

# Foreign Direct Investment and National Security: Perspectives from the EU and the US

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## ABSTRACT

Foreign direct investment (FDI) serves as a cornerstone of the global economy, driving economic growth and development across nations. However, amidst rising geopolitical tensions and uncertainties, there is a discernible shift towards strengthening or establishing new frameworks for FDI screening. This proactive approach is observable both in the United States and in the European Union and its member states. The growing reliance on these measures, designed to protect critical sectors and assets from potentially hostile third country acquisitions, may have implications that go beyond purely economic considerations, affecting transatlantic relations and the broader geopolitical landscape.

*European Union | USA | FDI | Transatlantic relations*

keywords

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by Federica Marconi\*

## Introduction

Foreign direct investment (FDI) represents a form of cross-border investment wherein an investor resident in one economy establishes a lasting interest in and a significant degree of influence over an enterprise resident in another economy.<sup>1</sup> The significance of FDI extends far beyond its role as a financial inflow. FDI serves as a catalyst for growth, an accelerator of competitiveness and an engine of prosperity on a global scale. Its pivotal role lies in ensuring openness, transparency and integration within economies, making it a crucial driver of technological advancement, efficient management practices and deeper integration into a developed network for international trade.<sup>2</sup>

In 2023, global FDI inflows experienced a year-on-year decline, totalling 1.3 trillion euros, marking a notable decrease of -7 per cent compared to 2022. However, this reduction still stood significantly above levels recorded in 2020, reflecting the massive rebound from the pandemic-induced downturn.<sup>3</sup>

According to data provided by the Organisation for Economic Co-operation and Development (OECD) for the year 2023, there has been a noticeable decline in FDI inflows into the EU27 when compared to the preceding year. The United States – the leading FDI recipient worldwide, followed by Brazil and Canada – also recorded fewer FDI inflows in 2023.<sup>4</sup>

<sup>1</sup> Organisation for Economic Co-operation and Development (OECD) data: *Foreign Direct Investment (FDI)*, <https://doi.org/10.1787/9a523b18-en>.

<sup>2</sup> Bibhuti Sarker and John Serieux, "Multilevel Determinants of FDI: A Regional Comparative Analysis", in *Economic Systems*, Vol. 47, No. 3 (September 2023), Article 101095, <https://doi.org/10.1016/j.ecosys.2023.101095>.

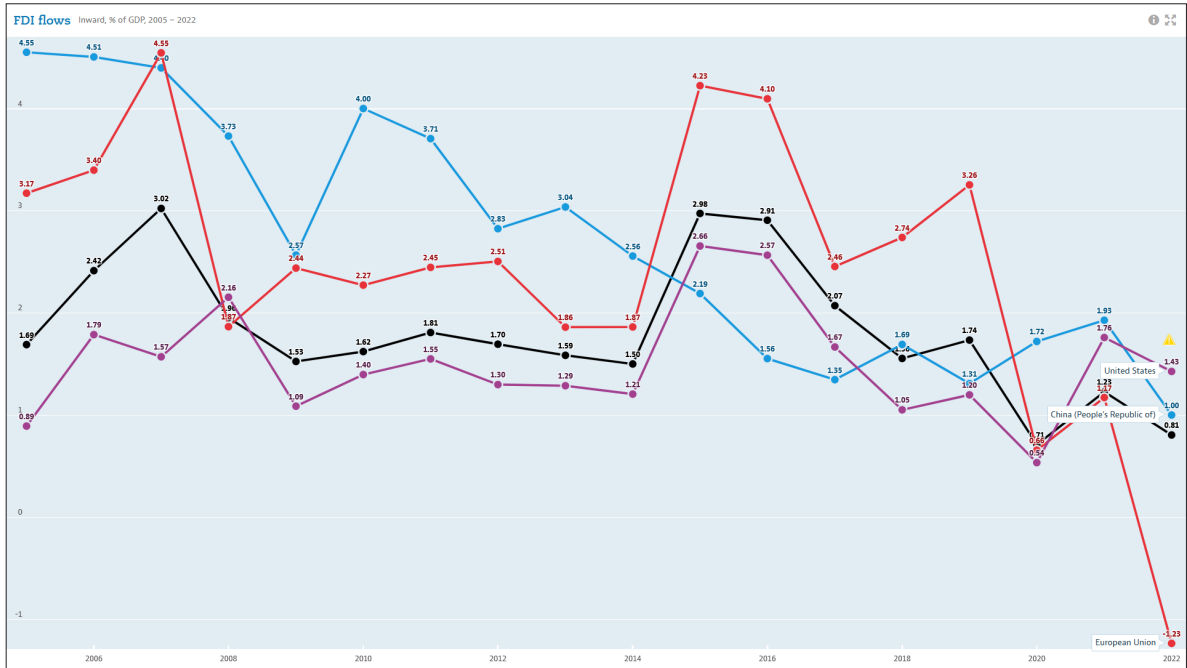
<sup>3</sup> OECD, *FDI in Figures*, April 2024, <https://www.oecd.org/corporate/mne/statistics.htm>.

<sup>4</sup> Ibid.

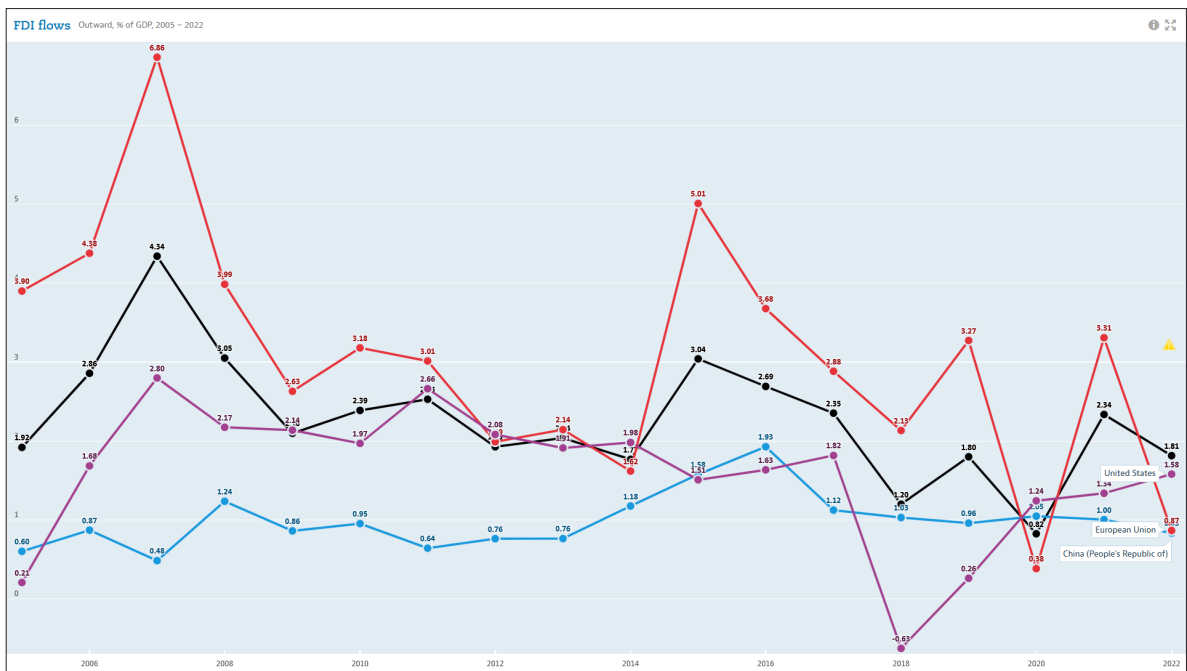
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**Figure 1** | FDI inward flows as GDP share in the European Union (red), US (violet), China (blue), OECD average (black)



**Figure 2** | FDI outward flows as GDP share in the European Union (red), US (violet), China (blue), OECD average (black)



Source: OECD Data: FDI Flows, <https://data.oecd.org/fdi/fdi-flows.htm#indicator-chart>.

The United States also emerged as a prominent source of outbound investment, worldwide, alongside China and Japan. Notably, the United States accounted for a substantial portion of FDI into the EU27.<sup>5</sup>

FDI is often associated with potential risks to national security. Three distinct threats related to FDI and national security have been identified: i) the possibility of limiting or denying the output from the recently acquired producer; ii) the potential misuse or sale of sensitive technology in a manner that undermines the national interests of the recipient country; iii) the risk of infiltrating the recipient country's digital systems to engage in monitoring, surveillance or the introduction of destructive malware within those systems.<sup>6</sup> Taken together, these threats highlight the overarching risk associated with FDI, namely the potential for the investor to gain significant political and economic influence within the host country.

Growing concerns surrounding FDI have been amplified by several events and trends over the past decade. These events have underscored the importance of safeguarding national security, critical infrastructure and economic interests in the face of evolving geopolitical dynamics and emerging threats.

The financial crisis of 2008–9 underscored the interconnectedness of global financial markets, emphasising the need for enhanced oversight of cross-border investments to prevent systemic risks. Similarly, the Covid-19 pandemic in 2020 exposed supply chain vulnerabilities, particularly in critical sectors like healthcare and pharmaceuticals, prompting calls for greater domestic production capabilities and protection of strategic national assets. Additionally, Russia's invasion of Ukraine highlighted the risks of relying on countries with conflicting values or geopolitical interests for critical supplies (of energy in Russia's case), emphasising the security implications of foreign investments.

Against this backdrop, rapid technological progress has fostered greater interconnectedness between nations, blurring the boundaries between the economic relevance and security implications of goods and services. This has raised concerns about potential implications of technological progress for national security and strategic competitiveness.<sup>7</sup> This dynamic has prompted governments to scrutinise more closely foreign investments in sectors critical to technological innovation and national defence.

<sup>5</sup> OECD Data: *FDI Flows*, cit.

<sup>6</sup> Theodore H. Moran, *Three Threats: An Analytical Framework for the CFIUS Process*, Washington, Peterson Institute for International Economics, July 2009, <https://www.piie.com/bookstore/three-threats-analytical-framework-cfius-process>.

<sup>7</sup> Clara Weinhardt, Karsten Mau and Jens Hillebrand Pohl, "The EU as a Geoeconomic Actor? A Review of Recent European Trade and Investment Policies", in Milan Babić, Adam Dixon and Imogen Liu (eds), *The Political Economy of Geoeconomics. Europe in a Changing World*, Cham, Palgrave Macmillan, 2022, p.107-136, [https://doi.org/10.1007/978-3-031-01968-5\\_5](https://doi.org/10.1007/978-3-031-01968-5_5).

Thus, the traditional concept of national security has undergone a significant change in response to new challenges. Once primarily concerned with defence and military matters, national security has now expanded to include economic considerations that reflect the complexities of a globally interconnected world.<sup>8</sup> As some experts have suggested, this transition can be seen as an instance of the “national security creep”, meaning an expansion of national security-related scrutiny and regulation in investment activities.<sup>9</sup>

In the United States, both Donald Trump and his successor as president Joe Biden have asserted that “economic security is national security” in their respective National Security Strategies.<sup>10</sup> Similarly, the EU has taken steps to recognise and address this shift in perspective by emphasising the seamless integration of economic security into the EU’s foreign and security policy.<sup>11</sup> Even more recently, the current President of the European Commission Ursula von der Leyen has emphasised the geopolitical role of the Commission she leads, promoting the proactive use of economic instruments to achieve geopolitical ends. The European Economic Security Strategy of June 2023 and the Communication “Advancing European Economic Security” of January 2024 further confirmed this new approach, culminating in the expressed equation of the concept of national security with that of economic security.<sup>12</sup>

## 1. The rise of geo-economic tools

The intertwining of economic interests with geopolitical ambitions has led to the growing use of trade and investment for strategic competition between global superpowers.<sup>13</sup> In particular, measures have been developed in response to the perceived challenges posed by China’s state-imposed market distortions, pursuit

<sup>8</sup> Mona Pinchis-Paulsen, “Let’s Agree to Disagree: A Strategy for Trade-Security”, in *Journal of International Economic Law*, Vol. 25, No. 4 (December 2022), p. 527-547, <https://doi.org/10.1093/jiel/jgac048>.

<sup>9</sup> Kristen E. Eichensehr and Cathy Hwang, “National Security Creep in Corporate Transactions 2023”, in *Columbia Law Review*, Vol. 123, No. 2 (March 2023), p. 549-614, <https://columbialawreview.org/?p=5110>.

<sup>10</sup> US Presidency, *National Security Strategy of the United States of America*, 2017, <https://history.defense.gov/Portals/70/Documents/nss/NSS2017.pdf>; and Interim National Security Strategic Guidance, 2021, <https://www.whitehouse.gov/wp-content/uploads/2021/03/NSC-1v2.pdf>.

<sup>11</sup> European External Action Service, *Geopolitics of the Green Transition and Improving EU’s Economic Security*, 28 March 2023, [https://www.eeas.europa.eu/node/427640\\_en](https://www.eeas.europa.eu/node/427640_en).

<sup>12</sup> European Commission, *An EU Approach to Enhance Economic Security*, 20 June 2023, [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_23\\_3358](https://ec.europa.eu/commission/presscorner/detail/en/IP_23_3358); Anna Vlasiuk Nibe, Sophie Meunier and Christilla Roederer-Rynning, “Pre-emptive Depoliticisation: The European Commission and the EU Foreign Investment Screening Regulation”, in *Journal of European Public Policy*, Vol. 31, No. 1 (2024), p. 182-211, DOI 10.1080/13501763.2023.2258153.

<sup>13</sup> Sophie Meunier and Kalypso Nicolaidis, “The Geopoliticization of European Trade and Investment Policy”, in *Journal of Common Market Studies*, Vol. 57, Annual Review (September 2019), p. 103-113, DOI 10.1111/jcms.12932.

of self-sufficiency and broader geopolitical objectives.<sup>14</sup>

The United States has been at the forefront of this geo-economic turn, implementing restrictions on open, liberal economic activity even during periods of relative stability. The shift toward a more geo-economic approach to trade policy, where trade measures serve not only traditional trade-related goals but also broader economic and strategic considerations, is now clear also within the EU.<sup>15</sup> This transition has become even more pronounced with the unveiling of the New Economic Security Strategy in June 2023.<sup>16</sup> This strategy positions the EU as a leader in formulating a holistic approach to economic security. A further step in this direction was taken on 24 January 2024, when the Commission adopted a comprehensive trade, investment and research package as part of the roll-out of the Economic Security Strategy, providing for five new initiatives to pursue its goals.<sup>17</sup> These initiatives aim at: i) further strengthening the protection of EU security and public order by proposing enhanced screening of FDI into the EU; ii) fostering dialogue and action for increased EU coordination on export controls; iii) engaging member states and stakeholders in identifying potential risks associated with outbound investments in a narrow set of technologies; iv) facilitating further discussions on supporting research and development related to technologies with dual-use capabilities; v) recommending measures through the Council to bolster research security at both national and sectoral levels.

FDI screening mechanisms are the most common instrument to manage the security implications of foreign investment. Both the United States and the EU – as well as most of its member states – have established comprehensive frameworks for reviewing and regulating foreign investment, albeit with different approaches and regulatory structures.

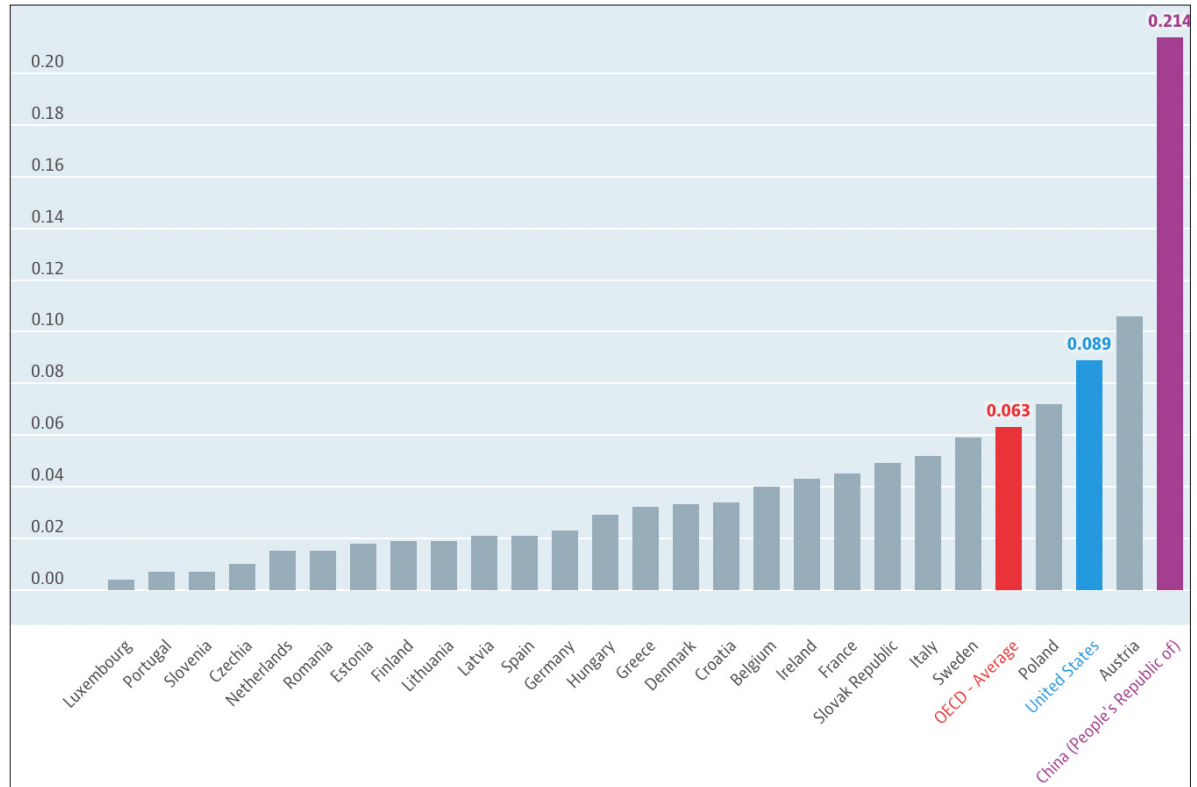
<sup>14</sup> Sarah Bauerle Danzman and Sophie Meunier, "The EU's Geoeconomic Turn: From Policy Laggard to Institutional Innovator", in *Journal of Common Market Studies*, 3 March 2024, <https://doi.org/10.1111/jcms.13599>; Francesca Ghiretti, "From Opportunity to Risk: The Changing Economic Security Policies vis-à-vis China", in *MERICs Reports*, February 2023, <https://merics.org/en/node/1805>.

<sup>15</sup> Anna Herranz-Surrallés, Chad Damro and Sandra Eckert, "The Geoeconomic Turn of the Single European Market? Conceptual Challenges and Empirical Trends", in *Journal of Common Market Studies*, 14 April 2024, <https://doi.org/10.1111/jcms.13591>; Pierre Haroche, "Geoeconomic Power Europe: When Global Power Competition Drives EU Integration", in *Journal of Common Market Studies*, 18 April 2024, <https://doi.org/10.1111/jcms.13596>.

<sup>16</sup> Luuk Schmitz and Timo Seidl, "As Open as Possible, as Autonomous as Necessary: Understanding the Rise of Open Strategic Autonomy in EU Trade Policy", in *Journal of Common Market Studies*, Vol. 61, No. 3 (May 2023), p. 834-852, <https://doi.org/10.1111/jcms.13428>.

<sup>17</sup> European Commission, *Advancing European Economic Security: An Introduction to Five New Initiatives* (COM/2024/22), 24 January 2024, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:52024DC0022>; Sarah Bauerle Danzman and Sophie Meunier, "Naïve no more: Foreign Direct Investment Screening in the European Union", in *Global Policy*, Vol. 14, Suppl. 3 (July 2023), p. 40-53, <https://doi.org/10.1111/1758-5899.13215>.

**Figure 3** | OECD FDI Regulatory Restrictiveness Index



Note: The chart presents a comparison of the results of the OECD FDI Regulatory Restrictiveness Index among the US, China, EU member states, and the OECD Average.

Source: OECD Data: *FDI Restrictiveness*, <https://data.oecd.org/fdi/fdi-restrictiveness.htm#indicator-chart>.

According to the OECD FDI Regulatory Restrictiveness Index, overall, the United States has more restrictive FDI regulatory restrictions than almost all EU member states. The index, used to assess the degree of restrictiveness of a country's FDI regulations, examines four main types of restrictions: foreign equity restrictions; discriminatory screening or approval mechanisms; restrictions on key foreign personnel and operational restrictions.

The United States established a regulatory mechanism for overseeing FDI well before Europe, despite its historical aversion to centralised government interference in market affairs. This mechanism, known as the Committee on Foreign Investment in the United States (CFIUS), operates at the federal level and is central to assessing potential national security risks of foreign investments. Over the past decade, both the Trump and Biden Administrations have made significant changes to the authority and jurisdiction of CFIUS, reflecting evolving concerns and priorities related to FDI and national security.

While not examined in this paper, it is crucial to acknowledge the existence of other instrument within the US system designed to protect national interests.

In 1977, in response to the Vietnam War, Congress enacted the International Emergency Economic Powers Act (IEEPA).<sup>18</sup> This act, alongside the Trading with the Enemy Act (TWEA) of 1917, provides the president with the authority to oversee and restrict trade. While the TWEA can only be used in times of war, IEEPA requires the president to declare a national emergency in response to an “unusual and extraordinary threat” to national security, foreign policy interests or the economy, either from the country involved in the transaction or from the transaction itself.<sup>19</sup>

The EU’s approach to the control of FDI is very different. Member states retain sole responsibility for the regulation of FDI due to their exclusive competence in matters of national security and public order. The FDI Regulation serves as a framework for cooperation between member states and between them and the European Commission. In this regard, the Economic Security Strategy has put forward a proposal to reassess the current FDI screening framework with a view to achieving greater regulatory convergence. This initiative is driven by the recognition that FDI screening mechanisms vary widely across EU member states, creating potential obstacles to the coherent pursuit of collective security objectives in trade and investment within the EU. Harmonisation of these regimes is essential to promote a more integrated approach to protecting economic interests and promoting stability within the European Union.

## 2. FDI screening in the United States

### 2.1 The evolution of CFIUS: From a “paper tiger” to a “strategic gatekeeper”

The Committee on Foreign Investment in the United States is an interagency body of the US Government that is authorised by law to review and address national security risks arising from certain transactions involving foreign investment in the United States.<sup>20</sup> Nevertheless, a definition of what constitutes national security is absent in the US FDI review system, making the CFIUS assessment of the impact of FDI on national security the determining factor at every stage of the review process.

CFIUS was established by President Gerald Ford (1974–77) with Executive Order No. 11858/75,<sup>21</sup> as a committee with “primary continuing responsibility within the

<sup>18</sup> Cfr. *International Emergency Economic Powers Act*, Public Law No. 95-223 (28 December 1977), §§ 202-203 (<https://www.govinfo.gov/content/pkg/STATUTE-91/pdf/STATUTE-91-Pg1625.pdf#page=2>), codified as amended at the Title 50 of the United States Code, Ch. 35, § 1702, <https://uscode.house.gov/view.xhtml?path=/prelim@title50/chapter35&edition=prelim>.

<sup>19</sup> David Zaring, “CFIUS as a Congressional Notification Service”, in *Southern California Law Review*, Vol. 83, No. 1 (November 2009), p. 81-132 at p. 91, <https://wp.me/p9cz3W-lS>.

<sup>20</sup> CFIUS operates pursuant to section 721 of the Defense Production Act of 1950 (DPA of 1950, Public Law No. 81-774, 50 U.S.C. §§ 4501 ss), as amended (Section 721), and as implemented by Executive Order 11858, as amended, and the regulations at chapter VIII of title 31 of the Code of Federal Regulations (C.F.R.).

<sup>21</sup> David Bailey, “U.S. Policy towards Inward FDI: CFIUS and Extension of the Concept of ‘National



Executive Branch for monitoring the impact of foreign investment in the United States".<sup>22</sup> Although CFIUS did not have the power to block or modify an investment at this stage, it was believed that the diplomatic pressure resulting from its decisions would be sufficient to prompt foreign investors to desist from finalising particular transactions.<sup>23</sup> As pointed out by several scholars, at this stage CFIUS was a "paper tiger with little to no enforcement power of its own".<sup>24</sup>

In 1988, significant novelties were introduced by the so-called "Exon-Florio amendment",<sup>25</sup> mainly in response to concerns about new technologies, closely linked to several attempts by Japanese investors to acquire American industries. Congress explicitly gave the president the power to review and decide on FDI. The Executive Order 1266/88 by President Ronald Reagan (1981–89) delegated the president's authority in the FDI review process to CFIUS. As a result, CFIUS became a committee with duties and powers to review investment transactions and make recommendations to the president in cases where it deemed it necessary to block the transaction. The Exon-Florio amendment marked the transition from the original configuration of CFIUS as a "reporting body" to what has effectively been described as a "strategic gatekeeper" of US interests.<sup>26</sup>

On 23 October 1992 President George H.W. Bush (1989–93) signed into law the National Defence Authorisation Act for Fiscal Year 1993,<sup>27</sup> which included the so-called "Byrd amendment". The amendment introduced mandatory criteria for CFIUS to review foreign direct investment,<sup>28</sup> and contributed to a greater

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Security", in *The Journal of World Investment & Trade*, Vol. 4, No. 5 (2003), p. 867-891 at p. 869, DOI 10.1163/221190003X00291; Edna Aparecida da Silva, "The United States Foreign Investment Policy: Conflict of Principles in CFIUS Reform", in *The Perspective of the World Review*, Vol. 3, No. 1 (April 2011), p. 29-64 at p. 45, <https://www.ipea.gov.br/revistas/index.php/rtm/article/view/104>.

<sup>22</sup> US Presidency, *Executive Order No. 11858 of 7 May 1975*, <https://www.archives.gov/federal-register/codification/executive-order/11858.html>. See also Colin Stapleton, "The Global Colony: A Comparative Analysis of National Security-based Foreign Investment Regimes in the Western Hemisphere", in *Washington University Law Review*, Vol. 92, No. 6 (2015), p. 1647-1681 at p. 1650, <https://journals.library.wustl.edu/lawreview/article/id/5075>; and Amy Deen Westbrook, "Securing the Nation or Entrenching the Board? The Evolution of CFIUS Review of Corporate Acquisitions", in *Marquette Law Review*, Vol. 102, No. 3 (Spring 2019), p. 643-699, <https://scholarship.law.marquette.edu/multir/vol102/iss3/3>.

<sup>23</sup> David Bailey, "U.S. Policy towards Inward FDI", cit.

<sup>24</sup> Souvik Saha, "CFIUS Now Made in China: Dueling National Security Review Frameworks as a Countermeasure to Economic Espionage in the Age of Globalization", in *Northwestern Journal of International Law & Business*, Vol. 33, No. 1 (Fall 2012), p. 199-235 at p. 209, <https://scholarlycommons.law.northwestern.edu/njilb/vol33/iss1/4>.

<sup>25</sup> It was part of the so-called Omnibus Trade and Competitive Act. See George Georgiev, "The Reformed CFIUS Regulatory Framework: Mediating between Continued Openness to Foreign Investment and National Security", in *Yale Journal on Regulation*, Vol. 25, No. 1 (Winter 2008), p. 125-134, <http://hdl.handle.net/20.500.13051/8088>; Timothy Webster, "Why Does the United States Oppose Asian Investment?", in *Northwestern Journal of International Law & Business*, Vol. 37, No. 2 (Spring 2017), p. 213-274, <https://scholarlycommons.law.northwestern.edu/njilb/vol37/iss2/2>.

<sup>26</sup> Amy Deen Westbrook, "Securing the Nation or Entrenching the Board?", cit., p. 665.

<sup>27</sup> *National Defense Authorization Act for Fiscal Year 1993*, Public Law No. 102-484, §§ 837(a)-(b), <https://www.govinfo.gov/content/pkg/COMPS-10665/pdf/COMPS-10665.pdf>.

<sup>28</sup> Edward M. Graham and David M. Marchick, *US National Security and Foreign Direct Investment*,

institutionalisation of the role of CFIUS and to a clearer definition of the steps and requirements of the entire process of FDI screening.

CFIUS and Congress have since repeatedly come into conflict over the interpretation of the scope of the new obligations imposed on CFIUS. These divergences arose in particular in relation to two transactions: (i) in 2005, the attempted acquisition of Unocal Corporation, one of the major US energy producers, by China National Offshore Oil Corporation, which has been described as “one of the most politically charged merger battles in U.S. history”;<sup>29</sup> (ii) in 2005, the attempted acquisition of six US commercial ports operated by the British-owned Peninsular and Oriental Steam Navigation Company by Dubai Ports World (a company largely owned by the government of the United Arab Emirates).<sup>30</sup>

To address these issues and better define the role and powers of CFIUS, on 24 October 2007 Congress adopted the Foreign Investment and National Security Act (FINSA).<sup>31</sup> FINSA placed a strong emphasis on national security, keeping the concept vague and undefined in order to provide the necessary flexibility to ensure the most adequate protection of US interests.<sup>32</sup> This led to the expansion of the list of transactions that could pose a risk to national security by explicitly including broad areas such as critical infrastructure and homeland security. In this way, CFIUS’s review of foreign investment moved beyond the narrow defence focus of its first three decades, adding a range of more economic considerations.<sup>33</sup> It should be borne in mind that this intervention took place after the terrorist attacks of 11 September 2001 and at a time when China was asserting itself strongly on the international market.<sup>34</sup>

## 2.2 The role and power of CFIUS under the Trump and Biden administrations

With the Trump presidency there was extensive recourse<sup>35</sup> to national security to justify the adoption of a multiplicity of measures against threats related to FDI from China. The Foreign Investment Risk Review Modernization Act (FIRRMA), signed

Washington, Peterson Institute for International Economics, October 2006, <https://www.piie.com/bookstore/us-national-security-and-foreign-direct-investment>.

<sup>29</sup> Christopher Palmeri, “Unocal Goes Out With a Bang”, in *Bloomberg*, 10 October 2005.

<sup>30</sup> Deborah M. Mostaghel, “Dubai Ports World Under Exon-Florio: A Threat to National Security or a Tempest in a Seaport?”, in *Albany Law Review*, Vol. 70 (2007), p. 583-623, <https://digitalcommons.law.ggu.edu/pubs/121>.

<sup>31</sup> *Foreign Investment and National Security Act of 2007*, Public Law No. 110-49, 121 Stat. 246 (codified as amended in scattered sections of 50 U.S.C.), <https://www.govinfo.gov/app/details/PLAW-110publ49>.

<sup>32</sup> *Foreign Investment and National Security Act of 2007*, H.R. 556, § 2(a)(6), 110th Congress, 2007.

<sup>33</sup> Amy Deen Westbrook, “Securing the Nation or Entrenching the Board?”, *cit.*, p. 671.

<sup>34</sup> James K. Jackson, “The Exon-Florio National Security Test for Foreign Investment”, in *CRS Reports for Congress*, No. RL33312 (29 March 2013), <https://sgp.fas.org/crs/natsec/RL33312.pdf>.

<sup>35</sup> Irene Yu, “Foreign Investment and National Security Challenges in the Data Age: An Assessment of the Current Regime and Recommendations”, in *Hastings Law Journal*, Vol. 74, No. 3 (2023), p. 959-986 at p. 973, [https://repository.uclawsf.edu/hastings\\_law\\_journal/vol74/iss3/9](https://repository.uclawsf.edu/hastings_law_journal/vol74/iss3/9).

into law by President Trump on 13 August 2018, resulted in a comprehensive overhaul of the organisation, function and duties of CFIUS. FIRRMA has expanded the scope and duration of reviews conducted by CFIUS, encompassing various types of transactions with implications for national security. These include real estate deals near military installations or government facility or property of national security sensitivities; investments in critical technology or infrastructure, and acquisitions involving sensitive personal data of US citizens. Additionally, FIRRMA allows CFIUS to scrutinize transactions in which a foreign government has a direct or indirect substantial interest and any transaction or arrangement designed to evade CFIUS.

While FIRRMA refrains from explicitly naming specific countries, it grants CFIUS the authority to potentially differentiate among foreign investors based on their country of origin, subject to predefined regulatory criteria. Furthermore, FIRRMA mandates foreign firms to file for review in certain circumstances, transitioning from a voluntary to a compulsory filing requirement.<sup>36</sup>

The stated objective was to update the tool to respond as effectively and efficiently as possible to national security threats posed by emerging risks, in particular with regard to critical infrastructure and technologies, including personal data. In a sign that personal data was at the heart of Trump's national security strategy, CFIUS stepped in on several occasions to oversee related transactions. For example, it reviewed investment transactions involving the StayNTouch software, online forum PatientsLikeMe, dating app Grindr,<sup>37</sup> and social media app TikTok.<sup>38</sup>

In September 2022, President Biden issued Executive Order 14083, "Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States". While this Executive Order did not change CFIUS's authority, it sought to ensure that the Committee's review of "transactions within its jurisdiction (covered transactions) [...] remains responsive to evolving national security risks".<sup>39</sup> The order urged CFIUS not to review transactions in isolation, but to consider them in the context of broader trends, with a particular focus on strengthening supply chain resilience, maintaining US technological leadership, protecting overall industry investment trends, cybersecurity and sensitive personal data. Thus, an approach has been adopted that considers the

<sup>36</sup> Cathleen D. Cimino-Isaacs, "CFIUS Reform Under FIRRMA", in *CRS In Focus*, No. IF10952 (21 February 2020), <https://crsreports.congress.gov/product/details?prodcode=IF10952>.

<sup>37</sup> Georgia Wells and Kate O'Keeffe, "U.S. Orders Chinese Firm to Sell Dating App Grindr over Blackmail Risk", in *The Wall Street Journal*, 27 March 2019, <https://www.wsj.com/articles/u-s-orders-chinese-company-to-sell-grindr-app-11553717942>; Julian Gewirtz and Moira Weigel, "Grindr and the 'New Cold War': Why US Concerns over the App Are Dangerous", in *The Guardian*, 18 May 2019, <https://www.theguardian.com/p/bfgbe>.

<sup>38</sup> US District Court for the District of Columbia, *TikTok Inc. v. Trump*, 2020, <https://www.courtlistener.com/docket/18455532/tiktok-inc-v-trump>.

<sup>39</sup> US Presidency, *Executive Order No. 14083 of 15 September 2022*, <https://www.federalregister.gov/documents/2022/09/20/2022-20450/ensuring-robust-consideration-of-evolving-national-security-risks-by-the-committee-on-foreign>.

cumulative risk of the FDI under review, with a long-term approach to the analyses to be conducted by CFIUS. In 2023, a new amendment to the National Defense Authorization Act expanded CFIUS's jurisdiction to cover agricultural land of a certain size and value and investments in US companies engaged in agriculture or related biotechnology, adding the Department of Agriculture as a CFIUS member.

### *2.3 An overview of the CFIUS activities*

Since the enactment of FIRRMA, there has been a steady increase in the number of transactions reviewed, largely driven by the broadening scope of transactions falling under CFIUS jurisdiction. Between 2020 and 2021, the number of written notices submitted by parties involved requesting CFIUS intervention to revise operations covered under its scope significantly increased from 187 to 272. In 2022, CFIUS reviewed 440 filings, consisting of 154 declarations and 286 notices.<sup>40</sup> Nearly sixty per cent of total notices proceeded to an investigation, with 162 investigations conducted by CFIUS in 2022 (130 in 2021, 88 in 2020).<sup>41</sup>

<sup>40</sup> The notice requires detailed information on all parties involved and has a minimum review period of 45 days. At the end of the review, parties may receive a safe harbour decision, which allows them to finalize the acquisition. Conversely, the declaration requires less detailed information and could undergo review within 30 days. However, it may result in either a request for a full filing (notice) or a determination of CFIUS's inability to take action. In these cases, parties would not receive a safe harbour decision unless they subsequently submit a notice, prompting CFIUS to conduct a more extensive evaluation of the transaction.

<sup>41</sup> Cathleen D. Cimino-Isaacs and Karen M. Sutter, "The Committee of Foreign Investment in the United States", in *CRS In Focus*, No. IF10177 (3 August 2023), <https://crsreports.congress.gov/product/pdf/IF/IF10177>.

**Table 1** | FDI notices from 2008 (financial crisis) to 2022 (pandemic and energy crisis)

Year	No. notices	No. investigations	No. mitigation measures	No. US President's decisions
2008	155	23	2	0
2009	65	25	5	0
2010	93	35	8	0
2011	111	40	8	0
2012	114	45	5	1
2013	97	49	9	0
2014	147	52	9	0
2015	143	67	12	0
2016	172	79	17	1
2017	237	172	30	1
2018	229	158	37	1
2019	231	113	28	1
2020	187	88	16	1
2021	272	130	26	0
2022	286	162	52	0

Note: Highlighted in grey are the cases in which the US President decided to exercise the veto power. Source: US Department of the Treasury, *Covered Transactions, Withdrawals and Presidential Decisions, 2008-2022*; and CFIUS, *Annual Report to Congress for CY 2022*, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-reports-and-tables>.

Since 2008, the US President has used his veto authority over foreign transactions only six times, all of which involved Chinese acquisitions. These instances underscore the increased scrutiny and regulatory actions applied to deals involving critical assets, indicative of the growing apprehensions regarding national security and economic welfare, especially towards China. Table 2 offers additional insights into these decisions.

**Table 2** | Presidential prohibitions of foreign transactions on the ground of national security concerns

Date	President	Case	Notes
2 February 1990	Bush	MAMCO case <i>Aerospace</i>	The state-owned China National Aero-Technology Import & Export Corporation was requested to withdraw from Mamco Manufacturing Company, a Seattle-based manufacturer of aerospace parts.
28 September 2012	Obama	Ralls Corporation case <i>Renewables</i>	Obligation on Ralls Corporation, a US company owned by Chinese citizens, to divest its interests in four wind farm projects in Oregon located near restricted airspace.
2 December 2016	Obama	Fujian Grand Chip Investment Fund case <i>Semiconductor</i>	Prohibition of the sale of the US assets of a German semiconductor manufacturer, Aixtron SE, to a Chinese investor, Fujian Grand Chip Investment Fund.
13 September 2017	Trump	Lattice Semiconductor case <i>Semiconductor</i>	Prohibition of the sale of Lattice Semiconductor to Canyon Bridge Capital Partners, a private equity firm run by US citizens but backed by funds from several Chinese state-owned entities.
12 March 2018	Trump	Broadcom case <i>Semiconductor</i>	Ban on Broadcom, a semiconductor manufacturer based in Singapore and the US, from acquiring Qualcomm, a leading US manufacturer of semiconductors and telecommunications equipment.
7 March 2019	Trump	Grindr case <i>Software</i>	Prohibition the acquisition of dating app Grindr by Chinese conglomerate Beijing Kunlun Tech Co.
6 August 2020	Trump	TikTok case <i>Digital platform</i>	Prohibition of the acquisition of the video app Musical.ly (later merged into TikTok) by the Chinese Beijing ByteDance Tech Co. (peculiar case: CFIUS investigation/US President's decision + use of IEEPA powers).

Source: Cathleen D. Cimino-Isaacs and Karen M. Sutter, "The Committee of Foreign Investment in the United States", cit.

It is worth noting that although only a small percentage of the total number of notifications were vetoed by the US President, a significant number of waivers were registered during the investment review process, as shown in Table 3.

**Table 3** | Notices withdrawn

Year	No. notices	No. notices withdrawn	No. notices withdrawn				
			During the review	During the investigation	Withdrawn and refiled	Notices withdrawn and transactions abandoned in light of CFIUS-related national security concerns	Notices withdrawn for any other reasons
2008	155	23	18	5	38	2	1
2009	65	25	5	2	7	1	2
2010	93	35	6	6	12	2	3
2011	111	40	1	5	10	0	0
2012	114	45	2	20	22	8	3
2013	97	49	3	5	2	6	1
2014	147	52	3	9	13	2	3
2015	143	67	3	10	16	3	1
2016	172	79	6	21	26	5	7
2017	237	172	4	70	79	24	6
2018	229	158	2	64	76	18	6
2019	231	113	0	30	33	8	4
2020	187	88	1	28	36	7	1
2021	272	130	2	72	115	9	2
2022	286	162	1	87	68	12	8

Source: US Department of the Treasury, *Covered Transactions, Withdrawals and Presidential Decisions, 2008-2022*; and CFIUS, *Annual Report to Congress for CY 2022*, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-reports-and-tables>.

This suggests that many companies prefer either to withdraw the notification and resubmit it in a form that meets the CFIUS requirements, or to abandon the investment transaction altogether rather than face the President's decision to block the transaction. In the latter case, the decision is made public and companies prefer to avoid being labelled as a threat to US security because of the obvious reputational and economic consequences.

### 3. FDI screening in the European Union

#### 3.1 A single FDI screening mechanism along the lines of the US model?

Ever since the debate on the dangers of FDI and the advisability and/or necessity of introducing common rules for its control at European level began, the United States has often been held up as a model for the establishment of a single FDI control mechanism.

Already in 2011, in a letter addressed to the then President of the European Commission José Manuel Barroso, Vice-President Antonio Tajani and Internal Market Commissioner Michel Barnier proposed the creation of an FDI review mechanism at the EU level that would replicate the US model.<sup>42</sup> The initiative was blocked due to fears that it would be perceived as protectionist and, as such, have negative effects on European investments in the Chinese market. The following year, a European Parliament's resolution to set up a body responsible for the ex-ante evaluation of FDI, along the lines of the US Inter-Agency Committee, and to report to the Parliament on a regional basis, went no farther.<sup>43</sup> In 2012, then Trade Commissioner Karel de Gucht said that a European-level security control of FDI was neither desirable nor feasible.<sup>44</sup>

The debate on the creation of such an instrument was revived only in 2017, with a proposal presented in the EP by the European People's Party. However, Germany, France and Italy opposed the proposal for a common FDI screening mechanism, opting for the adoption of a common framework that would not as such affect member states' prerogatives in the area of FDI control. The three countries were concerned about the structural challenges posed by the emergence of China as a major source of FDI in Europe.<sup>45</sup> The initial surge of Chinese FDI in European infrastructure began during the global financial crisis and was further boosted by the launch of the Belt and Road Initiative and the economic reforms adopted at the Third Plenum of the Chinese Communist Party in 2013.<sup>46</sup> Their apprehensions stemmed from several factors, but one of the foremost concerns was the perceived

<sup>42</sup> Ian Wishart and Jennifer Rankin, "Call to Investigate Foreign Investment in EU Market", in *Politico*, 23 February 2011, <https://www.politico.eu/?p=46166>.

<sup>43</sup> Marielle De Sarnez, *Report on EU and China: Unbalanced Trade?* (2010/2301(INI), 20 April 2012, [https://www.europarl.europa.eu/doceo/document/A-7-2012-0141\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-7-2012-0141_EN.html)).

<sup>44</sup> Karel De Gucht, *EU-China Investment: A Partnership of Equals*, Speech at the Bruegel Debate: China Invests in Europe Patterns Impacts and Policy Issues, Brussels, 7 June 2012, [https://ec.europa.eu/commission/presscorner/api/files/document/print/en/speech\\_12\\_421/SPEECH\\_12\\_421\\_EN.pdf](https://ec.europa.eu/commission/presscorner/api/files/document/print/en/speech_12_421/SPEECH_12_421_EN.pdf).

<sup>45</sup> Over the past twenty years, an estimated cumulative total of 120 billion euros in Chinese FDI has flowed into the EU. See European Commission, *Key Elements of the EU-China Press Release: Comprehensive Agreement on Investment*, 30 December 2020, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2542](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2542).

<sup>46</sup> Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform, 16 January 2014, [http://www.china.org.cn/china/third\\_plenary\\_session/2014-01/16/content\\_31212602.htm](http://www.china.org.cn/china/third_plenary_session/2014-01/16/content_31212602.htm).



“lack of reciprocity and about a possible sell-out of European expertise”.<sup>47</sup>

The introduction of an FDI Regulation was not only seen as a coordinated framework to enhance the EU’s collective response to these challenges but also symbolised a political declaration, demonstrating EU unity in tackling this crucial issue.<sup>48</sup>

The economic and strategic significance of moving towards a unified EU approach to FDI screening was evident, as acknowledged by then Commission President Jean-Claude Juncker: “Europe must always defend its strategic interests. That is why today we are proposing a new EU framework for investment screening”.<sup>49</sup> As a result, EU Regulation 2019/452 was adopted on 19 March 2019, entering into force on 10 April 2019 and becoming binding and directly applicable on 11 October 2020.

### *3.2 The FDI Regulation: A common framework for national FDI screening mechanisms*

The FDI Regulation identifies security and public order as the key interests that can justify the use of special powers and the implementation of restrictive measures in the context of the control of FDI.<sup>50</sup> However, it does not define the meaning of “security and public order”, leaving to the member states to define it.<sup>51</sup>

Nevertheless, a list is provided – by way of example and not exhaustively – encompassing a wide range of sectors and areas that could potentially impact security and public order and that might be relevant in the assessment conducted by each member state. The list includes: i) critical infrastructures (whether physical or virtual), such as energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructures, and sensitive facilities, as well as investments in land and buildings critical to the use of such infrastructures; ii) critical technologies and dual-use items, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies, as well as nanotechnology and biotechnology; iii) security of supply of critical production factors, including energy and raw materials, as well as food security; iv) access to, or the ability to control, sensitive information, including personal data; v) media freedom and their pluralism.

<sup>47</sup> “France, Germany, Italy Urge Rethink of Foreign Investment in EU”, in *Reuters*, 14 February 2017, <https://www.reuters.com/article/idUSKBN15T1NC>.

<sup>48</sup> Loïc Carcy, “The New EU Screening Mechanism for Foreign Direct Investments. When the EU Takes Back Control”, in *Bruges Political Research Papers*, No. 84/2021, <http://aei.pitt.edu/103426>.

<sup>49</sup> European Commission, *State of the Union Address 2017*, 13 September 2017, [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_17\\_3165](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_3165).

<sup>50</sup> Recital nos. 3 and 4 of the FDI Regulation.

<sup>51</sup> Elvire Fabry and Micol Bertolini, “Covid-19: The Urgent Need for Stricter Foreign Investment Controls”, in *Institut Jacques Delors Policy Papers*, No. 253 (April 2020), <https://institutdelors.eu/en/publications/covid-19-lurgence-dun-controle-renforce-des-investissements-etrangers>.

The FDI Regulation has been an improvement in at least three respects. Firstly, it has introduced common principles for national FDI control's procedures (Article 3). Secondly, it has institutionalised cooperation mechanisms (Articles 6-8). Lastly, it has facilitated the homogenisation of criteria for FDI screening based on security and public order (Article 4).

Under the cooperation mechanism, the FDI Regulation strengthens the European Commission's role and sets distinct provisions for FDI currently undergoing screening (Art. 6) and FDI not undergoing screening (Art. 7) in the recipient member state, as well as for FDI that is anticipated to impact projects or programs of EU interest. Moreover, the FDI regulation encourages member states and the Commission to cooperate with the responsible authorities of like-minded third countries on issues relating to FDI threatening national security and public order.

With regards to screening foreign direct investments based on security and public order, the regulation recommends that member states and the Commission work together with responsible authorities in similar third countries.

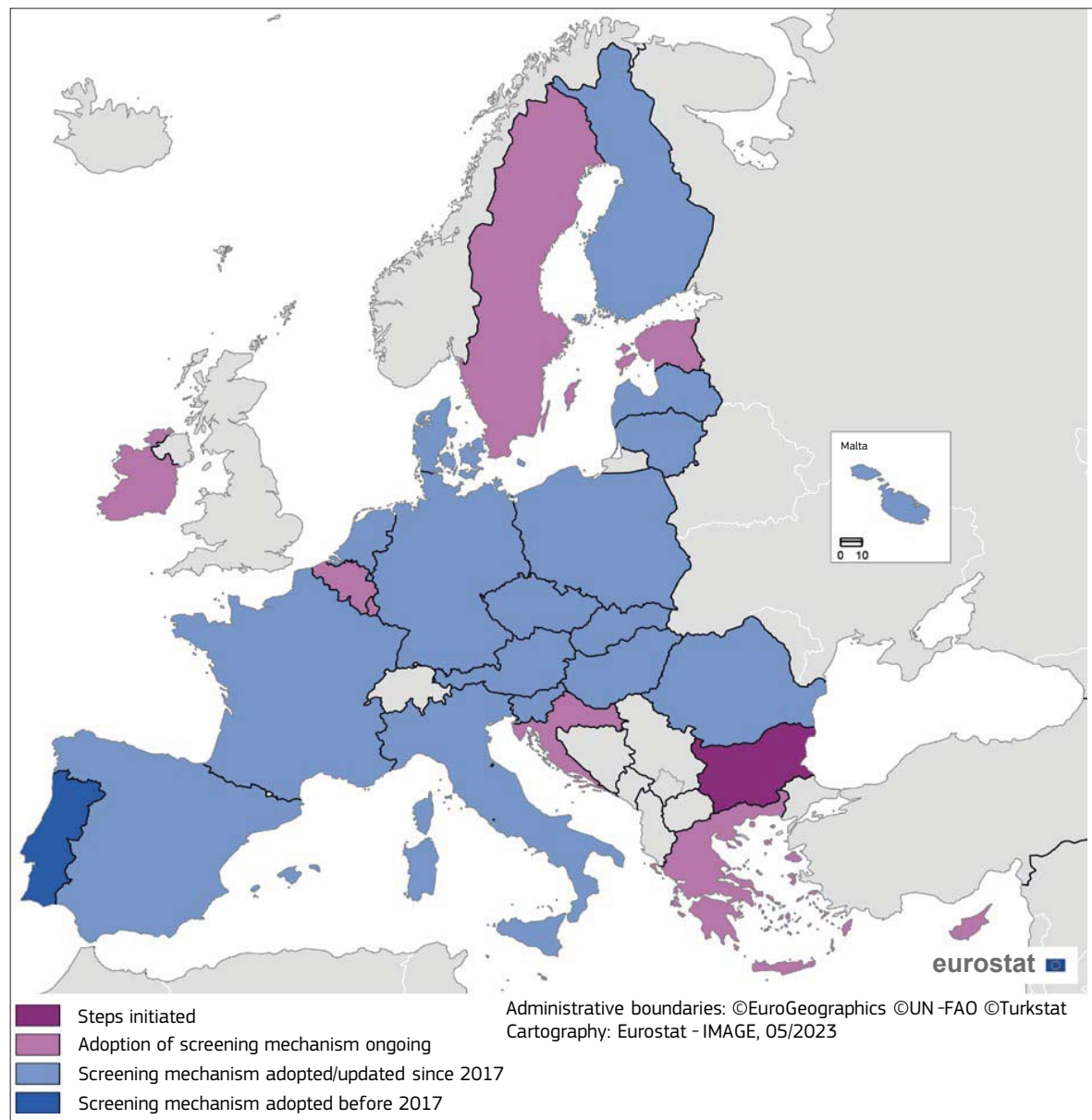
Recently, the European Commission called upon member states to set up fully-fledged screening mechanisms in order to respond to the shock and economic vulnerability caused by the pandemic<sup>52</sup> and address concerns arising from war contingencies by targeting Russian and Belarusian FDI.<sup>53</sup> Member states were urged either to strengthen control mechanisms already in place or to establish new ones. Alternatively, the Commission advised the use of all available options to deal with possible hostile takeovers in domestic markets.

As a result, the number of EU member states with a screening mechanism has increased from 11 to 21 since the EU's FDI screening regulation came into force, with more to come.

<sup>52</sup> 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)*, 26 March 2020, [https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:52020XC0326\(03\)](https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:52020XC0326(03)).

<sup>53</sup> European 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...*, 6 April 2022, [https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:52022XC0406\(08\)](https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:52022XC0406(08)).

**Figure 4** | State of the implementation of FDI mechanisms at national level



Source: European Commission DG Trade, *Third Annual Report on the screening of Foreign Direct Investments into the Union (2022) and Statistical Update on Export Controls (2021)*, Publications Office of the European Union, 2022, p. 14, <https://data.europa.eu/doi/10.2781/289185>.

### 3.3 An overview FDI screening in the EU

Although investment control mechanisms have been in place in many member states for decades, it was only in 2020 that the Regulation became operational. As a result, member states have started fulfilling their reporting obligations under the European Cooperation Mechanism. According to the first three annual reports on FDI screening, the use of the screening mechanism has continued to increase

since 2020.<sup>54</sup>

In 2022, on the basis of aggregated data received from member states, a total of 1,444 requests for acquisition authorisations from foreign investors together with review cases initiated ex officio by national governments were managed. 55 per cent of the cases were formally reviewed, compared to only 29 per cent in 2021, indicating an increase in the percentage of formally reviewed cases. Of the cases that were formally screened and for which member states reported a decision, the majority (86 per cent) were approved without conditions. Only 9 per cent of decisions resulted in authorisation with conditions or mitigating measures, compared to 23 per cent in 2021. National authorities blocked transactions in only 1 per cent of all cases decided, while in a further 4 per cent of cases the transaction was withdrawn by the parties.

In 2022, 17 member states submitted 423 notifications under the cooperation mechanism for foreign direct investments under review (Article 6 of the FDI Screening Regulation), of which six member states – Austria, Denmark, France, Germany, Italy and Spain – accounted for more than 90 per cent. In 2021, 13 member states submitted 414 notifications, compared to 11 member states in the previous reporting period. Five member states – Austria, France, Germany, Italy and Spain – accounted for more than 85 per cent of these notifications.

The transactions varied widely in terms of sectors, investor origins, and transaction values. The following table provides an overview of the sectors with the highest number of transactions from 2020 to 2022.

**Table 4** | Distribution of requests for acquisition authorisations made by foreign investors and ex officio by Sector in 2022

Sector	Percentage of transactions		
	2020	2021	2022
Manufacturing	50	25	27
ICT	17	36	24
Professional activities	-	-	12
Wholesale and retail	-	8.5	9
Financial activities	8	9.5	8
Constructions	-	4	-
Transport	-	-	7
Other activities	25	17	13

Source: European Commission's first, second and third Annual Report on the Screening of Foreign Direct Investments into the Union (2021, 2022, 2023).

<sup>54</sup> European Commission, *EU Foreign Investment Screening and Export Controls Help Underpin European Security*, 19 October 2023, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_5125](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_5125).

In 2022, manufacturing accounted for the highest share of transactions at 27 per cent, which is particularly relevant given the importance of SMEs in Europe as the backbone of its economy. Other notable sectors include ICT (24 per cent), professional activities (12 per cent), wholesale and retail (9 per cent), and financial activities (8 per cent).

## Conclusions

Both the national security strategies of the Trump and Biden Administrations highlight a common belief in the United States' enduring involvement in long-term political, economic and technological competition, particularly with global powers like China. This acknowledgment has led to a significant expansion in identifying sensitive sectors where foreign investments could potentially pose a threat to national security. This shift in national security priorities is reflected in the transformation of the role and scope of the CFIUS in recent years. However, this expansion has raised significant questions and concerns regarding the balance between safeguarding national security interests and facilitating legitimate foreign investment activities. As CFIUS's role continues to grow, stakeholders are increasingly scrutinising its actions to ensure that national security concerns are addressed effectively without unduly hindering investment flows.

In contrast, the European Union employs a decentralised approach to address similar concerns about foreign investment due to the varying regulatory frameworks among member states. While the EU has made efforts to enhance coordination through the FDI Regulation, the division of competences between the EU and its member states complicates efforts to establish a unified strategy akin to CFIUS.

The already mentioned Communication "Advancing European Economic Security" of January 2024 provides for a proposal to revise the FDI Regulation, which aims to repeal and replace the current one. It would require all member states to establish a national mechanism for monitoring FDI and introduce measures to harmonise them as far as possible. To this aim, it will identify specific sectors where all member states must review foreign investments and expand EU screening to include investments by EU investors that are ultimately controlled by non-EU entities or individuals. The proposal also seeks to address shortcomings identified in the initial years of the European cooperation mechanism and promote increased efficiency and effectiveness. It is important to note that the proposal will undergo the ordinary legislative procedure, potentially resulting in significant changes during negotiations between the European Parliament, the Council and the Commission.

Since 2021, efforts to foster collaboration on investment screening have been underway between the US and the EU within the Trade and Technology Council

(TTC). Despite disparities in respective approaches to investment screening, initiatives like the ones under Working Group 8 of the EU-US TTC aim to streamline transatlantic cooperation on this front, especially concerning critical technology issues. This Working Group seeks to share insights on investment patterns affecting security, including strategic trends, with a focus on identifying best practices for analysing risks and implementing mitigation measures, particularly in sensitive technology and data domains. However, its effectiveness thus far has fallen short of initial expectations.

At present, beyond the inevitable legal differences in the way FDI is reviewed, the US and the EU share many concerns about national and economic security, which will undoubtedly lead to further debates in the future. It will be interesting to follow these debates, especially after the US elections and the appointment of the new President of the European Commission following the European Parliament elections.

*Updated 7 May 2024*

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