interests, and sectors. The focus is on brownfield investments, showing CEE countries' primary interest in safeguarding vulnerable domestic economic entities from being sold in the aftermath of the economic shock caused by the COVID-19 epidemic. The more sensitive the protected sectors (or less resilient to the epidemic), the lower the threshold required to trigger the notification procedure.

While the screening mechanisms share many commonalities, which may be considered the 'core' of the CEE FDI regulation, more refined analysis demonstrates that the mechanisms differ in implementation. CEE countries have used the vague nature of the Regulation (EU) 2019/452 to set national screening mechanisms in line with their national priorities and perceived threats. Although all CEE countries decided to set general screening instruments (acts), not all countries took the same approach regarding the duration of the screening regime. Hungary has a two-tier system, comprised of a general (permanent) and provisional ('counter-pandemic') screening system, which will cease to be in effect as of 1 January 2021. Poland faces a similar

82 Art. 3, para. 5 Regulation (EU) 2019/452.

83 Art. 3, para 6, subpara. 8 Act LVII; Art. 85, para. 285 Act LVIII; art. 12h, para. 10 CCI. Austrian and Slovenian acts do not refer to any remedial scheme; hence, the general judicial control should apply.

84 Art. 3, para. 6, subpara. 8 Act LVII; art. 85, para. 287 Act LVIII; art. 81 COVID-19 Epidemic Act, §25, para. 3 and §26, paras. 1-2 ICA; art. 16a, para. 1 CCI.

85 Art. 6, para. 10, subpara. 1 Act LVII; art. 85, para. 291, subpara. 1 Act LVIII; art. 12k, para. 1 CCI.

86 §25, paras. 1-2 ICA; art. 16a, para. 1 CCI.

87 Arg. ex art. 72, para. 1 COVID-19 Epidemic Act; §8, subpara. 5 in conjunction with §27 ICA.

situation, in which the 'Anti-Crisis Shield Act', amending the CCI, should cease to apply following the official proclamation of the end of the epidemic. Likewise, the Slovenian 'anti-COVID' package shall remain in force until 30 June 2023, leaving the future of the Slovenian FDI screening unclear thereafter. Austria has established a one-tier screening system; however, as of 31 December 2022 the research and development of critical medical products and equipment shall be removed from the list of sensitive areas currently covered by Annex I of the ICA. Regarding the content, there is a very close resemblance between the Slovenian and Austrian provisions and their two screening systems. Hungary and Poland have developed more elaborate screening systems, with the Polish systems diverging from other CEE solutions in terms of thresholds, competent authority, moment of due notification, strictness, and length of the final assessment. There are noticeable differences regarding the procedural aspects of the screening. While all CEE countries seek prior approval for the planned transaction, each country differs significantly in the structure and length of the procedure (one-phase/two-phase assessment), degree of procedural sternness (approval/disapproval/conditional, approval/standstill requirement, or absence thereof), and gravity of civil sanctions (immediate/conditional nullification). The line of division may be drawn between the Eastern countries (Poland and Hungary) on one hand and Central countries (Austria and Slovenia) on the other.

Although Germany does not strictly belong to the CEE list,[88] its regulatory screening framework is important in the context of the previous CEE analysis and the following analysis of Croatian FDI screening rules. Germany is one of the Western European countries whose FDI screening mechanisms date back to the early the 2000s and some forms, even earlier.[89] In accordance with the Regulation (EU) 2019/452, the latest amendments of the German FDI regulatory framework have only supplemented the existing rules.[90] It may be inferred that the German solutions served as a legislative model for many of the CEE countries' FDI screening rules.[91] As Croatia holds a place within the CEE region and traditionally relies on the German legal system, it is natural that Croatia would follow the other CEE countries' legislative approach and base its own screening rules on Germany's.

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88 See https://stats.oecd.org/glossary/detail.asp?ID=303; https://op.europa.eu/en/web/eu-vocabularies/th-concept/-/resource/eurovoc/5781 (Accessed: 21 October 2020).

89 Theiselmann, 2009, pp. 1495–1496. More on the legislative history of the German regulatory framework, see Schladebach and Becker, 2019, p. 1077.

90 Foreign Trade and Payments Ordinance of 2 August 2013 (Federal Law Gazette I p. 2865), as last amended by Article 1 of the Ordinance of 10 July 2020 (Federal Law Gazette I p. 1637) and Foreign Trade and Payments Act of 6 June 2013 (Federal Law Gazette I p. 1482), as last amended by Article 1 of the Act of 10 July 2020 (Federal Law Gazette I p. 1637).

91 This can be noticed by merely comparing the highly resembling legal structure of FDI screening rules in Germany and the CEE countries, for example, regarding the determination of the thresholds, grounds for screening, and covered sectors.

3. FDI screening in Croatia *de lege lata*

Croatia is doing its best to adhere to the deadlines imposed for the transposition of EU legislation into its legal system. As the case with the Regulation (EU) 2019/452 will demonstrate, such transpositions are mostly based on the 'copy and paste' of abstract rules of EU legislation. Such a legislative approach normally results in various degrees of legal uncertainty. The uncertainty arises from the broad wording of EU legislation, which is intended to enable each Member State to preserve the purpose of EU legislation and adapt that legislation to the peculiarities of each national legal system.[92] Preferably, abstract EU rules should be transposed from the outset into concrete national rules that are applicable in practice, and do not result in a high degree of legal uncertainty. Unfortunately, the current lacklustre approach leaves too much to the imagination and, subsequently, to the later amendments of the transposed EU legislation.

Once the EU passed the Regulation (EU) 2019/452 in 2019, the regulation found its place in the Croatian legislator's proposal for the harmonisation of the Croatian legislation with the Community *acquis* during 2020. The initial plan for transposition of the Regulation (EU) 2019/452 into a legal act (law) was due in the first half of 2020.[93] The announcement of the implementation through a specific act resulted in a reasonable expectation that such transposition will be in line with German or CEE countries' FDI screening legislation already in place, as those countries' rules often serve as legislative models to replicate. Due to a very unfortunate series of events caused by the epidemic and the earthquake, it should come as no surprise that the transposition of the Regulation (EU) 2019/452 did not occur as planned. However, no one expected that instead of an extensive legal act (law), the Government of Croatia would ultimately implement the Regulation (EU) 2019/452 through ordinance (bylaw).

The Ordinance was passed by the Croatian Government on 24 September 2020, and it took effect in early October. It has only seven articles and is based on the government's legislative authority to enact ordinances for the transposition of the Community *acquis,* when such transposition can be achieved without the participation of the legislator.

The content of the Ordinance comes down to the establishment of a national contact point within the Ministry in charge of economic affairs and sustainable development. This point of contact is in charge of coordination and cooperation with the authorised contact points of other Member States and the Commission.[94] As provided by the Regulation (EU) 2019/452, this point of contact can also request the delivery of information from the foreign investor.[95] When another Member State or Commission

92 E.g., the first iteration of the Croatian Capital Market Act (2008) was plagued with many obscurities and issues. It presented a significant change in regulation of the capital markets comparing to previous legislation. Only the Capital Market Act from 2018 managed to rectify some of recognised issues, but many problems persist.

93 The Plan proposal for the harmonisation of Croatian legislation with the Community acquis during 2020, Croatian Parliament, Class 022-03/19-01/246, 31 December 2019, p. 2.

94 Art. 4, paras. 1 and 2 Ordinance.

95 Ibid., art. 4, para. 3; arts. 7 and 9 the Regulation (EU) 2019/452.

requests information about the FDI taking place in Croatia that may affect their security or public order, it may ask Croatian authorities to provide certain information about the FDI (e.g., the ownership structure of the foreign investor, the approximate value of the FDI, the business of the foreign investor, etc.). The competent Ministry, as the point of contact, can then request the foreign investor to deliver this information within seven days from receipt of the request.[96] The Ordinance, however, does not mention or require that the point of contact (or other administrative authority) will conduct FDI screening, as suggested by the Regulation (EU) 2019/452. This conclusion comes from the fact that the Ordinance does not refer to the cooperation mechanism in relation to FDI screening and does not contain any concrete screening mechanism.[97] The purpose of the Ordinance is solely to establish a point of contact. Thus, the Ordinance complies with the minimum transposition requirement of the Regulation (EU) 2019/452 (i.e., to establish a service centre that will handle requests from other Member States).[98]

It seems that the Croatian legislator did not take advantage of the opportunity to establish a screening mechanism regarding FDIs likely to affect security or public order. The main reason behind this decision remains unclear. It might be that the Croatian legislator was reluctant to negatively influence the inflow of potential (and much needed) FDI by imposing additional administrative burdens upon investors. Moreover, maybe the Croatian legislator concluded that it is unlikely that FDIs in domestic undertakings could affect national security or public order. Ultimately, maybe it was easier to comply with the minimum transposition requirement for now and leave the establishment of FDI screening mechanism for later consideration.

None of these reasons can be justified. Screening mechanisms could have been implemented in a way that would not have adversely affected the inflow of FDI into the Croatian economy.[99] However, Croatia willingly deprived itself of introducing a possible non-intrusive FDI screening mechanism intended to protect national security

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96 Art. 4., paras. 3 and 4 Ordinance.

97 E.g., pursuant to arts. 3 and 6 Regulation (EU) 2019/452. For more on this specific national screening regulation see Ch. 2 above.

98 Art. 11 Regulation (EU) 2019/452. Regarding the minimum transposition requirement see Lippert, 2019, p. 1540.

99 Concerning the need to avoid any measure that could prolong or in other way administratively burden foreign investments, the screening mechanism could have been established at a 'discretionary' basis. For example, this could have been achieved by enabling the FDI review to be initiated *ex officio* only within a specific period from the time the responsible authority became aware of the conclusion of the acquisition agreement or the FDI in an industry of strategic importance. Concerning the second reason, the national security or public order could be affected in many ways. The fact that Croatia is a sole or majority owner of some of the essential national infrastructure and assuming that it will not sell such infrastructure (e.g., the national energy production and distribution company, oil pipeline system company, national TV and radio broadcasting company), cannot ensure that FDI will not affect national security or public order. The FDI can take place in the private sector (e.g., by taking over of a privately owned domestic media company, weapons manufacturer, or a pharmaceutical company). Ultimately, possible postponement of the establishment of screening mechanisms cannot be accepted, as such mechanisms could have been established in way that would enable the responsible administrative authority to review FDI in specific sectors that are likely to cause concern if it deemed it necessary, all pursuant to the fleshed-out rules.

and public order. Moreover, there is no mechanism in place for other Member States or the Commission to inform Croatia of a potentially dangerous FDI that might affect security and public order, not only in Croatia, but also in other Member States.[100]

It is worth noting that Croatian law is familiar with forms of FDI screening in sector-specific national legislation. This generally relates to the regulation of credit lending institutions, voluntary and obligatory pension funds, stock exchanges, investment companies, central clearing depository companies, and the central clearing counterparties. The established screening mechanism in these cases generally follows the same approach. Namely, every acquisition of shares in these companies amounting to or above a determined threshold (10, 20, 30, or 50 percent of voting rights or capital share) requires prior approval from the competent authority (e.g., the Croatian National Bank for credit institutions, or the Croatian Financial Services Supervisory Agency for stock exchanges).[101] Approval of the intended transaction is given if the review demonstrates that the prescribed conditions are met. The purpose of such conditions is to ensure that the change in the shareholder structure is not detrimental to the orderly operation of the target company's business activities, or its compliance with the imposed regulatory duties and obligations.[102] Upon application for the approval of the intended transactions, the competent authority must respond to the transaction within a set time (usually within 60 days of receipt of the proper application).[103] If there

100 In this regard, the Regulation (EU) 2019/452 provides that the Member State shall give due consideration to the comments of the other Member States and the opinion of the Commission. Art. 7, para. 7 Regulation (EU) 2019/452.

101 Art. 24, para. 3 Credit Institutions Act, Official Gazzete, Nos. 159/2013, 19/2015, 102/2015, 15/2018, 70/2019, 47/2020; art. 79, para. 1 Voluntary Pension Funds Act, Official Gazzete, Nos. 19/2014, 29/2018, 115/2018; art. 20, para. 1 Obligatory Pension Funds Act, Official Gazzete, Nos. 19/2014, 93/2015, 102/2015, 64/2018, 115/2018, 58/2020 (there are no thresholds, every acquisition must be notified to the competent authority for approval); art. 12, para. 1 Capital Market Act, Official Gazzete, Nos. 65/2018, 17/2020 (investment company), ibid., art. 293 (stock exchange, referring to the appropriate application of the investment company rules), ibid., art. 542, para. 1 (central clearing counterparty, referring to the EU Regulation 648/2012, which introduces qualifying threshold of only 10 percent of the capital or voting rights), ibid., art. 641, paras. 1 and 3 (central clearing depository company).

102 Arts. 25, para. 2 and 28, para. 1 Credit Institutions Act (special emphasis is given to the non-existence of conviction for various criminal offences); art. 84, para. 1 Voluntary Pension Funds Act; art. 21, para. 2 Obligatory Pension Funds Act; art. 21, para. 1 Capital Market Act (investment company), ibid., art. 293 (stock exchange, referring to the appropriate application of the investment company rules), ibid., art. 542, para. 1 (central clearing counterparty, referring to the EU Regulation 648/2012), ibid., art. 648, para. 1 (central clearing depository company).

103 Art. 26, para. 4 Credit Institutions Act; art. 82, para. 1 Voluntary Pension Funds Act; art. 22, para. 1 Obligatory Pension Funds Act (it should also be noted that art. 24, para. 2 provides that the competent authority will refuse to issue approval to start conducting fund business activities if the rules of a third country with which the fund is closely related make the performance of supervision aggravating or impossible, e.g. where the rules of the third country enable delivery of required information only upon court order or entirely prohibit such delivery); art. 18, para. 3 Capital Market Act (investment company), ibid., art. 293 (stock exchange, referring to the appropriate application of the investment company rules), ibid., art. 542, para. 1 (central clearing counterparty, referring to the EU Regulation 648/2012), ibid., art. 646, para. 2 (central clearing depository company).

is a breach of rules and acquisition is executed without prior approval by the competent authority, the acquired shares will have to be divested within a certain period, during which the acquirer of such shares cannot act upon any voting rights derived from such shares (in some cases, the transactions conducted are considered null and void).[104]

Besides the screening mechanisms in place to ensure efficient and orderly operation of related industries, Croatian law establishes non-sector-specific screening mechanisms in the Competition Act's assessment procedure for compatibility of concentrations with competition rules. Every concentration of undertakings that would significantly impede effective competition in the market shall be forbidden.[105] Parties to the proposed concentration must notify the responsible authorities.[106] That authority will consider the effects of the proposed concentration on competition and possible limitations on access to the related market.[107] Ultimately, within a set timeframe, the proposed concentration will either be declared compatible, conditionally compatible, or incompatible.[108] In cases where the concentration has been conducted contrary to these rules, the authority can order the parties to transfer or divest the acquired shares; it can also prohibit or restrict the exercise of voting rights related to the shares in question. It can mandate a dissolution of the joint venture or any other form of control that resulted from the incompatible (prohibited) concentration.[109] Like the previous sector-specific screening mechanisms, these rules do not protect national security and public order. They are aimed at preventing all forms of restriction or distortion of competition. [110]

Moreover, Croatian law is familiar with screening mechanisms for specific state-owned companies that underwent privatisation but are still considered to be of special interest to the nation. This is the case with the national oil company, INA d.d., which was partially acquired by the Hungarian national oil company Mol Nyrt. currently holding 49,1 percent of the overall share capital. This legislation requires that every intention to acquire a qualified share in the company (25 and 50 percent of total shares with voting rights) shall be notified to the Ministry responsible for the energy industry.[111] Following notification, the competent Ministry gives an opinion to the Croatian Government, which may approve or disapprove such acquisition.[112] The Government

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104 Art. 30, paras. 1 and 7 Credit Institutions Act; art. 85, paras. 1 and 2 Voluntary Pension Funds Act; art. 20 para. 1 Obligatory Pension Funds Act (however, the transactions relating to the acquisition of related shares are null and void); art. 23, paras. 1 and 4 Capital Market Act (investment company); ibid., art. 293 (stock exchange, referring to the appropriate application of the investment company rules); ibid., art. 649, paras. 1 and 2 (central clearing depository company).

105 Art. 16 Competition Act, Official Gazzete, Nos. 79/2009, 80/2013.

106 Ibid., art. 17, para. 1.

107 Ibid., art. 21, para. 2.

108 Ibid., art. 22, paras. 2-7.

109 Ibid., art. 24, para. 2.

110 Ibid., art. 2.

111 Art. 10, para. 1 INA Privatisation Act, Official Gazzete, Nos. 32/2002, 21/2019.

112 Ibid., art. 10, paras. 3-6.

can deny the request if it considers the acquisition a serious threat to public safety, to the security, reliability, and regular supply of energy, and/or to the safety of the energy supply infrastructure.[113] The review is conducted on the basis of objective and non-discriminating standards.[114] If these rules are breached, the acquisition of related shares shall be null and void.[115] This rare, company-specific act aims to safeguard the regular oil supply and related company infrastructure. Hence, this fits into the general notion of protection of national security and public order, as determined by the case law of the CJEU[116] and the Regulation (EU) 2019/452.

Although the aforementioned examples do not aim to safeguard national security and public order in a comprehensive manner, as envisaged by the Regulation (EU) 2019/452, these rules demonstrate that the Croatian legislator is familiar with some forms of screening. Since the Ordinance lacks specificity, the following section elaborates on the need and outlines possible content for the prospective Croatian FDI screening mechanism, as proposed by the Regulation (EU) 2019/452.

4. FDI screening in Croatia – regulatory prospects

Considering the compatibility of a preponderant part of the Croatian legal system with the German legal system, implementation of the FDI screening mechanisms in Croatia *de lege ferenda* should, arguably, follow the experiences of other CEE countries and establish the national FDI screening legislation along the lines of the German FDI screening regulatory concept.[117]

■ *4.1. Personal scope of application (subjects covered)*

The legal framework established by the German Foreign Trade and Payments Act, and the accompanying German Foreign Trade and Payments Ordinance, generally applies to domestic companies across all sectors. Every legal entity with its registered office

113 Ibid., art. 10, para. 7.

114 Ibid., art. 10, para. 13.

115 Ibid., art. 10, para. 16.

116 Campus Oil, para 35.

117 This compatibility of the two legal systems and the following conclusion is not based solely on the fact that both legal systems belong to the Germanic legal tradition. German law served as a legal role model and inspiration for many crucial pieces of Croatian legislation (e.g., the Companies Act, the Insolvency Act, and significant parts of the Obligations Act). The Croatian legal system's reliance on German solutions is the only reasonable solution, especially since rich and long-standing jurisprudence of German courts already had the opportunity to decide legal issues that have not yet emerged in Croatia, thus contributing to further development of the established piece of legislation. This means that current German laws are a result of years of development by both German courts and the German legislature. In any case, German laws are the result of methodical and substantive approach in law-making by the German legislature. In addition, the German legal literature is extensive and abundant; thus, it can serve as a guide, with a corresponding level of caution and critique, in dealing with recognised legal issues before the competent Croatian authorities (e.g., administrative authorities, courts, the legislature).

or place of management in Germany is considered a domestic company. Branches of foreign legal entities managed in Germany and with their own bookkeeping, separate from the foreign parent company, are also included.[118] This means that even non-EU companies can be considered target companies if they have some form of permanent establishment in Germany. The economic or shareholder size of the target company is irrelevant.

The screening of the cross-sector industry covers any acquisition of a German company by investors outside the EU or the EFTA.[119] On the other hand, screening of sector-specific industry covers any acquisition of a German company by foreign investors (EU or non-EU).[120] It is irrelevant if the investor is a foreign company, a sovereign wealth fund, a private person, or some other entity.[121] Natural persons are considered non-EU investors if they do not have their permanent residence or ordinarily residence in the Member State.[122] Moreover, even investments conducted by domestic persons may be subject to review by the competent authority.[123]

The future Croatian regulatory framework should foremost determine the scope of application of the screening legislation. The approach taken by the German regulatory framework provides solid guidelines. Any domestic company or a branch of a foreign company managed in Croatia should be designated as a potential target company, subject to examination by the competent authority. Assuming the domestic economic policy objective to attract FDI,[124] the screening should be limited to acquisitions initiated by non-EU/EFTA investors, regardless of the strategic industry covered by the target company. This screening should include acquisitions by both natural and legal persons, irrespective of their legal form. Considering the current lack of a scrutiny mechanism, this would advance the current legislation and, if needed, future amendments could further develop such scrutiny mechanisms for specific industries. As such a regulatory framework could interfere with the private law (by nullifying the contract), it will have to be established in the form of a legal act (law), which could be further supplemented by a more detailed by-law (i.e., the Government's or competent ministry's ordinance). However, such an act should not apply retroactively to investments that have already taken place. Otherwise, the legislator and the Government could retroactively review previously executed transactions by lowering the triggering threshold, or by adding new sectors to the list of industries already subject to review.[125]

118 Ego in Goette, Habersack and Kalss, 2017, Rn. 722-723.
119 Art. 55, para. 1 Foreign Trade and Payments Ordinance; Ego in Goette, Habersack and Kalss, 2017, Rn. 721; Besen and Slobodenjuk, 2020, p. 442.
120 Art. 60, para. 1 Foreign Trade and Payments Ordinance; Ego in Goette, Habersack and Kalss, 2017, Rn. 721; Besen and Slobodenjuk, 2020, p. 442.
121 Ego in Goette, Habersack and Kalss, 2017, Rn. 721.
122 Ibid., Rn. 723.
123 For more on this see the following subchapter 4.2.
124 See ch. 3 above.
125 In this regard from the perspective of German law see Annweiler, 2019, pp. 530-531.

■ *4.2. Material scope of application (grounds and FDI thresholds triggering the screening)*

The German regulatory framework differentiates between the cross-sector industry and sector-specific industry examination. Cross-sector examination generally follows the Regulation (EU) 2019/452 guidelines, while the framework for sector-specific companies establishes even more rigorous screening rules than for cross-sector companies. Only investments that pose a threat to the German public order or security are covered, irrespective of whether it concerns a cross-sector or sector-specific industry.[126] The term 'public order' or 'security' replaced the previous term 'actual and sufficiently severe threat'.[127] Moreover, the protection refers to other Member States' and EU-wide interests, in accordance with the Regulation (EU) 2019/452.[128] For this purpose, German legislation has established a national point of contact within the designated authority.[129] The term 'threat' to public order or security is further specified by listing industries that are particularly important in this regard.[130]

Acquisition of a cross-sector company may be considered a threat to public order or security. This refers particularly to companies operating critical infrastructure related to information technology security, development, and modification of software used for operating such infrastructure in specific sectors (energy, water, information and telecommunications, financial and insurance, healthcare, transport, and food industries), production of technical equipment used for implementing statutory measures in order to monitor telecommunications, including knowledge about said technology, and holding specific licenses for telematics infrastructure components or services. Moreover, a threat may arise with regard to the significant media industry companies that contribute to shaping public opinion.[131] On the other hand, acquisition of a sector-specific company may be considered a threat to public order or security, particularly where the company manufactures or develops certain weapons, engines, or parts for tanks or other armoured vehicles, information technology products[132] with security functions to process classified state information or IT security infrastructure; also companies that manufacture or dispose of these kinds of technology would be of interest.[133]

Domestic companies operating critical infrastructure are also subject to review; this includes those providing service of specific relevance for the national security (cross-sector) or operating in a specifically sensitive security industry, such as the manufacture of weapons of war or the development of military technology (sector-specific).

126 Arts. 55, para. 1 and 60 para. 1 Foreign Trade and Payments Ordinance.
127 Bierwagen and von Wistinghausen, 2020, p. 1989.
128 Art. 4, para. 1., subparas 4 and 4a; art. 5, para. 2 Foreign Trade and Payments Act; Bierwagen and von Wistinghausen, 2020, p. 1989.
129 Art. 13, para. 2., subara 2 e) Foreign Trade and Payments Act.
130 Besen and Slobodenjuk, 2020, p. 442.
131 Art. 55, para. 1 Foreign Trade and Payments Ordinance.
132 Hereinafter referred to as IT.
133 Art. 60, para. 1 Foreign Trade and Payments Ordinance.

This is a very wide field, which allows the responsible authority to act with a high level of discretion. However, there is also legal uncertainty, as it is unclear whether FDI into a domestic company is permissible, according to these rules.[134] During the review, special attention is being paid to situations where: (1) the investor is directly or indirectly controlled by a foreign government, including its agencies or armed forces; (2) the investor was involved in prior acquisitions that negatively affected the public order or security in Germany or another Member State; or (3) there is considerable risk that the acquirer (or its representative) was/is involved in criminal activities or administrative offences.[135]

The aforementioned list of target companies, classified by their business operations, is not exhaustive. Any acquisition of a German company can be subject to review.[136] The difference is in the thresholds that trigger such review. In case of the listed cross-sector companies (e.g., critical infrastructure related to IT security), the threshold is set at 10 percent of the voting rights in the target company, while in other German companies, the threshold is set at 25 percent of the voting rights.[137] The 10 percent threshold is not considered a double threshold, first being triggered at 10 and then at 25 percent. It only triggers once, at 10 percent.[138] The lower 10 percent threshold seems to be influenced by the statistical fact that listed public limited companies (*Aktiengesellschaften*) in Germany usually have an average of 55 percent of shareholders present at the annual shareholders' meeting.[139] This means that 25 percent of the voting rights acquired would normally imply a majority at the general meeting of shareholders. Presumably, in smaller limited liability companies, the situation might be different (*GmbH*). Furthermore, the 10 percent threshold complies with the Organisation for Economic Cooperation and Development, the International Monetary Fund, and the World Bank benchmark definition of long-term FDI.[140]

The threshold triggering the review for sector-specific companies (e.g., manufacturer of weapons or developer of military technology) is set at 10 percent of the voting rights in the target company.[141] The cross-sector and sector-specific investments purport direct and indirect acquisition (investment), alongside acquisitions by more investors acting in concert (i.e., based on the agreement on the joint exercise of voting

134 Annweiler, 2019, p. 531.
135 Arts. 55, para. 1b and 60, para. 1b Foreign Trade and Payments Ordinance; Besen and Slobodenjuk, 2020, p. 444.
136 Schuelken and Sichla, 2019, pp. 1406–1407.
137 Art. 56, para. 1 Foreign Trade and Payments Ordinance; Besen and Slobodenjuk, 2020, p. 443.
138 Annweiler, 2019, p. 531.
139 Schuelken and Sichla, 2019, pp. 1409. In addition, the lowering of the threshold to 10 percent was initiated because a Chinese fund wanted to acquire 20 percent of the German energy network operator. Since FDI screening could not be initiated because of the prior 25 percent threshold, the 20 percent had to be acquired by the Federal Government. See Schladebach and Becker, 2019, p. 1078.
140 Schladebach and Becker, 2019, p. 1078; Lippert, 2019, p. 1539.
141 Art. 60a, para. 1 Foreign Trade and Payments Ordinance.

rights).[142] Such investments also include acquisition of a determinable part of a domestic company or its essential operating resources, when such resources are necessary for the continuation of business activities of the company or a determinable part thereof.[143] This means that the covered investments include both share and asset deals. However, to trigger such screening review it is generally sufficient that the foreign investor takes control over a domestic company or a determinable part thereof.[144] Foremost, such anti-circumvention rules ensure enforcement of the FDI screening rules in cases where an investor intends to conceal its foreign origin behind a domestic company acting as a direct investor. While an individual investor may acquire fewer shares to escape the triggering threshold, several investors acting in concert may acquire a shareholding that normally would significantly exceed that threshold. Hence, the anti-circumvention rules prevent the bypass of a group of investors acting in concert with the intention to take over the target company.

The prospective Croatian legislation should stipulate that only investments that pose a threat to the public order or security of Croatia should be covered. However, this broad stipulation requires more specificity. This can be achieved by listing industries of strategic interest to Croatia and where such threats could emerge. It seems there is no need to differentiate between investments in sector-specific or cross-sector industries. All companies that operate critical public infrastructure (energy and water supply, information and telecommunications, healthcare, pharmaceutical, food, military, and media industries) should be covered. However, other forms of industry should also be covered (IT technology related to provision of public service, robotics and AI, biotechnology, cyber technology, etc.). A good example of such specification is provided under German law for the media industry (i.e., media industry that contributes to the formation of public opinion and has a particular topicality and breadth of impact). This should generally exclude smaller media outlets with limited circulation, such as local newspapers, TV, and radio stations or newspapers relating to topics which are of no significance for the national security (e.g., home improvement magazines). Included are all forms of media industries, irrespective of their form (TV, radio, newspaper or web-based media). The aim of such a specification is to prevent or reduce legal uncertainty regarding whether an investment in a certain company falls under the review. This should prevent unnecessary requests made to the responsible authority. In other words, the list of industry sectors subject to review should be as exhaustive and specific as possible.

The thresholds triggering review by the Croatian authority could be set pursuant to the German model. Namely, at least 25 percent of share capital or voting rights acquired for most of the listed industries and at least 10 percent of share capital or voting rights acquired for industries of particular strategic importance. Moreover,

142 Ibid., arts. 56, paras. 2 and 3 and 60a, paras. 2 and 3; Ego in Goette, Habersack and Kalss, 2017, Rn. 724.

143 Arts. 55, para. 1a and 60, para. 1a Foreign Trade and Payments Ordinance.

144 Lippert, 2019, p. 1539; Besen and Slobodenjuk, 2020, p. 444.

future rules should cover acquisition of assets or control over the target company up to the threshold value, which corresponds to the overall economic value of the company (e.g., acquisition of part of a company or unit that amounts to 25 or 10 percent of the overall economic value of the company). When estimating the economic value, the dynamic value of the acquired company's assets at the time of notification, should be used alongside the book value. The existing screening rules provided by other Croatian laws are insufficient, since the current triggering thresholds relate solely to the acquisition of a certain amount of share capital or voting rights.[145]

Anti-circumvention rules should also be included in prospective Croatian legislation. In other words, legislation should specify the means of possible indirect investment that would trigger the screening procedure. This means that ownership control over domestic companies is not necessarily the only type of investment covered (share deal). What matters is the establishment of *any form of control* over the target company. For example, this should include situations where the investor is acting in concert with other stakeholders, where joint exercise of voting rights is established, and asset deals where control of only one determinable part of the domestic company is acquired. Unlike German law, the triggering threshold should also include staged acquisitions of shares. This should prevent acquisition of the domestic company in several fractions, which, individually, do not trigger the review (e.g., under 10 percent) but would jointly surpass such threshold (e.g., over 10 percent).[146] The rules could provide that only acquisitions conducted within a certain period of time will be considered for the purposes of determining whether a regulatory threshold has been surpassed (e.g., up to five or more years since the latest acquisition). Causality should be established between the latest acquisition and previous acquisitions. Special attention should be paid to cases where the acquisition is being conducted directly or indirectly by a foreign government, or where the investor was already involved in acquisitions that negatively affected domestic or other Member State's public order or security.

■ *4.3. Procedure (competence, obligatory notification, review process, and decision)*

Under German law, the Federal Ministry for Economic Affairs and Energy is designated as the competent authority for the screening procedure.[147] Notification to this authority is with regard to every investment in a domestic company belonging to the cross-sector listed industry (10 percent threshold), following the conclusion of the acquisition contract by the investor.[148] Although there is no obligation to report any other acquisition of a domestic company in the cross-sector industry (25 percent threshold), the responsible authority is authorised to conduct the FDI screening *ex officio*. It shall inform the investor about the commencement of the review within three months of becoming aware of

145 For more on this see ch. 3 above.

146 In this regard, from the perspective of German law see Ego in Goette, Habersack, and Kalss, 2017, Rn. 724.

147 Arts. 55, para. 1 and 60, para. 1 Foreign Trade and Payments Ordinance.

148 Ibid., art. 55, para. 4.

the investment (subjective time limit). However, no review can be conducted after five years following the conclusion of the acquisition contract (objective time limit), even if the authority only became aware of the investment after the expiration of that five year period.[149]

Upon request, the competent authority will issue a certificate of non-objection (clearance) to such acquisition if it finds that there is no threat to the domestic public order or security.[150] Such a certificate is deemed to be issued if the competent authority did not initiate the investigation upon expiration of the two-month period following notification of investment in the domestic company belonging to the cross-sector listed industry (10 percent threshold).[151] The subjective and objective time limits for commencement of the review by the responsible authority ensure legal certainty. The regulations regarding issuance of the certificate of non-objection emphasise this aim even further. If the investment review takes place, the competent authority may ask the investor to provide the competent authority with all the relevant documents for the review.[152] Once the documents have been provided, the respective investment can be prohibited only within the following four months.[153] This means that the competent authority is precluded from prohibiting the investment. Such an approach contributes to legal certainty, since the review process cannot be postponed indefinitely. The prohibiting decisions require approval from the entire federal government.[154]

FDI screening in the listed sector-specific industry companies follows the same procedure, with slight changes.[155] Investments in companies belonging to the listed sector-specific industry (military industry) must be notified to the competent authority.[156] It is presumed that the investment is approved if the competent authority does not initiate a review within three months of notification by the investor.[157] The competent authority can request submission of additional documents, and the prohibiting decision on the respective investment can be made only within the three months following receipt of all the requested documents.[158] This time limit ensures that the review will not drag along indefinitely. The Federal Ministry for Economic Affairs and Energy, as the responsible authority, can involve other federal ministries in the review process (e.g., Federal Ministry of Defence). A denial decision requires the agreement of several federal ministries.

The aforementioned German rules can serve as guidelines for drafting the procedural aspects of the prospective Croatian legislation. The Ministry in charge of

149 Ibid., art. 55, para. 3.
150 Art. 58, para. 1 Foreign Trade and Payments Ordinance; Besen and Slobodenjuk, 2020, p. 443.
151 Art. 58, para. 2 Foreign Trade and Payments Ordinance; Besen and Slobodenjuk, 2020, p. 443.
152 Art. 57 Foreign Trade and Payments Ordinance.
153 Ibid., art. 59, para. 1.
154 Ibid.
155 Annweiler, 2019, pp. 529-530.
156 Art. 60, para. 3 Foreign Trade and Payments Ordinance.
157 Ibid., art. 61.
158 Ibid., arts. 61 and 62, para. 1.

economic affairs and sustainable development should be designated as the competent authority. The Ministry should establish a special department that will conduct screening of notified and unnotified investments, alongside other necessary legal actions aimed at regulatory enforcement. Furthermore, some form of cooperation with other ministries should be established depending on the specific investment concerned (e.g., Ministries of Defence and Energy).

Unlike German rules, if the Croatian legislator opts for the suggested exhaustive list approach, all FDI under scrutiny should be subject to notification. Notification should follow the conclusion of the related acquisition contract. Such notification should be followed by a short time limit (e.g., 60 days from notification), within which the competent authority can initiate the review procedure of the notified investment. If the competent authority does not initiate the review procedure during that time limit, the investment shall be considered approved. If the competent authority, however, decides to instigate the review procedure, it should reach a decision within an additional time limit (e.g., four months). Nonetheless, such a time limit should commence only after all the relevant documents have been submitted by the investor to the responsible authority. If the investor fails to provide notification of the pending investment, the competent authority should be empowered to conduct FDI screening *ex officio* within a certain time period (e.g., 60 days) after becoming aware of the investment (subjective time limit). However, once a certain longer period has lapsed following the conclusion of the contract (e.g., five years), the competent authority should be precluded from initiating the screening procedure (objective time limit). Upon proposal by the competent authority, the Croatian Government should approve the final denial.

■ *4.4. Breach of the screening rules, prohibiting decision, and legal remedies*

In case of failure to notify the responsible authority (or any other breach of German FDI screening rules), the breaching transaction shall be null and void.[159] With regard to domestic companies, in the case of investments subject to prior notification (i.e., mandatory notification following the conclusion of the transaction contract), transactions cannot be executed until the authority approves the investment.[160] This refers to all companies pertaining to the listed sector-specific industries and listed cross-sector industries. This means that the related investor could not exercise any voting rights in the German company, grant any payment of dividends, or receive any company-related information that might endanger security or public order protected by these rules.[161] The exercise of the voting rights prohibition refers both to direct and indirect exercise of rights (e.g., by transferring shares to another person for this purpose, by concluding agreements that exercise voting rights and similar actions).[162] Intentional violation of such a prohibition is considered a criminal offence based on rules governing a violation

159 Art. 15, para. 1 Foreign Trade and Payments Act.
160 Ibid., art. 15, para. 3.
161 Bierwagen and von Wistinghausen, 2020, p. 1989; Besen and Slobodenjuk, 2020, p. 445.
162 Art. 15, para. 4, subpara. 1 Foreign Trade and Payments Act.

of merger control rules.[163] Acquisition is considered to be conducted under the dissolving condition, which is contingent upon the competent authority's prohibiting decision.[164] This means that the transaction is not only pending, but it will terminate, if the competent authority decides to prohibit the transaction. Once the competent authority reaches its prohibiting decision, it can expressly prohibit the exercise of the respective investor's voting rights, or appoint a trustee that will reverse the transaction in question. This reversal will be conducted at the expense of the investor.[165]

The future Croatian regulatory framework could easily adopt similar rules. Namely, the nullification of the acquisition transaction should be the result of a failure to notify the competent authority. However, such a transaction would be valid if a certain longer time period passed after the conclusion of the acquisition contract (e.g., five years). If notified, the transaction would be pending. It would become effective following approval by the Ministry or the lapse of the established timeframe for the Ministry's review. Until that moment, the investor should be precluded from exercising voting rights in the target company, granting any payment of dividends to anyone, or receiving any sensitive company-related information. If the Ministry ultimately decides to prohibit the pending acquisition, the transaction should terminate. Intentional violation of this prohibition could be established as a criminal offence. Naturally, in the case of prohibiting decisions, Croatian legislation should provide the foreign investor and any other person having legal interest in the transaction (e.g., a shareholder of the target company or the target company itself) the ability to seek legal remedy against the prohibiting decision. As the subject matter at hand concerns matters pertaining to commercial law, commercial courts rather than administrative courts should have sole jurisdiction to decide these cases.

5. Conclusion

Recent regulatory activity in the field of FDI screening has resulted in significant changes to the CEE legislation dealing with inward capital movements. The economic shock caused by the COVID-19 epidemic urged many of these changes and led to the establishment of reviewing standards for FDI pouring into critical resources whenever those investments might affect national security and public order of the recipient Member State. However, loose wording of the Regulation (EU) 2019/452, non-binding provisions on the introduction of national screening mechanisms, and lack of a truly EU-wide screening solution have enabled legislators to use this wide discretion to draft FDI laws according to their national priorities and perceived threats. The CEE country report has demonstrated the heterogeneity of national FDI laws. CEE countries' solutions share common elements with regard to target investments, protected interests,

163 Besen and Slobodenjuk, 2020, p. 445.
164 Art. 15, para. 2 Foreign Trade and Payments Act.
165 Art. 59, para. 3 Foreign Trade and Payments Ordinance.

and protected sectors; on the other hand, they demonstrate significant procedural differences, from rather lenient Central European solutions to more stern concepts employed by Eastern European countries.

Croatia is one of the CEE countries that has yet to introduce a comprehensive screening mechanism. The recent Croatian transposition of the Regulation (EU) 2019/452 resulted in the establishment of a national contact point that handles information requests from other Member States and the Commission. However, this transposition does not contain any FDI screening rules. Furthermore, the limited scope of the existing Croatian screening rules (e.g., in competition and capital market law) cannot serve the purposes established by the Regulation (EU) 2019/452. This legal state of affairs leaves Croatia vulnerable to hostile foreign acquisitions of strategic industries, especially those that are privately owned. Consequently, the Croatian legislator should strive to establish a screening mechanism that protects national security and public order. In establishing the FDI screening mechanism, Croatia should follow the German legislative concept. The prospective Croatian legislative model, however, does not need to be as comprehensive as the German one. The Croatian model should focus on the control of companies that operate critical public infrastructure, and those involved in the development of new technologies (especially technologies related to public infrastructure). The list of covered industries should be as exhaustive and specific as possible. In addition to clearly indicating the personal and material scope of the screening mechanism, future legislation should include various anti-circumvention rules that prevent loopholes or abuse of screening rules. To ensure legal certainty, the screening procedure should establish strict objective and subjective time limits for initiating and completing the screening procedure. Before the Croatian courts, investors and the parties involved should have legal recourse to challenge prohibiting decisions issued by the competent authority. Unfortunately, at this moment, there are no indications that the Croatian Government intends to establish such a screening mechanism.

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