



Fundamental Freedoms in the Economic Security Era: Who Will Save Intra-Eu Investments?

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ARTICLES

ABSTRACT

In just a few years, the deterioration of trade relations between the world's largest economies, the COVID-19 pandemic, Russia's war of aggression in Ukraine and a global increase in geopolitical tensions triggered new global risks connected with globalisation and profound technological shifts. The traditional dichotomy between economic and military risks has grown indistinct, bringing both economy and defence in the array of security concerns. Market liberalization, which the doctrine of interdependency traditionally welcomed as a tool to ensure prosperity, began to be regarded as a source of potential security threats.

At the European level, the need to balance the Union's traditional openness to trade and investments with a comprehensive strategy to protect its economy and citizens culminated with the adoption of an European Economic Security Strategy on 20 June 2023 and its implementing measures on 24 January 2024.

By bringing economic concerns closer to the sphere of security, the Economic Security Strategy creates new needs for certainty in the single market. These needs emerge quite significantly in the field of investments screening, where Member States still retain great discretion.

Focusing on the EU framework for investment screening, this paper aims to spark a reflection around the notion of economic security within the EU single market and the negative effects that a fragmented approach to economic security might have on market integration, and in turn on competitiveness for EU players, across many sectors. To clarify the scope of Member States' manoeuvre, the paper looks at the case law of the Court of Justice of the European Union (CJEU) on restrictions to fundamental freedoms, which to date remain the main outer limit to distinguish genuine security claims from purely protectionist measures in application of screening provisions to intra-EU transactions.

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KEYWORDS:

national security; economic security; FDI screening; EU internal market; EU Treaty freedoms

TO CITE THIS ARTICLE:

Maria Vittoria Morrone, 'Fundamental Freedoms in the Economic Security Era: Who Will Save Intra-Eu Investments?' (2026) 22(1) Utrecht Law Review 47–62. DOI: <https://doi.org/10.36633/ulr.1188>

In just a few years, the deterioration of trade relations between the world's largest economies, the COVID-19 pandemic, Russia's war of aggression in Ukraine and a global increase in geopolitical tensions have triggered new global risks connected with globalisation and profound technological shifts. The traditional dichotomy between economic and military risks has become indistinct, bringing both economy and defence within the array of security concerns. To protect its societies and economies, the European Union (EU) has intensified efforts to strengthen its resilience, whether to energy security, pandemic preparedness, competitiveness, or supply chains and key technologies. In this context, the Union's open strategic autonomy¹ quickly evolved into a broader economic security framework through the progressive enactment of initiatives extending beyond traditional economic tools such as trade defence instruments.² This paradigm shift culminated with the adoption of a 'European Economic Security Strategy' on 20 June 2023,³ and a comprehensive trade, investment and research implementing package on 24 January 2024.⁴ The new Economic Security priorities pursue various policy objectives that transcend a purely economic rationale to enter into the sphere of security and independence as a requisite of sovereignty. By bringing economic concerns closer to the sphere of security, or by securitising economic concerns, the strategy creates new needs for certainty in the single market. The latter is built around four pillars – the fundamental freedoms enshrined in the Treaty on the Functioning of the European Union (TFEU) – that are at the heart of European integration. In the current context, one may question whether the notions of public security and public policy, which allow Member States to deviate from the single market freedoms, have evolved, and to what extent they now include economic concerns. These needs for certainty emerge notably in the field of investments screening, where Member States still retain a great spectrum of both discretion and standards in determining whether certain transactions may pose risks to the national interests and which, in the current constitutional framework, the EU can only partially harmonise. Starting from an analysis of the EU framework for foreign direct investment (FDI) screening, this paper aims to spark a reflection around the notion of economic security within the EU single market and on the detrimental effects that a fragmented approach to economic security might have on the single market's integration, and in turn on competitiveness for EU players across many sectors. When looking at the impacts on the single market, this contribution focuses on cross-border investments within the Union carried out by EU nationals or EU entities without the involvement of third-country investors ('purely intra-EU investments').⁵

The paper proceeds as follows. Section 2 describes the main features of the current European FDI screening framework, focusing on two main gaps that risk having spill-over effects on the exercise of fundamental freedoms within the single market. In fact, despite the EU framework currently covering only foreign direct investments, this paper makes the point that regulatory

1 The term 'open' emphasises the EU's commitment to an open economy and the rule-based multilateral trading system. (European Union (2016) Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy 7 <https://www.eeas.europa.eu/sites/default/files/eugs_review_web_0.pdf> accessed 10 May 2025.

2 Extensively on the evolution of the Strategic Autonomy Doctrine in the EU: F Casolari, 'Supranational Security and National Security in Light of the EU Strategic Autonomy Doctrine: The EU-Member States Security Nexus Revisited' (2023) 28 European Foreign Affairs Review 323; T Verellen and A Hofer, 'The Unilateral Turn in EU Trade and Investment Policy' (2023) 28 European Foreign Affairs Review, Special issue.

3 European Commission, 'Joint Communication by the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy: European Economic Security Strategy' JOIN (2023) 20 final.

4 European Commission, 'Communication from the Commission to the European Parliament and the Council. Advancing European economic security: an introduction to five new initiatives' COM (2024) 22 final. As part of the package, the Commission envisaged a legislative proposal for an enhanced Foreign Direct Investment (FDI) Screening Regulation as well as three White Papers covering, respectively, risks connected with EU investments towards third countries (outbound investments), risks connected with the export of dual-use goods, and the need to enhance support for research and development involving technologies with dual-use potential. The fifth element of the package was a proposal for a Council recommendation on enhancing research security.

5 Unless otherwise specified, along these pages: 'foreign direct investment' will be used to refer to investments into the Union carried out by a natural person of a third country or an undertaking of a third country; 'purely intra-EU investments' will be used to refer to investments originating from within the Union and carried out by EU nationals or EU-established entities which are not directly or indirectly controlled by third-country nationals or entities; 'investment within the Union with foreign control' will be used to refer to investments from within the Union, indirectly carried out by third-country investors through their EU-established subsidiaries; and finally, intra-EU investments will be used to refer generically to investments originating from within the Union, whether they are purely intra-EU investments or investments within the Union with foreign control.

actions in the field of FDI screening inevitably influence Member States' approach to intra-EU investments too. Section 3 seeks to put these profiles of uncertainty into the broader context, looking at the economic security concerns because arising from geopolitical challenges. It goes on to illustrate briefly the Commission's recent proposal for a revised EU FDI screening framework, focusing on its most significant changes in comparison with the current regime. It then submits that the risk of a negative impact on purely intra-EU investments appears heightened when looking at the proposed revised regulation, which could include investments within the Union with foreign control. Section 4 looks at the case law of the Court of Justice of the European Union (CJEU) on restrictions to fundamental freedoms on security grounds, focusing in particular on the *Xella*⁶ ruling. This judgment clarified that the standard of review of restrictions to the fundamental freedoms is still suitable to assess the legitimacy of screening decisions applied to intra-EU investments. In this way, fundamental freedoms remain the heart and the guardians of the single market, marking the outer limit by which to distinguish security and economic claims. Section 5 provides a conclusion and future outlook.

2 THE 2019 FDI SCREENING REGULATION

Regulation (EU) 2019/452 (the 2019 Regulation) was adopted on 19 March 2019 and entered into force on 11 October 2020.⁷ It constituted a pivotal step towards the establishment of a European approach to the screening of FDI into the Union. Its provisions address investments originating from third countries that are directed within the Union's territory, which are likely to affect the security or public order of one or several Member States.⁸ The adoption of the 2019 Regulation, which came at a time of intense political debate around the bloc's approach to FDI,⁹ marked a paradigm shift in the Union's traditional approach to FDI¹⁰ and led to the establishment of a new regulatory field at Union level¹¹ and a new institutional role for the Commission in the area of FDI.¹² The EU has traditionally been one of the most open investment regimes in the world, being both the world's leading source and destination of FDI.¹³ Nevertheless, several Member States, affected by growing globalisation challenges, started voicing concerns around foreign investors, notably state-owned enterprises, taking over European companies with key technologies for strategic reasons.¹⁴ In this context, the Regulation aims to ensure better coordination among the Member States, and with the Commission, to identify, assess and mitigate risks to security and public order in connection with investments from third countries

6 Case C-106/22, *Xella Magyarország*, EU:C:2023:568.

7 Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, [2019] OJ L 79I.

8 Art. 2(1) of the 2019 Regulation defines 'foreign direct investment' 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 which enable effective participation in the management or control of a company carrying out an economic activity. Art. 2(2) defines 'foreign investor' as a natural person of a third country or an undertaking of a third country, intending to make or having made a foreign direct investment.

9 J Velten, 'The Investment Screening Regulation and Its Screening Ground "Security or Public Order": How the WTO Law Understanding Undermines the Regulation's Objectives' (2020) CTEI Working Papers 2020-01, 5.

10 The then Commission President Juncker announced the legislative proposal for the FDI Screening Regulation with the following statement: 'Let me say once and for all: we are not naive free traders. Europe must always defend its strategic interests. This is why today we are proposing a new EU framework for investment screening'. See European Commission Press Release 'State of the Union 2017—Trade Package: European Commission proposes framework for screening of foreign direct investments' (2017), <IP_17_3183_EN.pdf> accessed 10 May 2025.

11 European Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the regions welcoming foreign direct investment while protecting essential interests', COM (2017) 494 final; S Hindelang and S Moberg, 'The art of casting political dissent in law: The EU's framework for the screening of direct investments' (2020) 57 CML Rev 1428.

12 T Verellen, 'When Integration by Stealth Meets Public Security: The EU Foreign Direct Investment Screening Regulation' (2021) 48(1) Legal Issues of Economic Integration 19, referring to the 2019 Regulation as an example of 'integration by stealth'. The Commission's powers relating to foreign direct investments having a specific link with trade between the European Union and a third country had been recognised by the Court of Justice of the European Union in Opinion 2/15 *EU–Singapore FTA*, EU:C:2017:376.

13 United Nations Conference on Trade and Development, 'World Investment Report 2019: Special Economic Zones' UNCTAD/WIR/2019, <<https://unctad.org/publication/world-investment-report-2019>> accessed 20 May 2025.

14 European Commission, 'Reflection Paper on harnessing globalisation' COM (2017) 240 final.

within the Union. It aims to do this without prejudicing the openness of the Union's economic model and the attractiveness of the single market for FDI, and to this end, the Regulation was built around two pillars. First, it established a 'framework for the screening by Member States of FDI into the Union for grounds of security or public order'.¹⁵ This section of the Regulation introduced a minimum level of procedural and substantial harmonisation, promoting the convergence of Member States' national screening mechanisms when applied to investments from third countries. Under this 'light-touch' approach,¹⁶ Member States are not required to establish an FDI screening mechanism.¹⁷ If they do adopt or maintain one, however, they must comply with the Union's framework and its requirements.¹⁸ These include: obligations to ensure that national screening mechanisms set out the relevant timeframes, are transparent and avoid discrimination between third countries;¹⁹ obligations to take into account other Member States' comments and/or the Commission's opinions on specific investments;²⁰ and obligations to protect confidential information,²¹ as well as to allow *recourse* against screening decisions and to provide for anti-circumvention mechanisms.²² Besides these mandatory requirements, the 2019 Regulation includes a list of factors that national screening authorities *may* take into consideration when assessing whether a FDI is likely to affect security or public order.²³ These factors, which do not have binding effects on the Member States, include the investment's potential effects, particularly on critical infrastructure, critical technologies, the supply chains of critical inputs, the protection of personal data and media pluralism,²⁴ and the investor's potential links with foreign governments and state bodies, alongside its criminal records or previous involvement in activities affecting the security or public order of another Member State.²⁵

The second pillar is the heart of the 2019 Regulation. It introduces a mandatory cooperation framework between Member States and the Commission with regards to foreign direct investments likely to affect security or public order. Although with inevitable differences, the 2019 Regulation applies in all Member States, regardless of whether they have adopted a screening mechanism. As regards Member States that have a screening mechanism in place, the 2019 Regulation requires them to inform and notify the cooperation mechanisms any time they screen FDI. This entitles the other Member States, including those that do not have a screening mechanism themselves, as well as the Commission, to exchange relevant information concerning the transaction's effects on security or public order of the Union or its Member States. The Member States' comments and/or the Commission's opinion shall be given due consideration by the screening authorities of the receiving Member State when adopting the final decision.²⁶ As regards Member States that do not have a screening mechanism, whenever a foreign direct investment planned or completed in their territory is deemed by the other Member States and/or the Commission as likely to affect the security or public order, the 2019 Regulation empowers those Member States to provide comments, and the Commission to issue an opinion, which the receiving Member State shall duly consider.²⁷ The cooperation mechanism, for the first time, endowed the Commission with a specific role in relation to FDI. In the context of the cooperation mechanism, it is the only actor empowered to issue an opinion

¹⁵ Regulation (EU) 2019/452 (n 7), Art. 1(1).

¹⁶ Hindelang and Moberg (n 11).

¹⁷ Recital 8 of the Regulation provides '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'.

¹⁸ 11 Member States (Austria, Denmark, Germany, Finland, France, Latvia, Lithuania, Italy, Poland, Portugal and Spain) had an investment screening mechanisms in place even before the adoption of the 2019 Regulation. See European Commission, COM (2017) 494 (n 11).

¹⁹ Regulation (EU) 2019/452 (n 7), Art. 3(2).

²⁰ *ibid* Art. 3(3).

²¹ *ibid* Art. 3(4).

²² On the interpretation of the wording 'recourse' as opposed to 'redress' initially proposed by the Commission, see Verellen (n 12) 23.

²³ Regulation (EU) 2019/452 (n 7), Arts. 3(5) and 3(6).

²⁴ *ibid* Art. 4(1).

²⁵ *ibid* Art. 4(1).

²⁶ *ibid* Art. 6(2).

²⁷ *ibid* Art. 7.

towards the Member States carrying out the screening or in whose territory the investments are being carried out, whenever: (i) it considers that an FDI is likely to affect security or public order in more than one Member State, or it has relevant information in relation to that FDI, or (ii) where justified, after at least one third of the Member States considers that an FDI is likely to affect their security or public order, or (iii) it considers that investments risk undermining a strategic project or programme of Union interest.²⁸

2.1 PROFILES OF UNCERTAINTY IN THE 2019 FDI SCREENING REGULATION

2.1.1 The definition of security and public order

The 2019 Regulation allows Member States to screen foreign direct investments from third countries on grounds of security and public order. It does not, however, provide a definition of ‘security’ or ‘public order’. Article 4 includes some indicative factors that Member States may take into account, which arguably transcend the traditional conception of security, but their assessment is ultimately left to the Member States.²⁹ The Commission’s explanatory memorandum does not provide further guidance, in that it merely refers to the 2019 Regulation as a ‘policy response to protect legitimate interests with regard to foreign direct investments that raise concerns for security or public order of the Union or its Member States’.³⁰ As to which concerns might constitute ‘legitimate interests’,³¹ the memorandum mentions that ‘recently, a series of take-overs of European companies involved foreign investors with strong ties to their home governments which strategy focus on the purchase of European companies that develop technologies or maintain infrastructures that are essential to perform critical functions in society and the economy’.³² In the absence of harmonised EU rules, significant conceptual differences remain between national screening legislations with regards to the expression of concepts such as ‘security’, ‘public order’, ‘national security’ and ‘essential security interests’, as well as between the probability thresholds that indicate the likelihood of an adverse effect on security and public order (‘likely’, ‘disrupt’, ‘threaten’, ‘may affect’).³³ The lack of clear substantive criteria or definitions of the thresholds for the application of the screening mechanisms leaves considerable leeway for interpretation. Member States might thus construe them as to include concerns about loss of strategic technological knowledge not only from a security perspective but also from a more economic and industrial one.³⁴ This lacuna is already problematic from the perspective of third-country investors, in that an extensive interpretation of security or public order concepts risks undermining the open investment climate that the 2019 Regulation intends to safeguard.³⁵ Moreover, extensive interpretations of security and public policy grounds under the Regulation would be hard to reconcile with the case law of the CJEU, which does

²⁸ Ibid Art. 8.

²⁹ The screening is carried out by the Member States (Article 1(1)), and the Regulation is without prejudice to each Member State having sole responsibility to protect its national security and essential security (Article 1(2)).

³⁰ European Commission, Explanatory Memorandum to the Regulation 2019/452, 2.

³¹ The expression, although not explicitly clarifying the standard of review applicable to restrictions on FDI within the scope of the EU FDI Screening Regulation, seems to recall the Court of Justice of the European Union’s language in relation to fundamental freedoms restrictions, based, e.g., on Article 52 and Article 65 TFEU. ‘Legitimate interests’ is also used in Article 21(4) of the Merger Regulation (Regulation 139/2004), to describe the narrow exceptions that allow Member States to deviate from the Commission’s assessment on the impact of concentrations with a Union dimension on the competition in the single market.

³² European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union’ COM/2017/0487 final – 2017/0224 (COD), 10.

³³ European Commission, ‘Evaluation of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union,’ SWD (2024) 23 final, 37.

³⁴ J de Kok, ‘Foreignness in EU Investment Screening Law’, in J H Pohl, S Hindelang, T Papadopoulos and J Wiesenhal (eds.) *National Security and Investment Controls* (Springer 2024) 75; W Zwartkruis and B J de Jong, ‘The EU Regulation on Screening of Foreign Direct Investment: A Game Changer?’ (2020) 31 *European Business Law Review* 447.

³⁵ European Court of Auditors, ‘Screening foreign direct investments in the EU – First steps taken, but significant limitations remain in addressing security and public-order risks effectively’ Special Report 27/2023 <<https://www.eca.europa.eu/en/publications?ref=SR-2023-27>> accessed 10 May 2025, 37, calling on the Commission to introduce in the revised regulation a definition of ‘likely’ risk, by aligning it clearly to the notion of ‘genuine and sufficiently serious threat to a fundamental interest of society’.

not allow restrictions to FDI based on purely economic grounds.³⁶ However, one may argue that, when it comes to security threats in connection with third countries in particular, this narrow interpretation of security exceptions might be (proportionately) loosened to reflect the evolution in the public perception and Member States' needs.³⁷ In fact, the European Council explicitly listed reducing sovereignty and reinforcing the Union's economic base as a means to build a 'European sovereignty'.³⁸ Hence, considering the factors the Regulation itself lists as capable of affecting security and public order under Article 4, it is not inconceivable that industrial factors may legitimately inform Member States' assessments of possible security threats posed by third-country investments into the single market.³⁹ After all, the case law of the CJEU acknowledged that additional grounds for justifications may potentially be acceptable in the case of restrictions of capital movements involving a third country as compared to capital movements between Member States.⁴⁰

From the perspective of this contribution, however, vague criteria in the Regulation create a risk that, if Member States did reach some level of convergence under the nudge effect of the 2019 Regulation, they would arguably converge towards those broader notions of security and public order, which may justify the restriction of third-country investments but would not be acceptable for purely intra-EU investments (at the very least...)⁴¹

2.1.2 The scope of Member States' investment screening mechanisms

In addition to the definitional gap highlighted in the previous subsection, the 2019 Regulation allows Member States a great margin of discretion in designing their investment screening mechanisms. This leeway applies to the choice of adopting any mechanism at all, as well as which transactions or sectors to cover. The fragmentation of national mechanisms enacted by the Member States reflects their different views on the sectors that are more vulnerable to public order or security risks and on the degree of urgency by which to address such risk. Even when the same sectors are covered, experience shows that certain definitions and provisions of the 2019 Regulation are interpreted and applied in different ways across Member States.⁴² This is especially tricky in a context in which, due to Treaty provisions, Member States can determine by themselves *which investors* to cover.⁴³ In fact, at least half of the Member States that currently have an investment screening mechanism apply it to both EU and third-country investors.⁴⁴

Overall, despite the 2019 Regulation not directly aiming to address purely intra-EU investments, the gaps in its provisions, combined with the Union's institutional setting, leave the gate open for at least two categories of risks affecting intra-EU investments. First, investments may face disproportionate restrictions due to extensive interpretations of security and public

³⁶ Case C563/17, *Associação Peço a Palavra and Others*, EU:C:2019:144, para 72 and the case-law cited.

³⁷ Zwartkruis and de Jong (n 34) 16.

³⁸ European Council, 'Versailles Declaration' (10–11 March 2022) <<https://www.consilium.europa.eu/media/54773/20220311-versailles-declaration-en.pdf>> accessed 10 May 2025.

³⁹ J de Kok, 'Legal Remedies against Investment Screening Decisions' in B de Jong, A Looijestijn-Clearie, S Tans and M Veenbrink (eds), *The Rise of Public Security Interests in Corporate Mergers and Acquisitions* (Wolf Legal Publishers 2022) 85, 100.

⁴⁰ Case C446/04, *Test Claimants in the FII Group Litigation*, EU:C:2006:774, para 121. Similarly, the Commission acknowledged that permissible grounds of justification and proportionality may be interpreted more broadly in the case of investments from third countries. See European 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)' COM(2020)1981 final.

⁴¹ Suggesting that Member States might in fact adapt to a lower threshold based on the FDI Regulation, see also: Verellen (n 12); A Crivoi, 'EU FDI Screening – Level Up in Multilevel Governance?' (2024) 2 *ZeuR* 247; J de Kok (n 39).

⁴² European Commission, 'Evaluation of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union' SWD (2024) 23 final, 27.

⁴³ Reference is made particularly to Article 4(2) TEU, according to which 'national security remains the sole responsibility of each Member State', and Article 346 TFEU, according to which Member States may deviate from EU internal market rules to protect their 'essential security interests'.

⁴⁴ Number updated as of November 2024, based on the author's comparative review of investment screening laws in the Member States.

order exceptions by the Member States. Second, the lack of a clear delineation between the screening procedures that Member States should set up for the purposes of reviewing foreign direct investment as compared to intra-EU investments risks pushing Member States towards assimilating the thresholds for restricting these two categories of transactions. The more the notion of security evolves to encompass economic considerations, the higher the risk of infringing free movement rules or otherwise impeding the exercise of Treaty freedoms.⁴⁵ This might not be good news in the economic security era.

3 TOWARDS A EUROPEAN ECONOMIC SECURITY STRATEGY

The grey areas left by the 2019 Regulation raised important interpretative issues – and consequent risks of negative spill-over for investments within the single market. These risks are heightened by the current geopolitical context and the progressive mingling of economic and security concerns in the strategic agendas of the Union and its Member States. Since the adoption of the 2019 Regulation, new and profound challenges have highlighted the EU's structural supply dependencies and their potentially damaging effects in times of crisis. Global market liberalisation, which the doctrine of interdependency traditionally welcomed as a tool to ensure prosperity, began to be regarded as a source of potential security threats.⁴⁶ At the European level, challenges such as the vulnerability of supply chains for critical medical supplies, the politicisation of semiconductors, and the weaponisation of gas and energy supplies, revealed the need to balance the Union's traditional openness to trade and investments with a comprehensive strategy to protect its economy and citizens.⁴⁷ In this context, the notions of economy and security became dramatically intertwined in both language ('the *weaponisation of supplies*') and policy actions. Following the outbreak of the COVID-19 pandemic, only a few months ahead of the entry into force of the 2019 Regulation, the Commission issued a communication to the Member States concerning investments from third countries and the protection of Europe's strategic assets.⁴⁸ The communication singles out FDI screening as part of the overall response to the pervasive effects of the COVID-19-related emergencies *on the economy* of the EU.⁴⁹ In the 2022 Versailles Declaration adopted by the European Council in the aftermath of Russia's full-scale invasion of Ukraine, the EU leaders decided to 'take more responsibility for [the EU's] security and take further decisive steps towards building [...] *European sovereignty, reducing our dependencies* and designing a new growth and investment model for 2030'.⁵⁰ Only a few weeks later, the European Commission issued a communication providing guidance to the Member States concerning FDI from Russia and Belarus, calling on all Member States to urgently set up comprehensive FDI screening mechanisms and in the meantime to use other suitable legal instruments to assess potential risks that investments from those countries could create to security or public order in the Union.⁵¹ The 2023 Economic Security Strategy was adopted in this context, alongside the heightened pressure on the single market and concerns by uncontrolled third-country investments in the Union where reciprocity

⁴⁵ European Court of Auditors, Special report 27/2023 (n 35), 36.

⁴⁶ For an in-depth analysis of the challenges posed by economic security and the approaches to it taken by other large economies, see: European Parliament and others, 'European economic security: current practices and further development: in-depth analysis' (2024) INTA Committee Study.

⁴⁷ In the European Union the intersection between economic policy and security was more gradual and occurred later than in many other jurisdictions. First mentioned in 2013, when the expression 'strategic autonomy' was forged in the context of the Common Foreign Security Policy (European Council, 'Conclusions' doc. EUCO 217/13 (19–20 Oct. 2013)), the profound repercussions of economic vulnerabilities for the Union's security were highlighted clearly in the 2022 Versailles Declaration adopted by the European Council, where EU leaders decided to 'take more responsibility for [the EU] security and take further decisive steps towards building [...] *European sovereignty, reducing our dependencies* and designing a new growth and investment model for 2030' (European Council, Informal meeting of heads of state or government, Versailles, 10–11 March 2022, 23).

⁴⁸ European Commission, COM(2020)1981final (n 40).

⁴⁹ *ibid.*, 1.

⁵⁰ European Council (n 2), 23.

⁵¹ European Commission, 'Communication from the Commission – Guidance to the Member States concerning foreign direct investment from Russia and Belarus in view of the military aggression against Ukraine and the restrictive measures laid down in recent Council Regulations on sanctions' [2022] OJ C1511/01.

was lacking.⁵² Premised on the notion that the EU thrives in an open and rules-based world, the strategy seeks to establish a new balance between the EU's traditional openness and the need for a comprehensive approach to the Union's economic security. In doing so, the strategy sets out an overarching framework comprising both existing tools and newly proposed initiatives to minimise dependencies and vulnerabilities in critical sectors, based on three prongs, the first of which is promoting the EU's competitiveness supporting the bloc's economic base.⁵³ The new priorities pursue various policy objectives that range from maintaining a competitive edge in critical technologies with military applications, to ensuring physical and digital security of critical infrastructure, as well as preventing the weaponisation of economic dependencies or economic coercion: all goals that transcend a purely economic rationale to enter into the sphere of security and independence as a requisite of sovereignty. On 24 January 2024, the European Commission adopted a comprehensive trade, investment and research package, implementing the Economic Security Strategy of 20 June 2023.⁵⁴ At the heart of this implementing package lies the Commission's proposal for a revised FDI Screening Regulation repealing Regulation 452/2019 (the 2024 Proposal).⁵⁵ The 2024 Proposal was issued at the end of the Commission's mandatory evaluation on the functioning and effectiveness of the Regulation.⁵⁶ The evaluation was complemented by the findings of an OECD's report on the effectiveness and efficiency of the 2019 Regulation, as well as a special report of the European Court of Auditors (ECA) on the screening of FDI in the EU.⁵⁷ The results of these evaluations, combined with the experiences gained by the Commission through the assessment of over a thousand transactions notified to the cooperation mechanism, revealed several important shortcomings in the current framework.⁵⁸

3.1 THE 2024 PROPOSAL FOR A REVISED FDI SCREENING REGULATION

The 2024 Proposal seeks to provide solutions to the need for deeper regulatory convergence in the field of FDI screening and to improve the overall efficiency of the system. Amongst the several novelties introduced, three could be said to mark a fundamental shift in the reach of the EU's framework, with profound effects on the single market fundamental freedoms. These changes are described in turn.

⁵² See for example, European Commission, 'Fourth Annual Report on the screening of foreign direct investments into the Union' COM (2024) 464 final, stating that 'in their Joint Communication on a 'European Economic Security Strategy', which aims at minimising risks arising from certain economic flows in the context of increased geopolitical tensions and accelerated technological shifts'. Reference is also made to the OECD FDI restrictiveness index, ranking China amongst the most restrictive in the world. In this vein, the Critical Raw Material Act acknowledges that the EU relies almost exclusively on imports for many critical raw materials, and suppliers of those imports are often highly concentrated in a small number of third countries, predominantly China. This concentration exposes the EU to significant supply risks that could jeopardise the functioning of the single market and damage the EU's competitiveness (the European Commission's Proposal for a Regulation of the European Parliament and of the Council establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) 168/2013, (EU) 2018/858, 2018/1724 and (EU) 2019/1020). In the literature, see: M Martin-Prat, 'The European Commission Proposal on FDI Screening' in J Bourgeois (ed), *EU Framework for Foreign Direct Investment Control* (Kluwer Law International 2020), 98; Hindelang and Moberg (n 11), 1430; J Bourgeois and E Malathouni, 'The EU Regulation on screening foreign direct investment: Another piece of the puzzle' in J Bourgeois (ed), *EU Framework for Foreign Direct Investment Control* (Kluwer Law International, 2020).

⁵³ The other two pillars are: protecting economic security through targeted and proportionate tools that minimise spill-over effects on global economy; and partnering with the broadest possible range of countries to address shared concerns and interests, including by entering new trade agreements and relying on the rule-based multilateral trading system.

⁵⁴ European Commission, 'Communication from the Commission to the European Parliament and the Council. Advancing European economic security: an introduction to five new initiatives' COM (2024) 22 final. As part of the package, the Commission envisaged a legislative proposal for an enhanced Foreign Direct Investment (FDI) Screening Regulation as well as three White Papers covering, respectively, risks connected with EU investments towards third countries (outbound investments), risks connected with the export of dual-use goods, and the need to enhance support for research and development involving technologies with dual-use potential. The fifth element of the package was a proposal for a Council recommendation on enhancing research security.

⁵⁵ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 of the European Parliament and of the Council' COM (2024) 23 final.

⁵⁶ European Commission, SWD (2024) 23 final (n 33).

⁵⁷ OECD, 'Framework for Screening Foreign Direct Investment into the EU: Assessing Effectiveness and Efficiency' <www.oecd.org/en/publications/framework-for-screening-foreign-direct-investment-into-the-eu_f75ec890-en.html> accessed 10 May 2025. European Court of Auditors (n 35).

⁵⁸ European Commission COM (2024) 464 final, (n 52).

3.1.1 The obligation to introduce a national investment screening mechanism

The adoption of the 2019 Regulation, combined with the increasing political pressure from the Commission, resulted into a sharp increase in the number of Member States having an investment screening mechanism.⁵⁹ Despite this remarkable progress, some Member States are still missing from the count.⁶⁰ The absence of screening mechanisms in these Member States hampers the effectiveness of the EU framework, in that foreign investors targeting sensitive assets may choose non-screening Member States as a gateway into the internal market, thereby relying on the freedoms granted by the internal market rules to companies established in any EU Member State.⁶¹ To close the gap, the 2024 Proposal foresees an obligation for Member States to set up a national mechanism to assess foreign investments on grounds of security and public order.⁶²

3.1.2 The deeper level of harmonisation

As seen above, the 2019 Regulation mainly provides a ‘framework’ for the screening of FDI at the national level, establishing minimum substantial and procedural standards that should inform the assessment of the Member States. From a closer look, many of these requirements are codifications of Treaty principles on the free movement of capital, as articulated by the CJEU.⁶³ The lack of harmonisation created considerable imbalances in Member States’ use of the Regulation. It also created inefficiencies, because not all transactions notified would in principle warrant being assessed by the cooperation mechanism. And it ultimately caused ineffectiveness, because the Member States’ freedom to design their mechanisms resulted in significant differences in scope and approach between screening systems.⁶⁴ The 2024 Proposal deepens the harmonisation of national screening mechanisms both on procedural and substantial grounds. From a procedural standpoint, the 2024 Proposal breaks down the assessment of notified investments into an initial phase and an in-depth investigation,⁶⁵ empowers Member States to take autonomous (*ex officio*) initiative to screen investments which are not subject to mandatory screening under the proposed regulation within 15 months of the transaction,⁶⁶ and requires Member States to issue annual reports with aggregated data of the investments screened.⁶⁷

On substance, the 2024 Proposal overturns the 2019 Regulation’s agnostic stance as to the material scope of the national screening mechanisms. It introduces a *requirement* for national screening mechanisms to cover at least (i) investments in EU companies participating in projects or programmes of Union interest (listed in Annex I to the proposed regulation); and (ii) investments in EU companies active in critical sectors (listed in Annex II to the proposed regulation).⁶⁸ The areas of particular importance under Annex II range from key technologies (semiconductors, artificial intelligence, quantum, biotechnologies, digital, sensing, space, energy, robotics), to critical medicines and critical financial services.⁶⁹ The 2024 Proposal also considerably expands the list of factors that Member States *shall* take into account when determining whether an investment is likely to negatively affect security or public order,

⁵⁹ *ibid*; European Commission, [2022] OJ C1511/01 (n 51).

⁶⁰ As of August 2025, Cyprus is still in the process of adopting an investment screening mechanism. Ireland, Croatia and Bulgaria have enacted the relevant legislation, but they have not yet entered into force. A list of screening mechanisms notified by Member States is available at <policy.trade.ec.europa.eu/enforcement-and-protection/investment-screening_en> accessed 21 August 2025.

⁶¹ According to Article 54 and case law of the Court of Justice, the status of being an EU company is based on the location of the corporate seat and the legal order where the company is incorporated, rather than on the nationality of the shareholders. See Article 54 TFEU; Case C-80/12 *Felixstowe Dock and Railway Company Ltd and others v HM Revenue & Customs* EU:C:2014:200.

⁶² Article 3 of the 2024 Proposal provides that ‘Member States shall establish a screening mechanism’.

⁶³ Verellen and Hofer (n 2), 22; Hindelang and Moberg (n 11), 1477; J de Kok, ‘Towards a European framework for foreign investment reviews’ (2019) 44(1) *EL Rev* 24, 42.

⁶⁴ European Commission, SWD (2024) 23 final (n 33), 19–21.

⁶⁵ European Commission, COM (2024) 23 final (n 55), Art. 4(2)(a).

⁶⁶ *ibid*, Art. 4(2)(c).

⁶⁷ *ibid*, Art. 4(2)(f).

⁶⁸ *ibid*, Arts. 3(2) and 4(4).

⁶⁹ *ibid*, Art. 19, providing that the Annexes can be amended by the Commission through delegated acts.

effectively replacing the 2019 Regulation's indicative list with a binding obligation.⁷⁰ Despite the increased harmonisation, the 2024 Proposal does not provide a definition of 'security' or 'public order', thus only partially closing the gaps analysed in Section 2.1.

3.1.3 The extension in the material scope of application to cover intra-EU investments

The 2019 Regulation applies to foreign direct investments carried out by a natural person of a third country or an undertaking of a third country. Foreign investments made through entities established in the Union are not covered, except if they are carried out by means of artificial arrangements that do not reflect economic reality and circumvent the screening mechanisms and screening decisions.⁷¹ This aspect of the 2019 Regulation was widely criticised for its failure to acknowledge that investments carried out by foreign investors through their EU subsidiaries could in some circumstances trigger the same security or public order risks for the Union as they would do if the transaction was directly carried out by the foreign investors.⁷² The 2024 Proposal addresses this shortcoming by extending the scope of application of the EU framework to 'investment within the Union with foreign control', that is, investments made by an EU-established entity directly or indirectly controlled by a third-country investor. Investments from entities that have no third-country participation (purely intra-EU investments) or which only have a non-controlling participation by a foreign investor (portfolio investments) are not covered by the proposed regulation.⁷³ This extension constitutes a remarkable step forward in comparison with the concept of circumvention in the 2019 Regulation. If adopted, the revised regulation would lead to the screening of transactions which are carried out through entities established in the EU within the meaning of Article 54 TFEU (intra-EU investments). The 2024 Proposal hence refers to both Articles 207 and 114 TFEU as legal bases of the proposed regulation.

Notwithstanding its undeniable merits, the abovementioned extension to the scope of the regulation would trigger new questions as to the standard of review of screening measures affecting intra-EU investments.⁷⁴ In turn, this will heighten the uncertainties surrounding the standard of review that Member States will apply when assessing purely intra-EU investments under their national mechanisms, introducing a new layer of pressure on the single market's fundamental freedoms.

3.2 THE LAYERING OF FREE MOVEMENT RULES IN RELATION TO SCREENED INVESTMENTS

Under the TFEU, measures hindering the execution of a direct investment constitute restrictions on the freedom of establishment and/or the free movement of capital.⁷⁵ The former prohibits all restrictions on the establishment of nationals or entities of a Member State in the territory of another Member State.⁷⁶ The latter prohibits all restrictions to capital movements and payments between Member States and between Member States and third countries. The free movement of capital is the only fundamental freedom that applies outside the single market,

⁷⁰ *ibid*, Art. 13, as opposed to Article 4 of the 2019 Regulation.

⁷¹ Regulation (EU) 2019/452 (n 7), Recital 10.

⁷² European Commission, SWD (2024) 23 final (n 42), 19; OECD, 'Framework for Screening Foreign Direct Investment into the EU: Assessing Effectiveness and Efficiency' 2022 <www.oecd.org/en/publications/framework-for-screening-foreign-direct-investment-into-the-eu_f75ec890-en.html> accessed 10 May 2025, 81; In literature: de Kok (n 63), 42.

⁷³ European Commission, COM (2024) 23 final (n 55), Art. 2(3). Nevertheless, they could still be caught by national screening provisions based on the discretionary choices of each Member States.

⁷⁴ A. Crivoi (n 41), 247, pointing out that 'the tension between the purposefully wide scope of the freedom of establishment and the proposed expansion of the FDI Screening Regulation to intra-EU investment becomes more apparent.'

⁷⁵ It is settled case law that direct investment consists in investments of any kind made by natural or legal persons which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available to carry out an economic activity. Acquisition of a holding in an undertaking constituted as a company limited by shares is a direct investment where the shares held by the shareholder enable them to participate effectively in the management of that company or in its control (C446/04, *Test Claimants*, (n 40) paras 181–182).

⁷⁶ Articles 49 and 54 TFEU.

covering third-country investments into the Union.⁷⁷ However, the CJEU clarified that the free movement of capital does not automatically apply to all capital movements from third countries. Since the Treaty does not extend the freedom of establishment to third countries, it is important to ensure that the interpretation of Article 63(1) TFEU as regards relations with third countries does not enable economic operators who do not fall within the limits of the territorial scope of freedom of establishment to profit from that freedom.⁷⁸ In other words, the possibility of third-country nationals or entities relying on the free movement of capital to access the EU market relies on the relationship between the free movement of capital and the freedom of establishment, and which fundamental freedoms would apply to the specific case according to the criteria of EU law.⁷⁹ In line with the jurisprudence of the CJEU, the central element in determining which one of the two freedoms applies is the purpose of the national legislation at issue in the specific case. National legislation intended to apply only to those shareholdings that enable the holder to exert a definite influence on a company's decisions and to determine its activities falls within the scope of the freedom of establishment. On the other hand, national provisions that apply to shareholdings acquired solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking must be examined exclusively in light of the free movement of capital.⁸⁰ The rest of the assessment differs depending on whether the investor is an EU or a third-country national: while in a third-country context it is sufficient to examine the purpose of the legislation to determine which freedom applies, for intra-EU investments, the assessment should also consider the facts of the specific case.⁸¹

The 2024 Proposal adds complexity to the puzzle: intra-EU transactions with foreign control would be brought under the EU FDI screening framework, while purely intra-EU investments would remain solely disciplined at the national level. This additional complexity is arguably the unavoidable consequence of a necessary improvement. In fact, the Union's institutional framework would not allow harmonisation of purely intra-EU screening mechanisms, be it under the umbrella of a Union exclusive (Article 207 TFEU)⁸² or shared (Article 114 TFEU) competence.⁸³ At present, full harmonisation is prevented by Article 4(2) TEU, according to which 'national security remains the sole responsibility of each Member State', and Article 346 TFEU, according to which Member States may deviate from EU internal market rules to protect their 'essential security interests'. Be that as it may, the question remains: who will save intra-EU investments from unjustified restriction?

4 FUNDAMENTAL FREEDOMS IN THE ECONOMIC SECURITY ERA

The previous sections sought to put the FDI screening framework into the overall context of shifting political attitude towards foreign direct investments and intertwining of economic and security concerns. As mentioned above, in the current institutional setting, Member States retain the sole responsibility to screen FDI as well as purely intra-EU transactions, and they are in fact encouraged to develop their own national foreign direct investment screening mechanisms. If the 2024 Proposal is accepted as it stands, the new regulation would go as

⁷⁷ Article 63 TFEU.

⁷⁸ Case C-35/11, *Test Claimants (II)*, EU:C:2012:707, para 100.

⁷⁹ de Kok (n 39), 94.

⁸⁰ Case C-35/11, *Test Claimants (II)* (n 78), paras 91–92; Case C-47/12, *Kronos International Inc. v Finanzamt Leverkusen*, EU:C:2014:2200, paras. 30–43.

⁸¹ Case C-47/12, *Kronos International Inc.* (n 80), para 37.

⁸² On the interpretation of Article 207 TFEU in the context of foreign direct investment screening, see: Opinion 2/15 (EU–Singapore FTA), EU:C:2017:376.

⁸³ Under Article 3(1)(e) TFEU, the Union has exclusive competence in the area of the common commercial policy. Article 207 TFEU provides that such policy 'shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, *foreign direct investment*, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.' Under Article 4(1)(a) TFEU, Member States and the Union shall have shared competence in the area of internal market. Article 114 TFEU empowers the European Parliament and the Council to adopt the measures for the approximation of Member States' regulatory and administrative frameworks relating to the internal market and its functioning.

far as to *require* all Member States to have one. Notwithstanding the recurring clarifications by the EU institutions and the CJEU that intra-EU investments remain subject to the fundamental freedoms, the lack of full harmonisation in the area creates leeway for Member States to adopt protectionist measures under the umbrella of ‘economic security’.⁸⁴ As Member States become more sensitive regarding the acquisition of strategic national companies and technologies, there is a concrete possibility that the use of screening mechanisms is employed to protect national champions from foreign takeovers, including when the buyer is an EU investor without any third-country participation.⁸⁵ When applied to purely intra-EU investments, this scenario would not only dramatically clash with the Treaty provisions on fundamental freedoms: it would also backslide integration across many sectors in the single market, which is essential for the Union’s competitiveness and is at the heart of the European Economic Security Strategy. To minimise these risks, we are left with the tried-and-true fundamental freedoms, as interpreted in the case law of the CJEU.

Under the TFEU, restrictions of fundamental freedoms are permitted only in so far as they (i) are based on a legitimate interest; and (ii) are appropriate and necessary (*extrema ratio*) to achieve those objectives.⁸⁶ Legitimate interests are either those reasons set out in the Treaties such as ‘public security’, ‘public policy’ or ‘public health’, or overriding reasons in the public interest as identified in the case law of the CJEU.⁸⁷ Of all the grounds of derogations from the fundamental freedoms, the notion of public security is doubtless the most conceptually and semantically close to economic security. Notwithstanding the above, the notion of public security is inherently linked to the essence of state sovereignty, hence politically charged and difficult to define.⁸⁸ In *La Quadrature du Net*, the CJEU clarified that a Member State’s responsibility to protect national security corresponds to the primary interest in protecting the essential functions of the state and the fundamental interests of society.⁸⁹ It encompasses the prevention and punishment of activities capable of seriously destabilising the fundamental constitutional, political, economic or social structures of a country and, specifically of directly threatening society, the population or the State itself.⁹⁰

⁸⁴ European 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)’, COM(2020)1981 final, stating ‘that in the analysis of justification and proportionality, restrictions on the movement of capital to and from third countries take place in a different legal context compared to restrictions to intra-EU capital movements. Consequently, under the Treaty additional grounds of justification may be acceptable in the case of restrictions on transaction involving third country. The permissible grounds of justification may also be interpreted more broadly.’ In addition, Recital (12) of the revised regulation under the 2024 Proposal provides that

the screening of foreign investments which are carried out through subsidiaries of the foreign investor established in the Union should in all cases comply with the requirements stemming from Union law, and in particular with the Treaty provisions on freedom of establishment and free movement of capital, as interpreted in the case-law of the Court of Justice of the European Union, consistently with the objective of preserving an open and inclusive internal market. Any restrictions to the freedom of establishment and free movement of capital in the Union, including the screening and measures arising from screening, such as mitigating measures and prohibitions, should be based on a genuine and sufficiently serious threat to a fundamental interest of society, and should be appropriate and necessary as set out in the case law of the Court of Justice. At the same time, when assessing the justification and proportionality of a restriction, the specificities of investments within the Union operated through a subsidiary of a foreign investor may be taken into account when assessing any restrictions on freedom of establishment or to the free movement of capital, including where appropriate in any Commission opinion adopted pursuant to this Regulation. This should be done taking into account the integration of Member State schemes into a Union-wide cooperation mechanism.

⁸⁵ In the same direction: Verellen (n 12) 35–36.

⁸⁶ Case C-555/19, *Fussl Modestraße Mayr*, EU:C:2021:89, para 52 and the case-law cited. AG Sharpston’s Opinion in Case C-400/08, *Commission v Spain* EU:C:2010:588, para 36, summarised that

where a restriction results from a measure which does discriminate on grounds of nationality, Article 46(1) EC allows it to be justified on grounds of public policy, public security or public health. Where there is no such discrimination, the restriction may also be justified by overriding requirements relating to the general interest, provided that the restrictions are appropriate for securing attainment of the objective pursued and do not go beyond what is necessary for attaining that objective. The reasons invoked by a Member State in order to justify a derogation from the principle of freedom of establishment must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that Member State, and by precise evidence enabling its arguments to be substantiated.

⁸⁷ Arts 52(1) and 63 TFEU.

⁸⁸ P Koutrakos, ‘Public Security Exceptions and EU Free Movement Law’ in Koutrakos et al (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Bloomsbury, 2019), 191.

⁸⁹ Joined Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net and Others v Premier ministre and Others*, EU:C:2020:6.

⁹⁰ *Ibid*, para 135.

Framed as above, one may naturally wonder whether the notion of public security may, under any circumstances, encompass economic concerns. The foundational case on the interpretation of the public security exception in relation to free movement rules is *Campus Oil*, which concerned a measure enacted by the Irish government to safeguard energy security in Ireland in the 1980s.⁹¹ In its ruling, which for the first time assessed energy supply as a justification for invoking the public security exception from the free movement of goods, the Court established a number of key principles that still hold. First, relying on exceptions from free movement rules is not justified if EU law already provides for the necessary measures to ensure protection of the interests for which the exception was invoked.⁹² Second, Member States cannot invoke exceptions to the free movement rules, including public security, to offset the economic difficulties caused by market integration.⁹³ Third, public security measures, as other exceptions to a fundamental principle of the Treaty, must be proportionate and not go beyond that which is necessary for the protection of the interests they intend to secure.⁹⁴ The above principles were tested and confirmed in the case cluster on golden shares of the early 2000s, where the public security exception was analysed in light of the free movement of capital.⁹⁵ It is now the Court's settled case law that recourse to public security as a justification to deviate from the fundamental freedoms requires a 'genuine and sufficiently serious threat affecting one of the fundamental interests of society'.⁹⁶ Potential threats do not meet the threshold.⁹⁷ While Member States are in principle free to determine their national needs, those grounds must be interpreted strictly, so that their scope cannot be defined unilaterally by each Member State without any control by the EU institutions. In any event, such derogations cannot be misapplied to serve purely economic interests.⁹⁸ Moreover, the burden of proving the genuineness of the interest pursued lies with the Member State adopting the restriction.⁹⁹

While the above principles may be clear in theory, their practical application in the era of economic security might prove more challenging. As the distinction between economy and security progressively blurs, one may wonder whether the criteria developed by the Court in the cases illustrated above would still suffice to draw the line. In this author's view, at least three arguments advocate for a positive reply. Firstly, the exclusion of economic justifications finds its origin precisely in case law relating to national protectionism, which unequivocally established that Member States could not deviate from Treaty freedoms solely to safeguard their domestic industries from the competition stemming from the internal market.¹⁰⁰ In this vein, measures aimed at protecting specific sectors,¹⁰¹ individual undertakings,¹⁰² or regional industries,¹⁰³ have consistently, unreservedly, been deemed to pursue purely economic ends.

Secondly, despite the general rules that economic ends are precluded as justifications for derogation from free movement rules, the Court accepted that it is exceptionally possible to

⁹¹ Case C-72/83, *Campus Oil*, EU:C:1984:256.

⁹² *ibid.*, para 27.

⁹³ *ibid.*, para 35.

⁹⁴ *ibid.*, para 37.

⁹⁵ See e.g. Case C-367/98, *Commission v Portugal* EU:C:2002:326; C-483/99, *Commission v France*, EU:C:2002:327; C-503/99, *Commission v Belgium*, EU:C:2002:328; C-463/00, *Commission v Spain*, EU:C:2003:71; C-98/01, *Commission v United Kingdom*, EU:C:2003:273; C-283/04, *Commission v the Netherlands*, EU:C:2006:608; C-112/05, *Commission v Germany*, EU:C:2007:623; C-174/04, *Commission v Italy*, EU:C:2005:350; C-274/06, *Commission v Spain*, ECLI:EU:C:2008:86; and C-326/07, *Commission v Italy*, EU:C:2009:193.

⁹⁶ *Ex multis*, Case C-54/99, *Eglise de Scientologie*, EU:C:2000:124, para 17.

⁹⁷ Case C-476/98, *Commission v Germany*, EU:C:2002:631, para 157.

⁹⁸ Case C-398/98, *Commission v Greece*, EU:C:2001:565, para 35; Case C563/17, *Associação Peço a Palavra and Others*, EU:C:2019:144, para 72 and the case-law cited.

⁹⁹ In Case C-310/09, *Ministre du Budget, des Comptes publics et de la Fonction publique v Accor SA*, EU:C:2011:581, para 63, the Court held that 'neither the national court nor the parties which submitted observations have provided evidence to justify that restriction. It must therefore be held that Article 49 TFEU precludes legislation such as that at issue in the main proceedings'.

¹⁰⁰ S Arrowsmith, 'Rethinking the Approach to Economic Justifications under the EU's Free Movement Rules' (2015) 68(1) *Curr Leg Prob* 307, 310.

¹⁰¹ Case 7/61, *Commission v Italy*, EU:C:1961:31.

¹⁰² Case C-324/93, *Evans Medical*, EU:C:1995:84.

¹⁰³ Case C-21/88, *Du Pont de Nemours Italiana v USL di Carrara*, EU:C:1990:121.

justify *prima facie* economic measures as a means to achieving non-economic aims.¹⁰⁴ Albeit coming with some degree of unpredictability,¹⁰⁵ this approach allows the public security exception to extend beyond physical territorial integrity and to cover concerns at the core of economic security, but only in so far as they are genuinely intended to preserve essential functions of the state. It was through the establishment of this ‘further aim’ that in *Campus Oil* the Court considered that Ireland could legitimately impose import restrictions to safeguard its energy supply.¹⁰⁶ And it was based on the exact same test that, 59 years later, the *Hidroelectrica* ruling concluded that securing electricity supply, which per se could constitute a legitimate ground of justification, does not mean securing the supply of electricity *at the best price*.¹⁰⁷

Thirdly, the significance of evidence in free movement cases is growing.¹⁰⁸ Regardless how far the public security exception or other justifications might reach, the burden of proving the genuineness of the justification invoked relies on the Member State adopting the restriction.¹⁰⁹ The evidence to be provided extends beyond the justification, as when a national measure is considered justifiable in principle, the proportionality test becomes critical. It follows that even when the justification is properly demonstrated, a Member State must show that the national measure is both appropriate and necessary to attain the goal pursued.¹¹⁰ The growing complexity of the evidence required to support derogations from fundamental freedoms arguably makes it correspondently more difficult for a Member State to invoke public security while pursuing economic interests.

Fourthly, the abovementioned principles were tested and confirmed by the Court in the recent *Xella* preliminary ruling, which for the first time assessed an investment screening measure following the entry into force of the 2019 Regulation.¹¹¹ Although the judgment is hardly ground-breaking, in that it mostly reiterates the Court’s consolidated case law, the *Xella* ruling is a landmark decision. In spite of newly emerging notions of security, the ruling clarified that restrictions to intra-EU investments are still to be interpreted narrowly.¹¹² The case concerned the acquisition by a Luxembourgish company of the Hungarian company Xella Magyarország, primarily active in the manufacturing of concrete construction products. The Hungarian government vetoed the acquisition on grounds of ‘national interest’, under the national screening provisions.¹¹³ In its ruling, the Court found that measure aimed at ensuring

¹⁰⁴ See J Snell, ‘Economic Justifications and the Role of the State’ in P Koutrakos, N Shuibhne and P Syrpis (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Bloomsbury 2019), 12–31, for a detailed examination of the ‘strategy of linkage.’

¹⁰⁵ See, eg., Arrowsmith (n 100) 320, explaining that ‘the further purpose doctrine is of very limited assistance in identifying the limits on the presumption against protectionist measures.’

¹⁰⁶ To ensure the continuation of operations at the main national oil refinery Whitegate, the Irish government imposed a purchase obligation on all petroleum importers, requiring them to buy a proportion of their requirements from the Whitegate refinery at prices determined by the Irish government and typically higher than market-based equivalents.

¹⁰⁷ Case C-648/18, *Autoritatea națională de reglementare în domeniul energiei (ANRE) v Societatea de Producere a Energiei Electrice în Hidrocentrale Hidroelectrica SA*, EU:C:2020:723. See in particular para 43, stating that

[s]ecuring the supply of electricity does not mean securing the supply of electricity at the best price. The purely economic and commercial considerations underlying the national legislation at issue in the main proceedings are not grounds of public security within the meaning of Article 36 TFEU, or requirements relating to the public interest which make it possible to justify quantitative restrictions on exports or measures having equivalent effect. If such considerations were able to justify a prohibition on direct export of electricity, the very principle of the internal market would be undermined.

¹⁰⁸ N N Shuibhne and M Maci, ‘Proving public interest: the growing impact of evidence in free movement case law’, (2013) 50 CML Rev 965.

¹⁰⁹ Case C-423/98, *Albore*, EU:C:2000:401, paras 21–22, stating that: ‘[a] mere reference to the requirements of defence of the national territory cannot suffice to justify discrimination on grounds of nationality’, and that ‘[t]he position would be different only if it were demonstrated, for each area to which the restriction applies, that non-discriminatory treatment of the nationals of all the Member States would expose the military interests of the Member State concerned to real, specific and serious risks which could not be countered by less restrictive procedures.’

¹¹⁰ Case C-400/08, *Commission v Spain* (n 86), para 62.

¹¹¹ Case C-106/22, *Xella*, (n 6).

¹¹² *ibid*, para 66. Some authors noted that the ruling does not prevent a broader interpretation of restrictions applied to intra-EU with foreign control. See: A. Crivoi (n 41) 247.

¹¹³ Law No LVIII of 2020 on transitional provisions relating to the end of the state of emergency and to the pandemic crisis) of 17 June 2020 (Magyar Közlöny 2020/144).

the security of supply of raw materials to the construction sector.¹¹⁴ Such interest, unlike the objective of ensuring security of supply in the petroleum, telecommunications and energy sectors, could not be deemed a ‘fundamental interest of society’ within the meaning of the Court’s case law illustrated above.¹¹⁵ Moreover, confirming the growing importance of evidence, the Court found that Hungary failed to establish that the vetoed acquisition was actually capable of posing a ‘genuine and sufficiently serious threat’ to the supply of basic raw materials to the local construction sector.¹¹⁶ The ruling thus concluded that a measure such as the one at hand, blocking a transaction to ensure the security of supply to the construction sector, was incompatible with the freedom of establishment.¹¹⁷

Although the *Xella* ruling shed new light on the standard of review applicable to intra-EU investment screening in the economic security era, the question remains whether this alone will suffice to prevent protectionist measures within the single market. Indeed, as explained at the beginning of this section, it appears unrealistic that Member States will consistently apply different thresholds to assess investments from third countries, investments from the Union but involving third countries, and purely intra-EU investments, in the absence of public or private enforcement. In turn, because purely intra-EU investments are not covered by either the 2019 Regulation or its proposed revision, the Commission may not be able to monitor all intra-EU screening measures adopted by the Member States, which ultimately might lead to insufficient or unequal public enforcement. In addition, even if the Commission identified unjustified screening decisions by the Member States and consequently opened infringement procedures under Article 258 TFEU, court disputes take time. By the time a ruling is issued, the concerned investor would have probably withdrawn the bid, lost its interest in it, or accepted the restrictive conditions imposed by the screening Member State. For the same reasons, private enforcement does not seem a viable option when it comes to investment screening.

For all these reasons, whether and to what extent judicial control will prevent protectionist screening measures is yet to be seen. In the best scenario, the CJEU’s conclusions in the *Xella* ruling might provide new momentum for private parties to seek redress and for the Commission to enhance its monitoring over intra-EU screening decisions by the Member States. Despite all the difficulties, in the current institutional setting whereby Member States retain exclusive competence on national security, private and public enforcement remain the main available tools to prevent the erosion of fundamental freedoms. If it is true that its enforcement might have some blind spots, there are significant investigative and (timely) enforcement powers available to the Commission every time national screening decisions are planned or adopted in the context of concentrations with a Union dimension.¹¹⁸ Ultimately, the resort to enforcement actions in individual cases might lead Member States to apply greater caution when restricting intra-EU investments on security grounds.

5 CONCLUSION

The current geopolitical context poses new challenges for the single market fundamental freedoms. By bringing economic concerns closer to the sphere of security, the European Economic Security Strategy heightened a need for certainty. This emerges clearly in the field of investments screening, where Member States still retain a great margin of discretion. The lack of a full ‘Europeanisation’ of the investment screening framework, although currently mandated by Treaty provisions, entails a significant risk that Member States develop their own concepts of economic security which could differ from, or even conflict with, the objectives of the European Economic Security Strategy. If Member States were to restrict purely intra-EU transactions based on economic or industrial considerations, this would ultimately hamper

¹¹⁴ Case C-106/22, *Xella*, (n 6) para 62.

¹¹⁵ *ibid*, para 69.

¹¹⁶ *ibid*, para 69.

¹¹⁷ *ibid*, para 74.

¹¹⁸ In several instances the Commission investigated Member States’ restrictions of intra-EU investment for security concerns in the context of mergers with Union dimension. The most recent example is the *Aegon* case, initiated after Hungary had vetoed an EU merger on national security grounds. By a decision adopted under Art. 21(4) of the Merger Regulation, the Commission concluded that Hungary had not demonstrated the genuine pursuit of public security interests, thus ordering the measure’s withdrawal. See: European Commission, ‘Decision of 21 February 2022 relating to Article 21, paragraph 4, of Council Regulation 139/2004’, C (2022) 1143 final.

market integration and competitiveness, to the detriment of the Union's very same economic security. At present, notwithstanding the recurring clarifications by the EU institutions that intra-EU investments remain subject to the fundamental freedoms, the lack of harmonisation of screening criteria leaves the gate open for Member States to adopt protectionist measure under the umbrella of 'economic security'. While it is essential that Member States are well equipped to address security risks stemming from investments, it is also vital to separate genuine security from purely economic interests. To draw a line between these two, in the economic security era, is not an easy task. Yet the CJEU's recent *Xella* ruling proved that the substantive assessment of security concerns under national investment screening mechanisms is not subject to pure political discretion. Despite the sensitiveness of this task, relying on fundamental freedoms to review security measures in intra-EU cases has incredibly important consequences. While it will clearly not achieve the same results as 'positive' harmonisation through legislative instruments, an uptake in private and public enforcement might serve as a 'negative' harmonisation tool, leading Member States to apply greater caution when restricting intra-EU investments on security or public policy grounds. In this way, fundamental freedoms will be both an outer limit to security claims based on intra-EU investment screening provisions, and a precautionary incentive against their abuse.

COMPETING INTERESTS

The author has no competing interests to declare.

AUTHOR NOTE

The opinions, findings, conclusions or recommendations expressed in this article are made on a personal basis by the author and do not necessarily reflect the official opinion of the European Commission.

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TO CITE THIS ARTICLE:

Maria Vittoria Morrone,
'Fundamental Freedoms in the
Economic Security Era: Who Will
Save Intra-Eu Investments?'
(2026) 22(1) Utrecht Law
Review 47–62. DOI: [https://doi.
org/10.36633/ulr.1188](https://doi.org/10.36633/ulr.1188)

Published: 19 May 2026

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