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FDI Screening in the Czech Republic

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Abstract

The screening of foreign direct investment (FDI) has emerged as one of the most contested points of intersection between the interests of national security and the free movement of capital under Article 63 TFEU. Within this evolving regulatory landscape, the Czech FDI Screening Act introduces a residual category of investments that, while falling outside the scope of mandatory screening, remain subject to two mechanisms of considerable reach: the quasi-voluntary consultation proceedings before the Ministry of Industry and Trade (MIT), and a five-year retroactive call-in power exercisable on the Ministry's own motion. Although formally framed as procedural safeguards in the service of public policy and public security, their compatibility with the proportionality requirement of Article 65 TFEU has yet to be subjected to focused doctrinal analysis.

The present thesis addresses that gap. Adopting the doctrinal legal research method, together with its European legal method derivative, it examines the two mechanisms against the standards of restriction developed by the Court of Justice of the European Union (CJEU) and the three-step proportionality test consistently applied, *inter alia*, under Article 65 TFEU. The analysis draws upon Czech national law, EU primary and secondary law, the case law of the Court, and the broader international scholarly debate on FDI screening within the Union.

It is argued that both mechanisms constitute restrictions on the free movement of capital and that, although suitable for pursuing a legitimate security objective, neither satisfies the necessity requirement. The consultation proceedings operate as a *de facto* mandatory regime in the absence of objectively defined notification thresholds, while the retroactive review power generates legal uncertainty incompatible with the requirement of foreseeability, owing in particular to the absence of any subjective limitation period running from the moment the MIT becomes aware of the investment. The thesis concludes that, in their present form, the two mechanisms amount to disproportionate restrictions on the free movement of capital that cannot be justified under Article 65(1), point (b) TFEU.

Preface

Expedit enim rei publicae, ne quis re sua male utatur.

For the public interest requires that no one should make an evil use of his own property.

[Corpus Iuris Civilis, Institutes 1.8.2.]

Abbreviations

AI	Artificial Intelligence
CJEU	Court of Justice of the European Union
EEC	European Economic Community
EU	European Union
FDI	Foreign Direct Investment
MIT	Ministry of Industry and Trade
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom

1 Introduction

1.1 Background

The Treaty on the Functioning of the European Union (TFEU) constitutes a general prohibition on all restrictions on the movement of capital between Member States and between Member States and third countries.[1] Following the overall trend, this limitation is not absolute; allowing for an exhaustive list of exceptions including, *inter alia*, measures based on public policy or public security.[2] With respect to such justification and pursuant to Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (FDI Regulation), the Czech legislature passed the Foreign Direct Investment Act no. 34/2021 Coll. (FDI Act) in 2021.[3] This Act established a procedure to monitor potentially risky inwards capital flows into the Czech Republic, to vet suspicious transactions, and to potentially restrict those identified as high-risk.[4]

Prior to its introduction, there was no systemic regulation of FDI in place in the Czech Republic. The issue at hand is not the introduction of an FDI screening mechanism as such, a regulatory trend observable across the EU. Rather, the concern lies in the wide range of investments *de facto* subjected to scrutiny and the degree of discretion conferred upon the screening authority in initiating and conducting that review.

The FDI Act designated the Czech Ministry of Industry and Trade (MIT) as the supervisory authority empowered with monitoring and conducting the screening procedures under this legislation. The material scope covers specific types of non-EU inward foreign investments which require obligatory vetting approval from the MIT. However, largely owing to the recent adoption of the new Cybersecurity Act no. 264/2025 Coll. (Cybersecurity Act), the number of investments affected by the mandatory screening regime is substantial. Aside from the broadly defined scope of investments falling under this legislation, the FDI Act essentially establishes a residual category of investments that do not directly fit the enumerated criteria for further scrutiny. Furthermore, the state authority retains a right to *ex officio* initiate an investigation into any foreign investments that "*are capable of threatening the security of the Czech Republic or internal*

[1] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326 ('TFEU'), Article 63.

[2] TFEU, Article 65, para. 1, point. b) *in fine*.

[3] Non-binding English translation available here: <https://mpo.gov.cz/assets/en/foreign-trade/investment-screening/legislation/2022/11/Act-on-FDI-Screening_unofficial-translation_1.pdf>.

[4] The Government of the Czech Republic, 'Explanatory Memorandum to the Screening of Foreign Investments Act' 2020 ('Explanatory Memorandum') <https://www.psp.cz/sqw/text/orig2.sqw?idd=173157> accessed 4 April 2026 23.

or public order […]". The power of the MIT to conduct an *ad hoc* screening procedure is reserved for a period of five years.

Such an FDI screening system presents significant practical difficulties and legal challenges for foreign investors. In particular, investors face a dilemma of choosing between passivity or proactivity. Specifically, when it comes to initiating a consultation procedure, commonly requiring extensive documentation, before the MIT in order to mitigate the ad hoc investigation or potential negative consequences associated with an investment that was concluded without a prior approval from the Czech Government. The number of investments impacted by this law is theoretically infinite. This form of FDI screening raises serious questions as to whether the restrictions it imposes on the free movement of capital can be adequately justified on the grounds of public policy or public security and whether they satisfy the requirement of proportionality.

1.2 Purpose and Research Question

The purpose of the thesis is to analyse the proportionality of the restriction imposed by the Czech FDI Screening regime on the free movement of capital. The analysis focuses specifically on the residual category of investments subject to *ex post* review by the MIT. Against this background, the thesis seeks to answer the following main research question:

- To what extent do the quasi-voluntary consultation proceedings and the retroactive review power of the Czech Ministry of Industry and Trade (MIT) under the FDI Act constitute a disproportionate restriction on the free movement of capital under Article 63 TFEU?

In order to address this main research question, the analysis is structured around the following sub-questions:

- How does the Czech FDI Act regulate the residual category of investments, in particular through the consultation proceedings and the retroactive call-in power of the MIT?
- How are the concepts of public policy and public security construed as justifications for restrictions on the free movement of capital under Articles 63 and 65 TFEU?
- Does the quasi-voluntary nature of the consultation proceedings under the Czech FDI Act operate as a *de facto* mandatory requirement, and if so, does this render it a disproportionate restriction on the free movement of capital under Article 65 TFEU?
- Does the open-ended nature of the MIT's retroactive review power, in the absence of a subjective limitation period, satisfy the proportionality

requirement under Article 65 TFEU as a justification for the restriction on the free movement of capital?

1.3 Delimitations

The FDI screening landscape in the EU is diverse. As of this point, all of the EU Member States, with the latest addition of Croatia and Cyprus, introduced their versions of legislation relating to the assessment of foreign direct investments.[5] While the point of departure is the same for each Member State, the resulting legislation reveals considerable variations in how individual parliaments have interpreted the necessity of public policy or public security measures. These interpretations differ across a range of key parameters: the reach of the screening regime, the range of subjects obliged to comply with its procedures, and the designation of the authority empowered to issue a final decision. While each piece of legislation and its comparative analysis warrants academic debate, this thesis focuses primarily on the Czech FDI Act and, within that framework, on the specific provisions governing the residual category of investments subject to *ex post* review of the MIT.

With respect to the Czech FDI Act, while the significance of the enlarged material scope or the procedural intricacy associated with the screening are noteworthy, a detailed analysis of their broader implications is beyond the scope of this study and is left for further academic debate. Instead, the thesis limits its scope to the residual category of investments which do not directly fall under the FDI Act, however, can still be scrutinized to a certain degree by the MIT over a specific period of time. This aspect of the regulatory framework engages a number of doctrinal concerns particularly with respect to the principle of legal certainty. Nonetheless, the key issue for the present analysis is restricted to its potential qualification as a restriction on the free movement of capital under Article 63 TFEU.

1.4 Method and Material

The thesis adopts the doctrinal legal research method, together with its European legal method derivative.[6] In its baseline form, this method consists of a two-fold process.[7] First, the selection and systematisation of relevant sources of the law. Second, their subsequent interpretation and analysis; followed by derivation in the form of a deductively valid inference.

5 See European Commission, 'LIST of SCREENING MECHANISMS NOTIFIED by ME BER STATES.' (*CIRCABC* 9 February 2026) <https://circabc.europa.eu/ui/group/be8b568f-73f3-409c-b4a4-30acfcec5283/library/7e72cdb4-65d4-4eb1-910b-bed119c45d47/details?download=true> accessed 7 April 2026.

6 Karl Reisenhuber (ed), *European Legal Methodology* (Intersentia 2017).

7 Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law, Third edition* (Routledge 2025), 18.

On this basis, the analysis identifies and systematises three groups of sources. At the national level, the FDI Act and its accompanying explanatory memorandum form the principal point of reference. At the EU level, the analysis relies on primary law, in particular Articles 63 and 65 TFEU, and on secondary law in the form of Regulation 2019/452. The case law of the Court of Justice of the European Union (CJEU) constitutes a further integral source. The mutual relationship between these layers is governed by the hierarchical structure of norms: Czech national law conforms to both primary and secondary EU law, and secondary EU law in turn yields to primary EU law.[8]

The doctrinal method employed by the thesis must be distinguished from the interpretive method applied by the CJEU itself, which informs the reading of its case law. Two strands of that interpretive method are of particular relevance. First, autonomous interpretation, under which the norms and concepts of EU law are construed uniformly across the legal orders of the Member States, regardless of any divergent national doctrinal practice, and solely by the CJEU. Second, teleological interpretation, which is favoured over a purely textual reading of provisions of national or EU law, and which corresponds to both the EU's institutional guidelines on interpretation[9] and the established practice of the Court.[10]

Contemporary national literature on the subject matter is limited. The principal source is Commentary to the FDI Act, which analyses its individual provisions and provides background for further interpretation.[11] Published in 2022, the commentary does not capture more recent developments, including the introduction of the new Cybersecurity Act, and this limitation is accounted for in the use made of it. The commentary also draws primarily on the explanatory report to the FDI Act and adopts a perspective rooted in national administrative law, which further narrows its usefulness for the present analysis. Beyond this source, national contributions consist mainly of law-journal articles and online commentary published on the websites of law firms.

The reliance on international scholarship is in part a consequence of the limited national academic discourse in this area. A plausible explanation lies in the small

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[8] Constitution of the Czech Republic, Article 10, available in English here: <https://www.usoud.cz/fileadmin/user_upload/Tiskova_mluvci/Ustava_EN.pdf>; Case 6-64 *Flaminio Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66; Case 11-70 *Internationale Handelsgesellschaft mbH* [1970] ECLI:EU:C:1970:114; Reisenhuber (n **6**), 120-121; Consolidated version of the Treaty on European Union [2012] OJ C 326 ('TEU'), Article 19, para. 3, point b).

[9] Rafał Mańko, 'The EU as a Community of Law Overview of the Role of Law in the Union' (2017) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599364/EPRS_BRI(2017)599364_EN.pdf> accessed 8 April 2026, 6.

[10] As demonstrated in Case C-370/12 *Thomas Pringle v Government of Ireland and Others* [2012], ECLI:EU:C:2012:756 [53] *et seq*.

[11] Jan Kupčík, Barbora Dufková and Martin Švec, *Zákon o prověřování zahraničních investic. Komentář [the Foreign Investments Screening Act: A Commentary]* (1st edn., CH Beck 2022) 204.

number of cases ending in the prohibition or termination of an FDI. Of the 20 cases reviewed by the MIT in 2024, none resulted in a prohibition;[12] the same outcome holds for the 22 cases reviewed in 2023.[13] This does not mean that all foreign investments subject to MIT review are ultimately approved; proceedings are often terminated when the underlying grounds for review cease to exist, or when the transaction does not satisfy the statutory criteria defining a foreign investment under the material scope of the FDI Act. The overall scarcity of cases, with the isolated exception of the proceedings involving the Chinese company EMPOSAT Co., Ltd., combined with the inherently sensitive nature of the subject matter, which frequently involves non-public or classified information, constrains the production of substantive scholarly analysis at the national level.

International scholarship publications therefore provide a substantial resource for addressing this gap, although their use entails reliance on analogical reasoning drawn from publications addressing FDI regulation at the EU level or within other Member States whose regulatory contexts do not necessarily correspond to the framework under examination.

1.5 State of the Art

The academic literature addressing FDI screening in the EU has expanded considerably in recent years, mainly driven by the ongoing development of national screening mechanisms across Member States and the enactment and future modification of Regulation 2019/452. Scholarly publications may be broadly grouped around three interconnected themes: the evolution and legitimacy of FDI screening frameworks, their relationship with the free movement of capital and other internal market freedoms, and the proportionality of the restrictions they impose. For the purpose of this thesis, the focus is mainly aimed at Hindelang/Moberg, de Kok, Antonaki, and Groussot/Michael/Mlynarcikova, while the reference to other authors illustrates the wider literature perspective.

On the first theme, the emergence of FDI screening as a regulatory phenomenon on the EU level has attracted significant academic attention. Witkowska[14] provides a comprehensive overview of the EU inward FDI screening framework

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[12] The MIT, 'Annual Report on Foreign Investment Screening in the Czech Republic for 2024' (2025) <https://mpo.gov.cz/assets/cz/zahranicni-obchod/proverovani-zahranicnich-investic/2025/12/Annual-Report-2024.pdf> accessed on 2 May 2026.

[13] The MIT, 'Annual Report on the Screening of Foreign Investments in the Czech Republic for the Year 2023' (2024) <https://mpo.gov.cz/assets/cz/zahranicni-obchod/proverovani-zahranicnich-investic/2024/12/annual_report23_EN.pdf> accessed on 2 May 2026.

[14] Janina Witkowska, 'The European Union's Screening Framework for Foreign Direct Investment: Consequences for External Relations' (2020) 23 Comparative Economic Research. Central and Eastern Europe 21.

and its implications for external relations. Hindelang and Moberg[15] offer a critical reading of the EU screening framework, arguing that it effectively casts political dissent in legal form by enabling Member States to pursue protectionist objectives under the disguise of security justifications. This argument is further developed by de Kok,[16] who characterises the development of EU FDI regulation as a shift from liberalisation towards a state of exception. Broadly framed legal regimes combined with politically influenced decision-making processes result in the scope of public policy and public security being practically determined by political rather than legal considerations. Doppen[17] approaches the same phenomenon from a political science perspective, tracing the shift from competition to cooperation among Member States in the administration of FDI screening. Reins[18] situates the EU framework within the broader context of energy policy by arguing that the screening regulation reflects an ever-growing EU competence in areas traditionally reserved for Member States. Li[19] similarly examines the concept of open strategic autonomy as the ideological driver behind the strengthening of inward FDI review at the EU level.

On the note of the relationship between FDI screening and the internal market, Antonaki[20] provides a comprehensive doctrinal analysis by examining the tension between the free movement of capital and public interest objectives, and the conditions under which restrictions may be reconciled with primary law obligations. Hindelang's broader body of work,[21] including his analysis of recent changes to the German investment screening mechanism with Hagemeyer-Witzleb,[22] and his examination of the Europeanisation of FDI screening through soft law with Huth,[23] engages with the question of how national screening mechanisms interact with EU primary law. Burnside and Kidane[24] explore the intersection of FDI screening with merger control and the increasing complexity

[15] Steffen Hindelang and Andreas Moberg, 'The Art of Casting Political Dissent in Law: The EU'S Framework for the Screening of Foreign Direct Investment' (2020) 57 Common Market Law Review 1427-1460.

[16] Jochem de Kok, 'Investment Screening in the EU: From Liberalisation to the State of Exception' (2025) 27 The Journal of World Investment & Trade 1.

[17] Floor Doppen, 'From Competition to Co-Operation? FDI Screening in the EU' [2025] JCMS: Journal of Common Market Studies.

[18] Leonie Reins, 'The European Union's Framework for FDI Screening: Towards an Ever More Growing Competence over Energy Policy?' [2019] Energy Policy 665.

[19] Catherine Li, 'The European Union's Open Strategic Autonomy: Strengthening Inward Foreign Direct Investment Controls' (2023) 53 EurAmerica 493-549.

[20] Ilektra Antonaki, *Capital, Market and the State: Reconciling Free Movement of Capital with Public Interest Objectives*, vol. 20 (Brill Nijhoff 2022).

[21] Steffen Hindelang, *The Free Movement of Capital and Foreign Direct Investment the Scope of Protection in EU Law* (Oxford University Press 2009).

[22] Teoman M Hagemeyer-Witzleb and Steffen Hindelang, 'Recent Changes in the German Investment Screening Mechanism in Light of the EU Screening Regulation' (2021) 2 Central European Journal of Comparative Law 39.

[23] Steffen Hindelang and Jan Philipp Huth, 'Europeanization of FDI Screening through Soft Law? Administrative Cooperation under the 2024 Commission Proposal for an Updated EU FDI Screening Regulation' (2025) 20 Global Trade and Customs Journal 759.

[24] Alec Burnside and Adam Kidane, 'Merger Control Meets FDI: The Multi-Stop Shop Expands' (2022) 7 Competition Law & Policy Debate.

of the multi-jurisdictional environment in which foreign investors must operate. Schonberg, Vincent, and Barrio[25] provide a practitioner-oriented perspective on the implications of navigating both the EU Foreign Subsidies Regulation and FDI screening regimes with particular focus on Chinese businesses. Zonta[26] further develops this intersection analysing the combined impact of the FDI screening regulation and the Foreign Subsidies Regulation on mergers and acquisitions in the EU. Jhunjhunwala and Ladha[27] offer a comparative perspective on European protectionist tendencies across jurisdictions. Huang[28] contributes with a governance analysis of cybersecurity considerations across supply chains in FDI screening mechanisms reflecting the increasing relevance of technological security concerns in the design of screening regimes.

Despite the growing body of literature on FDI screening in the EU, academic work specifically addressing the Czech framework remains scarce. The available national literature, as discussed in the preceding section, is mainly confined to code commentary and does not engage substantively with the question of compatibility with EU primary law. The proportionality of the FDI Act's residual category of investments and the open-ended nature of the MIT's retroactive review power, in particular, have not been subjected to focused doctrinal analysis.

1.6 Outline

This thesis consists of three substantive chapters. The first provides a concise understanding of the regulatory regime of the FDI Act with regard to the residual category of investments. The main focus is put on the analysis of the five-year retroactive screening power of the MIT. The second specifies the EU framework for investment screening focusing on the reference point of Article 63 TFEU as the default rule for the free movement of capital; followed by subsequent examination of the public policy or public security justification framework in Article 65 TFEU together with the FDI Regulation 2019/452. The third further develops and combines the factual basis from the previous two chapters when assessing the question of proportionality with respect to the consultation proceedings and the retroactive review power of the MIT and their impact on the free movement of capital under Article 63 TFEU.

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25 Morris Schonberg, Laurence Vincent and Daniel Barrio, 'Navigating the EU Foreign Subsidies Regulation and FDI Screening Regimes in Europe: Strategic Considerations for Chinese Businesses' (2026) 24 Competition Law Journal 107.

26 Enrico Zonta, 'From Economic Security to Legal Uncertainty: Exploring the Impact of the FDI Screening Regulation and Foreign Subsidies Regulation on Mergers and Acquisitions in the EU' (2025) 16 Journal of European Competition Law & Practice.

27 Rabindra Jhunjhunwala and Moin Ladha, 'Demystifying Protectionist Regimes in the Age of Globalisation: A Brief Comparative Analysis of the Indian and Other FDI Screening Regimes' (2024) 25 Business Law International 39.

28 Jiaqi Huang, 'Cybersecurity across the Supply Chain in FDI Screening Mechanisms: A Comparative Governance Analysis' (2026) 27 The Journal of World Investment & Trade 160.

2 Czech FDI Screening Act

2.1 Introduction

The Foreign Direct Investment screening Act in the Czech Republic was implemented and entered into force in 2021. Until its introduction, the Czech legal order primarily relied on universal crisis management laws[29] and on a sectoral regulation of dangerous goods or of critical infrastructure.[30] The FDI Act was established on the backbone of EU Regulation 2019/452 on FDI (**3.5**) which served its purpose as a means to facilitate equivalent harmonisation, in some cases even the creation, of FDI screening regulation across all the EU Member States. Since the area of foreign (factual necessity for emphasis on a non-EU country of origin) direct investments falls under the exclusive competence of the EU,[31] the Member States' legislative bodies do not have any proactive competence to implement any category of regulation themselves,[32] however, they can do so only if empowered by the EU or when implementing EU acts.[33] This is exactly the case of the FDI Regulation which provided foundation for intra-EU cooperation and introduced basic principles of FDI screening procedure.

The Czech government, as an executive body empowered to propose legislation, decided to implement this Regulation while proactively setting up a new regime for FDI screening under a single act. The Explanatory memorandum to the FDI Act highlights the necessity "to adapt" this Regulation into the national law.[34] Aside from the obvious fact that any kind of Regulation under EU law (contrary to the case of Directives) requires no such form of transposition and its provisions are directly applicable,[35] the FDI Regulation's objective does not encompass the formation of an FDI screening procedure. It is therefore not surprising that the FDI Act's internal mechanisms reflect a process of creation akin to flying a plane while building it.

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[29] See Crisis management Act no. 240/2000 Coll. or now amended Cybersecurity Act no. 264/2025 Coll.

[30] See Banking Act no. 21/1992 Coll., Electronic Communications Act 127/2005 Coll., Energy Sector Act no. 458/2000 Coll., Weapons and Ammunition Act no. 112/2002 Coll., or Pyrotechnics Act 206/2015 Coll.

[31] TFEU, Article 3, para. 1, point. e) read in conjunction to Article 206 *et seq*.

[32] Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (Eighth, Oxford University Press 2024) 108.

[33] TFEU, Article 2, para 1.

[34] The Government of the Czech Republic, 'Explanatory Memorandum to the Screening of Foreign Investments Act' 2020 ('Explanatory Memorandum') <https://www.psp.cz/sqw/text/orig2.sqw?idd=173157> accessed 4 April 2026, 22.

[35] This applies, as long as their provisions are sufficiently clear, precise, and relevant; see Craig and Gráinne de Búrca (n **32**) 229.

The following subchapters aim to describe and analyse the FDI Act's internal framework with an emphasis on the residual category of investments affected by the consultation process and by the five-year retroactive power of the MIT.

2.2 Framework

Comprised of 30 Sections, the FDI Act is by legislative design objectively lucid codification regulating certain obligations of foreign investors.[36] Furthermore, it empowers the MIT to conduct administrative screening procedures and authoritatively rule on foreign investments that may hypothetically interfere with internal or public order of the Czech Republic.[37] For the purpose of collective understanding, semantic indication is made towards the language nomenclature of the Czech statutory regime when making reference to "internal or public order". This terminology is systematically used across the whole body of Czech legal order and by interpretation corresponds with the EU-recognised term "public policy or public security". Apparent textual difference is thus mitigated by the shared teleological meaning. To attain the necessary degree of clarity for the duration of this thesis the latter expression is favoured.

Initial analysis of substantive law leads to the question of defining the scope of the FDI Act – territorial, temporal, personal and material scope. Additionally, the framework is described in its entirety by a reference to the procedural dimension of the screening procedure.

2.2.1 Scope of Application

The Act was published on February 2nd and entered into force in its entirety on May 1st, 2021. Moreover, it is clearly territorially limited to the territory of the Czech Republic.

The personal scope is guided by the characterization of a foreign investor. The subject concerned is classified as any entity that has made or intends to make a foreign investment in the Czech Republic and is not a national of the Czech Republic or of another EU Member State; or does not have a registered office in the Czech Republic or in another EU Member State; or is directly or indirectly controlled by a person meeting at least one of the previously stated conditions; under certain conditions, a trustee of a trust fund may also be captured by this definition of a foreign investor.[38]

The material scope of the FDI Act is centred around the definition of a foreign investment. Preliminary classification requires cumulative fulfilment of four elements: existence of assets in any given form; provision of such assets for the purpose of conducting economic activity; localisation of such economic activity in the territory of the Czech Republic and ability to exercise an effective degree

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[36] This is, however, far from comparable to the French legislative approach, which is notably more concise and structured within a limited number of provisions. See: Code monétaire et financier, Part V, Financial Dealings with Foreign Countries, Article L. 151 and following; available here: <https://www.unodc.org/cld/uploads/res/document/fra/1953/financial-and-monetary-code_html/financial_and_monetary_code_as_of_2010_english.pdf>

[37] FDI Act, Section 6 and Section 1, point a).

[38] FDI Act, Section 2.

of control over the performance of this economic activity.[39] Subsequently, the main material scope is completed by an exhaustive list of foreign investments requiring permission from the MIT. The main investment target areas conditioned by an approval are production, research, development, innovation of military material; critical infrastructure; administrator of a critical information infrastructure information/communication system or service; or development or manufacturing of dual-use items.[40]

Notably, the entirety of the material scope question becomes complex when also including the residual category of foreign investments (**2.3**) or *quasi* mandatory regime of consultations (**2.4**) applicable for investments into an entity holding a licence for nation-wide radio or television broadcasting or publisher of periodical press, the aggregate minimum average print run of which amounts to 100,000 copies per day in the past calendar year.[41]

Understandably, the set-out criteria of applicability are, evidently, broadly predefined. Since their meaning is not extensively clarified in the FDI Act itself, except for the effective degree of control concept elaborated in Section 5, or by a reference to applicable provisions of the national law, extensive interpretational tendency will likely be favoured when applying the law. Decision-making practice will probably not provide any remedy for such uncertainty either; that is so with respect to the behind-closed-door nature of the proceedings and terse reasoning provided by the Government (the MIT) in the limited number of mostly non-public rulings. Testimony to that is the first and only case of a terminated investment in the Czech Republic, the proceedings against the EMPOSAT Co., Ltd. based in Beijing, China.[42]

2.2.2 Procedural Implications

Even though the scope of the thesis primarily examines the question of substantive law, a brief reflection towards procedural regulation is necessary. As mentioned above, FDI screening process is an administrative proceeding[43] of a *sui generis* nature. This characteristic is mainly shaped by the subject matter of the proceedings involving matters of national security, public policy or public security.[44] Moreover, the sort of national agencies involved adds to the point of speciality; precisely, the screening procedure allows for joint participation of the MIT, the Government in its entirety, the Ministries as per their sectoral expertise,

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39 FDI Act, Section 3.

40 FDI Act, Section 7.

41 FDI Act, Section 10.

42 See Order of the Czech Government of 19 March 2025, published based on the Free Access to Information Act no. 106/1999 Coll. request; available here: <https://vlada.gov.cz/cz/urad-vlady/poskytovani-informaci/poskytnute-informace-na-zadost/informace-tykajici-se-vlady-cr-219673/>

43 The Administrative Procedure Code, Act No. 500/2004 Coll., as amended, Section 9.

44 The Government of the Czech Republic, 'Explanatory Memorandum to the Screening of Foreign Investments Act' 2020 ('Explanatory Memorandum') <https://www.psp.cz/sqw/text/orig2.sqw?idd=173157> accessed 4 April 2026, 34.

the National Competition Authority, the National Cyber and Information Security Agency, the Czech National Bank, the law enforcement and the Intelligence services.[45] The nature of the proceedings is further emphasised by the explicit regulation of classified and sensitive materials within the case file, along with the corresponding duty of confidentiality.[46] Nonetheless, the proceeding still follows the fundamental framework known to the Administrative Procedure Code. When it comes to legal remedies available, their accessibility is guaranteed by the possibility of an appeal against the governmental decision to refuse before the competent administrative court.[47] The FDI Act also introduced a number of administrative offenses to which a foreign investor may be liable, e.g. failing to fulfil the obligation imposed by a decision on prohibition of further existence of the foreign investment or making a foreign investment without filing a request to permit the foreign investment.[48]

From the practical point of perspective, if a foreign investor plans to make an investment, as one covered by the material core of the FDI Act in Section 7, they must initiate proceedings before the MIT by submitting a request for the approval of foreign investment[49] via the online platform.[50] After the filing procedure is concluded, the MIT forwards the case to above-mentioned agencies for their opinions.[51] If the MIT comes to the conclusion that the investment may threaten the security of the Czech Republic or public policy or public security, it must refer the case to the Government for deliberation and subsequent issue of an opinion.[52] The MIT accounts for the position of the Government and concludes the screening proceedings by a positive or negative decision on permission of the foreign investment.[53]

2.3 Residual Category of Investments

Section 8, paragraph 1 of the FDI Act *de facto* introduced a residual category of foreign investments. This category does not directly fulfil the criteria of a foreign investment as defined by Section 7 of the FDI Act; however, such investments are nevertheless considered to be capable of threatening the security of the Czech Republic or its public policy or public security and are therefore still subjected to a mandatory screening procedure. The MIT may initiate

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45 FDI Act, Section 11, para. 1.

46 FDI Act, Section 18-21.

47 FDI Act, Section 22-24.

48 FDI Act, Section 25, para. 1 and 2.

49 Formalized by the Government Decree No. 178/2021 Coll.; Available here: <https://e-sbirka.gov.cz/sb/2021/178?zalozka=text>

50 The MIT, 'Submitting a Request for a Foreign Investment Approval or a Consultation Proposal' (*Mpo.gov.cz* 2021) <https://mpo.gov.cz/en/foreign-trade/investment-screening/submitting-a-request-for-a-foreign-investment-approval-or-a-consultation-proposal/submitting-a-request-for-a-foreign-investment-approval-or-a-consultation-proposal--261351/> accessed 28 April 2026.

51 FDI Act, Section 11, paras. 1 and 2.

52 FDI Act, Section 13.

53 FDI Act, Section 14, para. 1 and 2.

proceedings in such cases ex officio, based on the outcome of consultation proceedings (**2.4**), or within five years of the completion of the foreign investment if the investor did not submit a consultation proposal (**2.5**).[54]

The text of the Act does not provide for any exhaustive or non-exhaustive list of foreign investments comprised by this category. Additionally, there appears to be a complete absence of national case law interpreting or applying this particular section. Moreover, judicial practice concerning the FDI Act as a whole remains, at present, essentially non-existent.[55] This absence of authoritative interpretation largely restrains the possibility for an adequate analysis of the provision in question; effectively leaving the justifications of the legislator in the Explanatory report[56] as the primary source for interpretation. While the explanatory report offers a more detailed elaboration on the issue, its interpretative value remains inherently limited, since it lacks necessary binding force and cannot substitute in full judicial or administrative practice.

The Explanatory report for the FDI Act sets out a non-exhaustive list of sectors which are of an importance for the security of the Czech Republic or its public policy or public security. The enumeration provided is intentionally illustrative and should be regarded as an indication, serving primarily to signal to foreign investors that investments targeting such sectors are likely to be subjected to screening procedure by the MIT.[57] This approach is explicitly justified in light of the necessity to conduct an individualised, ad hoc assessment of each foreign investment, thereby maintaining sufficient regulatory flexibility to respond to evolving economic and technological developments. Particularly, it is argued that this approach enables it to mitigate risk associated with emerging or dual-use technology, including those situated in sectors not yet formally designated as critical to national security but which may nevertheless give rise to unforeseeable security concerns.

Contrary to this, it is worth noting the view of Jochem de Kok who argues that the combination of a broadly framed legal regime and a politically influenced decision-making process leads to a situation in which the scope of security and public order is, in practice, determined by political considerations.[58] The following findings institute a clear indication of the issue outlined.

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[54] FDI Act, Section 8, para. 1, point. a) and b).

[55] A comprehensive review of the available case law of the Constitutional Court, the Supreme Administrative Court, the Supreme Court, and Regional Administrative Courts has not revealed any relevant decisions. This absence may be attributed, in particular, to the relative rarity of cases in which decisions within the FDI screening procedure are subject to judicial review, as well as to the essentially sensitive nature of the matters at hand, which frequently involve classified information.

[56] Explanatory Memorandum (n **44**).

[57] Explanatory Memorandum, 57.

[58] Jochem de Kok, 'Investment Screening in the EU: From Liberalisation to the State of Exception' (2025) 27 The Journal of World Investment & Trade 1 283.

The Explanatory Report also sets out a non-exhaustive list of sectors considered particularly sensitive for the purpose of foreign investment targeting. At its core, the enumerated areas centre around three broad areas. The first and most prominent is critical infrastructure. The second being technology, covering wide a spectrum of advanced and dual-use goods including AI. The third is informational and societal influence, extending to control over personal data, critical informational systems, and the capacity to shape public opinion through media. Rounding out the list are supplies essential to food, energy, and raw material security, alongside non-military objects of relevance to national defence.[59]

It is important to reiterate that foreign investment activity within these areas does not automatically imply a threat to the national security or public policy. Nevertheless, given the broadly defined scope of the relevant sectors, it becomes fundamentally difficult for foreign investors to achieve a sufficient degree of legal certainty and predictability in assessing whether their contemplated investments may trigger the screening process. The need for transparency and legal predictability are barely advanced by indications embedded in a poorly accessible explanatory report; especially when formulated in language that is hardly comprehensible to foreign investors.

The foreign investor is effectively confronted with a strategic choice: either to initiate consultation proceedings on its own motion, thereby involving the MIT at an early stage of the transaction, or to proceed without prior engagement and bear the resulting legal uncertainty. In the latter scenario, the investment remains exposed, for a period of five years, to the possibility that the Ministry may *ex officio* initiate *ex post* screening proceedings, hypothetically leading to a finding of invalidity of the investment and the imposition of an administrative fine. The structure of the regulatory regime rationally constrains foreign investors to a single diligent course of action.[60]

2.4 Consultation proceedings

In response to the said concerns of legal certainty and predictability, the legislature introduced a mechanism of quasi-voluntary consultation proceedings, designated to mitigate uncertainty by enabling foreign investors to seek preliminary guidance on the regulatory implications of their investment proposal. The designation "quasi-voluntary" is used deliberately, given that the regulation induces foreign investors to initiate consultation proceedings since the mitigation of legal uncertainty achieved thus significantly outweighs the risks associated in abstaining from such action. Additionally, the wording of Section

[59] Explanatory Memorandum, 57-58.

[60] Compare with the approach chosen by the Government of the UK: Cabinet Office, 'National Security and Investment Act 2021: Statement for the Purposes of Section 3' (*GOV.UK*21 May 2024) <https://www.gov.uk/government/publications/national-security-and-investment-statement-about-exercise-of-the-call-in-power/national-security-and-investment-act-2021-statement-for-the-purposes-of-section-3--2> accessed 3 May 2026.

10 of the FDI Act governing consultation proceedings imposes an obligation to initiate such proceedings in specific cases, namely where the target entity holds a licence for nationwide radio or television broadcasting or qualifies as a publisher of periodicals, the aggregate minimum average print run of which amounts to 100,000 copies per day in the past calendar year.

In practice, consultation proceedings can be characterised as a "mini-screening procedure". Upon the submission of a request by the foreign investor to initiate the consultation proceedings, the MIT proceeds to circulate the information provided, supplemented by its own preliminary findings, to the relevant agencies for their assessment and subsequent issuance of an opinion. On the basis of this inter-agency evaluation, the Ministry subsequently determines whether to start formal screening proceedings or, alternatively, to conclude the matter by issuing a confirmation that the foreign investment will not be subject to further scrutiny.[61] On the other hand, the legal effect of such affirmation is limited as it does not preclude the MIT from taking action later on where the information submitted in the course of the consultation proceedings is later found to have been intentionally misleading or false.[62]

The legislature quite openly admits to the broadly defined scope of the FDI Act. However, at the same time, they put forward its justification (on grounds of public policy and public security) as well as introduce the notion of consultation proceedings in order to mitigate negative consequences which foreign investors may face. The explanatory report itself explicitly acknowledges that foreign investors are effectively presented with a trade-off between higher administrative burden, in the form of submitting a request for consultation, and a substantial level of legal uncertainty manifested in the risk of an ex post retroactive call-in by the MIT within the five-year period. It may be argued that the current framework of the mechanism effectively undermines the notion of voluntariness as it is difficult to imagine that a rational investor would proceed with a substantial foreign investment without seeking to mitigate such a significant level of regulatory risk. In practice, the formally optional nature of the consultation procedure is substituted by a *de facto* obligation.

The validity of this hypothesis is further supported by empirical data derived from the screening reports of the MIT which reveal an obvious disparity between the number of voluntary consultation proceedings and formal screening procedures. In 2024, 9 voluntary consultations were conducted compared to 6

[61] Explanatory Memorandum, 61-62.
[62] Explanatory Memorandum, 61-62

mandatory screenings,[63] while in 2023 the figures indicated 20 consultations as opposed to 7 mandatory screenings.[64]

With the information provided, it is not possible to determine the motivations underlying a foreign investors' decision to initiate a voluntary consultation proceedings. Whether these are attributed to a precautionary approach or to the emergence of some form of standard practice, such behaviour appears to be closely linked to the regulatory design itself. This operational feature raises a number of doctrinal concerns, particularly from the perspective of legal certainty; nevertheless, as for the purpose of this thesis, the central issue lies in its potential to constitute a restriction on the free movement of capital under Article 63 TFEU.

2.5 Retroactive Call-in Power of the MIT

The residua category of investments under the FDI Act concerns situations in which a foreign investor completes an investment in a targeted entity that does not fall within the core material scope of the Act. Namely, it does not meet the criteria for mandatory screening under Section 7 and, by the investor's assessment, does not fulfil the threshold under Section 8 of being capable of posing a threat to the security, public order, or public policy of the Czech Republic. Additionally, no voluntary consultation has been initiated pursuant to Section 10. In such circumstances, the MIT retains the power to start regular screening proceedings ex officio within a period of up to five years following the completion of the investment.[65]

The five-year period is designed to function as an objective limitation period, commencing at the moment the investment is completed and operating as a fixed temporal boundary, rather than as a subjective limitation period dependent upon the point at which the MIT becomes aware, or should have been aware, of the existence of the investment and the identity of the investor. In this respect, the MIT is effectively vested with a broad discretionary power to initiate screening proceedings at any point within the five-year period, including at its very last day, irrespective of whether it had prior knowledge of the investment. Consequently, the framework does not impose any time-based pressure on the authority to act without undue delay, thereby allowing for a potentially prolonged state of ambiguity.

To extend the consideration further, Section 8, para. 4, imposes an obligation on the MIT to initiate screening proceedings *ex officio* where a foreign investor

[63] The MIT, 'Annual Report on Foreign Investment Screening in the Czech Republic for 2024' (2025) <https://mpo.gov.cz/assets/cz/zahranicni-obchod/proverovani-zahranicnich-investic/2025/12/Annual-Report-2024.pdf> accessed on 2 May 2026, 7.

[64] The MIT, 'Annual Report on the Screening of Foreign Investments in the Czech Republic for the Year 2023' (2024) <https://mpo.gov.cz/assets/cz/zahranicni-obchod/proverovani-zahranicnich-investic/2024/12/annual_report23_EN.pdf> accessed on 2 May 2026, 5.

[65] FDI Act, Section 8, para. 1, point b).

fails to submit a request for approval pursuant to Section 7, or where, even after the expiry of the five-year period under paragraph 1, it is subsequently established that the investor intentionally concealed facts which would otherwise have justified the initiation of screening proceedings. In practice, this provision significantly broadens the temporal scope of the authority's intervention powers; enabling it to review foreign investments without a strict time limitation where there are reasonable grounds to suspect such concealment thereby approaching a *de facto* open-ended review competence.

This disparity has not gone unnoticed in the legislative discourse. A proposed amendment to the relevant provision was advanced by Ivan Adamec, a member of the Chamber of Deputies of the Czech Republic (the lower chamber of the bicameral parliament). He acknowledged the legitimate need for a flexible regulatory framework enabling the government to mitigate risk to national security, public order, or public policy through an *ex post* screening mechanism which covers the broadly defined scope of foreign investments not directly falling under the FDI Act.[66] At the same time, he argued that such mechanisms must be clearly delineated both in terms of their material scope and temporal limits, so as to avoid creating undue barriers to foreign investment.[67]

In support of this position, reference was made to the German FDI regulation which incorporated a three-month subjective limitation period applicable to the national screening authority; thereby introducing a more balanced approach to the *ex post* intervention by the state authority in the private business sphere.[68] In an effort to mitigate the legally questionable nature of this open-ended review competence, the proposed amendment sought to introduce a six-month subjective limitation period in relation to Section 8, para. 1,[69] alongside a ten-year objective limitation period calculated from the completion of the investment. As it is evident from the current wording of the Act, this amendment was ultimately not adopted.

[66] Ivan Adamec, 'Amendment No. 6261 to the Government Bill on Foreign Investment Screening and on Amendments to Related Acts' (*psp.cz* 16 September 2020) ('Amendment No. 6261') <https://www.psp.cz/sqw/text/orig2.sqw?idd=67483&pdf=1> accessed 3 May 2026, 6.

[67] Amendment No. 6261, 6.

[68] Amendment No. 6261, 6.

[69] The proposed alteration largely replicates the mechanism established under the National Security and Investment Act 2021, in particular as set out in Part 1, Chapter 1, Section 2(2)(a) and (b).

3 Free Movement of Capital in EU

3.1 Introduction

The establishment and effective functioning of the Internal Market, the Common Market, and the Economic and Monetary Union are fundamentally dependent on the proper and minimally restricted operation of the four fundamental freedoms. From an economic perspective, this fact is grounded in the principle of optimal resource allocation within the EU, whereby factors of production are enabled to move freely to locations in which they are most efficiently and productively employed.[70] The legal framework governing the above-mentioned is predominantly contained in the Part Three of the TFEU which governs Union policies and internal actions. In particular, Title I on the Internal market provides in Article 26 that the internal market is to function as an area without internal frontiers, guaranteeing the free movement of goods, persons, services and capital. Nonetheless, the degree of liberalisation achieved under the TFEU is not unconditional as the Treaty itself provides for grounds upon which restrictions to the fundamental freedoms may be justified. This characteristic is further reflected and developed in the case law of the CJEU.

In the context of the EU, the liberalisation of capital movements evolved more gradually compared to the other fundamental freedoms of the Internal market.[71] This trend is explained by a reference to the integral characteristics of capital flow liberalisation which is commonly associated with significant macroeconomic risks (highly relevant for the post-war developing Europe), e.g. financial instability and larger output losses.[72] The beginning of liberalisation took root in the Treaty of Rome when establishing the European Economic Community (EEC) to further advance the level of economic integration.[73] Article 67 EEC *et seq.* established progressive abolition of restrictions on capital movements during the transitional period, albeit only to the extent necessary to ensure the proper functioning of the common market. Slow liberalisation efforts were, to a significant extent, gradually constrained by the judgement of the *Casati* case, in which the CJEU, *inter alia*, held that the Treaty provisions on the free movement of capital did not possess direct effect.[74]

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[70] Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (Eighth, Oxford University Press 2024) 638.

[71] Ilektra Antonaki, *Capital, Market and the State: Reconciling Free Movement of Capital with Public Interest Objectives*, vol. 20 (Brill Nijhoff 2022) 18.

[72] IMF, 'The Liberalization and Management of Capital Flows – An Institutional View' (Staff Paper of the IMF Executive Board 2012) 12.

[73] Dennis Swann, *The Economics of the Common Market: Integration in the European Union* (Eighth, Pinguin Group 1995) 103.

[74] Case 203/80 *Casati* [1981] ECLI:EU:C:1981:261 [10]-[11].

A major breakthrough materialised with the enactment of Council Directive 88/361/EEC following earlier capital directives[75] and in the broad context of the Single European Act in 1985. Pursuant to Article 1 of the Directive, a precise legal foundation was laid down to acknowledge the direct effect of provisions aimed at eliminating restrictions on cross-border capital movements; this interpretation was later upheld in the *Aldo Bordessa* case.[76, 77] The process of development into proper and equal internal market freedom was concluded in 1994 when the Maastricht Treaty entered into force and established the Economic and Monetary Union; finally diminishing the post-war scepticism and exchanging it for a more liberal approach to capital movement in the EU.[78]

Similarly, now Article 63 TFEU was subjected to judicial review by CJEU in case *Sanz de Lera* which reaffirmed that the provision has a direct effect since it is formulated in a clear and precise way without any conditions attached to its implementation.[79]

Recent changes are illustrating that the regulatory driver cycle (post-war scepticism to liberalisation) has, in a sense, come full circle. The abandonment of Germany's traditional Ostpolitik,[80] recurring proposals to significantly strengthen European defence capabilities,[81] highlight a broader trend towards securitization. Similarly, Member State practice, such as the reintroduction and prolongation of border controls,[82] demonstrates how temporary and exceptional measures (initially justified by crises) may evolve into a more permanent feature of the legal landscape. The EU legal order is, undoubtedly, not static but rather responsive and increasingly formed by considerations of public policy and security.

Given these circumstances, the emergence and expansion of FDI screening regimes appear, at first glance, structurally justified. However, empirical data

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[75] First Council Directive of 11 May 1960 for the implementation of Article 67 of the Treaty, OJ No 43, 12. 7. 1960, 921/60, and Second Council 63/21/EEC Directive of 18 December 1962, OJ 9, 22.1.1963, 62–74.

[76] Sideek M. Seyad, 'Free Movement of Capital' in Dennis Patterson and Anna Södersten (eds), *A Companion to European Union Law and International Law* (Wiley Blackwell 2016) 230.

[77] Joined cases C-358/93 and C-416/93 *Aldo Bordessa, Vicente Marí Mellado and Concepción Barbero Maestre* [1995] ECLI:EU:C:1995:54 [32]-[35].

[78] Antonaki (n **71**) 23-24.

[79] Joined cases C-163/94, C-165/94 and C-250/94 *Lucas Emilio Sanz de Lera, Raimundo Díaz Jiménez and Figen Kapanoglu* [1995] ECLI:EU:C:1995:451[48].

[80] Ian Klinke, 'Dead or Dormant? German Ostpolitik after Ukraine' (2025) 10 European Journal of International Security 1 <https://www.cambridge.org/core/journals/european-journal-of-international-security/article/dead-or-dormant-german-ostpolitik-after-ukraine/4A194E99FFBB80D89FE841EB1EA474C5> accessed 26 March 2025.

[81] See: Bundesministerium der Verteidigung, 'Gesamtkonzeption Militärische Verteidigung Verantwortung Für Europa. Militärstrategie Und Plan Für Die Streitkräfte' (2026) <https://www.bmvg.de/resource/blob/6093766/01b1718498c25db9010ea13724d7a37a/dl-gesamtkonzeption-der-militaerischen-download-deu-data.pdf> accessed 22 May 2026.

[82] See Commission, 'Temporary Reintroduction of Border Control' (*Migration and Home Affairs*2023) <https://home-affairs.ec.europa.eu/policies/schengen/schengen-area/temporary-reintroduction-border-control_en> accessed 22 May 2026.

introduced a degree of tension into this narrative. In the case of the Czech Republic, comparatively applicable also across the EU, a substantial portion of scrutinised investments originate from jurisdictions such as the United States or Canada, while investments from traditionally perceived high-risk countries, like Russia or China, account for a limited share.[83] This raises a legitimate question as to the underlying regulatory objective; whether the framework is genuinely targeted at specific security risks or whether it operates more broadly as a precautionary measure.

The element of proportionality, therefore, becomes increasingly questionable. If the material scope of FDI screening regimes is amply broad to justify intervention in a wide range of cases, and if the practice of Member States evolves towards the screening of nearly all foreign investments, the distinction between justified restriction and structural limitation of the free movement of capital risks becoming blurred. In such a scenario, the role of the CJEU may itself be tested; especially where public policy and security justifications are afforded a wide margin of appreciation.

The following subchapters describe and analyse the legal baseline for FDI screening in the EU. The analysis proceeds from primary law to secondary law. The point of departure is the free movement of capital under Article 63 TFEU, with particular emphasis on its material and territorial scope; notably in relation to investments originating from third countries outside the EU. This is followed by an examination of the public policy and public security justification under Article 65 TFEU, and subsequently by a discussion of Regulation 2019/452 on FDI and its ongoing revision.

3.2 Standard of Article 63 TFEU

Article 63, paragraphs 1 and 2 TFEU prohibits all restrictions on the movement of capital and payments between Member States, as well as between Member States and third countries.

In terms of material scope, the provision draws a distinction between two concepts: the movement of capital and payments. Neither is expressly defined in the Treaty; the CJEU has therefore assumed the role of clarifying their respective meanings through its case law. In *Luisi and Carbone*, the Court held that current payments constitute transfers of foreign exchange made as consideration in the context of an underlying transaction. Capital movements, by contrast, are financial operations essentially concerned with the investment

[83] The MIT, 'Annual Report on Foreign Investment Screening in the Czech Republic for 2024' (2025) <https://mpo.gov.cz/assets/cz/zahranicni-obchod/proverovani-zahranicnich-investic/2025/12/Annual-Report-2024.pdf> accessed on 2 May 2026; The MIT, 'Annual Report on the Screening of Foreign Investments in the Czech Republic for the Year 2023' (2024) <https://mpo.gov.cz/assets/cz/zahranicni-obchod/proverovani-zahranicnich-investic/2024/12/annual_report23_EN.pdf> accessed on 2 May 2026.

of funds as such, rather than with remuneration for a service.[84] As regards the concept of capital movement specifically, the Court further clarified in *Trummer and Mayer* that the non-exhaustive nomenclature set out in Annex I to Directive 88/361/EEC still carries indicative value for the purposes of its definition.[85] That list encompasses a broad range of capital movements, most notably, and most relevantly for the purposes of this thesis, direct investments.[86]

In terms of territorial scope, free movement of capital is unique among the four fundamental freedoms in that it operates on an *erga omnes* basis.[87] It extends not only to movements of capital between Member States, but equally to those between Member States and third countries.[88] The general prohibition therefore applies equally to capital movements involving third countries. In this regard, the CJEU has held that national measures subjecting direct foreign investment to prior authorisation requirements constitute restrictions on the movement of capital within the meaning of Article 63 TFEU.[89] It must be noted, however, that the said case law is considerably outdated, which inevitably raises the question of its continued applicability in the current regulatory landscape.

The concept of a restriction in Article 63 TFEU generally covers any restriction on movements of capital both between Member States[90] and between Member States and third countries.[91] In particular, that concept includes measures which are discriminatory in nature in that they establish, directly or indirectly, a difference in treatment between domestic and cross-border movements of capital which does not correspond to an objective difference in circumstances[92] and which are therefore liable to deter natural or legal persons from other Member States or third countries from carrying out cross-border movements of capital.[93]

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84 Joined cases 286/82 and 26/83 *Graziana Luisi and Giuseppe Carbone v Ministero del Tesoropara* [1984] ECLI:EU:C:1984:35 [21].

85 Case C-222/97 *Manfred Trummer and Peter Mayer* [1999], ECLI:EU:C:1999:143 [20]-[21].

86 See Case C-282/04 Commission v Netherlands [2006] ECLI:EU:C:2006:608 [19]; Case C-367/98 *Commission v Portugal* [2002] ECLI:EU:C:2002:326 [38]; Case C-174/04 *Commission v Italy* [2005] ECLI:EU:C:2005:350 [12].

87 Antonaki (n **71**) 24.

88 Case C-439/97 *Sandoz* [1999] ECLI:EU:C:1999:499 [18].

89 Case C-478/98 *Commission v Belgium* [2000] ECLI:EU:C:2000:497 [18]; Case C-54/99 *Église de Scientologie de Paris v Prime Minister* [2000] ECLI:EU:C:2000:124 [14].

90 Joined Cases C-105/12 to C-107/12 *Essent and Others* [2013] EU:C:2013:677 [39].

91 Case C-45/17 *Jahin* [2018] EU:C:2018:18 [19]-[21]; Case C-135/17 *X (Controlled companies established in third countries)* [2019] EU:C:2019:136 [26].

92 Case C-485/14 *Commission v France* [2015] ECLI:EU:C:2015:506 [25]-[26].

93 Case C-78/18 Commission v Hungary (Transparency of associations) [2020] ECLI:EU:C:2020:476 [53].

3.3 Free Movement of Capital v. Freedom of Establishment

At this point, it is equally important to acknowledge that the delineation between the internal market freedoms is not always straightforward, as individual cases may on initial analysis engage more than one freedom simultaneously. The judgement in the *Xella Magyarország* case offers an accurate illustration of the fact.[94] The case arose from a dispute before the Budapest High Court concerning a decision by the Hungarian Minister for Innovation and Technology prohibiting Xella Magyarország Kft., a Hungarian company forming part of a multinational group whose ultimate parent was registered in Bermuda, from acquiring 100% of the shares in Janes és Társa, a small Hungarian company engaged in the extraction of gravel, sand and clay. The prohibition was issued under Hungarian legislation establishing a foreign investment screening mechanism, which classified Janes és Társa as a "strategic company" and treated Xella Magyarország as a "foreign investor" solely on account of its indirect ownership by a third-country entity, despite being itself an EU-incorporated company.

The referring court sought to clarify, *inter alia*, whether such a national screening mechanism was compatible with EU law, specifically Article 65(1)(b) TFEU read in conjunction with Regulation (EU) 2019/452 on the screening of foreign direct investments, insofar as it could block an intra-EU acquisition on grounds of protecting the national interest in securing the supply of basic raw materials to the local construction sector. In line with its established case law, the CJEU held that the case did not fall within the scope of the free movement of capital, but instead within the freedom of establishment under Article 49 TFEU. The Court argued this in light of the *definite influence criterion*, whereby national legislation intended to apply exclusively to shareholdings enabling the holder to exert a definite influence over a company's decisions and to determine its activities falls within the freedom of establishment rather than the free movement of capital.

As observed by Groussot, Michael, and Mlynarcikova,[95] the Opinion of Advocate General Ćapeta in Xella provides a more concrete account of how the two freedoms are to be delineated. Of particular relevance is the distinction drawn therein: a foreign investment falls within the scope of the free movement of capital where it takes the form of a short-term or minority investment; that is, an acquisition of shares made purely for financial purposes, without any intention to influence the management or control of the undertaking (*targeted entity*) concerned.[96]

[94] Case C-106/22 *Xella Magyarország* [2023] ECLI:EU:C:2023:568 [41]-[44].

[95] Xavier Groussot, Savvas Michael and Ema Mlynarcikova, 'The Screening of Foreign Investments in EU Law: When "Security and Public Order" Become the New Black in Internal Market Laws and Policies' (2024) 7 Nordic Journal of European Law 36.

[96] Case C-106/22 *Xella Magyarország* [2023] ECLI:EU:C:2023:568, Opinion of AG Ćapeta, point 27.

This distinction carries significant practical implications for foreign investors. As the only internal market freedom operating on *an erga omnes* basis, the free movement of capital under Article 63 TFEU is the sole Treaty provision upon which a non-EU foreign investor may rely; the freedom of establishment being, by its very nature, reserved for intra-EU cases. The degree of complexity and case-by-case assessment necessity is well reflected in the CJEU's case law.[97]

Concerning this point, Advocate General Stix-Hackl aptly observed in her Opinion in the *Fidium Finanz AG* case that if reliance on Article 56 EC (now Article 63 TFEU) in relation to undertakings in third countries were automatically precluded whenever another fundamental freedom is engaged on account of the subject matter in question, the guarantees afforded by the free movement of capital would be rendered meaningless.[98] In other words, the Advocate General argues in favour of a parallel approach; one permitting the simultaneous application of the free movement of capital alongside the freedom of establishment. This view finds support in academic literature. Hindelang, for instance, suggests that the parallelism mode is the prevailing approach among scholars.[99]

These observations prompt a broader question as to whether the free movement of capital, as currently constructed, affords foreign investors a sufficiently robust layer of protection in the context of FDI screening. The tension is a structural one: public policy and public security justifications under Article 65 TFEU reflect, by their very nature, the sovereign interests of the Member State; interests which may, to the greatest extent, materialise in a prohibition of a foreign investment. Yet, if the logic of the *definite influence criterion* is followed to its conclusion, the investments falling within the scope of Article 63 TFEU are, almost by definition, those of a more limited character; minority or short-term holdings carrying no decisive influence over the target entity. Consequently, such investments, precisely because of their limited impact, are possibly not capable of genuinely threatening national security or public policy to a degree that would justify the possible restriction.

[97] Compare Case C-452/04 *Fidium Finanz AG* [2006] ECLI:EU:C:2006:631 with Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECLI:EU:C:2006:774 and Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECLI:EU:C:2007:161.

[98] Case C-452/04 *Fidium Finanz*, ECLI:EU:C:2006:182, Opinion of AG Stix-Hackl, point 74.

[99] Steffen Hindelang, *The Free Movement of Capital and Foreign Direct Investment the Scope of Protection in EU Law* (Oxford University Press 2009) 110 and 114.

3.4 Public policy and Public Security Exceptions

Exceptions to the free movement of capital are embedded in Article 65 TFEU. These justifiable restrictions apply to intra-Community and third country capital movements equally. Article 65 (1), point a) TFEU relates to a tax-carve out provision which preserves the right of Member States to treat taxpayers differently under the national law based on their residence or where their capital is invested. That is so, without that differentiation being automatically considered a restriction on the free movement of capital.[100]

On the other hand, Article 65 (1), point b) TFEU sets out the broadest of the exceptions to the free movement of capital. It establishes three distinct derogations: first, the power to take measures necessary to prevent infringement of national law, specifically in the fields of taxation and prudential supervision of financial institutions; second, the power to impose declaration requirements on capital movements for administrative or statistical purposes; and third, the most relevant for the purpose of this thesis, the power to restrict capital movements on grounds of public policy or public security – the *ordre public* exception.[101] It is this third limb that provides on of the primary law legal basis for the operation of FDI screening regimes across the EU.

Additionally, the provisions set out in Article 65 (1) must be read in conjunction with Article 65 (3) which mandates that the measure adopted shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments. This further emphasises the relative nature of these exceptions, as measures adopted thereunder remain subject to strict review by the CJEU to ensure they are objectively justified and proportionate.[102]

Whenever a Member State seeks to rely on the public policy or public security justification under Article 65 (1), point b TFEU, it does so within a framework of deliberate interpretative openness. Neither concept is expressly defined in EU law,[103] reflecting a deliberate legislative choice to preserve regulatory flexibility and prioritise case-by-case evaluation over rigid categorisation.[104] Member States therefore retain a degree of discretion in determining what constitutes a threat to public policy or public security within their respective legal orders.[105] That discretion is, however, considerably constrained by the CJEU which limits the unilateral determination by each Member State without any control by the

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100 See Case C-279/93 *Schumacker* [1995] ECLI:EU:C:1995:31 or Case C-376/12 *Bouanich* [2014] ECLI:EU:C:2014:138.

101 Hindelang (n **99**) 215.

102 Case C-480/19 *Veronsaajien oikeudenvalvontayksikkö* [2021] ECLI:EU:C:2021:334 [29].

103 Compare United Nations Conference On Trade And Development, *The Protection of National Security in IIAs* (UN 2009).

104 Jochem de Kok, 'Investment Screening in the EU: From Liberalisation to the State of Exception' (2025) 27 The Journal of World Investment & Trade 1 268.

105 Teoman M Hagemeyer-Witzleb and Steffen Hindelang, 'Recent Changes in the German Investment Screening Mechanism in Light of the EU Screening Regulation' (2021) 2 Central European Journal of Comparative Law 39, 45-46.

institutions of the EU.[106] The Court has consistently held that a restriction on these grounds is permissible only where it addresses a genuine and sufficiently serious threat to a fundamental interest of society and must not serve reasons of a purely economic nature.[107]

Over the years, the CJEU has progressively clarified the substantive limitations of the public policy and public security justification through its case law. Hindelang, summarising the relevant jurisprudence,[108] identifies several categories of measures which the Court recognised as capable of meeting the threshold of genuine and sufficiently serious threat to a fundamental interest of society. In the area of public security, these include defence[109] or measures aimed at ensuring the continuity of essential public services,[110] e.g. securing a minimum supply of petroleum products,[111] electricity and telecommunications.[112] Moreover, the Court has recognised that the notion of public policy and public security extends, as argued by Hindelang, to measures combating terrorism[113] and drug trafficking,[114] as well as the prohibition of political activities directed at undermining the constitutional order of a Member State.[115]

It must be acknowledged that the CJEU has not yet had occasion to rule directly on the compatibility of indefinite limitation periods in the context of FDI screening with the requirements of EU law. Nevertheless, the golden share line

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106 Case C-543/08 *Commission v. Portugal* [2010] EU:C:2010:669 [85].

107 Case 41-74 *Yvonne van Duyn v Home Office* [1974] ECLI:EU:C:1974:133 [18-19]; Case 30-77 *Regina v Pierre Bouchereau* [1977] ECLI:EU:C:1977:172 [35]; Case C-54/99 *Église de Scientologie de Paris* [2000] ECLI:EU:C:2000:124 [17]; Case C-106/22 *Xella Magyarország* [2023] ECLI:EU:C:2023:568 [64]-[66]; Case C-35/98 *Staatssecretaris van Financiën v B.G.M. Verkooijen* [2000] ECLI:EU:C:2000:294 [48].

108 Hindelang (n **99**) 226-228.

109 Case C-423/98 *Alfredo Albore* [2000] ECLI:EU:C:2000:401 [21].

110 Case C-463/00 *Commission v Kingdom of Spain* [2003] ECLI:EU:C:2003:272 [70].

111 Case 72/83 *Campus Oil Limited* [1984] ECLI:EU:C:1984:256 [34]; Case C-483/99 *Commission v French Republic* [2002] ECLI:EU:C:2002:327 [47]; Case C-503/99 *Commission v Kingdom of Belgium* [2002] ECLI:EU:C:2002:328 [46].

112 Case C-463/00 *Commission v Kingdom of Spain* [2003] ECLI:EU:C:2003:272 [71].

113 See joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECLI:EU:C:2008:461; The case demonstrates that combating terrorism can constitute a legitimate ground for restricting capital movements, specifically through asset-freezing measures adopted under Articles 60 and 301 EC (now Articles 75 and 215 TFEU). The Court accepted that such measures could be justified on security grounds, while simultaneously holding that they must still respect fundamental rights and remain subject to judicial review. It does not directly address Article 65 TFEU or FDI screening, so the link is therefore analogical rather than direct.

114 Joined cases C-358/93 and C-416/93 *Aldo Bordessa, Vicente Marí Mellado and Concepción Barbero Maestre* [1995] ECLI:EU:C:1995:54.

115 Hindelang makes a reference to a commentary by Georg Ress and Jörn Ukrow on Article 58 EC (now Article 65 TFEU), *Grabitz/Hilf* commentary on EU law, marginal number 36; this publication is not easily accessible with respect to its date of publication. Therefore, probable reference by analogy can be made in this regard towards Case 36-75 *Roland Rutili v Ministre de l'intérieur* [1975] ECLI:EU:C:1975:137 [32].

of cases[116] offers a compelling basis for analogical reasoning. In this line of jurisprudence, the Court consistently held that national measures restricting the free movement of capital must be grounded in objective, precise, and publicly available criteria.[117] Measures conferring open-ended or insufficiently defined powers on national authorities, consequently, fail the proportionality test on that basis. This reasoning is certainly applicable to the question at hand. A review power exercisable without a defined subjective limitation period is, by its very nature, neither precise nor foreseeable; especially, when conditioned upon a quasi-voluntary consultation.

3.5 Regulation 2019/452 on FDI

Regulation 2019/452 establishes a Union-level framework for the screening of inward foreign direct investments. Outward investment flows and access to third country markets fall outside its scope and are addressed by separate trade and investment policy instruments. The adoption of the Regulation was neither straightforward nor uncontroversial. This reflected the broader tensions surrounding the development of EU competences in this area and various (non)existent forms of national FDI screening mechanisms.[118] The Regulation aims to fulfil two objectives. First, it provides a framework within which Member States may screen foreign direct investments on grounds of security or public order. Second, it establishes a cooperation mechanism between Member States, and between Member States and the Commission, in relation to investments liable to affect those interests.[119]

3.5.1 Structure

The legislative design can be organised into five principal pillars. The first concerns the screening mechanisms of Member States. The Regulation does not impose an obligation to screen.[120] Rather, it preserves each Member State's discretion to maintain, amend, or adopt screening mechanisms within the framework it establishes. Where such mechanisms exist, they must meet certain minimum standards of transparency and non-discrimination. Member States are required to clearly set out the circumstances triggering a screening, the applicable grounds, and the relevant procedural rules including timeframes.[121]

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[116] Daniele Gallo, 'On the Content and Scope of National and European Solidarity under Free Movement Rules: The Case of Golden Shares and Sovereign Investments' (2016) 1 European Papers 823.

[117] Case C-326/07 *Commission v Italy* [2009] ECLI:EU:C:2009:193 [45], [51] and [52]; Case C-171/08 *Commission v Portugal* [2010] ECLI:EU:C:2010:412 [76]-[77]; Case C-244/11 *Commission v Greece* [2012] ECLI:EU:C:2012:694 [74]-[78].

[118] Steffen Hindelang and Andreas Moberg, 'The Art of Casting Political Dissent in Law: The EU'S Framework for the Screening of Foreign Direct Investment' (2020) 57 Common Market Law Review 1428.

[119] Hindelang and Moberg (n **118**) 1445.

[120] FDI Regulation, Recital (8) *in fine*.

[121] FDI Regulation, Article 3.

The second pillar sets out the substantive factors which Member States and the Commission may take into account when assessing whether a foreign direct investment is likely to affect security or public order. These encompass effects on critical infrastructure, critical technologies and dual-use items, supply of critical inputs, access to sensitive information, and the freedom and pluralism of the media. The Regulation also permits consideration of the nature of the foreign investor; including whether it is directly or indirectly controlled by a third-country government or whether there is a serious risk of involvement in illegal or criminal activities.[122]

The third pillar establishes a cooperation mechanism between Member States and the Commission. This operates on two tracks. One covering investments currently undergoing screening and one covering investments that are not. The Commission is empowered to issue opinions in both cases. The final screening decision remains at all times with the Member State concerned.[123]

The fourth pillar addresses investments likely to affect projects or programmes of Union interest; granting the Commission a specific power to issue opinions in such cases. Unlike the general cooperation mechanism, Member States are required to reflect those opinions and to provide reasoning where they choose not to follow their conclusions.[124]

The fifth pillar deals with procedural and institutional arrangements. These include information requirements, confidentiality obligations, the establishment of national contact points, and annual reporting obligations imposed on both Member States and the Commission.[125]

3.5.2 Limitations

Advocate General Ćapeta described the FDI Regulation as "*a kind of a platypus, a strange creature when compared to the 'ordinary' type of regulations envisaged by Article 288 TFEU*".[126] She points out the nature of regulations which function, when enacted by the EU legislator, as binding rules directly applicable in all Member States. Contrary to that, the FDI Regulation does not impose binding rules, nor does it introduce a common foreign direct investment screening mechanism. Its only purpose is to authorise, not mandate, Member States to introduce legislation that governs the screening of foreign direct investment. Moreover, the Regulation establishes a framework of common standards which such

[122] FDI Regulation, Article 4, read in conjunction with Recitals (12) and (13).
[123] FDI Regulation, Article 6 and 7.
[124] FDI Regulation, Article 8.
[125] FDI Regulation, Articles 9, 10, 11 and 5.
[126] Case C-106/22 *Xella Magyarország* [2023] ECLI:EU:C:2023:568, Opinion of AG Ćapeta, point 32.

national mechanisms, if established, must comply with, thereby only partially harmonising existing national legislation.[127]

The *ultima ratio* of this legislative choice is, as argued by Ćapeta, the redelegation of competences back to the Member States. Since the inclusion[128] of capital movements under the scope of foreign direct investment, within the exclusive common commercial policy competence, the existing FDI screening mechanisms of Member States, introduced under shared competence in matters relating to the internal market,[129] would become invalid.[130] Thus, the main objective of the FDI Regulation was to resolve this issue.

Furthermore, the effects of Article 4 FDI Regulation on the *ordre public* exception in the context of free movement of capital are intricate. The provision provides a demonstrative list[131] of factors that may be taken into consideration by Member States or the Commission in determining whether a foreign direct investment is likely to affect security or public order. Hindelang and Moberg question, *inter alia*, whether this enumeration broadens the Member States' discretion to restrict third-country direct investments (applicable in the situation as per **3.3**) beyond the limits determined by free movement of capital fundamental freedoms. In other words, whether Article 4 FDI Regulation has any harmonizing or concretizing effect on the public policy and public security exceptions.[132]

With a reference to CJEU case law,[133] they argue that the FDI Regulation does not have a harmonizing effect and it further lacks a definition of the notions of protection of security and public order.[134] Consequently, the Member States are still individually responsible for determining the requirements of public order and public security with respect to their national needs; reflecting the requirement of a genuine and sufficiently serious threat to a fundamental interest of society.[135] In consequence, the proportionality assessment must proceed against Article 65 TFEU directly because the Regulation does not harmonise the public-policy concept.

It may be concluded that the FDI Regulation, in its current form, acts as an interim measure towards the inevitable future of FDI screening regulation. The legislative design and the discretionary wording reflect the compromise achieved. All in all, as a consequence of the disparity caused by the Member

[127] Case C-106/22 *Xella Magyarország* [2023] ECLI:EU:C:2023:568, Opinion of AG Ćapeta, point 32.

[128] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306; entry into force on 1 December 2009.

[129] With respect to the derogations allowed under Article 65(1), point (b) TFEU.

[130] Case C-106/22 *Xella Magyarország* [2023] ECLI:EU:C:2023:568, Opinion of AG Ćapeta, points 34-35.

[131] FDI Regulation, Recital (12) FDI.

[132] Hindelang and Moberg (n **118**) 1448 and 1450.

[133] Case C-543/08 *Commission v. Portugal* [2010] EU:C:2010:669.

[134] Hindelang and Moberg (n **118**) 1452.

[135] Case C-54/99 *Église de Scientologie de Paris* [2000] ECLI:EU:C:2000:124 [17].

States' actions and the Lisbon Treaty. The Regulation, in the end, served its function as a wake-up call for those Member States that have not yet established their mechanisms for FDI screening. At the same time, it allowed the Commission to gather a sufficient amount of data regarding the operational practicalities of these mechanisms, while maintaining the primary responsibility for their conformity with the EU law on the Member States. In light of the ongoing legislative negotiations, it is apparent that the restriction of FDIs has entered into a next stage.[136] Further elaboration on that note, however, stands outside of the scope of this thesis.

[136] See Proposal for a Regulation of the European Parliament and of the Council on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 of the European Parliament and of the Council, COM (2024) 23 final, 2024/0017 (COD).

4 Proportionality Assessment

4.1 Principle of Proportionality under Article 65 TFEU

The free movement of capital, as a fundamental principle of EU law, may be restricted only by national rules which are justified by reasons referred to in Article 65 TFEU or by overriding requirements of the general interest. Furthermore, in order to be fully 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 and to accord with the principle of proportionality embedded in Article 5 (4) of the Treaty on EU (TEU).[137] The burden of proof, when it comes to providing sufficient explanation as to the proportionality of a restriction, lies with the Member State.[138] Under the CJEU's case law, the proportionality test takes the form of a three-step test: suitability, necessity and proportionality stricto sensu.[139]

4.2 Voluntary Consultations and Retroactive Review Power v. Free Movement of Capital

Before the proportionality of the examined provisions can be assessed, their qualification as restrictions on the free movement of capital within the meaning of Article 63 TFEU must be established. The CJEU has consistently held that national measures subjecting FDIs to prior authorisation requirements or administrative review procedures constitute restrictions within the scope of that provision. That is the case, irrespective of whether they are formally framed as optional or discretionary.[140]

With regard to the consultation proceedings, the structural asymmetry between the administrative cost of initiating a consultation and the legal risk associated with passivity, namely the possibility of *ex post* screening proceedings over a five-year period, renders the voluntary classification largely insignificant. As the CJEU held in *Église de Scientologie*, even informally coercive administrative mechanisms may constitute restrictions where their practical effect is to deter cross-border capital movements.[141] The empirical disparity between the number of consultation proceedings and formal screenings corroborates this assessment. Additionally, where the consultation is explicitly required, namely in the case of investments targeting licensed nationwide broadcasters or qualifying publishers

[137] Case C-503/99 *Commission v Kingdom of Belgium* [2002] ECLI:EU:C:2002:328 [45].
[138] TFEU, Article 296.
[139] Case C-829/24 *Commission v Hungary (Protection of national sovereignty)* ECLI:EU:C:2026:90, Opinion of AG Kokott, point 109.
[140] Case C-478/98 *Commission v Belgium* [2000] ECLI:EU:C:2000:497 [18]; Case C-54/99 *Église de Scientologie de Paris v Prime Minister* [2000] ECLI:EU:C:2000:124 [14].
[141] Case C-54/99 *Église de Scientologie de Paris* [2000] ECLI:EU:C:2000:124 [17].

of periodical press under Section 10 FDI Act, the restriction is direct and unconditional.

With regard to the retroactive review power, the five-year *ex officio* call-in period allows the MIT to initiate screening proceedings at any point within this period, irrespective of whether the investment satisfies the statutory criteria for mandatory screening. A rational investor must either engage in precautionary consultation proceedings or tolerate an extended exposure to regulatory risk. This restrictive effect falls squarely within the concept of a restriction as articulated by the CJEU in *Commission v Hungary* (Case C-78/18).[142]

Having established the existence of restrictions in relation to both mechanisms, the analysis proceeds to examine their compatibility with the principle of proportionality as stated under Article 65 TFEU.

4.2.1 Suitability

The first step of the proportionality test requires that the examined national measure be suitable for achieving the legitimate objective it pursues. In the present context, that objective is the protection of public policy and public security of the Czech Republic, a ground expressly recognised under Article 65(1), point (b) TFEU and consistently affirmed in the case law of the CJEU from *Van Duyn* and *Bouchereau* through to *Église de Scientologie*.[143] The threshold of a genuine and sufficiently serious threat to a fundamental interest of society, as developed by that case law, provides the normative baseline against which the measures must be evaluated.

There is little difficulty in establishing that FDI screening as such is a suitable instrument for pursuing this objective. The CJEU has accepted, in principle, that measures imposing authorisation requirements or administrative oversight mechanisms on capital movements may be appropriate where they are designed to identify and mitigate genuine threats to fundamental interests of society, including national security and public order.[144] This conclusion, while established in the context of the golden share jurisprudence, applies equally by analogy to FDI screening mechanisms, which represent a structurally comparable form of state intervention in the private investment sphere.[145]

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[142] Case C-78/18 Commission v Hungary (Transparency of associations) [2020] ECLI:EU:C:2020:476 [53].

[143] Case 41-74 *Yvonne van Duyn v Home Office* [1974] ECLI:EU:C:1974:133 [18-19]; Case 30-77 *Regina v Pierre Bouchereau* [1977] ECLI:EU:C:1977:172 [35]; Case C-54/99 *Église de Scientologie de Paris* [2000] ECLI:EU:C:2000:124 [17]; Case C-106/22 *Xella Magyarország* [2023] ECLI:EU:C:2023:568 [64]-[66]; Case C-35/98 *Staatssecretaris van Financiën v B.G.M. Verkooijen* [2000] ECLI:EU:C:2000:294 [48].

[144] Case C-326/07 *Commission v Italy* [2009] ECLI:EU:C:2009:193 [45], [51] and [52]; Case C-171/08 *Commission v Portugal* [2010] ECLI:EU:C:2010:412 [76]-[77]; Case C-244/11 *Commission v Greece* [2012] ECLI:EU:C:2012:694 [74]-[78].

[145] Steffen Hindelang, *The Free Movement of Capital and Foreign Direct Investment the Scope of Protection in EU Law* (Oxford University Press 2009) 110 and 114.

The consultation proceedings, even in their quasi-voluntary form, contribute to this objective in a rational and non-arbitrary manner. By enabling the MIT to obtain relevant information about proposed investments at an early stage, including data on the investor's ownership and control structure, financing arrangements, and the nature of the targeted entity, they provide the relevant authorities with a meaningful factual basis upon which to determine whether formal screening proceedings are warranted. The exchange of information facilitates a preliminary risk assessment without requiring the investor to await an *ex officio* decision, thereby advancing the state's ability to identify potential security threats in a timely fashion. This instrumental connection between the measure and the stated objective is genuine and not manifestly inappropriate.

Similarly, the five-year retroactive call-in power is, in principle, a suitable mechanism for achieving the stated security objective. Foreign investments in the residual category, by definition, do not trigger mandatory screening under Section 7 FDI Act. The legislature was therefore confronted with the practical difficulty of ensuring that investments capable of posing a genuine threat to public policy or public security are not permanently immunised from scrutiny merely because they fail, at the time of completion, to meet the criteria for mandatory review. A temporal window enabling *ex officio* intervention addresses this concern by creating a regulatory safety net for cases in which the security implications of an investment become apparent only after its completion, or in which the MIT acquires information rendering the investment potentially reviewable at a later stage. The link between the five-year period and the objective of protecting public security is accordingly rational.

The suitability step is therefore satisfied with respect to both the consultation proceedings and the retroactive review power. Both measures are rationally connected to the legitimate objective of protecting public policy and public security under Article 65(1), point (b) TFEU.

4.2.2 Necessity

The second and most important step of the proportionality test requires that the examined measures do not go beyond what is necessary to attain the legitimate objective. Where multiple measures capable of equally achieving the same objective are available, the Member State is required to choose the one least restrictive of the free movement of capital. This standard has been consistently reiterated across the CJEU's case law on restrictions on capital movements, with particular clarity in the golden share line of cases. In *Commission v Italy* (Case C-326/07), *Commission v Portugal* (Case C-171/08), and *Commission v Greece* (Case C-244/11), the Court emphasised that national measures restricting the free movement of capital must be grounded in objective, precise, and publicly accessible criteria. The conferral of open-ended or insufficiently defined discretionary powers on national authorities is inherently questionable from a proportionality perspective. These principles apply directly to the provisions under examination.

Turning first to the consultation proceedings, the necessity assessment raises considerable difficulties. The mandatory character of the consultation regime means that the administrative burden it imposes falls, in practice, on a category of investments far broader than those genuinely capable of posing a security threat. The absence of a clear, binding, and publicly accessible threshold defining which investments may trigger *ex officio* screening under Section 8 FDI Act, beyond the reference to investments capable of threatening the public policy or public security of the Czech Republic, leaves investors with no reliable basis on which to assess their regulatory exposure.[146] In this environment, rational investors proceeding with any investment that touches upon the illustrative sectors enumerated in the explanatory report are effectively compelled to engage in consultation proceedings, regardless of whether their investment poses any genuine security concern. This structural dynamic has a direct impact on the necessity assessment.

The CJEU held in *Église de Scientologie* that a prior authorisation scheme fails the necessity test where it affords national authorities an overly broad margin of discretion, rendering the conditions for restriction unpredictable and investor behaviour effectively constrained by regulatory uncertainty rather than by legally defined obligations.[147] The consultation proceedings under the FDI Act exhibit exactly this characteristic. The absence of objectively defined notification thresholds means that the scope of the *de facto* obligation to consult is determined not by the law but by the investor's risk tolerance, a standard that is fundamentally subjective and therefore incapable of generating the legal predictability that the free movement of capital requires.

A less restrictive alternative is readily identifiable without any meaningful sacrifice of the security objective. The legislature could have introduced a binding and exhaustive or semi-exhaustive list of investment categories subject to a duty of prior notification, accompanied by clearly defined jurisdictional thresholds. The UK National Security and Investment Act 2021 offers an appropriate comparative model: it distinguishes between mandatory notification, limited to acquisitions in defined sensitive sectors, and voluntary notification for investments falling outside those sectors, while publishing a binding statement under Section 3 of the National Security and Investment Act specifying the criteria against which the call-in power will be exercised.[148] This design substantially reduces investor uncertainty without undermining the state's

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146 Explanatory Memorandum, 57-58.

147 Steffen Hindelang and Andreas Moberg, 'The Art of Casting Political Dissent in Law: The EU'S Framework for the Screening of Foreign Direct Investment' (2020) 57 Common Market Law Review 1452.

148 Compare with the approach chosen by the Government of the UK: Cabinet Office, 'National Security and Investment Act 2021: Statement for the Purposes of Section 3' (*GOV.UK*21 May 2024) <https://www.gov.uk/government/publications/national-security-and-investment-statement-about-exercise-of-the-call-in-power/national-security-and-investment-act-2021-statement-for-the-purposes-of-section-3--2> accessed 3 May 2026.

capacity to review investments that pose genuine security concerns.[149] A similarly targeted regime, rather than a broadly defined residual category and a de facto obligatory consultation, would constitute a less restrictive means of achieving an equivalent level of protection.

The analysis of the retroactive review power raises more fundamental objections. The five-year period itself, viewed in isolation, does not have to be considered excessive for an *ex post* review mechanism, given that several Member State regimes operate with broadly comparable timeframes. What renders the Czech mechanism disproportionate is not the duration of the period *per se*. Rather, it is its designation as a purely objective limitation period starting from the date of completion of the investment, without any corresponding subjective limitation period running from the date on which the MIT became aware, or should have become aware, of the investment in question.

The consequence of this design is significant. The MIT is under no time-based incentive to act diligently or promptly upon obtaining knowledge of a potentially reviewable investment. It can, in principle, initiate proceedings on the last day of the five-year period, having possessed full knowledge of the investment for years prior, without this delay carrying any legal consequence for the authority.

The amendment proposal advanced by Ivan Adamec MP draws attention to this structural deficiency and proposes a structurally balanced mechanism. The objective period provides the state with sufficient time to become aware of reviewable investments; the subjective period ensures that once awareness is established, the authority cannot delay intervention indefinitely. The legislative choice, while formally within the competence of the Member State, does not automatically satisfy the necessity requirement under EU law, particularly where a less restrictive alternative was expressly identified in the legislative process and rejected.

The *de facto* open-ended nature of the review power under Section 8, paragraph 4 FDI Act emphasises the disproportionality even further. This provision removes any effective temporal limitation where the investor is alleged to have intentionally concealed facts that would otherwise have justified the initiation of screening proceedings. While it is entirely legitimate, and consistent with general principles of administrative law, to extend limitation periods in cases of fraudulent concealment, the concept of intentional concealment is not defined with sufficient precision in the FDI Act. In the absence of binding criteria limiting the circumstances in which this extension applies, and in the absence of any judicial practice capable of delimiting its meaning, Section 8, paragraph 4 FDI Act approaches a *de facto* open-ended review competence. This outcome is

149 Ivan Adamec, 'Amendment No. 6261 to the Government Bill on Foreign Investment Screening and on Amendments to Related Acts' (*psp.cz* 16 September 2020) ('Amendment No. 6261') <https://www.psp.cz/sqw/text/orig2.sqw?idd=67483&pdf=1> accessed 3 May 2026, 6.

directly contrary to the requirement that restrictions on the free movement of capital be grounded in objectively foreseeable criteria.[150]

The necessity step is consequently not satisfied with respect to either measure. The quasi-voluntary consultation proceedings impose an administrative burden broader than necessary in the absence of objectively defined notification thresholds. The retroactive review power exceeds what is necessary in the absence of a subjective limitation period and in light of the open-ended extension applicable under Section 8, paragraph 4 FDI Act.

4.2.3 Proportionality Stricto Sensu

Since neither the consultation proceedings nor the retroactive review power satisfies the necessity requirement under the second prong of the proportionality test, the analysis does not proceed further. Under the CJEU's approach to proportionality, a measure that fails the necessity test is already disproportionate and cannot be rehabilitated by considerations arising at the third step.[151] It is possible to conclude that both measures constitute disproportionate restrictions on the free movement of capital under Article 63 TFEU that cannot be justified on the grounds of public policy or public security under Article 65(1), point (b) TFEU.

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[150] Case C-326/07 *Commission v Italy* [2009] ECLI:EU:C:2009:193 [45], [51] and [52]; Case C-171/08 *Commission v Portugal* [2010] ECLI:EU:C:2010:412 [76]-[77]; Case C-244/11 *Commission v Greece* [2012] ECLI:EU:C:2012:694 [74]-[78].

[151] Compare with the CJEU's approach in Case C-503/99 *Commission v Kingdom of Belgium* [2002] ECLI:EU:C:2002:328.

5 Conclusion

The present thesis has examined whether the quasi-voluntary consultation proceedings and the retroactive review power of the MIT under the Czech FDI Act constitute disproportionate restrictions on the free movement of capital under Article 63 TFEU. The analysis has shown that the consultation regime under Section 10 FDI Act, although formally voluntary, operates *de facto* as a default course of action by reason of the asymmetry between its modest administrative cost and the substantial legal risk of *ex post* intervention, and that the retroactive call-in power under Section 8 FDI Act functions as a purely objective limitation period further extended towards an open-ended review competence by Section 8, paragraph 4 FDI Act. Read against the requirement, formed in the golden share line of cases, that any restriction on the free movement of capital be grounded in objective, precise, and publicly accessible criteria, both mechanisms qualify as restrictions within the meaning of Article 63 TFEU.

Although they are suitable for pursuing the legitimate security objective, they fail the necessity step under Article 65(1), point (b) TFEU. The consultation regime in the absence of objectively defined notification thresholds, and the retroactive review power in the absence of a subjective limitation period contribute to this conclusion. It follows that both mechanisms, as currently designed, constitute disproportionate restrictions on the free movement of capital that cannot be justified under Article 65(1)(b) TFEU. The disproportionality is not located in the existence of either mechanism but in the specific design of each mechanism.

The contribution of the present thesis is dual. Doctrinally, it fills a gap in the national academic discourse by subjecting an aspect of the Czech FDI regime to focused analysis under EU primary law, an exercise whose reasoning is transposable to other Member State regimes raising comparable structural concerns. Operationally, it identifies two reforms indicated for the Czech legislator: a binding statement of the criteria triggering *ex officio* screening under Section 8 FDI Act, replacing the non-exhaustive guidance currently contained in the Explanatory Report, and the introduction of a subjective limitation period of a duration comparable to the three-month period in operation under German law. The amendment proposal of MP Ivan Adamec, although ultimately not adopted, provides a valid template for both.

The doctrinal landscape against which this analysis sits is on the verge of significant transformation. The Commission's 2024 Proposal to repeal Regulation 2019/452 and replace it with a recast FDI Screening Regulation marks a decisive shift from the authorising logic of the current Regulation towards a mandate-based framework of harmonisation, one that introduces a common definition of screening, a minimum scope of mandatory sectoral coverage, and a reinforced cooperation mechanism between national authorities and the Commission. This recast will not, in itself, cure the proportionality defects identified in this thesis, since the foreseeability requirement of Article 65 TFEU operates as a primary law standard that no secondary law instrument can displace. The design choices in Sections 8 and 10 of the Czech FDI Act would continue to fall short of that standard. It may, however, indirectly accelerate domestic legislative reform by raising the floor of regulatory transparency expected across the Union, thereby exposing nationally distinctive features such as the absence of a subjective limitation period to a sharper comparative spotlight. The protection of public policy and public security is a legitimate, and at the present geopolitical stage an increasingly pressing, Member State interest. The form in which that interest is pursued, however, remains subject to the constitutional discipline of the Treaty, irrespective of how the secondary law framework evolves.

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