NOTE

CFIUS OR SISYPHUS: TOWARD A EUROPEAN FRAMEWORK FOR FOREIGN DIRECT INVESTMENT REVIEW†

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ABSTRACT

This Note discusses a recent legislative proposal by the European Commission to establish a European Union-wide framework for reviewing, and potentially blocking, foreign direct investment, where such investment implicates national or international security concerns. The Commission's proposal has garnered comparison to the Committee on Foreign Investment in the United States (CFIUS), a U.S. interagency committee authorized to conduct investment review. Despite widespread interest in the proposal, the Treaty on the Functioning of European Union (TFEU), which prohibits restrictions on the free movement of capital, might stand in the way of the full realization of the Commission's vision for a robust investment screening framework. This Note begins with a discussion of the TFEU's limitation of restrictions on the free movement of capital, including European Court of Justice decisions, and identifies a set of principles—proportionality, non-discrimination, and legal certainty—which must underlie any derogation of the free movement of capital. This Note then examines the Commission's proposal in light of these guiding principles, highlighting points of tension. Finally, this Note provides guidance on the implementation of investment screening mechanisms consistent with the TFEU.

I. INTRODUCTION

Standing before an assembly of the European Parliament in Strasbourg on September 13, 2017, Jean-Claude Juncker delivered his penultimate State of the Union Address as president of the European Commission (Commission), and conveyed a clear directive for the development of European investment policy: "Let me

† In Greek mythology, Sisyphus was condemned to endlessly roll a heavy stone up a hill, only for it to roll down again as he approached the top. A Sisyphean task is one "resembling the fruitless toil of Sisyphus; endless, laborious, ineffective." *Sisyphean*, OXFORD ENGLISH DICTIONARY ONLINE, https://www.oed.com/view/Entry/180455 [https://perma.cc/D777-6JDE] (last visited Aug. 1, 2019).

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say once and for all: we are not naïve free traders."[1] With this proclamation, Mr. Juncker proceeded to introduce a proposal for the European Union's (E.U. or Union) first-ever supranational mechanism for the review of foreign direct investment (FDI), which, if fully realized, would empower regulators to pull back the welcome mat from certain foreign investors.[2]

Mr. Juncker's concern with foreign direct investment is hardly surprising; as the world's economies become increasingly interconnected, cross-border transactions of all stripes are subject to increased investor and regulatory interest.[3] While such transactions offer unique benefits to individuals and entities in the countries in which transactions are consummated, they intersect with a host of strategic interests.[4] Among the critical classes of cross-border transactions is FDI, in which control of an enterprise or asset in one economy is acquired by an investor in another economy.[5] Unlike portfolio investments, in which influence over the management of the enterprise or asset is not transferred, FDI is characterized by a transfer in management.[6] This managerial influence carries particularly important implications when the enterprise or asset acquired involves participation in defense or other strategic industries and access to sensitive information.[7]

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1. European Commission Press Release SPEECH/17/3165, President Jean-Claude Juncker's State of the Union Address 2017 (Sept. 13, 2017), http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm [https://perma.cc/2TEM-LF7U].

2. *Id.*

3. *See, e.g.*, *Reflection Paper on Harnessing Globalisation*, at 6, COM (2017) 240 final (May 10, 2017), https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-globalisation_en.pdf [https://perma.cc/SRF4-KLWB].

4. *See id.* at 9.

5. *See* Organisation for Economic Co-Operation and Development [OECD], OECD Benchmark Definition of Foreign Direct Investment 17 (4th ed. 2008), http://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf [https://perma.cc/CA37-ZGSV]. The OECD defines Foreign Direct Investment (FDI) as a "category of cross-border investment made by a resident in one economy . . . with the objective of establishing a lasting interest in an enterprise . . . that is resident in an economy other than that of the direct investor." *Id.* at 17. The lasting interest is characterized by influence over management of the enterprise. *Id.* at 22 n.9.

6. *Id.* at 17; *see also* Joined Cases C-282 & C-283/04, Comm'n v. Netherlands, 2006 E.C.R. I-09141, ¶ 19 (holding that the movement of capital, for purposes of Article 56(1) [now Article 63], includes "direct investments in the form of participation in an undertaking through the holding of shares which confers the possibility of effectively participating in its management and control.").

7. *See, e.g.*, *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*, at 2, 5, COM (2017) 494 final (Sept. 13, 2017), https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-494-F1-EN-MAIN-PART-1.pdf [https://perma.cc/5DEE-MDZ2] [hereinafter

The European Union is the world's leading destination for foreign direct investment, receiving over $550 billion (USD) of inward FDI in 2016; by comparison, the United States received $468 billion (USD) in inward FDI in the same year.[8] With such a significant volume of inward FDI, European lawmakers have raised concerns about the sources of investment and the consequences of ceding influence over certain critical domestic companies and assets to foreign investors.[9] As a response to these mounting concerns, in September 2017, the Commission issued a proposed regulation (Proposal), which, if enacted, would establish an E.U.-wide framework for FDI review on national security grounds.[10]

The E.U. has authority to regulate foreign direct investment pursuant to its competence over Europe's common commercial policy, enumerated in the Treaty on the Functioning of the European Union (TFEU).[11] The E.U.'s authority in this area, however, is not without limitation. The TFEU establishes the free movement of

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Welcoming Foreign Direct Investment] (discussing concerns that the acquisition of sensitive assets enables their exploitation to the detriment of a State's competitive position, security, and public order).

8. *See Most Recent FDI Statistics for OECD and G20 Countries*, OECD (July 15, 2017), http://www.oecd.org/investment/statistics.htm [https://perma.cc/9KEE-USCF]. Unlike the E.U., the United States has long boasted a robust investment review regime, with authority vested in the Committee on Foreign Investment in the United States (CFIUS). *See generally* Margaret L. Merrill, *Overcoming CFIUS Jitters: A Practical Guide for Understanding the Committee on Foreign Investment in the United States*, 30 Quinnipiac L. Rev. 1 (2011) (providing procedural and substantive background on CFIUS).

9. *See, e.g.*, Letter from Brigitte Zypries, Michel Sapin, & Carlo Calenda, German, French, and Italian Finance Ministers, to Cecilia Malmström, Comm'r, European Commission (Feb. 2017), https://www.bmwi.de/Redaktion/DE/Downloads/S-T/schreiben-de-fr-it-an-malmstroem.pdf?__blob=publicationFile&v=5 [https://perma.cc/7BTK-42YV] [hereinafter Letter to European Commissioner Malmström] (Brigitte Zypries, Michel Sapin, and Carlo Calenda represent the Finance Ministries of Germany, France, and Italy, respectively). France, Germany, and Italy are among the most vocal Member State proponents of broad investment review capabilities and reciprocal investment conditions. Certain Member States, including the Scandinavian, Benelux, and Baltic States, and others, such as Poland, Greece, and Spain, have been less supportive of calls for strengthened FDI review. *See, e.g.*, Rainer Bierwagen, *Germany Tightens Its Rules on Foreign Corporation Acquisitions and Proposes an EU Regulation*, Lexology (July 20, 2017), https://www.lexology.com/library/detail.aspx?g=82609c3b-dc1f-4898-859f-aaf9d8b4c519 [https://perma.cc/9Q2T-VDQL].

10. *See 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*, art. 1, COM (2017) 487 final (Sept. 13, 2018), https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-487-F1-EN-MAIN-PART-1.pdf [https://perma.cc/UC5D-UPRE] [hereinafter *Proposal*]. The Proposal is prefaced by an Explanatory Memorandum. Citations to pages refer to the Explanatory Memorandum; citations to articles refer to the Proposal.

11. Consolidated Version of the Treaty on the Functioning of the European Union art. 3(1)(e), Oct. 26, 2012, 2012 O.J. (C 326) 51 [hereinafter TFEU]. The European Court of Justice has looked to Council Directive 88/361/EEC as a proxy for the definition of

capital as a fundamental freedom of the European Union and, in Article 63, provides specific prohibitions on the restriction of capital movement.[12] Although not expressly enunciated by the Treaty, FDI is among the types of capital movement specifically contemplated under Article 63.[13] Thus, while the Commission may be well-intentioned in introducing a proposed framework for the review of FDI, the TFEU could well stand as a roadblock to the realization of the robust review mechanisms it envisions.

This Note proceeds in four parts. Part II provides background related to the TFEU, including the Treaty's protections against restrictions on the free movement of capital and the principles against which permissible restrictions are to be evaluated, as well as the language and status of the Commission's Proposal. Part III measures the Proposal against the critical limitations on the Commission's ability to enact a system of FDI review and offers guidance for the design of FDI screening mechanisms that comport with the TFEU. Part IV draws conclusions based on the preceding analysis and looks ahead to the legislative process that the Proposal faces over the coming months and years.

II. Background

The European Union espouses free market principles and has repeatedly emphasized its commitment to establishing a liberal, open economic environment.[14] To that end, the free movement of capital is a fundamental freedom enshrined in the Treaty on the Functioning of the European Union.[15] The free movement of capital offers myriad benefits to the economies of the E.U. and its Member States.[16] Classical economics suggests that the unrestricted flow of capital allows for the direction of capital to places and undertakings where it can be used most efficiently, to

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capital movement under Article 63; the Directive includes foreign direct investment within its sweep. *See* Council Directive 88/361/EEC, annex I, 1988 O.J. (L 178) 8 (EC).

12. TFEU, *supra* note 11, art. 63.

13. *See* Council Directive 88/361/EEC, *supra* note 11, at 5–8; *see also Proposal*, *supra* note 10, at 4.

14. *See, e.g.*, TFEU, *supra* note 11, tit. IV (providing for the free movement of persons, services, and capital).

15. *See id.* art. 63.

16. *See generally* Steffen Hindelang, The Free Movement of Capital and Foreign Direct Investment (2009) (reviewing the comprehensive economic benefits of liberalized capital movement).

generate the greatest possible return.[17] The efficient allocation of capital, in turn, increases employment, fosters innovation and encourages firms to improve product quality, reduces productive disparities between developed and less developed countries within the European Union, and supports the long-term economic growth of the E.U. and Member States.[18] Accordingly, the E.U. takes a cautious approach to any measures that serve to reduce economic openness.[19]

FDI screening regimes, by definition, restrict capital movement and, on their face, run counter to the open economic ideals that the common commercial policy strives to actualize.[20] In fact, in recent years, commentators have observed a rise in protectionist policies in response to increasing investment from developing and emerging market countries.[21] Given the TFEU's structural protections against restrictions on free capital movement and principles guiding the common commercial policy, the viability of the proposed investment screening framework remains an open question.

In addition to any philosophical tension between free capital movement and investment screening, there are structural constraints on the policy choices expressed in the Proposal. Foreign direct investment is among the matters contemplated by the common commercial policy, over which the E.U. has exclusive competence under the TFEU.[22] Restrictions on capital movement, both between Member States and between Member States and third countries, are expressly prohibited by Article 63.[23] Subsequent sections provide guidance and exceptions relevant to the administration of Article 63.[24] Further, the jurisprudence of the European Court of Justice (ECJ) gives content to the application of Articles 63 through 65, enunciating and clarifying the limitations that bear on any legal framework that the E.U. may enact, the most

17. *See id.* at 19, 23. Hindelang also suggests that the free movement of capital supports the achievement of the EU's other fundamental freedoms—the free movement of goods, services, and persons. *Id.* at 23.

18. *See id.* at 19–20.

19. *See, e.g.*, *Proposal*, *supra* note 10, at 2–4 (reiterating that openness to foreign investment remains a guiding principle for the European Union and that restrictions on capital movement should be implemented with deliberation).

20. *See* HINDELANG, *supra* note 16, at 22.

21. *See id.* at 26–27.

22. *See* TFEU, *supra* note 11, art. 3(1)(e).

23. *See id.* art. 63. Throughout this discussion, the term "third country" is used to refer to states that are not members of the European Union (EU or Union).

24. *See infra* Part II.A; *see also* TFEU, *supra* note 11, arts. 64, 65.

important being proportionality, legal certainty, and non-discrimination.[25]

As it stands, roughly half of the Member States of the E.U. boast an investment screening system of one form or another.[26] The Commission's Proposal does not seek to supersede Member States' existing investment review regimes; rather, the Proposal is aimed at harmonizing national regimes and creating mechanisms by which national regulators may collaborate in the review of investments bearing on E.U.-wide concerns.[27] Similarly, the Proposal is intended to stand alongside existing competition and merger review laws and regulations.[28] Although the Proposal does not aim to establish a body at the supranational level with unilateral authority to review or unwind investments, it does endeavor to shape investment review regimes at the national level, implicating the TFEU all the same.[29]

A. *The Letter and Spirit of the TFEU Firmly Establish the Free Movement of Capital*

Title IV of the TFEU—Free Movement of Persons, Services and Capital—provides the Treaty's major touchstones for assessing the permissibility of regulations concerning foreign direct investment and, particularly, inward FDI from a third country.[30] As introduced above, Article 63 provides the Treaty's principal limitation on restrictions of capital movement, while Articles 64 and 65 enumerate limited exceptions to Article 63. This Section reviews Articles 63 through 65 and interpretive decisions of the ECJ to

25. *See, e.g.*, Case C-54/99, Église de Scientologie de Paris v. The Prime Minister, 2000 E.C.R. I-1353, ¶ 4; Joined Cases C-163, C-165 & C-250/94, *Sanz de Lera*, 1995 E.C.R. I-4830; Case C-452/04, *Fidium Finanz AG v. Bundesanstalt für Finanzdienstleistungsaufsicht*, 2006 E.C.R I-9562. While there are other limitations on FDI screening regimes beyond the TFEU, including World Trade Organization and bilateral and multilateral investment agreements, this Note only considers the limitations imposed by the TFEU.

26. *Proposal*, *supra* note 10, at 2. E.U. Member States with investment screening regimes established as of this writing include Austria, Denmark, Germany, Finland, France, Latvia, Lithuania, Italy, Poland, Portugal, Spain, and the United Kingdom. European Commission Press Release IP/17/3183, State of the Union 2017 - Trade Package: European Commission Proposes Framework for Screening of Foreign Direct Investments (Sept. 14, 2017), https://europa.eu/rapid/press-release_IP-17-3183_en.htm [https://perma.cc/MRP9-LKLT]. Of course, the standing of the United Kingdom with respect to the Proposal is in limbo with the United Kingdom's impending exit from the European Union.

27. *See Proposal*, *supra* note 10, at 2; *id.* at pmbl. ¶ 13.

28. *See id.* at art. 3(1).

29. *See id.*

30. *See generally* TFEU, *supra* note 11, tit. IV.

articulate how the E.U. may implement a restriction on the free movement of capital.

First, Article 63 expressly provides that, subject to limitations set forth in the Treaty, "all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited."[31] By its language, Article 63 enshrines ideals for the liberalization of capital movement in the Treaty.[32] Under the terms of Article 63, any restriction on the movement of capital enacted by governmental units of the E.U. or Member States is presumptively impermissible.[33]

While the Treaty does not define "movement of capital," for purposes of interpreting Article 63, the European Court of Justice has looked to Council Directive 88/361 to provide an illustrative list of activities and transactions constituting movements of capital.[34] Directive 88/361 includes within its sweep "direct investments on national territory by non-residents," a functional definition of foreign direct investment.[35] Likewise, in *Sanz de Lera*, an early case in the ECJ's free movement of capital jurisprudence, the Court held that a Spanish law requiring individuals to obtain prior governmental authorization before exporting currency impermissibly contravened the Treaty's free movement of capital principles.[36] Moreover, in the same case, the Court found the principles applicable to third country nationals.[37] The Court went so far as to acknowledge the Treaty's objective in liberalizing capital movements between Member States and between Member States and third countries.[38] As such, restrictions on foreign direct investment constitute presumptively impermissible restrictions on the movement of capital between Member States and third countries. However, this presumption against restrictions on the free movement of capital is rebuttable; indeed, Articles 64 and 65 establish safe harbors and guidelines for certain permissible restrictions.[39]

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31. TFEU, *supra* note 11, art. 63(1).

32. *See* Martha O'Brien, *Article 63 TFEU (ex Article 56 TEC) On Free Movement of Capital and Payments*, *in* 2 SMIT & HERZOG ON THE LAW OF THE EUROPEAN UNION § 63.02 (Matthew Bender & Co., 2018).

33. TFEU, *supra* note 11, art. 63.

34. *See* Case C-483/99, Comm'n v. France, 2002 E.C.R. I-4781, ¶ 36; O'Brien, *supra* note 32, at § 63.02; *see also* Council Directive 88/361/EEC, *supra* note 11, at 8 (enumerating types of capital movements).

35. *See* Council Directive 88/361/EEC, *supra* note 11, at 8.

36. Joined Cases C-163, C-165, & C-250/94, *Sanz de Lera*, 1995 E.C.R. I-4830, ¶¶ 23–30.

37. *Id.* ¶¶ 43–48.

38. *Id.* ¶ 19.

39. *See* TFEU, *supra* note 11, arts. 64, 65.

As an initial matter, Article 64 indicates that restrictions on capital movement between Member States and third countries in force prior to the introduction of the TFEU are allowed to remain in effect.[40] This provision was introduced so that historic agreements between the E.U. or Member States and third countries would not be disturbed.[41] In the face of this provision saving existing restrictions on capital movement, Article 64 includes a mandate that the E.U. continue to liberalize capital movement from third countries.[42] Although Article 64 does not provide substantive content for this discussion, it is demonstrative of the TFEU framers' intent to provide for the free movement of capital in the Treaty.

While Article 64 is a procedural guide bearing on the implementation of Article 63, Article 65 speaks directly to the application of Article 63, providing limited circumstances in which restrictions on the free movement of capital are permissible.[43] In fact, the thrust of Article 65 is an exception to the mandate of Article 63, allowing for restrictions of capital movement on public policy or public security grounds.[44] Where governmental units have enacted laws that serve to restrict the free movement of capital, they have pointed to this language in defense of such restrictions.[45] These are the fundamental grounds upon which the E.U. and Member States justify FDI screening regimes and reserve the power to block investments.[46] Critically, Article 65 advises that restrictions on capi-

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40. *Id.* art. 64(1).

41. *See* Martha O'Brien, *Article 64 (ex Article 57 TEC) On General Exceptions*, *in* 2 SMIT & HERZOG ON THE LAW OF THE EUROPEAN UNION § 64.02 (Matthew Bender & Co., 2018).

42. *Id.*

43. TFEU, *supra* note 11, art. 65. Article 65 provides, in relevant part:

> 1. The provisions of Article 63 shall be without prejudice to the right of Member States:
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> (a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;
>
> (b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or *to take measures which are justified on grounds of public policy or public security.*

Id. art. 65(1) (emphasis added).

44. *Id.*; *see also* Martha O'Brien, *Article 65 (ex Article 58 TEC) On Exceptions for Individual Member States*, *in* 2 SMIT & HERZOG ON THE LAW OF THE EUROPEAN UNION § 65.03 (Matthew Bender & Co., 2018) (the Article 65(1)(b) exception "provides the general justifications for restrictive measures on grounds of protecting public policy and public security").

45. *See, e.g.*, Case C-54/99, Église de Scientologie de Paris v. The Prime Minister, 2000 E.C.R. I-1353, ¶ 23 (reviewing French investment review regime which government claimed to implement in the name of public policy and security).

46. *See Proposal*, *supra* note 10, at 4.

tal movement "shall not constitute a means of arbitrary discrimination or [represent] a disguised restriction on the free movement of capital" for an ulterior purpose.[47] A series of principles has been distilled from this language and resulting ECJ jurisprudence, which serves to guide the use of the public policy or public security exception.

B. *Under the TFEU, Restrictions on the Free Movement of Capital Must Be Proportionate, Non-Discriminatory, and Provide Legal Certainty*

As discussed above, while Article 65 empowers the E.U. and Member States to regulate FDI in ways which would otherwise constitute impermissible restrictions on the movement of capital, it does not imbue those authorities with carte blanche to review, and, in the extreme, block or unwind, proposed or concluded deals. The exception is guided by the principles of proportionality, nondiscrimination, and legal certainty, which should be understood as necessary conditions of any permissible investment screening mechanism.[48]

1. Proportionality

The principle of proportionality appears repeatedly in the ECJ's jurisprudence concerning restrictions on the free movement of capital.[49] Likewise, the Organisation for Economic Co-operation and Development (OECD), which comprehensively tracks FDI and surveys investment review regimes worldwide, counts proportionality as an essential element of investment review regimes.[50] In the

47. TFEU, *supra* note 11, art. 65(3); *see also* O'Brien, *supra* note 44, at § 65.03; Église de Scientologie, ¶ 17 ("[W]hile Member States are still, in principle, free to determine the requirements of public policy and public security in light of their national needs, those grounds must . . . be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions."); Case-C 367/98, Comm'n v. Portugal, 2002 E.C.R. I-04731, ¶ 52 ("[E]conomic grounds can never serve as justification for obstacles prohibited by the treaty.").

48. *See infra* Parts II–IV.

49. *See, e.g.*, Joined Cases C-163, C-165, & C-250/94, *Sanz de Lera*, 1995 E.C.R. I-4830, ¶¶ 23–26; Case C-54/99, Église de Scientologie de Paris v. The Prime Minister, 2000 E.C.R. I-1353, ¶ 18.

50. *See, e.g.*, OECD, Proportionality of Security-Related Investment Instruments: A Survey of Practices 2 (2008), https://www.oecd.org/investment/investment-policy/40699890.pdf [https://perma.cc/TFH9-JUBE] [hereinafter OECD Proportionality Survey]. OECD offers the following guidelines for proportionality: "restrictions on investment should not be more costly or more discriminatory than needed to achieve the security objectives and they should not duplicate what is, or could be, better dealt with by other regulations."

context of capital movement, proportionality principles are violated where a governmental body attempts to restrict the free movement of capital on Article 65 grounds and public policy or security interests could be effectively achieved by less restrictive means.[51] In *Sanz de Lera*, the ECJ relied on the principle of proportionality in rejecting the law at issue, finding that the Spanish government could have pursued its purported security interests by less restrictive means than a requirement of prior authorization for the exportation of currency.[52] Similarly, in striking down a Dutch provision granting the national government corporate governance rights with respect to recently privatized companies,[53] the ECJ explained that, with respect to restrictions on the free movement of capital, Member States may protect their interests "only within the limits set by the Treaty and must, in particular observe the principle of proportionality."[54]

The ECJ has indeed applied proportionality principles to restrictions in the form of investment screening mechanisms.[55] In *Église de Scientologie*, the ECJ considered whether a French law requiring that parties to certain foreign direct investments seek the prior authorization of the Minister for Economic and Financial Affairs before consummating said transactions violated the provisions of Article 73(b) of the Treaty establishing the European Economic Community (EC Treaty) [precursor to the TFEU Article 63], prohibiting restrictions on capital movement.[56] Under the French scheme at issue, the Minister for Economic and Financial Affairs was empowered to reject applications for prior authorization on a number of public policy bases. Further, where parties consummated foreign direct investments without prior authorization, the Minister could order the cessation of investment or business activities and unwinding of the investment.[57] The Court first found that

51. *Sanz de Lera*, *supra* note 25, ¶¶ 23–26 (rejecting the Spanish government's argument that a restriction on the free movement of capital was justified on public policy and security grounds where the interests claimed by the Spanish government could have been achieved by less restrictive means).

52. *Id.* ¶¶ 23–30.

53. These provisions, known as "golden shares," are discussed *infra* Part II.A.2.

54. Joined Cases C-282 & C-283/04, Comm'n v. Netherlands, 2006 E.C.R. I-09141, ¶¶ 33.

55. *See, e.g.*, Case C-54/99, Église de Scientologie de Paris v. The Prime Minister, 2000 E.C.R. I-1353, ¶ 4.

56. *See id.* ¶¶ 13, 23. The language of Article 73 of the Treaty establishing the European Economic Community was carried through revisions of the European treaties and now substantially constitutes TFEU Article 63.

57. Église de Scientologie, ¶¶ 6–7.

the French law subjecting FDI to prior authorization by the French government constituted a restriction on the movement of capital within the meaning of Article 73(b).[58] Nonetheless, the Court acknowledged that public policy and security concerns might justify such restrictions.[59] In evaluating the restriction imposed by the French law, the Court focused on the proportionality of the law's restrictions on capital movement and the level of legal certainty afforded to parties engaged in transactions subject to the restriction.[60] As for proportionality, the Court considered whether the restriction was necessary to achieve the public policy end for which it was imposed and, likewise, whether that end could be achieved by less restrictive means.[61] The Court ultimately concluded that less restrictive means would have been sufficient.[62]

Although the ECJ's complaint with the prior authorization scheme rested primarily on the scheme's over-inclusivity, the Court shrewdly noted that a system of prior authorization also runs the risk of falling short of its security objectives and may be insufficient as an antidote to some security threats.[63] By this reasoning, the Court essentially underscored the importance of appropriately tailoring restrictions on the free movement of capital.[64] The ECJ's reasoning in *Église de Scientologie* provides a strong yardstick against which the Court would likely measure investment review mechanisms under the Proposal. Those screening mechanisms that are able to pass muster with respect to proportionality must also be non-discriminatory and provide a degree of legal certainty, factors which will be discussed in the sections that follow.

2. Non-Discrimination

While proportionality arose out of the ECJ's case law as a natural extension of the language of Article 65, the principle of non-discrimination is rooted in the text of Article 63 itself.[65] The ECJ puts a fine point on non-discrimination, touching upon the principle repeatedly in its free movement of capital cases, several of which

58. *Id.* ¶ 14 (citing Joined Cases C-163, C-165 & C-250/94, *Sanz de Lera*, 1995 E.C.R. I-4830, ¶¶ 24–25).

59. *Id.* ¶ 17.

60. *Id.*

61. *Id.* ¶ 18.

62. *Id.*

63. *Id.* ¶ 20.

64. *See id.* ¶¶ 18–20 (finding that the French review regime suffers from issues of over and under-inclusivity).

65. *See* TFEU, *supra* note 11, art. 63.

will be reviewed below. For instance, according to the ECJ in its *Finanzamt Köln-Alstadt* decision, Article 65 should be read to prevent both direct and indirect discriminatory measures.[66] Despite this focus on non-discrimination, the practice of investment screening evokes at least some inherently discriminatory essence, particularly to the extent that a review regime empowers a state to intervene in investments with origins in particular third countries.[67] The ECJ has announced numerous indicia of discriminatory restrictions on the free movement of capital.

In a series of cases known as the "Golden Share" cases, the ECJ added to the doctrinal framework for determining the permissibility of restrictions on the free movement of capital.[68] Each case dealt with legislative provisions that vested national governments with the ability to exert control over recently privatized companies in sectors of strategic importance, a form of control known as a "golden share."[69] In some cases, the corporate governance rights held by national governments under golden share provisions included veto rights and the right to block large foreign acquisitions without prior authorization.[70]

The ECJ in these cases clarified its view of measures that might constitute discriminatory restrictions on the free movement of capital. In *Commission v. Portugal*, the ECJ found that the free movement of capital was rendered illusory where the rules at issue were "liable to impede the acquisition of shares in the undertakings concerned and to dissuade investors in other Member States from investing in the capital of those undertakings."[71] In *Commission v. Germany*, the ECJ extended that language, rejecting a law on grounds that it limited the ability of foreign shareholders to participate in a company's governance and discouraged the establish-

66. Case C-279/93, Finanzamt Köln-Alstadt v. Schumacker, 1995 E.C.R. I-00225, ¶ 26 (quoting Case 153/73, Sotgiu v. Deutsche Bundespost, 1974 E.C.R. 153, ¶ 11).

67. *See* Nikos Lavranos, *Some Critical Observations on the EU's Foreign Investment Screening Proposal*, Kluwer Arb. Blog (Jan. 2, 2018), http://arbitrationblog.kluwerarbitration.com/2018/01/02/critical-observations-eus-foreign-investment-screening-proposal/ [https://perma.cc/4Q6Q-7VVB]. While commentators have also noted that Member States engaging in investment screening on discriminatory bases would almost surely violate Free Trade Agreements, *id.*, this Note will focus on the degree to which discriminatory treatment is prohibited by the TFEU itself.

68. *See, e.g.*, Case C-367/98, Comm'n v. Portugal, 2002 E.C.R. I-04731; Case C-483/99, Comm'n v. France, 2002 E.C.R. I-4781; Case C-98/01, Comm'n v. United Kingdom, 2003 E.C.R. I-4641.

69. *See* O'Brien, *supra* note 32, at § 63.03.

70. *Id.*

71. Comm'n v. Portugal, ¶ 45.

ment or maintenance of lasting and direct economic links.[72] In rejecting a restriction on the free movement of capital, the ECJ chose language consistent with the definition of FDI, i.e. lasting and direct economic links.[73] This seems to suggest that the ECJ's treatment would have some bearing on FDI screening mechanisms. Ultimately, the Golden Share cases illustrate the degree to which the ECJ is critical of potentially discriminatory restrictions on the free movement of capital.

Still, there have been instances in which the ECJ has found restrictions on the free movement of capital, even those of a discriminatory nature, to be justified on public policy or security grounds.[74] In *Commission v. Belgium*, the Court found that a golden share vesting the government with oversight rights over strategic energy assets controlled by certain private enterprises constituted a restriction on the free movement of capital.[75] Nonetheless, the Court found the restriction to be justified on public security grounds, and proportional to the government's manifest objective.[76] In so finding, the Court conducted a means-testing analysis of the restriction against the government's interest in ensuring energy supplies in the event of a crisis.[77] This analysis embraces both proportionality and non-discrimination principles. It is difficult at times to separate the ECJ's analysis pertaining to each discrete principle, however, the Court's language makes it apparent that it wishes to ensure restrictions on the free movement of capital are both proportional to the security objective pursued and non-discriminatory.[78]

The ECJ has also developed its free movement of capital jurisprudence in a genre of cases in which the TFEU's free movement of capital guarantee intersects with the TFEU's other fundamental freedoms.[79] In what is regarded as one of the most consequential limitations on free capital movement upheld by the ECJ, the case of *Fidium Finanz* offers insight into the nature of permissible

72. Case C-112/05, Comm'n v. Germany, 2007 E.C.R. I-9020, ¶ 52.

73. *Id.*

74. *See, e.g.*, Case C-503/99, Comm'n v. Belgium, 2002 E.C.R. I-4809.

75. *See id.* ¶ 46.

76. *Id.* ¶¶ 45, 55 (affirming the principle that "in order to be so justified, the national legislation must be suitable for securing the objective which it pursues and must not go beyond what is necessary in order to attain it, so as to accord with the principle of proportionality").

77. *Id.* ¶ 46.

78. *See id.* ¶ 18.

79. *See, e.g.*, Case C-452/04, Fidium Finanz AG v. Bundesanstalt für Finanzdienstleistungsaufsicht, 2006 E.C.R. I-9562 (concerning the free movement of services).

restrictions on capital movement, where they accompany restrictions of other fundamental freedoms.[80] The regulation at issue required foreign lenders to obtain government authorization before offering consumer loans to residents of Germany using the Internet.[81] Fidium Finanz, a Swiss financial institution, argued that the regulation constituted an impermissible restriction on the free movement of capital in violation of Article 56 of the EC Treaty [now TFEU Article 63].[82] The ECJ declined to find that the requirement of prior authorization for a foreign lender attempting to make consumer loans in Germany violated the Treaty's prohibitions on restrictions of capital movement.[83] Instead, the Court found the measure to constitute a restriction on the free movement of services, characterizing any restriction on capital movement as an inevitable and indirect consequence of regulation of the underlying financial service.[84]

Despite the ECJ's decision, *Fidium Finanz* is distinguishable from the issue of foreign direct investment. Although the German law challenged in *Fidium Finanz* featured a prior authorization provision for foreign lenders, similar in some senses to an investment screening regime, the ECJ characterized the offering of consumer loans as a service within the meaning of the Treaty.[85] The Court went so far as to affirm its reliance upon Directive 88/361 in determining capital movements contemplated by Article 56, and specifically excluded the financial services at issue in *Fidium Finanz* from the reach of Article 56.[86] In light of the Court's treatment of the Treaty's protections against restrictions on the movement of capital and services, *Fidium Finanz* is instructive. Still, the case should not be read to suggest that an FDI screening regime with prior authorization requisites would pass muster without a greater show-

80. *Id.*; *see also* O'Brien, *supra* note 32, at § 63.03 (characterizing the impact of the *Fidium Finanz* decision). The various fundamental freedoms enshrined in the TFEU, such as the free movement of workers, freedom of establishment, and free movement of services, regularly intersect with the free movement of capital. *See* TFEU, *supra* note 11, arts. 45, 49, 56, 57.

81. *See* Fidium Finanz, ¶¶ 9–19.

82. *Id.* ¶¶ 17–20.

83. *Id.* ¶¶ 48–50.

84. *Id.* Importantly, the Treaty's protections against restrictions on the free movement of services do not extend to third countries in the same manner as those bearing on the free movement of capital. Thus, the Swiss *Fidium Finanz* was not protected to the extent of a Member State citizen.

85. Fidium Finanz, ¶ 39.

86. *Id.* ¶ 41.

ing that the regime in question could be administered in a proportionate and non-discriminatory manner.[87]

Finally, while the Proposal and its accompanying materials do not single out third countries for special treatment as potential threats to E.U. security interests, much of what has been published by the Commission and its various political and research extensions suggests a particular caution with respect to state-owned enterprises and China's access to critical sectors in the E.U.[88] Although this does not imply that investment review will be administered in an impermissible way, it should lead to heightened awareness of the risks attendant to review mechanisms that afford a high degree of discretion to Member State and Commission regulators.

3. Legal Certainty

Apart from the substantive requirements of proportionality and non-discrimination, legal certainty remains a major procedural requisite bearing on restrictions on the free movement of capital. In other words, parties to an investment must understand the procedures and rules to which they will be held as part of an investment review regime.[89] Recall that the FDI screening regime at issue in *Église de Scientologie* was rejected insofar as it did not "enable individuals to be apprised of the extent of their rights and obligations."[90] This is the essence of legal certainty. While legal certainty is perhaps more difficult to quantify than the other guiding principles, the presence of certain features may suggest that an investment review mechanism offers legal certainty to investors.

Because of the discretion left to lawmakers and regulators, legal certainty is especially sensitive when considering systems of administrative authorization, such as investment review.[91] In *Commission v. Portugal*, the ECJ underscored the importance of legal certainty,

87. *See supra* Parts II.B.1–2.

88. *See, e.g.*, Gisela Grieger, *Foreign Direct Investment Screening: A Debate in Light of China-EU FDI Flows*, Eur. Parliamentary Res. Serv., 1, 12 (May 2017), http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/603941/EPRS_BRI(2017)603941_EN.pdf [https://perma.cc/8WZ5-F9T3] (concluding that "Chinese FDI was mainly driven by market-seeking and strategic asset-seeking motives and focused on big EU economies").

89. *See* Leo Flynn, *Coming of Age: The Free Movement of Capital Case Law 1993–2002*, 39 Common Mkt. L. Rev. 773, 802 (2002) (identifying the requirement of legal certainty in a review of free movement of capital cases).

90. Case C-54/99, Église de Scientologie de Paris v. The Prime Minister, 2000 E.C.R. I-1353, ¶¶ 22–23.

91. *See generally* Flynn, *supra* note 89 at 802–03 (explaining the inherent risk of discrimination and lack of legal certainty in administrative authorization systems).

finding that administrative authorization schemes must be rooted in "criteria which are known in advance to the undertakings concerned, and all persons affected by a restrictive measure of that type must have a legal remedy available to them."[92] Legal certainty may be fostered by means such as time limits for each phase of the review process, the creation of safe harbors for investment parties who proactively submit to review, and transparent mechanisms for mitigation and judicial recourse.[93]

These principles are consistent with international investment policy standards, including those for which the OECD advocates.[94] Specifically, the OECD Council recommends that governments considering restrictive investment policies take steps to ensure that such policies are "guided by the principles of nondiscrimination, transparency of policies and predictability of outcomes, [and] proportionality of measures and accountability of implementing authorities."[95] While the OECD's guidance does not carry the same authoritative weight as the TFEU or ECJ decisional law,[96] the guidance largely mirrors the standards governing restrictions on the free movement of capital in the E.U.[97]

C. *The Substantive and Procedural Novelties of the European Commission's Proposal Implicate Free Movement of Capital Concerns*

Building upon the discussion of the structural provisions of the TFEU impacting restrictions on the free movement of capital, and the guiding principles that must underlie an FDI screening mechanism in the European Union, this Section focuses on the European Commission's Proposal. The Proposal was the culmination of much discussion at the Member State and Commission level.[98]

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92. Case-C 367/98, Comm'n v. Portugal, 2002 E.C.R. I-04731, ¶ 50.

93. *See, e.g.*, OECD, Guidelines for Recipient Country Investment Policies Relating to National Security 2 (May 25, 2009), http://www.oecd.org/daf/inv/investmentpolicy/43384486.pdf [https://perma.cc/NJJ4-N8BH] [hereinafter OECD Guidelines].

94. *See id.*

95. *Id.*

96. *See id.* (acknowledging that OECD guidance is advisory in nature and subsidiary to international agreements and law).

97. *See supra* Part II.

98. *See, e.g.*, Letter to European Commissioner Malmström, *supra* note 9. In late 2018, the principal legislative bodies of the European Union—the European Parliament, Council, and Commission—reached a political agreement concerning the proposed framework. *See* European Commission Press Release IP/18/6467, Commission Welcomes Agreement on Foreign Investment Screening Framework (Nov. 20, 2018), http://europa.eu/rapid/press-release_IP-18-6467_en.htm [https://perma.cc/9KCX-AJCR]. The legislative process will be discussed in greater detail in Part III.B.

Presumably in response to the prohibition on restrictions of capital movement enshrined in the TFEU, the Commission's Proposal does not establish a unified review regime, nor does it mandate the adoption of screening mechanisms at the Member State level.[99] Instead, the Proposal seeks to harmonize existing Member State regimes and set forth guidelines for Member States that wish to enact investment screening regimes in the future. Additionally, the Proposal establishes coordination functions at the Commission level for FDI review.[100] Among the consequential provisions of the Commission's Proposal are a bifurcation of the review process between Member States and the European Commission; the establishment of a cooperation mechanism; a list of factors that may be taken into consideration in investment screening; and the minimum procedural mandates imposed on Member States that have, or choose to institute, investment screening regimes.[101]

1. Bifurcation of the Review Process and Establishment of a Cooperation Mechanism

As an initial matter, the Proposal bifurcates the review process between two levels of regulatory authority, depending upon the nature of the investment at issue.[102] Member States would retain authority over investments planned or consummated within their territory, while the Commission is empowered to initiate and participate in the review of investments likely to affect projects of particular E.U. interest.[103] Where an investment falls within the overlapping purviews of multiple Member States, or Member States and the Commission, the Proposal dictates that the Member States collaborate in the review.[104]

Article 9 of the Proposal provides the framework for Commission screening, which may be undertaken where an investment is "likely to affect projects or programmes of Union interest on grounds of security or public order."[105] Under the framework, the Commission reviews a subject investment and communicates its

99. *See Proposal*, *supra* note 10, art. 4; *id.* at 3.
100. *See id.* art. 4; *id.* at 3.
101. *See infra* Parts II.C.1–3.
102. *See Proposal*, *supra* note 10, arts. 8, 9.
103. *Id.* art. 9(1); *id.* at 9.
104. *Id.* art. 9; *see also infra* Part II.C.3.
105. *See Proposal*, *supra* note 10, art. 9(1). An annex to the Proposal provides a list of projects of E.U. interest sufficient to warrant review by the Commission, including the critical technological and communication initiatives "Galileo, Horizon 2020, Ten-T, and Ten-E." *See id.* Annex at 4.

opinion to the Member State or States in which the investment is planned or has been concluded.[106] The Member State is then left to its own devices, with the mandate that it "shall take utmost account of the Commission's opinion and provide an explanation to the Commission in case its opinion is not followed."[107] The Proposal broadly defines "projects or programmes of Union interest" and the list provided in the Proposal's annex is specifically non-exhaustive.[108] Consequently, investment parties are left with a lack of clarity that risks running afoul of the standards articulated in *Église de Scientologie* and other ECJ cases.[109]

Article 8 explains the cooperation mechanism by which Member States and the Commission would jointly review investments.[110] In the event that a planned or concluded investment in one Member State is "likely to affect [another Member State's] security or public order, [the latter] may provide comments to [the former]."[111] Further, where the European Commission concludes that an "investment is likely to affect security or public order in one or more of the Member States" of the E.U., the Commission may issue an advisory opinion to the relevant Member States.[112] While the Proposal makes clear that it is not intended to require Member States to adopt FDI screening mechanisms, some commentators believe that the efficacy of the cooperative mechanism relies upon the establishment of screening mechanisms in all Member States.[113] Moreover, while the Proposal prescribes that Member States must take into consideration the concerns of its peer Member States and the Commission, the Proposal is silent on the consequences of disobeying this mandate.[114] Similarly, based upon the Proposal text alone, questions remain about the ranking of various Member States' priorities in the decision to approve or deny a particular investment.[115] Additionally, some commentators question the

106. *Id.* art. 9(3).

107. *Id.* art. 9(5).

108. *See id.* Annex at 4.

109. *See* Case C-54/99, Église de Scientologie de Paris v. The Prime Minister, 2000 E.C.R. I-1353, ¶¶ 22–23.

110. *See Proposal*, *supra* note 10, art. 8.

111. *Id.* art. 8(2).

112. *Id.* art. 8(3).

113. *See* Lavranos, *supra* note 67 (arguing that the sharing of information and review responsibilities relies upon the existence of screening mechanisms in each Member State).

114. *See Proposal*, *supra* note 10, art. 8(6).

115. *Id.* While the standards articulated in the Proposal are designed to harmonize screening processes, the language of the Proposal functions to imbue Member States with a great degree of discretion in conducting investment review. *See infra* Part III.

financial responsibility borne by various Member States if planned "investments fail to materialize" as a result of "interventions" that have a "market distorting" effect.[116]

2. Factors to be Taken into Account in Investment Screening

Article 4 of the Proposal articulates factors that may be taken into consideration in the screening of foreign direct investments.[117] Borrowing from the public policy and security language of Article 65 of the TFEU, the Proposal centers review factors around sectors and information related to national security and E.U. concerns, providing that Member States and the Commission may consider the potential effects of an investment on the following:

- critical infrastructure, including energy, transport, communications, data storage, space or financial infrastructure, as well as sensitive facilities;
- critical technologies, including artificial intelligence, robotics, semiconductors, technologies with potential dual use applications, cybersecurity, space or nuclear technology;
- the security of supply of critical inputs; or
- access to sensitive information or the ability to control sensitive information.[118]

The Proposal additionally suggests that the reviewing body—whether Member State or Commission—consider whether a foreign investor is controlled by the government of a third country, including through a financing arrangement.[119] Under the Proposal, a reviewing authority is empowered to initiate a review when it finds that an investment implicates one of the enumerated concerns, or related concerns, whether or not enumerated.[120] Without more guidance, investors will likely be left with a degree of uncertainty as to when certain investments will be subjected to the review of a Member State or the Commission.[121]

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116. Lavranos, *supra* note 67.

117. *See Proposal*, *supra* note 10, art. 4.

118. *Id.* art. 4.

119. *Id.* Such arrangements include investments by state-owned enterprises and loans.

120. *See id.* at 12 ("Article 4 provides a *non-exhaustive list* of factors that may be taken into consideration when screening foreign direct investment on the grounds of security or public order.") (emphasis added).

121. *See infra* Part III.A.2.

3. Procedural Requirements for Member State Review Regimes

The Proposal does include provisions aimed at increasing the certainty of the review processes to be carried out by Member States and at the international level.[122] For example, Article 6 dictates that Member States should establish timeframes for issuing screening decisions, guidelines for handling confidential information, and nominal provisions for judicial redressability.[123] In fact, the Proposal's preamble touches upon the importance of fostering legal certainty with respect to investment screening mechanisms.[124] Still, the Proposal paints with a broad brush and largely lacks detail on standards for aspects of the regulatory process surrounding investment review, including judicial redress. Insofar as the Proposal seeks to provide the framework for a harmonized investment review regime across the E.U., the Proposal could adopt provisions to bolster legal certainty around investment review.[125]

The Proposal also briefly addresses the risk of circumvention by artificial corporate arrangements and similar tactics.[126] Circumvention may occur where a corporate entity is established in a Member State for the purpose of facilitating an investment or transaction on behalf of a foreign entity.[127] The Proposal leaves to Member States the responsibility of establishing provisions "necessary to prevent circumvention of the screening mechanisms and screening decisions."[128] Without more, it is difficult to project the impact, if any, of the passing mention of anti-circumvention in the Proposal.

Despite the professed breadth of the Proposal, some European decision-makers still wish to see more power vested in supranational authorities. European Parliament deliberations over the Proposal were led by French MEP Franck Proust, who has argued that the Proposal needs even more teeth to deliver on the Commis-

122. *See Proposal*, *supra* note 10, at pmbl. ¶ 7.

123. *See id.* art. 6(2)–(4).

124. *Id.* pmbl. ¶ 7 ("It is important to provide legal certainty and to ensure EU wide coordination and cooperation by establishing a framework for the screening of foreign direct investment in the Union on grounds of security or public order.").

125. *See infra* Part III.

126. *See Proposal*, *supra* note 10, art. 5.

127. *See id.* at 12 ("Such measures may include the screening, in compliance with EU law, of direct investments carried out by an undertaking formed in accordance with the law of a Member State and owned or controlled by a foreign investor, when the investment is made through artificial arrangements within the EU that do not reflect economic reality and circumvent the screening mechanisms.").

128. *Id.* art. 5.

sion's goals, calling the Proposal, as written, "timid."[129] Part III considers how much further, if at all, the Commission could go with its FDI review regime.

III. Analysis

A. *Evaluating the European Commission's Proposal*

On the whole, the European Commission's Proposal leaves a high degree of discretion to supranational and Member State regulators and fails to provide comprehensive, substantive standards for mitigation measures and judicial redressability.[130] Discretion is the natural enemy of the guiding principles identified above; where regulators may block or unwind investments without clear guidelines, parties to investments are left without certainty, to say nothing of regulators' ability to administer the screening function in a disproportionate or discriminatory manner.[131] Accordingly, revisions to the Proposal should address gaps in proportionality, nondiscrimination, and legal certainty. Provisions aimed at curing potential defects may take different shapes, including quantitative triggers attached to deal review, the ability of investment parties to seek ex-ante approval and safe harbors, and clearer provisions relating to mitigation and judicial redressability.[132] Some of these provisions are seen in investment review regimes currently in effect around the world.[133]

1. Bifurcation of the Review Process and Establishment of a Cooperation Mechanism: Clarifying Jurisdiction

As written, the Proposal allows for both ex-ante and ex-post review under Member States' screening regimes and vests a measure of reviewing authority with the European Commission under less-than-clear circumstances.[134] While these provisions generally

129. *See* Jonathan Stearns, *Amid China M&A Drive, EU Rushes for Investment-Screening Deal*, Bloomberg (Mar. 4, 2018), https://www.bloomberg.com/news/articles/2018-03-04/amid-china-m-a-drive-eu-rushes-for-investment-screening-deal [https://perma.cc/9NNT-BES9].

130. *See supra* Part II.

131. *See supra* Parts II.B.2–3.

132. *See* OECD Guidelines, *supra* note 93, at 3 (discussing measures which support legal certainty in investment review regimes).

133. *See, e.g.*, OECD Proportionality Survey, *supra* note 50, at 2–3 (reviewing investment review approaches and proportionality measures in various countries).

134. *See Proposal*, *supra* note 10, at 2–3 (explaining that the Proposal will not interfere with a country's existing screening regime, which may be ex-ante or ex-post and vary in coverage and applicability to Member States and third countries).

reflect appropriate deference to Member States, inconsistency in administering ex-post review reduces legal certainty, particularly as investments increasingly implicate concerns in multiple jurisdictions. Similarly, the Proposal reserves authority for the European Commission to review investments that implicate "projects or programmes of Union interest," and defines such projects with a non-exhaustive list.[135]

For example, under the Proposal, an investment with putative impact in both Member State A and Member State B might be subject to ex-ante review under the screening regime in Member State A. Assuming the proposed investment passes review in Member State A, the parties to the investment might take steps to further or conclude the investment, yet still face exposure to ex-post review under the screening regime in Member State B.[136] If the investment happens to intersect with projects of E.U. interest, the Commission could also claim reviewing authority.[137] In order to reduce the risk of inconsistent outcomes, legislators might consider amending the Proposal to harmonize provisions for ex-ante submission to investment screening. Prior authorization schemes have and will continue to face ECJ scrutiny;[138] however, the predictability of outcomes fostered by a harmonization effort with respect to the timing of review would inspire a degree of investor confidence.

Given the fact-sensitivity of the FDI transactions subject to screening, it may well be unduly restrictive and formalistic to limit the Commission's review to projects enumerated in a list or Member States' respective reviews to investments in certain sectors or at a particular stage in the investment lifecycle.[139] There is an inherent tension between the competing needs for predictability and uniformity on one hand, and flexibility on the other.[140] Nonetheless, without a more concrete statement of the respective jurisdiction of the Commission and Member States, investors are left without the measure of certainty required under *Église de Scientologie*.[141] Investors have the right to "be apprised of the extent of

135. *See id.* art. 9.

136. *See id.*, at 2–3, art. 9.

137. *See id.*

138. *See, e.g.*, Case C-54/99, Église de Scientologie de Paris v. The Prime Minister, 2000 E.C.R. I-1353.

139. *See Proposal*, *supra* note 10, pmbl. ¶ 8 (expressing the need to provide prescriptive guidelines while maintaining flexibility).

140. *See id.*

141. *See* Église de Scientologie, ¶¶ 22–23.

their rights and obligations deriving from [the Treaty]."[142] Inasmuch as an investor, under the Proposal, would lack a reasonable understanding of the operative reviewing authority, or the extent of various bodies' jurisdiction over a given transaction, the Proposal wades perilously close to the line of impermissibility.

2. Factors to be Taken into Account in Investment Screening: Reducing Discretion

It is apparent that the public policy and security grounds underpinning the Article 65 exception to the TFEU's prohibition of restrictions on the free movement of capital are susceptible to broad construction.[143] Nonetheless, the ECJ has made clear that a governmental unit, claiming an Article 65 exception in order to restrict the free movement of capital, must tailor the restriction to the policy end pursued.[144] Under the Proposal, regulators have broad ability to initiate investment review. The factors provided in Article 4 of the Proposal are hardly more specific than the Treaty phrases "public policy" or "public security."[145] Moreover, the language introducing the factors is permissive—explaining that the factors *may,* not *must,* be considered when evaluating investments for potential review.[146] Consequently, investment parties are left without guidance as to when a deal will be subject to review. On the contrary, a rather remarkable breadth of industries, sectors, and assets may justify review under the Proposal's framework.[147] Compounding that breadth, the list of factors is explicitly non-exhaustive, giving enforcement authorities broad discretion to review transactions along other lines.[148]

The TFEU and the ECJ's decisional law dictate the primacy of proportionality, non-discrimination, and legal certainty.[149] To the extent that the Proposal empowers regulators at national and supranational levels to intervene in investments on such broad bases as it allows, investment parties are not left with a definitive

142. *Id.* 22.

143. *See supra* Part II.

144. *See, e.g.*, Joined Cases C-282 & C-283/04, Comm'n v. Netherlands, 2006 E.C.R. I-09141, ¶¶ 32–33; Église de Scientologie, ¶¶ 18–22.

145. *See Proposal*, *supra* note 10, art. 4.

146. *Id.*

147. *See id.* (providing factors that bring a subject investment within the ambit of review). Again, these factors merely represent the inner limit, under the Proposal, of authority for review by a Member State or the Commission.

148. *Id.*

149. *See supra* Part II.

understanding as to when their deals might be subject to review.[150] Consequently, attempts on the parts of investors to predict when their investments will be subject to review would involve a certain amount of speculation, which falls short of standards for legal certainty articulated by the ECJ.[151] The *sine qua non* of legal certainty is a party's knowledge of its rights and obligations under a legal or regulatory regime; it is not clear that FDI review mechanisms enacted under the framework articulated in the Proposal will be characterized by that measure of certainty.

Rather than attaching review to general descriptors of sector or technology, the Proposal could adopt quantitative triggers for the initiation of investment review. By implementing quantitative triggers, such that deals meeting certain thresholds in terms of dollar-value or percentage of interest transferred are automatically subject to review, with some degree of uniformity across national regimes, the European Commission could offer a heightened degree of certainty to investment parties. Additionally, the presence of quantitative triggers might encourage investment parties to proactively submit to ex-ante review, given greater certainty that a particular investment will be subject to regulatory scrutiny.

3. Procedural Requirements for Member State Review Regimes: Charting Courses for Mitigation and Judicial Redress

Another aspect of proportionality is the nature and extent of action taken by regulators when a deal fails to pass scrutiny. Under the Proposal and the various investment review regimes currently in force in Member States, regulators are empowered with means as aggressive as blocking a proposed investment or unwinding a deal already consummated.[152] It is admittedly difficult to speak universally of recourse or remedies, given the fact-sensitive nature of investment review for public policy or security concerns. However, mitigation provisions present a proactive solution, giving investors a greater degree of input into the review process and opportunity to address regulatory concerns before succumbing to consequences as dire as the blocking or unwinding of an invest-

150. *See Proposal*, *supra* note 10, art. 4.

151. *See, e.g.*, Église de Scientologie, ¶¶ 22; Case-C 367/98, Comm'n v. Portugal, 2002 E.C.R. I-04731, ¶ 50 (holding that administrative authorization schemes must be rooted in "criteria which are known in advance to the undertakings concerned").

152. *See Proposal*, *supra* note 10, art. 2 (defining investment screening to include procedures allowing regulators to "assess, investigate, authorize, condition, prohibit or unwind foreign direct investments.").

ment.[153] Moreover, mitigation provisions represent a channel through which regulators and investment parties can work together to address regulatory concerns surrounding critical FDI. Mitigation is loosely contemplated in the Proposal; however, absent clear and uniform mitigation processes, notions of mitigation under the Proposal lack real teeth.[154] Of course, mitigation measures will vary from deal to deal, particularly to the extent that the investment parties, target industry, and target assets, differ. Still, procedural uniformity would lend a greater degree of legal certainty to the Proposal and any investment screening regime that takes effect.

As with the unaddressed need for clearer mitigation measures, the Proposal also lacks guidance with respect to the ability of investment parties to seek judicial redress in the wake of adverse screening decisions.[155] The OECD has identified the availability of judicial redress as a critical characteristic of investment review mechanisms.[156] While the contours of judicial redressability will, of course, vary across Member States, reflecting differences in Member States' legal systems, the Proposal could provide further guidance.

B. *Legislative Process and the Path Toward Ratification*

The Proposal is subject to the E.U.'s tripartite legislative process, which consists of debate and negotiation between the European Parliament, European Council, and the Commission.[157] Early indications from the European Parliament's Committee on International Trade, under the direction of Franck Proust, suggested that the legislative process might well yield a more forceful framework.[158] Indeed, the Committee's first draft report largely reflected Proust's ambition to toughen the Proposal and establish a

153. *See* OECD GUIDELINES, *supra* note 93, at 4.

154. *See Proposal*, *supra* note 10, art. 7(2)(c) (mentioning mitigation, but failing to provide specific guidance as to potential mitigation procedures).

155. *See id.* art. 6(4) (articulating a need for judicial redressability, but failing to provide any clarity as to the design or implementation of such mechanisms).

156. *See* OECD GUIDELINES, *supra* note 93, at 4 ("The possibility for foreign investors to seek review of decisions to restrict foreign investments through administrative procedures or before judicial or administrative courts can enhance accountability.").

157. *See* TFEU, *supra* note 11, art. 294.

158. *See generally Draft Report on the 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*, COD (2017) 224 (Mar. 7, 2018) (amending Proposal to mandate consideration of certain factors in review, shorten review periods, and reserve authority for supranational regulators, among other provisions).

robust role for supranational regulators in reviewing investments.[159] Moreover, it is no secret that the European Commission looked to the Committee on Foreign Investment in the United States (CFIUS), which has nearly absolute power to review and block FDI in the United States, in framing its Proposal.[160] Of course, the unique constraints of the European legal framework, including the TFEU, stand in the way of the Commission fully replicating CFIUS, particularly with its consolidation of power in a single executive and non-reviewability. Still, there are some who would enact as faithful a reproduction as possible.[161]

In late 2018, the three principal legislative bodies of the E.U. reached a political agreement concerning the proposed framework.[162] On March 5, 2019, the European Council approved of the framework, with final language largely resembling the original Proposal.[163] The framework entered into force on April 10, 2019, beginning an 18-month period over which European lawmakers at the E.U. and Member State levels will work toward full implementation.[164] There is still ground to cover for European legislators, as E.U. bodies will undertake actions to facilitate the application of the framework and many Members States will likely revisit their domestic policies concerning investment review. Accordingly, national and supranational activity in the coming years will reveal the complete upshot of the framework.

In the meantime, while European lawmakers continue to shape the substantive and procedural provisions of European investment review mechanisms under the approved framework, the principles discussed throughout this Note—namely, proportionality, non-discrimination, and legal certainty—must underpin the implementation of any FDI review mechanisms ratified into law. In appraising

159. *See id.*

160. *See, e.g.*, *Welcoming Foreign Direct Investment*, *supra* note 7, at 5.

161. *See, e.g.*, Stearns, *supra* note 129.

162. *See* Press Release, Commission Welcomes Agreement, *supra* note 98.

163. *See, e.g.*, Yves Botteman & Daniel Barrio, *The EU Framework for Screening of Foreign Direct Investment Receives Informal Approval by the European Parliament and Council*, KLUWER COMPETITION L. BLOG (Dec. 1, 2018), http://competitionlawblog.kluwercompetitionlaw.com/2018/12/01/the-eu-framework-for-screening-of-foreign-direct-investment-receives-informal-approval-by-the-european-parliament-and-council/ [https://perma.cc/56BA-TQ3J]; *see also* European Commission Press Release IP/19/1532, Foreign Investment Screening: New European Framework to Enter Into Force in April 2019 (March 5, 2019), http://europa.eu/rapid/press-release_IP-19-1532_en.htm [https://perma.cc/3D6W-3VU5].

164. *See* European Commission Press Release IP/19/2088, E.U. Foreign Investment Screening Regulation Enters Into Force (April 10, 2019), http://europa.eu/rapid/press-release_IP-19-2088_en.htm [https://perma.cc/SZ7T-ENWS].

the language of any further legislation, observers should take care to trace responsibility and authority for investment review among Member State and supranational regulators, evaluate the discretion left to reviewing bodies, and account for the processes that an aggrieved investor would need to undergo in order to mitigate concerns or challenge a regulator's decision.

IV. Conclusion

The European Commission's ambition to harmonize investment screening is an appropriate response to rapidly-increasing FDI activity and emergent security concerns. While the Commission looked to CFIUS and other global analogues in crafting its Proposal, the Commission is limited in its power by the language of the TFEU.[165] The Proposal acknowledges the need to comply with the structural provisions of the TFEU bearing on the free movement of capital, but leaves ample room for administration in a manner that contravenes principles of proportionality, non-discrimination, and legal certainty.

The Commission's Proposal could be strengthened through pragmatic provisions aimed at eliminating the degree to which foreign investment review could be administered in an uneven and uncertain, much less discriminatory, manner. These provisions could include quantitative triggers, standardized ex-ante submission and review, and clearer processes around mitigation and the seeking of judicial redress following adverse decisions. As European lawmakers refine and implement the Proposal, they have an opportunity to forge a sturdier, more certain foundation for global investors, while achieving the Commission's manifest security goals.

165. Even as CFIUS serves as a model regime, U.S. lawmakers have opened debate about the efficacy of CFIUS, proper role for the committee going forward, and means of strengthening the U.S. review process. *See Evaluating CFIUS: Administration Perspectives: Hearing Before the Subcomm. on Monetary Policy & Trade of the H. Comm. on Financial Services*, 115th Cong. (2018); *CFIUS Reform: Examining the Essential Elements: Hearing Before the S. Comm. on Banking, Housing, & Urban Affairs*, 115th Cong. (2018).