

Pre-emptive Depoliticization:

The European Commission and the EU Foreign Investment Screening Regulation

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Abstract

In March 2019 the European Union adopted the first pan-European investment screening framework, thus joining the bandwagon of growing investment screening mechanisms around the world. This article explores why the European screening framework was adopted swiftly and with no politicization, even as the negotiations unfolded against the background of heightened politicization of trade and investment policy. The paper develops three hypotheses: 1) converging member state preferences; 2) securitization of investment policy; and 3) Commission entrepreneurship. It then explores them empirically through process-tracing, drawing on extensive interviews with the actors involved. It argues that the European Commission played a pivotal role. To avoid falling into another strand of politicization and defuse political mines, the Commission engaged in a ‘pre-emptive depoliticization’ strategy that shortened the policy process, limited the number of actors involved, and justified the policy options in a legalistic framing.

Keywords:

FDI, investment screening, European Commission, depoliticization

Introduction

This article investigates the role of the European Commission in the establishment of the European Union (EU) investment screening framework (ISF) adopted in March 2019 and into force since October 2020.¹ This framework coordinates Member States' investment screening mechanisms (ISMs). ISMs are legal processes authorizing governments to verify Foreign Direct Investment (FDI) transactions deemed problematic for national security. With this new policy instrument, the EU has added to the increasing list of ISMs across the world. The EU ISF is the first of many new unilateral trade and investment policy instruments created since the EU's Common Commercial Policy (CCP) took an 'assertive' and less 'naïve' turn, especially towards China, which the EU labelled in 2019 a 'systemic rival' (European Commission 2019 and 2021a).

The quick and smooth adoption of the EU ISF is puzzling in several respects. First, the European Commission, as a longstanding advocate of trade and investment liberalization, had resisted earlier attempts to screen investment (Chan and Meunier 2021). Second, the EU adopted the ISF at a time when many of its national economies needed foreign capital to stimulate growth after the euro crisis. Yet investment screening might depress inward FDI by placing restrictions on incoming investment and by deterring potential investors. Third, several high-profile trade and investment negotiations had been contested and politicized in the mid-2010s, which slowed or stalled their adoption (De Bièvre et al., 2020). Yet the ISF was adopted rapidly and without much public salience.

How can we explain the swift and unpoliticized adoption of the EU investment screening regulation? This is a question of immediate policy relevance as the EU is in the process of adopting other unilateral trade and investment instruments and as ISMs are spreading throughout the world. This is also a question of broader theoretical relevance as neither the nascent literature on the politics of investment screening nor the vibrant literature on the (geo)politicization of trade and investment policy can answer it (Meunier & Nicolaidis, 2019).

The paper develops three hypotheses to explain the ISF passage: 1) converging Member State preferences; 2) the securitization of investment policy; and 3) Commission entrepreneurship. These hypotheses are explored through process-tracing relying on primary sources and extensive interviews with the policy actors.

We argue that the EU ISF is a case of pre-emptive depoliticization, showcasing Commission entrepreneurship. Facing mounting contestation over the appropriateness of an EU ISF, the Commission defused political mines by launching a modest instrument coordinating rather than substituting national review. Nevertheless, the Commission has established new institutional dynamics: gaps in the initial design are likely to fuel policy problems, yet there is now an institutional framework to build upon. We can thus expect future institutional developments in this area.

We start by presenting the EU's new ISF. We then take stock of the literature on the politicization of trade and investment policy in the EU. This leads us to develop three hypotheses to explain the swift and unpoliticized adoption of the EU ISF: converging Member States preferences, securitization, and Commission entrepreneurship. We then trace empirically the EU ISF policy process. The last section discusses the findings and suggests

ways in which it could be applied beyond this case. In the conclusion we explore the instrument significance for the EU's FDI policy regime.

1. The EU's investment screening framework: Concepts and practice

FDIs are investments where an investor domiciled in a foreign jurisdiction acquires a stake in a business of at least 10% of the voting power of the enterprise and, thus, gains 'lasting interest' and control over this enterprise (OECD, 2008). FDIs enter host economy in two modes: cross-border mergers and acquisitions (M&As), whereby the investor acquires existing assets, and 'greenfield investment', whereby the investor creates new facilities.

States regulate the entry of FDI on their territory through different policy tools, including ISMs. ISMs enable governments to review, reject or precondition FDI transactions based on predetermined criteria, usually their expected impact on national security and public order. In the past decade, as FDI has become increasingly used as a tool of economic statecraft, the number of ISMs worldwide has grown rapidly and countries with established ISMs have drastically expanded the scope of review (Bauerle Danzman & Meunier, 2021). In the EU, 11 out of the then 28 Member States had some form of investment screening by 2017ⁱⁱ, but few were using them regularly (European Commission, 2021b; Meunier, 2014).

The EU ISF is embedded in the unique context of the EU's compound polity, where the centralization of policy-making authority in trade and investment coexists with national sovereignty in selected areas of economic policy and in security and defence policies (Bauerle Danzman & Meunier, 2021). The ISF enables the Member States and the Commission to raise concerns about specific transactions that may threaten 'security or public order in more than

one Member State' mostly for investments in critical technologies, infrastructure, media and personal data. It applies to any FDI, whether greenfield or M&A. Member States are required to inform the Commission and other Member States of some transactions and provide the specified information, such as ownership structure of the investor and approximate value of the investment. The Commission is entitled to review these transactions and issue non-binding opinions to the Member States. Also, the Commission is authorised to issue opinions on the grounds of 'security and public order' for investments that might affect a project or program of interest to the whole EU (such as Galileo and Horizon 2020).

The EU ISF represents a *light-touch version* of a traditional ISM. Member States preserve the ultimate decision power, while the Commission can only issue advisory opinions. Yet, the EU ISF is a major institutional innovation, as it makes the Commission a monitor of a new and sensitive policy network involving all Member States, and enables it to acquire a stronger role in a security and defence policy domain traditionally viewed as highly sensitive and within the realm of core state powers (Genschel & Jachtenfuchs, 2014, p. 9).

2. Politicization, contestation, and the role of the European Commission

The quick and unpoliticized negotiation and adoption of the EU ISF took place in the context of high politicization and contestation of European trade and investment negotiations in the mid-2010s. This section replaces the ISF negotiation into this context, analysed by the literature on the politicization of EU affairs. Theoretically, this literature highlights the need to differentiate between contestation and politicization and to pay attention to the institutional underpinnings of mass mobilization. Empirically, it shows how the European Commission

has been drawn into multiple strands of contestation and provides preliminary evidence of the Commission's autonomy at devising counter-politicization strategies.

Politicization and contestation

Over the past decade, an extensive literature has analysed 'the end of the permissive consensus' in EU affairs (Hooghe & Marks, 2009) and the growing contestation and politicization of European governance in a variety of policy areas (De Bruycker, n.d.; De Wilde, n.d.; de Wilde et al., 2016; Garcia-Duran et al., 2020; Schimmelfennig et al., 2015). We interpret contestation as 'acts of contention over specific norms' (Eliasson & Garcia-Duran, 2020, p. 435), including both a support for and an opposition to a policy, and contention over specific procedures or processes. Politicization combines contestation with increased salience, which refers to public prominence and conflict expansion to a wider set of actors taking part in the policy debates (de Wilde et al., 2016).

There is an agreement in the literature that 2015-2016 marked a politicization of EU trade policy along all dimensions. Contestation and salience were high as European publics mobilized, both online and in person, around the negotiation of trade and investment deals by the EU -- most notably TTIP and CETA (Bouza & Oleart, 2018; Cato, 2016; A. T. Chan & Crawford, 2017; De Bièvre & Poletti, 2020; De Ville & Siles-Brügge, 2018; Eliasson & Garcia-Duran, 2020; Garcia-Duran et al., 2020; Laursen & Roederer-Rynning, 2017; Young, 2016, 2019). The contentious issues primarily centred on the environmental impact of these deals and the Investor-State-Dispute-Settlement procedures (ISDS), which the wider public saw as empowering international business and shrinking the political space for social regulation (De Ville & Siles-Brügge, 2017, 2018; Young, 2016). A first global wave of

mobilization had taken place in 1997-98 against the OECD-sponsored negotiations on the Multilateral Agreement on Investment (MAI) (Meunier & Roederer-Rynning, 2020) and in 2011 against the multilateral Anti-Counterfeiting Trade Agreement (ACTA) on intellectual property rights enforcement (Meunier & Czesana, 2019). Yet, the resurgence, scope, and salience of mass mobilization in 2015-2016 took many EU trade negotiators by surprise.

There is little consensus on the roots of this politicization. Much of the literature is society-centred, focusing on the dynamics of interest-group mobilization. Young (2016), for example, explains the unusual politics of TTIP with EU-US cross-investment business alliances lobbying for harmonization of regulatory standards, and parallel mobilization of public by civic interest groups concerned over such harmonization. De Bièvre and Poletti (2020) likewise argue in favour of a society-centred explanation combining structural conditions and interest group agency. Other explanations are more institutional or state-centred. For example, Meunier (2017) and Basedow (2016, 2021) show how the inclusion of investment chapters in free trade agreements (FTAs) became possible only after the transfer of competence over FDI policy into the CCP by the 2009 Treaty of Lisbon. Roederer-Rynning (2017) and Laursen and Roederer-Rynning (2017) argue that it is both a societal and an institutional phenomenon that in Europe involves parliamentary assertion. In light of cross-national variations in the pattern of TTIP politicization, Meunier and Roederer-Rynning (2020) emphasize the importance of governmental entrepreneurship in shaping public attention to trade and investment negotiations.

The European Commission in the eye of the storm

The turbulent politics of the last decades has drawn the European Commission into the eye of the storm because of its central position in multiple underlying controversies.

One institutional controversy concerns contestation of the Commission powers in the field of investment by the Member States (Schill, 2019; Young, 2019). For several decades prior to the Treaty of Lisbon the Commission had attempted to widen EU competences in trade and investment negotiations (Basedow, 2018; Meunier, 2017). The Commission promoted EU involvement into international FDI negotiations, gradually pushed for the extension of EU competences by setting the agenda and embraced legal fringe competences (Basedow, 2018), and eventually acquired the FDI competence ‘by stealth as a result of Commission entrepreneurship and historical serendipity’ (Meunier 2017, 594).

The competence controversy erupted after the Lisbon Treaty, leading to the involvement of the Court of Justice of the European Union (CJEU). The CJEU clarified that, while FDI is covered by exclusive competence as part of the CCP, ISDS and portfolio investments remain under the shared competence of the EU and the Member States (Opinion 2/15). Thus, the agreements covering both FDI and ISDS are ‘mixed agreements’ requiring individual Member State ratification in addition to Council and European Parliament (EP) ratification (Schill, 2019; Young, 2019).

As this institutional battle played itself out, the Commission willy nilly entered the broader debate about the legitimacy of EU trade and investment policy, fuelled by the TTIP and CETA negotiations. From 2014 on, the Commission started asserting the need to rethink and justify ‘who these policies are for’ (European Commission, 2015) and ‘modernize’ trade, competition, and investment policies to make them better fit the changing global realities and societal expectations (European Commission, 2017a) – ushering in a geopolitical turn of trade policy (Meunier & Nicolaidis, 2019).

Though a new rhetoric emerged, the strategic focus of the Commission remained on the free trade. The Commission adopted ‘Trade for All’ strategy, embraced the doctrine of ‘Managed globalization’ highlighting new ‘non-trade objectives, such as multilateralism, social justice, and sustainable development’, and introduced elements of alternative trade paradigms – to continue previous trade policy-making practices and *protect the dominating ‘free trade’ paradigm* (De Ville & Siles-Brügge, 2018; Garcia-Duran et al., 2020; Young, 2019).

It is unclear how purposefully and autonomously the Commission sought to regrow free trade against social and political turbulence. There are indications that it played an entrepreneurial role in the policy-making process to counterbalance contestation. Some have suggested that the Commission might have mobilized business groups to bolster ISDS against the opposition from societal actors (Basedow, 2019). Others have pointed out that, in response to contestation of FDI competences, the Commission changed its practice from negotiating investment issues as a part of FTAs to negotiating investment agreements separately (Young, 2019). Yet others have claimed that the EU ISF *increased the EU’s bargaining power vis-a-vis the US and China* (Schill, 2019). All of this can help the Commission pursue its longstanding goals of achieving investment liberalization (Schill, 2019), an argument which is consistent with a series of claims made by international studies beyond the EU (Canes-Wrone et al., 2020; Kang, 1997; Lenihan, 2018). However, it remains unclear whether these indications are systematic strategies or just *ad hoc* responses to fluctuating circumstances. Thus, the role of the Commission in this era of turbulence remains enigmatic.

Because of its institutional novelty, the EU ISF allows us to probe into this enigma. Existing research suggests that the new ISF was supported by technologically advanced Member

States (Chan and Meunier 2021) and was not contested by European business (Wernicke, 2021) – leaving the role of the Commission unspecified. Time has come to open the black box of the Commission.

3. Converging Member State preferences, securitization, or purposeful supranational entrepreneurship?

To investigate the rapid non-salient adoption of the EU ISF in the outlined politicization context, we consider three possible explanations drawing on different strands of literature with different views on the Commission’s role in the policymaking process.

Hypothesis 1: Alignment of key actors’ preferences

For liberal intergovernmentalism, the EU policy-making is a product of bargaining between Member States to reach a ‘positive-sum’ agreement, reflecting preferences shaped by domestic actors under pressures of economic interdependence (Moravcsik, 1993, 1997, 2018). States expecting to benefit less from the agreement are likely to cooperate less and can threaten to veto policy proposals, including through ‘veto coalitions’ of small states (Moravcsik, 2018). The ‘positive sum’ and alignment of preferences, on the other hand, is expected to eliminate polarization among Member States and the issue salience. As the agent of the Member States, the Commission is expected to act as an honest broker.

Indeed, an unusually fast and non-salient process of the ISF adoption might result from an overall political consensus. The convergence of France, Germany, and Italy around the idea of preventing selling out European expertise abroad, and the following non-salient policy process suggests that the preferences of Member States might have aligned. The fears of transferring European expertise without reciprocity might be fuelled by the diversified legislation across Member States, where foreign investors could by-pass the existing screening procedures through the single market freedoms in absence of EU-harmonized FDI control (Schill, 2019). These considerations had pushed Member States to design an EU-level screening framework to reduce the transactional screening costs and satisfy the domestic demands for a harmonized investment control. In line with the pattern of FDI competences contestation, the Member States would seek to retain the power of economic regulation, whereas the Commission provided logistical and technical assistance. We thus suggest the first hypothesis to explain the depoliticized nature of the ISF adoption:


H1: The EU ISF reflected the converging preferences of key Member States. The Commission acted as an honest broker in the absence of politicization.

The observable implications of Hypothesis 1 include the convergence of preferences of the Member States towards the need of the ISF and its nature, as well as the convergence of preferences of the main interest groups affecting states' preferences.

Hypothesis 2. Securitization of foreign investment

The lack of politicization of the ISF negotiations could be explained with securitization theory, which implies depoliticization of policymaking (Buzan et al., 1998; Salter, 2008;

Stritzel, 2007). Securitization means highlighting an ‘existential threat to have substantial political effects ... to break free of procedures or rules he or she would otherwise be bound by’ (Buzan et al., 1998, p. 25). The attempt at securitization depends on the acceptance of a ‘threat’ articulated by the ‘speaker’, *i.e.* policy actor influencing the process, by the target audience: otherwise, it will remain contested (Buzan et al., 1998). Such an acceptance depends on various conditions including the successful framing of an issue as a threat, existing discourses, and positional power of the policy framer (Stritzel, 2007). The target audience, in turn, can operate within different settings including popular, elite, technocratic and scientific communities (Salter, 2008).

Indeed, the security concerns over foreign investors from geopolitically unfriendly countries, especially state-owned/controlled enterprises, has grown rapidly since the mid-2010s. The rapidly changing economic reality, fuelled by technological transformation that has turned everyday objects and innocuous activities into potential security threats, led national actors to reconsider their view of FDI from seeing them as a source for economic wellbeing to reviewing them as a potential geopolitical weapon (Bauerle Danzman and Meunier, 2021). Accordingly, France, Germany and Italy framed growing FDI flows from China into the EU as a security threat requiring urgent action. They targeted diverse audiences, including member governments and technocratic experts of the Commission, to quickly proceed with the adoption of the ISF. This said, our second hypothesis explaining the unpoliticised  adoption is:

H2: The EU ISF resulted from the securitization of FDI in key Member States. Securitization depoliticized the issue while compelling the liberal-minded Commission to initiate legislation.

The observable implications include policy makers framing growing FDI into strategic sectors as existential threat to national security that requires an urgent action in the form of ISF. The liberal-minded Commission was targeted by the agenda-setters of the regulation to ‘accept’ the security threat posed by FDIs forcing it to move fast, which led to public insulation from the policy debates.

Hypothesis 3. Commission entrepreneurship: pre-emptive depoliticization

Finally, the absence of politicization might be explained by the political entrepreneurship of the Commission (Harcourt & Radaelli, 1999; Majone, 2014), which has been highlighted previously in the case of investment policy (Basedow, 2018, 2021; Meunier, 2017). A wide range of literature from supranationalist to comparative politics (Basedow, 2018; Evans et al., 1985; Nugent & Rhinard, 2016, 2019; Woll, 2006) suggests that the Commission, as a ‘potentially autonomous actor’ (Evans et al., 1985), is capable of formulating, pursuing, and achieving policy goals in relative independence.

The Commission possesses several features that enable it to behave as a policy actor rather than mere agent (Evans et al., 1985). These features include: (i) *structural position* at the intersection between European and global politics with access to varied information flows; (ii) *organizational features* such as administrative continuity and resources, which enable the development of transformative strategies; and (iii) *ideological purpose and institutional memory*, which are derived from its embeddedness in the liberal international trade regime (Hooghe, 2002; Majone, 2014; Nugent & Rhinard, 2016, 2019; Woll, 2006).

With regards to FDI policy, the Commission has the exclusive right of legislative initiative and the possibility to vary insulation of the agenda-setting phase. This relative autonomy is even more pronounced in foreign affairs where executive actors have always enjoyed a degree of insulation from public scrutiny (Basedow, 2018; Nugent & Rhinard, 2016; Woll, 2006).

Through a combination of these structural, organizational, and ideological features, the Commission is well positioned to act independently, exploit opportunities at the intersection of different arenas, and to shape the legislative process through formal *and* informal processes (Nugent & Rhinard, 2016, 2019). By submitting a light-touch policy proposal, speeding-up the policy process and constraining salience, the Commission might have managed to depoliticize the policy process and unite Member States around a policy based on the lowest common denominator. This said, we suggest a third hypothesis to explain the lack of politicization in the ISF adoption process:

H3: Commission entrepreneurship in the policy process resulted in the pre-emptive depoliticization of the EU ISF adoption.

The observable implications include reducing the number of policy actors by the Commission, avoiding polarization in the negotiations, and exercising formal and informal powers to shrink and simplify the policy process.

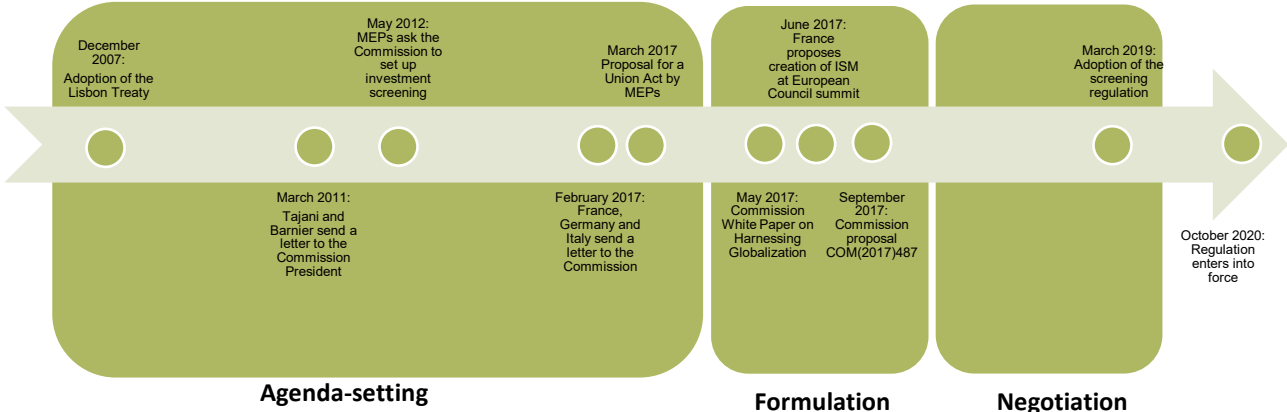
4. The Commission and the making of the EU's ISF

This section explores empirically the negotiation and adoption of the EU ISF through process-tracing the policy process, the preferences of the main actors, and the key strands of potential

contestation. We rely on primary sources and 13 elite semi-structured interviews with policymakers and stakeholders involved in crafting the EU ISF. The interviews have been conducted in person in Brussels and online in February 2019 and January - February 2022. We triangulate evidence by comparing and cross-checking interviewees' statements against each other, against their public statements and policy documents, as well as by comparing and cross-checking our own notes from the interviews.

Figure 1 provides an overarching view of the ISF policy-making timeline divided into three phases. Phase 1, agenda-setting, ran from the 2007 Lisbon Treaty, which transferred FDI competence to the EU level, to 2017, when the Commission started working on the regulation proposal. Phase 2, policy formulation, ran from May until September 2017, when the Commission issued its proposal for regulation on 'establishing a framework for screening of foreign direct investments into the European Union' (COM(2017)487). Phase 3, policy negotiation, ran from the beginning of the negotiations in September 2017 to the adoption of the regulation in March 2019.

Figure 1: The ISM policy-making process



Phase 1: Agenda-Setting (2007-2017)

During this period, the debates about the necessity of foreign investment control at the EU level intensified in two successive waves. The first wave materialized in 2011, triggered by the 2010 bid from Chinese company Xinmao, allegedly backed by state funds, for the Dutch cable maker Draka. Even though the bid was later withdrawn, it nevertheless ‘shocked’ some senior EU officials as it had outcompeted all the offers from EU firms (von Reppert-Bismarck, 2011; Wishart & Rankin, 2011).

A second wave of debate occurred in 2016 after two controversial takeover bids for German companies by Chinese investors. The first was the 4.5 billion euros acquisition of Kuka, one of the world’s leading makers of advanced robotic arms, by Midea, a Chinese appliance company. The second takeover bid was the attempt by Chinese Fujian Grand Chip to acquire Aixtron, a German chipmaker. The bid was eventually blocked through the CFIUS process because Aixtron had an American subsidiary, but it raised alarm in Germany and forced a debate at the EU level.

In February 2017, France, Germany, and Italy sent a joint letter to the Commission calling for investment review at EU level, followed by a Proposal for Union Act on screening of FDI in strategic sectors by the EP in March 2017, setting an agenda for the ISF policy formulation.

Key actors and preferences

Member States. During the first wave of debate, the majority of Member States showed little enthusiasm for the idea of an EU-level investment screening. The traditionally liberal

economies such as Scandinavia, Netherlands and the UK were not in favour of stricter investment control in the EU and saw no benefits for the EU in trying to restrict inward FDIs (von Reppert-Bismarck, 2011). French and Italian authorities, on the other hand, were known for their tendency to protectionism. France, with its long history of economic nationalism and concern about some types of FDI (such as US investment in the 1960s and 1990s), was interested in EU-level investment screening arguing that the EU should demand reciprocity for its business and stop being naive on international trade and investment (von Reppert-Bismarck, 2011). Italy was in the process of adopting its own national ISM. After turbulent relations with the EU under Berlusconi, Italy under the new Monti government was eager to restore good relations with Brussels. In 2010, Monti had authored a report to then Commission President José Manuel Barroso warning that ‘The rise of state sponsored investments is also fueling concerns about an excessive exposure of EU assets to foreign grab in sectors that have been liberalized’ (Monti, 2010, p. 89). Apart from France and Italy, only Poland, Portugal and Spain apparently supported the concept of European investment screening (Wishart & Rankin, 2011).

Germany operated a ‘U-turn’ in late 2016 after the Kuka and Aixtron transactions. Between 2008 and 2016, Germany had welcomed Chinese FDIs with open arms. Because most Chinese acquisitions happened in SMEs, often with no competing takeover bids, they had taken place under the radar (Chan and Meunier 2021). This changed in 2016 with the controversial acquisition of Kuka and Aixtron raising concerns on insufficiency of existing legal tools to prevent technology transfer. After these episodes, Germany tightened its own ISM and joined the camp of supporters of EU-level investment screening.

The Commission. The Commission experienced its first internal debate about the FDI screening in 2011. Antonio Tajani, then EU Commissioner for Industry and Entrepreneurship, and Michel Barnier, then Internal Market Commissioner, wrote a joint letter to Commission President José Manuel Barroso, warning against Europe’s naïveté on foreign investment and recommending the development of a supranational body to vet FDI in the EU to make sure that non-EU investments in Europe are not ‘attempts to close down businesses after having stolen all of their “know-how”’ (Chan and Meunier 2021). However, Trade Commissioner Karel De Gucht dismissed that proposal as ‘neither desirable nor feasible’ on the grounds that this would be interpreted as a protectionist move that could alienate foreign investors in Europe and have repercussions for European investment in China (Chan and Meunier 2021). The discussion over a European ISM was halted.

European Parliament. The Lisbon Treaty had also given greater power in trade and FDI policy to the EP. Some members of the EP (MEPs) formally asked the Commission and the Member States in May 2012 ‘to set up a body entrusted with the ex ante evaluation of foreign strategic investment, along the lines of the CFIUS, in order to obtain a clear picture of businesses operating and investing in the territory of the EU’ (De Sarnez, 2012, p. 11). In January 2015, however, the Commission rejected the concept of investment screening at the EU level, citing its commitment to ‘ensuring that markets remain open’ (Malmström, 2015).

Interest Groups. Business associations active at the EU level are traditional proponents of a liberal FDI regime and open economic borders. In 2008, Business Europe had published a position paper calling for ‘freedom of investment in the EU and abroad’ and expressing ‘serious concerns’ over the proposals to create a CFIUS-type FDI screening procedure at EU level. In 2011 the director of international affairs of Business Europe, Adrian van den Hoven,

highlighted that ‘99% of the time [FDI] is not a problem’ (Wishart & Rankin, 2011). Stefan Wengler, director of the European retail federation Foreign Trade Association, argued that screening FDIs would be ‘preposterous’ in light of EU attempts to invest in emerging countries (von Reppert-Bismarck, 2011). Overall, business interest groups seemed reluctant at the idea of an EU ISM.

Potential strands of contestation

During this phase, the key debates revolved around the basic question of whether the EU needed investment control. The discussions focused on the idea of a review committee based on the CFIUS model (Wishart & Rankin, 2011). The proponents of a European ISM highlighted the risk of ‘giving up precious technical know-how and sectors of strategic importance to unknown investors’ and raised concerns about ‘unchecked foreign investment, particularly from China, India, Russia and Brazil’ (von Reppert-Bismarck, 2011). The opponents saw this as a protectionist move damaging the EU economy: they argued that FDI was ‘critical to Europe’s ability to emerge stronger from financial crisis’ (von Reppert-Bismarck, 2011).

Defusing political mines

During this first wave of debates, the Commission exercising its power of legislative initiative chose *not to formulate* a policy proposal. The ‘pushback’ against the idea of investment screening illustrated ‘how deep the differences [ran] among European policymakers over

managing foreign investment flows' at that time (von Reppert-Bismarck, 2011).

Policymakers' opinions were polarized; but the issue was not discussed in broader circles.

Phase 2: Policy formulation

In May, following calls from France, Germany, Italy, and the EP, the Commission issued the reflection paper 'Harnessing the Benefits of Globalization', which expressed the intention to take 'appropriate action' regarding the concerns over foreign investors acquiring European companies for strategic reasons (European Commission, 2017a): continued commitment to free-trade liberalization required a reassessment of the means to achieve it. On September 13, 2017 the Commission declared the end of European naivete in trade (Juncker, 2017) and published its proposal for the ISF regulation. In sum, it took the Commission a few months – and for some policymakers at DG Trade, a very intense summer (Interview 11COM3DGT) – to formulate the proposal.

Key actors and preferences

Member States. In 2017 there were five main groups of the Member States depending on their position on European investment screening: the 'proponents', the 'free traders', the 'investment dependants', the 'investment hubs', and the 'agnostics'. The group of proponents of EU screening regulation, besides France, Germany, and Italy, included Poland, Lithuania and Austria. The 'free traders' were Sweden, Estonia, Finland, Belgium, Denmark and Netherlands. They argued for maintaining as open borders as possible for FDI. The 'investment dependants', including Greece and Portugal, had been hit hardest by the financial crisis and depended on investment financing to pay external debts, thus opposing the

investment screening. The ‘investment hubs’ included Luxemburg, Cyprus, Ireland and Malta, which traditionally had been functioning as intermediaries for FDI flows and, thus, were sensitive to the imposition of a pan-European regulation that might undermine their interest in offering foreign investors reliable capital transits. The rest of the Member States, such as Bulgaria or Croatia, were ‘agnostics’: having not seriously considered this issue before, they had not yet formed a position (Chan and Meunier 2021).

The Commission. By 2017, the Commission had started to reassess its approach to both globalization and the rise of China. For decades, DG Trade had pursued a free-trade agenda and open borders for FDIs irrespective of other countries taking advantage of that European openness and not playing by the rules. In May 2017, the Commission’s White Paper on ‘Harnessing Globalization’ suggested for the first time that it might create a pan-European FDI screening policy (European Commission, 2017a). Still, the Commission assigned the task to develop the ISF proposal to the liberal-oriented DG Trade, a decision that revealed the Commission’s intention to develop the new tool *within* the free-trade agenda.

European Parliament. Overall, the EP was ‘on board’ with this policy initiative. However, different MEPs expressed various views on what the final mechanism should look like detailed in the next subsection on policy negotiation.

Interest Groups. There was no impact assessment and related stakeholder consultation during the proposal preparation, thus we lack an official account of the concrete business positions on the policy initiative, and of whether these positions were addressed. Overall, business actors in the EU had traditionally advocated for a liberal regime and expressed scepticism

about the idea of a pan-European FDI screening. They, and trade unions, entered the policy debates late, i.e., once the policy proposal was submitted.

Potential strands of contestation

The issue of centralization. Early on, the discussion focused on a supranational ‘centralised committee’ with FDI screening competences at EU level (von Reppert-Bismarck, 2011). After resurfacing in 2017 (European Commission, 2017b), this model was discarded as a political ‘mine’. Such a policy seemed ill-advised given the concurrent battle on EU competences over FDI. It would have elicited strong Member State opposition, compounded by the fact that national security was a matter of exclusive national competence. The Court’s Opinion 2/15 had not yet arrived – it was released a week after the Commission’s ‘Harnessing Globalization’ paper. Finally, a centralized CFIUS-type system entailed strict requirements for harmonization of screening procedures across Member States, which would have required considerable time and effort.

Ensuring reciprocity. In their initial letter to the Commission (February 2017), France, Germany, and Italy highlighted their worries ‘about the lack of reciprocity and about a possible sell-out of European expertise’. The Three called on the Commission to suggest an EU-level ‘protection’ based on ‘economic criteria’ to ensure the level playing field and reciprocity.ⁱⁱⁱ Some MEPs supported this approach, as reflected in the Proposal for a Union Act^{iv} from March 2017. The Proposal advocated a EU-level protection ‘on economic criteria’ and called on the Commission to propose a policy to ‘extend the scope of existing protections to strategic sectors.... [and] establish a principle of reciprocity in the EU's investment policy’ (European Parliament, 2017). Such an approach was suspect to the free-trade liberals who

feared that reciprocal screening might trigger a chain reaction from third countries with negative implications for outward EU investments. Screening FDI on economic grounds potentially opened the door to arbitrariness and protectionism, introduced discrepancies among policies,^v or collided with the EU competition regime on M&As. Thus, a policy proposal based on economic reciprocity might lead to a contestation from a variety of liberal-oriented actors.

Defusing political mines

Owing to its right of legislative initiative, the Commission has the power to organize the process of policy initiation, formulate the legislative proposal and present it to legislators and wider public. The Commission made an opportunistic use of these powers to defuse political mines.

Drafting the regulation. Formal drafting powers helped the Commission mitigate the risk of competence contestation. The staff considered both the centralized CFIUS-type mechanism and a ‘lighter’ decentralized version (European Commission, 2017b). DG Trade quickly dismissed the idea of a centralized EU screening authority, owing to disagreements among Member States and the fact that national security is their exclusive competence. A ‘light’ framework version was preferred: it used common criteria and standards for FDI screening, while keeping the ultimate decision power with the Member States. Still, this first version granted certain screening powers to the Commission, particularly for FDI transactions ‘likely to affect projects or programmes of Union interest on the grounds of security or public order’ (European Commission, 2017c, p. 10). Essentially, this was an attempt to, on one hand, pacify

the Member States by keeping the main screening powers in their hands, yet ‘open the doors’ for the EU to ‘speak with a single voice’ starting with a limited domain of ‘union interest’ projects.

The Commission also addressed the budding reciprocity controversy. Despite calls from agenda-setters for EU-level protection based on reciprocity and economic criteria, none of these survived in the policy proposal. The choice of DG Trade as lead DG revealed the Commission’s support for a liberal-oriented framework. Also, it was clear to the Commission from an early stage that a policy draft based on economic reciprocity would lead to losing the ‘free-traders’ and might intensify political contestation, including from business (Interviews 7COM2DGT, 3EPM1). Instead, the Commission chose to proceed with a draft based on security screening criteria, which allowed to address the strategic concerns of the agenda-setters while keeping the ‘free traders’ happy.

Policymaking process. Before being presented to the legislators, a legislative proposal typically undergoes a process of impact assessment, which includes stakeholder consultation, followed by a formal adoption of the proposal by the College of Commissioners. The overall goal of the impact assessment is to assess a policy initiative, alternative policy options and their impacts by analysing inputs from various range of stakeholders, including national authorities, interest groups and expert communities (European Commission, 2021a).

The policy proposal submitted in September 2017 was accompanied by the Explanatory Memorandum and the Commission Staff Working Document but lacked an impact assessment report. The proposal was ‘exceptionally’ submitted without an impact assessment ‘in view of the rapidly changing economic reality, growing concerns of citizens and Member

States' (European Commission, 2017c, p. 10). 'Skipping' the impact assessment at the stage of policy formulation could serve two goals. First, it could save time, as a typical impact assessment takes one year (European Commission, 2021a). Saving time was essential for the Commission, whose intention was to get the policy approved before the next EP election scheduled for May 2019 (Interview 7COM2DGT). Second, avoiding impact assessment allowed to reduce the number of stakeholders that would affect the policy draft. Both objectives could help manage polarization and keep the issue under the public radar. Such objectives would have been appealing for the Commission at a time of growing tumult in European politics.

Phase 3: Policy negotiation

Stakeholders could send their feedback during the three months following the ISF legislative proposal (13 September to 12 December 2017). Afterwards the proposal was considered by the European Committee of the Regions and the Economic and Social Committee, which issued their opinions on 23 March and 18 April 2018 respectively. Concurrently the Council and the EP discussed the draft in preparatory bodies. The inter-institutional negotiations (trialogues) took place from July 2018 to late autumn 2018, leading to a final first-reading agreement in early 2019. Overall, it took a record 18 months to adopt the regulation.

Key actors and their preferences

Member States. Member States entered the policy negotiations with the initial preferences described in subsection 4.2., though some of their preferences gradually changed. Italy switched position dramatically from supporting to opposing the ISF following the victory of

the League and the Five Stars Movement in March 2018. It was one of the two countries (together with the UK) who abstained at the final Council's vote on the policy proposal. By contrast, Denmark, initially reluctant, eventually rallied around the idea, and even introduced its own screening on security grounds in May 2021.

Regarding competence, the suggested screening powers of the Commission on Union-related projects were not supported by the Member States. Otherwise, they welcomed the 'light' ISF, which guaranteed them unilateral authority to both adopt their own screening policies and decide on concrete FDI transactions.

Regarding grounds for screening, France was known as the biggest supporter of economic reciprocity screening. The 'free traders' favoured the security-oriented draft. Eventually, the Member States' positions on the matter converged around the security-oriented screening.

The Commission. The Commission's key preference was to facilitate prompt negotiation of the draft. Besides the looming deadline of the EP elections scheduled for May 2019, the Commission now also faced an Italian government much more interested in attracting Chinese FDI than establishing an EU ISF. It sought to limit the potential damage by speeding up the process (Interviews 3EPM1, 7COM2DGT).

The European Parliament. The EP supported the ISF and saw itself on the Commission's side. However, MEPs held conflicting views on the nature and scope of the mechanism. The liberal-oriented groups supported the 'light touch' and security-oriented instrument, whereas, with some exceptions, center-to left groups favoured wider control, economic reciprocity, and a stronger role for the EU. In addition, the EP advocated stronger competences for itself with

a ‘word to say’ in transactions review. Eventually, MEPs came to an understanding of the necessity to reach a compromise to get the policy adopted (Interviews 3EPM1, 7COM2DGT).

Interest Groups. During the stakeholder consultation the Commission received feedback from three actors: the Federation of German industries, the Austrian Federal Economic Chamber, and the Federation of European Private Port Operators and Terminals. Additionally, position papers and other feedback published on official websites emerged later in 2018, but outside of the formal consultation. The stakeholders stressed the necessity of clear definitions and legislative certainty. Some also ‘strongly reject[ed] economic viability as criteria in investment screening’ (Federation of German Industries, 2017, p. 8) and lobbied for ‘keeping things [economic and security criteria] separated’ (Interview 6BA3EUI). With a rare exception, business viewed including reciprocity as grounds for ISF negatively for fear of triggering a negative chain reaction affecting outward European FDIs. In addition, business raised concerns over 1) administrative burden with additional filing and time constraints, 2) confidentiality, and 3) clear and transparent security screening criteria.

Much of these views were aired during informal stakeholder consultations, in which interest groups, including trade unions, participated. Though less active, trade unions welcomed the initiative. They saw it as a positive development to protect workers’ rights and the social dialogue. However, the ISF was not their top priority, and they were not actively involved in the negotiation process beyond expressing their general support to the policy ‘whatever will come out’ (Interview 10TU1EUI).

Potential strands of contestation

Although significant ‘mines’ were mitigated at the early stage of policy proposal, several risks remained during the policy negotiation stage.

The issue of competences. Many of the Member States remained sceptical about the necessity of the European screening regulation. If not convinced, they could still block its adoption.

Likewise, a few tricky issues remained regarding competence. The Commission’s intention to screen FDI affecting Union-related projects was controversial for the Member States. The EP’s intention to participate in the review process, framed in the name of accountability and transparency, was controversial for Member States and business actors who sought to preserve maximum confidentiality.

The issue of scope. Though the policy proposal was focused on security criteria, discussions on economic reciprocity remained. In addition, the issues of sector coverage, timeline for review, ways to deal with potential disagreements between the Commission and Member States on the necessity of issuing an opinion, and the entry into force date and preparation period were discussed.

Defusing political mines

During the negotiation phase, the Commission employed various informal powers of persuasion to keep the negotiations moving and deescalate conflict.

First, the Commission organized a consultative and explanatory work among the Member States to show the ‘added value’ of an EU-level screening framework (Interview

7COM2DGT). It advocated the advantage of the ISF as a cooperation framework that would align the diverse national procedures and help Member States ‘see what is happening in the neighbouring Member States’. The Commission emphasized a ‘light touch’ regulation with minimum administrative burden and tight deadlines: local actors ‘would not notice we are there’ (Interview 7COM2DGT). The Commission also dropped the idea of gaining screening competences regarding the Union-related projects.

Second, the Commission actively cooperated with liberal-minded MEPs and the EP’s Committee on International Trade. A representative of the Commission was ‘almost camping’ in the EP. S/he held ongoing discussions with MEPs, collected different views for the Commission’s consideration, delivered back the Commission’s response, and so on. The supporting MEPs were engaged into informal consultations too, talking to various policy stakeholders. The rapporteur did ‘a good job’ of helping forge a consensus among policymakers (Interviews 3EPM1, 7COM2DGT, 8EPM1).

Third, the Commission organised an outreach and explanation campaign across interest groups to get them ‘on board’. While limiting screening to security grounds, the Commission emphasized: 1) confidentiality commitments, 2) excluding the EP from the screening process, 3) tight deadlines for the transactions review, 4) no need for additional EU-level filing from the participants to the transaction, and 5) stipulating a clear (though not exhaustive) list of screening criteria (Interviews 4BA2S1, 6BA3EUI, 7COM2DGT, 10TU1EUI). To make sure that business community was open towards the new policy proposal, the Commission conducted extensive informal consultations.

Finally, to persuade the proponents of reciprocity and level-playing field, the Commission used legal framing in its argumentation. It appealed to the EU's commitments within WTO and OECD allowing to restrict FDI on security grounds only. Further, the Commission argued that the EU possesses other legal instruments to ensure reciprocity and level playing field and – not least - it committed to submitting a proposal on foreign subsidies to address the market distortions created by state-subsidised FDIs.^{vi} By doing so, the Commission separated investment screening in sensitive industries on security grounds from the competition and market distortion issues. Although it was “not an easy message”, the Commission managed to shape the discussion within the legal framework and move forward with the security-oriented regulation: ‘Luckily, we had these legal constraints’ (Interview 7COM2DGT).

5. Discussion

The empirical data provide partial support for Hypothesis 1. In early 2017, the three biggest Member States – France, Germany and Italy – aligned to push for the adoption of the European ISF. It is plausible that the Commission, under pressure from these ‘big Member States’, decided to *initiate legislation*. However, the hypothesis is less conclusive when it comes to the *process of negotiation*: the alignment broke up when Italy joined the camp of ISF opponents; the reluctant Member States had enough clout to muster a blocking minority; while they didn't, they could have led to protracted negotiations. Last but not least, the demand for ISF did not come from interest groups, which were initially reluctant. In fact, the graduate convergence of Member States' and interest groups' preferences over the ‘light touch’ security-oriented version of the ISF reflected Commission entrepreneurship during the policy process rather than an initial alignment of interests.

We can also find partial support for Hypothesis 2. There were elements of the ‘security threat’ framing in policy documents and political speeches from both national and the EU actors (Schild, 2022). It is plausible that the Commission accepted the reasoning behind the concerns over FDI and joined the campaign on investment control to cajole EU hawks. Indeed, the Commission invoked security issues to justify skipping the impact assessment and speed up the policy process. Evidently, this security framing seems natural to contemporary observers now that the regulation is adopted and in force. However, it is crucial to remember that *security concerns were not the core original concerns* of France, Germany, and Italy. In their initial letter to the Commission, these Member States highlighted the need for policy addressing *reciprocity and economic criteria screening rather than protection of national security*. Moreover, ministers for the economy, rather than for defence or home affairs, played the key role in setting the agenda (Schild, 2022). Contestation over the economic vs security framing was also evident in the EP, which, though supporting the regulation, pushed for more powers for itself and was conflicted over the issue of economic reciprocity.

If not mitigated by the Commission, each of the internal contestation strands could have spilled over to the wider public, through politicization tactics of the Member governments (Meunier & Roederer-Rynning, 2020) or interest group mobilization (Keller, 2018; Young, 2016). The negative economic consequences of protectionist policies, especially for the ‘investment dependant’ Member States, could then be framed as affecting the wider wellbeing, rather than the security of ordinary Europeans.

The empirical data provide stronger support for Hypothesis 3. The evidence reveals that the Commission, anticipating a resurgence of broad-based politicization of investment issues, accelerated the policy process by proposing a lowest possible denominator legislation,

thereby preventing the issue from gaining salience and entering the wider public debate. Calls for investment screening had arisen long before 2017. But for a long time, the Commission simply blocked them for fear of opening the door to protectionism. By 2017, however, the Commission had developed a less sanguine view of globalization and the intentions of Xi Jinping's China. The Commission then set the wheels in motion with roughly the same goals as earlier – keep markets as open as possible - but a new arsenal of tools of which the ISF was the vanguard. In the context of highly politicized trade policymaking, contestation over FDI competences, and renewed populism in Europe, the Commission could not afford falling into another strand of contestation and politicization. Through a mix of formal and informal powers, the Commission defused the political mines, constructed a 'light touch' version allowing to keep various Member States aboard, and helped forge a compromise in line with its overarching commitment to a liberal trade regime.

Our findings imply that, under certain conditions, the Commission operates relatively independently of other policy actors in the pursuit of its own goals, which are formulated for the long run, institutionalized in its services, and embedded in its self-understanding. They also show the importance of both formal and informal powers as they grant the Commission a rather high degree of autonomy over problem definition and policy construction (Nugent & Rhinard, 2016). The implied 'actorness' of the Commission is not fixed or given but should be seen as variable and dependent on certain factors. These factors include the policy field and the level of Commission discretion (here: exclusive competence over FDI), the lessons drawn from previous crises (here: the TTIP and CETA politicization of trade and investment), the space for ideational entrepreneurship (here: policy framing or use of legal commitments as a means of persuasion), and the strength of *esprit de corps* among the civil servants, including

their vision of policy development (here: long-standing goal on achieving trade and investment liberalization).

Conclusion

This article explored why the new EU ISF was negotiated and adopted quickly and in appearance unproblematically, even though it was a novel policy instrument shaped in a context of politicization of trade and investment. We argued that the Commission played a pivotal role by engaging in ‘pre-emptive depoliticization’ – a strategy of structuring and framing the policy process to defuse political mines. Based on a reassessed view of the necessity of screening FDI, the Commission spearheaded a light-touch instrument which avoided the pitfalls of centralization and protectionism. It succeeded in keeping alternative frameworks at bay by shortening the policy process, limiting the number of actors involved, legal framing, and explanatory work with policy stakeholders.

We look at this new policy in a wider context of the Commission’s response to public contestation of trade and investment liberalization and Member States’ opposition to the extension of the EU powers in investment policymaking. The EU’s ISF is the first step towards the emergence of a significant EU investment policy regime. In May 2021 the Commission proposed the Foreign Subsidies Regulation (FSR) to counter the distortive effects of FDI involving EU-illegal state aid and subsidies;^{vii} a political agreement was reached in June 2022. In June 2022, the EU adopted a long-in-the-making international public procurement instrument (IPI),^{viii} widely viewed as an important reinforcement of the EU’s emerging investment regime. In December 2021, the Commission proposed a widely discussed regulation on economic coercion from third countries.^{ix}

Obviously, more developments in this policy domain might be expected. The COVID-19 pandemic and Russia's invasion of Ukraine revealed the importance of critical infrastructure and technologies for national security (in various sectors from energy to media) and forced EU leaders to reconsider their approach to the common security and defence policy. The Strategic Compass for stronger EU security and defence adopted by the Council in March 2022 points out that 'making full use of the Union's framework and national mechanisms' for FDI screening 'remains critical to identify and mitigate risks to security and public order', that the Council will 'explore additional proposals to mitigate risks for companies which produce critical technologies and products and face non-EU acquisitions', and that national ISMs 'should be in place in all Member States as early as possible' (p. 35).

In quickly assembling this light-touch instrument, however, the Commission has left the door open for potential crises stemming from holes in the initial design. The multi-level ISF designed and adopted in haste might be insufficient to address potential problems – for instance if a Member State adamantly refuses to reject an investment against the advice of the Commission and several other Member States, or if a Member State abuses investment screening for protectionist aims. Such problems might force Member States to reconsider the existing ISF and transfer more powers to the EU level for more efficient screening procedures, thus leading to more integration in the EU investment policy.

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ⁱ 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 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2019:079I:TOC>

ⁱⁱ Austria, Denmark, Finland, France, Germany, Italy, Latvia, Lithuania, Poland, Portugal, Spain

ⁱⁱⁱ Proposal for ensuring an improved level playing field in trade and investment attached to the Letter to the Commission by France, Germany and Italy, February 2017.

^{iv} 10 MEPs from European People’s Party: Weber, Caspary, Saifi, I. Winkler, Cicu, Proust, Quisthoudt-Rowohl, Reding, Schwab, Szejnfeld, European People’s Party

^v e.g. EU’s laws in energy sector on certification of foreign-owned / controlled companies

^{vi} Respective policy proposal was submitted in May 2021

^{vii} Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market {SWD(2021) 99 final} - {SWD(2021) 100 final} - {SEC(2021) 182 final}

^{viii} Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 on the access of third-country economic operators, goods and services to the Union’s public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries.

^{ix} Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union and its Member States from economic coercion by third countries market {SEC (2021) 418 final} - {SWD(2021) 371 final} - {SEC(2021) 372 final}