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The Protection of Public Health as a Reason for Restricting Trade and Screening Foreign Investments Within the EU Legal Order

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Abstract.
One of the fundamental principles underpinning the functioning of the European Union economic system is the principle of an open market economy with free competition. This is a principle of constitutional order, from which derive the freedom of trade and the freedom of investment. The EU legal order, however, allows the authorities of the Member States to adopt and implement national measures restricting the free exercise of the above economic activities. A key condition for restrictive measures to be taken is that there are reasons for general non-economic interest, such as the need to protect public health. The present study aims to examine the context of exercising this capability at two levels and in two areas. Regarding the intra-EU level, a Member State may impose restrictions on the free movement of goods within the internal market provided that it seeks to ensure the protection of consumer health. As far as the level of economic relations with third countries is concerned, especially the investment sector, the possibility of screening foreign investment and mainly the FDI is provided to achieve objectives related to the safeguarding of fundamental interests of society such as public health. The value of the study is that it contributes a particular legal perspective on important issues raised mainly by the pandemic outbreak in the field of economic relations, and especially in the field of trade and investment.

Keywords: European Union, freedom of trade, freedom of investment, exceptions

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1. Introduction

The EU internal market is defined as a single space without internal frontiers in which the exercise of certain economic freedoms is guaranteed, including the freedom of movement of goods in accordance with the provisions of the Treaty. The exercise of this freedom is mainly pursued by the introduction of prohibitions imposed on the Member States, in particular by the prohibition of customs duties and tax measures having equivalent effect as well as the prohibition of quantitative restrictions and all measures having equivalent effect (MEQRs) on intra-EU trade in goods. However, TFEU

introduces an exception from the principle of prohibition of restrictive measures. In particular, the application of such measures can be justified only if it falls under one of the exceptions of Article 36 TFEU.

Furthermore, TFEU provides for the free movement of capital as a general principle of EU economic system. The protection of public health has been recognized by the Court of Justice of the European Union as an imperative reason in the general interest capable of justifying measures restricting both trade in goods and the movement of capital within the internal market.

Regarding the structure of the study, it firstly examines the concept and nature of restrictive measures prohibited under EU Law (Section 2). The next section deals with the conditions that must be met in order for the authorities of a Member State to be entitled to apply restrictive trade measures to protect public health. Particular emphasis is placed on the fundamental principle of proportionality (Section 3). Subsequently, the legal framework governing direct investment as a basic form of capital movement within the EU internal market is examined (Section 4). However, a member state can implement measures which are justified by imperative reasons of general (public) interest such as reasons related to public order, public security or public health (Section 5). In particular, given that the foreign direct investment (FDI) falls under the scope of EU Common Commercial Policy, the EU is competent to adopt measures to control these investments for reasons related to the protection of public policy, security and health (Section 6). In this context, the EU has adopted a legal act establishing a framework for the screening of FDI into the EU. The aim is to control or limit acquisitions by foreign companies, of European companies operating in sensitive and strategic sectors of the economy. Mainly it is sought to prevent the risk arising from foreign companies' efforts to acquire healthcare potential or related industries, through FDI into EU territory (Section 7).

Examining the above issues is particularly important since they are related to critical problems highlighted by the outbreak of the pandemic. The study contributes a particular legal perspective regarding issues that will certainly concern many researchers and writers in the future.

2. The Scope of Prohibition of Quantitative Restrictions and all MEQRS

2.1. The Notion of Imports and Exports of Products Between Member States

Article 34 TFEU and Article 35 TFEU impose prohibitions covering globally trade in goods within the EU internal market.

As it is known, the first provision prohibits quantitative restrictions on imports in relations between

Member States, as well as the application of any measure having an effect equivalent to quantitative restrictions (MEQRs) while the latter prohibits between Member States quantitative restrictions on exports and measures having equivalent effect to quantitative restrictions [9].

As has been clarified, these provisions only regulate the movement of goods between Member States, which includes the import and export of goods to and from the EU Member States. They do not apply to trade with third countries. The concept of goods covers all products whose common feature is that they are valued in money and, as such, can be traded.

2.2. The Notion of Quantitative Restrictions

The concept of quantitative restrictions includes measures adopted by the Member States and restricting in whole or in part the importation or exportation of goods on the basis of quantity, value, volume or weight [3].

Such measures are the explicit prohibition on imports or the imposition of a quota system. In other words, quantitative restrictions apply when certain import or export limits have been met. A quantitative restriction may be based on regulations or merely an administrative practice. Therefore, even a disguised quota system falls within Article 34 TFEU.

2.3. The Notion of MEQRs

The Court of Justice has adopted, in its case-law, an expansive conceptual approach by including within the scope of the restrictions regulated by Articles 34 and 35 TFEU any measure (commercial regulation) which is capable of hindering, directly or indirectly, actually or potentially, intra-EU trade in goods[?].

The term ”measures” includes primarily laws, regulations or administrative provisions adopted by the competent public authorities of the Member States. In order for a national regulation to constitute a measure having equivalent effect within the meaning of Articles 34 and 35 TFEU, it is necessary that it is capable to influence and in particular produce restrictive effects on intra-EU trade. A measure produces such effects when it either prohibits or excludes imports or exports between Member States or makes them difficult.

In particular, as regards Article 35 TFEU, it falls within its scope and therefore any measure of an exporting member State is prohibited if it meets two conditions, namely

on the one hand, it applies to all operators operating in its territory and on the other hand its application in practice affects the exit of products from the market of that state more than the marketing of them in its domestic market[?].

The scope of article 34 TFEU includes regulations adopted by the importing Member State and directly affect only imported goods, discriminating against them in relation to domestic goods. This category therefore includes any national regulation producing direct and obvious discriminatory effects.

In addition, measures that apply indiscriminately to both domestic and imported products may be considered as MEQRs and be judged incompatible with Article 34 TFEU. This category mainly includes any national regulation which has as its object the definition of technical specifications and standards of production of goods [10]. The Court has established the principle of mutual recognition of technical standards and specifications between Member States [6][?]. According to it, every product that is legally produced and marketed in a Member State, in accordance with the specifications, rules and methods in force in that Member State, must have access to the market of any other Member State.

The Court has set out specific criteria in the light of which a national regulation should be considered in order to be considered as a MEQRs.

In view of the above, the Court[?] concluded that they are included in the category of measures having equivalent effect to a quantitative restriction within the meaning of Article 34 TFEU:

1. any national measure which has as its object or produces as its result the more unfavorable treatment of products originating in other Member States.
2. any national provision relating to the conditions which those goods must satisfy, as regards the standards of their production, even if those provisions apply indiscriminately to all products.
3. any other measure which impedes access to the market of a Member State for products originating in other Member States.

3. The Possibility of Adopting Restrictive Measures

3.1. The Protection of Public Health as a Legitimately Pursued Purpose

Article 36 par. (a) TFEU gives Member States the right to derogate from the principle of prohibition on measures imposing restrictions on imports, exports or transit, where such a derogation is justified by reasons of general (non-economic) interest. A Member

State may invoke, in order to impose national restrictions on intra-EU trade, reasons relating to the protection of public morality, public order, public safety, protection of human health and life.

A restrictive measure may be justified, under the provision of Article 36 if there is an urgent need to protect public health. According to the consolidated Court case law, human health and life are at the forefront of the goods and interests protected by the Treaty[?]. A condition for justifying a prohibition of the marketing of a certain product is the sufficient proof that it constitutes a real public health risk which must be assessed in depth. Evidence must be based on the most recent scientific data available to the competent national authorities which, in the context of the projected risk assessment, must evaluate both the extent to which the use of prohibited products is likely to have detrimental effects on the health of consumers and the degree of severity of these effects.

A risk to public health can obviously arise in the event of a shortage of medicines in the territory of a Member State. In the light of this risk, the adoption by a state authority of a measure restricting trade with other Member States must be assessed. In particular, its implementation may be justified by the need to ensure the uninterrupted and stable supply of medicines throughout the country in order to meet essential medical needs[?].

The Coronavirus disease 2019 (COVID-19) outbreak in Europe has clearly posed and continues to pose a serious risk to human health and life. In the context of combating the pandemic almost all Member States have introduced export prohibition measures on the basis of article 36 TFEU. The prohibition concerns personal protective equipment which is essential to combat the pandemic. It was therefore deemed necessary to impose export restrictions in order to preserve this equipment for the domestic market [5].

3.2. The Obligation to Comply with the Principle of Proportionality When Taking Measures for the Protection of Health

Even if the marketing of a product, imports and exports endanger human health and life, there is a general need to take measures that restrict them, in addition to justifying the imposition of restrictions on trade, the application of specific restrictive measure must comply with the principle of proportionality. It is necessary that the measure applied in each specific case be proportionate to the purpose of preventing the risk that threatens the above goods. In order to determine whether this requirement is met, it is necessary to consider whether the applicable measure restricting imports or exports is, on the one hand, appropriate to ensure that the objective pursued which is

the protection of health or public safety and, on the other, is absolutely necessary to achieve it[?].

The principle of proportionality forms the basis of the provision of Article 36 par. (b) TFEU[?]. Measures adopted by the Member States must constitute neither a means of arbitrary discrimination nor a disguised restriction on the movement of goods.

A Member State must provide specific evidence in order to prove objectively that the restrictive measure it is implementing *is appropriate or adequate* to achieve the protection of public health. It must be examined whether this measure actually meets the effort to achieve the legitimate aim pursued in a consistent and systematic manner[?]. In other words, national regulation can ensure that the legitimate aim which it is supposed to pursue is achieved only if it actually serves its implementation with consistency, coherence and system.

The condition of *adequacy* is not satisfied if the national legislation in question does not in any way affect the reason invoked by the State applying that regulation. It must exist between the restrictive regulation and the intended purpose such as e.g. the uninterrupted supply of medicines, a close link in the sense that its implementation leads directly to the realization of the purpose, contributes to its realization. Conversely when the aforementioned link is too loose, the national regulation cannot be deemed appropriate to ensure the implementation of the purpose of protection of health.

A Member State regulation providing for a single price for the sale by pharmacies of prescription medicines for human has not been deemed appropriate to achieve the projected objective of ensuring a better geographical distribution of traditional pharmacies in that State. The need to ensure universal and equal access of the population to the above-mentioned medicines throughout the above-mentioned territory was generally argued, but this argument was not based on evidence proving the adequacy of the measure for a better geographical distribution of pharmacies[?].

The ability of a regulation to contribute, consistently and systematically, to the achievement of a public health protection objective is questionable, since it imposes the prohibition on the marketing of a substance without this prohibition extending to the marketing of another substance and therefore without prejudice to trafficking of this latter substance which has the same properties as the first and could be used as its substitute[?].

On the contrary, the national legislation under which the parallel import authorization of a medicine automatically expires due to the expiry in the same State of the marketing authorization for the reference medicine on the basis of which the aforementioned authorization was granted is, in principle, capable of contributing to the achievement of the intended purpose, namely the safeguarding of human health and life. The result of its application is to prevent the parallel introduction of a medicine whose

harmlessness is no longer necessarily proven, given that, due to the expiry of the marketing authorization of the reference medicine, the national pharmacovigilance authority lacks a source of information on the safety of the medicine in question[?].

In summary, a restrictive measure is not considered appropriate when, in the end, despite its adoption and implementation by the authorities of a Member State, the achievement of the legitimate aim pursued is not ensured. In such a case, the implementation of the national measure restricts intra-EU trade, violates the principle of free movement of goods as a basic principle of the internal market but does not achieve the purpose of public health.

The question of the *necessity* to implement a measure restricting the movement of goods is connected, especially in relation to the protection of human life and health, to scientific research. The existence of recent and reliable scientific research evidence documenting that the movement of a product poses a risk to public health is obviously particularly important because (a) it helps to clearly define Member States' margin of appreciation for taking national measures; and (b) is critical to the degree of necessity of taking a measure.

Thus, if there are such scientific findings as to indicate that the marketing of a product endangers public health, national authorities may apply restrictive provisions under Article 36 TFEU bearing the burden of proving that they are necessary for its effective protection. To do this, they must take into account the research findings of the international scientific community in this case. If, on the contrary, the available scientific findings are not capable of documenting the existence of a risk to public health, then it obviously becomes particularly difficult for a Member State to invoke and demonstrate the need to protect it in order to justify the imposition of restrictions on intra-EU trade.

In case the scientific research has not reached safe conclusions regarding certain issues related to the health of consumers, e.g. as to the specific substances they use, the margin of appreciation for public health protection measures available to national authorities is significantly extended[?]. More specifically, a situation may arise in which scientific studies have led to results whose nature is insufficient, incomplete or inaccurate, making it impossible to determine with certainty the existence or extent of the risk invoked by a Member State for health. However, it is not excluded that real damage to public health may be caused in the hypothetical case that the aforementioned risk eventually occurs. In other words, neither the existence of risks is scientifically substantiated nor, however, the possibility of their occurrence is ruled out. In such a case, a Member State may invoke the *principle of precaution* and apply restrictive measures without having to wait for the full existence and seriousness of the risks in question to be established[?]. However, such measures may be justified under the principle of precaution, provided that they do not discriminate and are objective.

According to Court case-law, in order for the above principle to be properly applied, it is necessary, on the one hand, to identify the potentially negative consequences of the use of a product the marketing of which is subject to restrictions and prohibitions and on the other hand to assess the overall health risk posed by the marketing of a product on the basis of the most reliable scientific data available[?].

The requirement of necessity, when implementing measures prohibiting or restricting the import or export of products, is satisfied only if the imposition of such measures is *absolutely necessary* in order to achieve a legitimate aim of general interest such as the protection of health, in other words if only by imposing the specific measures, public health can be protected. In order to justify, in the light of Article 36 TFEU, a measure capable of restricting the free movement of goods between Member States, it must not exceed the measure necessary to achieve the legitimate aim pursued, it must not go beyond what is necessary to attain this aim. The restrictive measure must not infringe the above fundamental economic freedom more than what is absolutely necessary for the protection of public health[?].

This condition is not met when the aforementioned protection can be achieved just as effectively by taking measures that are less restrictive for intra-EU trade. In the event that more arrangements capable of achieving the protection of health are available, the Member State relying on Article 36, must choose to apply the one that hurts to a lesser extent than the rest, the trade between with other member states.

As has been clarified by recent case-law, in the exercise of a Member State's discretion in taking measures to protect public health, the legal instruments it chooses should be limited to what is really necessary to ensure public health and be proportionate to the aim thus pursued, which could not be achieved by measures less restrictive of intra-EU trade.

The article 36, because it introduces an exception to the fundamental principle of the free movement of goods within the internal market, must be interpreted in such a way that it does not extend its effects beyond what is necessary to protect the interests which it aims to guarantee. National regulations implemented pursuant to this article shall not impede imports or exports in a manner that is disproportionate with respect to their objectives. Therefore, measures adopted pursuant to Article 36 shall be justified only if they serve the interests (human life and health) protected by that Article and do not affect intra-EU trade more than it is strictly, absolutely necessary[?].

Regarding the prohibition on the exports of protective materials, medical equipment and medicines useful for the control of COVID-19, the case in which the authorities of an individual Member State take measures to prevent a risk which, in their opinion, threatens public health in that particular State is different from the case of a pandemic in which the concept of health protection acquires a European dimension. It is not

certain that the consolidated case law justifying a Member State when, in order to face health emergencies, it takes restrictive measures to protect the population in its territory, is appropriate in the event of pandemics. The rising concept of health solidarity as a central EU objective allows a different interpretation of the exemption for reasons related to the protection of public health, taking into account the whole EU population and not the inhabitants of just one Member State [11].

Whereas, at first sight, that is to say, the imposition of the specific restrictions appears to be covered by the case-law relating to the interpretation of Article 36 of the TFEU and is therefore justified under that provision, however, precisely because health is threatened throughout the EU territory, the unilateral restrictions imposed by each Member State may not finally be appropriate to achieve the goal of combating the pandemic. On the contrary, it is possible that this objective can be achieved more effectively and without affecting the internal market through measures implemented by the EU at central level and which can ensure the adequacy for the entire EU population of the goods needed to mitigate the risks of the epidemic.

4. The Freedom of Investment Under Article 63 TFEU

Pursuant to Article 63 (1) TFEU, *all restrictions on the movement of capital are prohibited both between Member States and between Member States and third countries* [4]. This prohibition applies to all restrictions, whether they constitute discrimination (ie apply only to nationals of another state) or do not constitute discrimination (ie apply indiscriminately to nationals of an EU member state and to nationals of other states).

It should be noted that, as regards the territorial scope of the free movement of capital, the prohibition of restrictions is not limited to internal relations within the EU, ie relations between the Member States but extends to capital movements between them and third countries [8][?].

As it is well known, the main form of capital movement within the meaning of article 63 (1) TFEU is direct investments and portfolio investments[?].

The Court has interpreted the term "*direct investment*". This term covers all types of investments made by natural or legal persons and with which it seeks to establish or maintain stable and direct links between the person investing the funds (investor) and the company for which the capital are intended, for the purpose of carrying out a certain economic activity[?]. In the event that the investment takes the form of acquiring shares in a new or existing company, the purpose of establishing or maintaining stable financial links presupposes that the shareholder acquires through the shares the possibility to participate actively effectively, in the management of the respective company or in its control. The Court held that direct investments are investments made in the form

of participation in an undertaking through the holding of shares which provides the possibility of actual participation in the management and control of that undertaking[?].

The acquisition, by investors of another state, of shares in certain national enterprises, as well as the full exercise of the relevant voting rights, are also considered as a form of capital movement [12].

On the contrary, *portfolio investments* are investments made in the form of securities in the capital market with the sole purpose of investing money without the intention of exerting influence on the management and control of the company. The act of acquiring securities in the capital market with the above purpose falls within the scope of application of article 63[?].

The TFEU does not contain any definition of the meaning of restrictions which are contrary to Article 63. The Court has favored a broad, expansive interpretation of the term restrictions. According to its case-law, the term "*restriction of capital movements*" within the meaning of the above provision means any national measure which may prevent residents of a Member State from investing in other States or from preventing foreigners from investing in a Member State.[?] The scope of the prohibition provision of the aforementioned article includes not only direct but also indirect restrictions i.e. national measures which are not directly intended to restrict the cross-border transfer of money and other funds but have an indirect impediment or deterrent effect on the relevant transactions.

A typical case of restriction is a member state regulation that imposes on an investor who is a citizen of another state the prohibition to acquire more than a certain number of shares in certain companies of the first state, imposes unequal treatment of nationals of other States and constitutes an infringement of Article 63 (1) TFEU.

5. The Possibility of Imposing Restrictions for Reasons of General Interest

Member States reserve the right to adopt and implement, for reasons of general interest, the measures provided for in Article 65 (1)[13]. In particular, they can implement measures dictated by reasons of public order or public security.

However, by virtue of the provision of article 65 (3) TFEU the above measures should be neither a means of arbitrary discrimination nor a disguised restriction on the free movement of capital.

In its *Communication on certain legal aspects concerning intra-EU investment*[?], the Commission set out its position on the grounds which Member States have the right to invoke in order to adopt restrictive measures. The laws or regulations of the Member

States relating to the free movement of capital which discriminate against investors who are nationals of another state may exceptionally be justified by imperative reasons of general (public) interest such as reasons related to public order, public security or public health.

In any case, according to the Court case law, the measure imposed must be appropriate for achieving the intended purpose and not exceed the measure absolutely necessary to achieve this purpose[?].

6. The Foreign Direct Investment as an Area Covered by the Common Commercial Policy

Since the entry into force of the Lisbon Treaty, the field of Foreign Direct Investment (FDI) has been part of the common commercial policy (CCP) [1]. According to article 207 (1) TFEU, the CCP is based on uniform principles regarding FDI [2]. The term ”*foreign*” investments means both investments made in the territory of the EU by foreign nationals and legal persons of a third country and those made in third countries by nationals or legal persons of an EU member state. Consequently, the provisions of Article 207 TFEU do not apply to investments made by nationals of an EU member state or by the legal entities referred to in Article 54 TFEU in another member state. As regards the term ”direct investment”, it has already been stated that the Court has interpreted the term ”direct investment” in the light of the Nomenclature of Capital Movements set out in Annex I to Directive 88/361/EEC.

In this area, pursuant to Article 3 (1) (e) in conjunction with Article 207 (1) TFEU, the EU has the exclusive responsibility to formulate and implement FDI policy. This common policy is exercised both through the conclusion of international agreements (art. 207 (4)) and through the adoption of autonomous (unilateral) measures, namely Regulations (art. 207 (2)).

We would say, however, that the main tool for the exercise of the common policy in the field of FDI will be the agreements with third countries. These agreements may relate exclusively to investment-related matters, in which case they will be stand-alone investment agreements, or they may be comprehensive in the sense that they cover all aspects of the economic relations between the parties including a chapter governing FDI.

These EU Economic Agreements guarantee the right of the parties to adopt and implement, in accordance with their respective responsibilities, measures to achieve legitimate public policy objectives. The Parties recognize that these agreements provisions are without prejudice to the their right to adopt, in their own territory, regulations and provisions aimed at achieving legitimate public policy objectives such

as the protection of public health and public safety, the protection of the environment and the promotion and protection of cultural diversity[?].

It follows from the above that in the field of foreign direct investment, only the EU is competent to adopt measures to control these investments for reasons related to the protection of public policy, security and health.

In the exercise of this competence, the EU has adopted, pursuant to Article 207, a legal act establishing a framework for the screening of FDI into the EU.

7. The EU Legal Framework for the Screening of FDI Into the EU in Critical Areas Related to Security, Public Order and Public Health

The EU is the main source and main destination for FDI. Foreign investors[?] are increasingly focusing on the search for new markets and strategic assets, and state-owned enterprises are playing an increasingly important role in the global economy. In some economies, state-owned enterprises account for a significant share of outgoing FDI. It is observed that in some cases the state facilitates the acquisitions of foreign companies by national companies, mainly by facilitating access to financing at interest rates below market rates. There is a risk that foreign investors will seek control or influence over European companies whose activities have an impact on critical technologies, infrastructure, inputs or sensitive information. The third countries from which these investors come may be able to use these assets to a detriment not only to the EU's technological advancement, but also to its public security and public order.

The growing number of acquisitions of European companies by foreign companies, in particular Chinese companies has caused the growing concern of EU member states. Many of these acquisitions involve European companies operating in sensitive and strategic sectors of the economy. These acquisitions have been the cause for the strengthening of the national control mechanisms of some Member States and at the same time set up the conditions for managing the issue at EU level.

The realization that risks can arise from FDI was the main reason that pushed the EU to adopt a Regulation to control them.

The Regulation (EU) 2019/452[?] (*FDI Screening Regulation*) sets the framework for addressing the concerns of EU member states [7]. It should be noted that several of the EU's key international partners (Australia, Canada, China, India, Japan and the United States) have already put in place mechanisms for controlling FDI in order to address the relevant concerns.

Despite the fact that most investments do not come from China, but mainly from America and Canada, China's FDI cause the most concerns. These concerns focus on

their rapid growth, on the fact that they target sensitive strategic sectors and that a large proportion of Chinese investors are either state-owned or state-controlled companies. These types of companies can either be supported or influenced by government authorities, so they are targeted for acquisitions for strategic reasons, instead of purely financial reasons and they are financially supported by their state. China's main interest in foreign direct investment in the EU is mainly in the areas of advanced industrial equipment and machinery, information and communication technology, as well as utilities, transport, infrastructure and energy, which in many cases are directly related with the defense industry and therefore raise issues of national security. Indicatively, we can mention the acquisition of the German robot company Kuka by Midea's, the acquisition of the Irish airline Avolon by HNA, the acquisition of the German energy company EEW Energy by Beijing Enterprises, the acquisition of the French company SMCP fashion from Shandong Ruyi Technology.

The FDI Screening Regulation establishes procedures by which it is possible to evaluate, investigate, approve, depend on terms, prohibit or reverse a FDI [14].

Specifically, it provides for the possibility for EU member states to have transparent, predictable and non-discriminatory mechanisms for examining FDI on the grounds of public security or public policy[?]. It also establishes cooperation procedures between EU countries and the European Commission on FDI that are likely to affect public security or public order[?].

In order to determine whether a FDI is likely to affect those fundamental interests, Member States and the Commission may consider its possible consequences, inter alia for: (a) critical infrastructure, whether natural or virtual infrastructure, including infrastructure in the fields of energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial services, facilities, as well as land and real estate, crucial for the use of these infrastructures b) critical technologies and dual-use items, including technologies in the fields of artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense , energy storage, quantum and nuclear technologies, as well as nanotechnologies and biotechnologies (c) the supply of critical factors of production, including energy or raw materials, as well as food security; (d) access to sensitive information, including personal data, or the ability to control such information; (e) freedom and media pluralism.

Following the outbreak of the COVID-19 epidemic and the adoption of measures to deal with the effects of the crisis, the European Commission approved a Guidance for EU countries on FDI and the free movement of capital from third countries and the protection of Europe's strategic resources[?]. It is a fact that the COVID-19-related emergency has had far-reaching effects on the EU economy. Among the possible economic consequences is the increase in potential risk for strategic industries, especially for

healthcare-related industries. In this unfavorable situation, the EU's exposure to foreign investment must be balanced with the appropriate means of control.

In the context of the COVID-19 emergency, the EU and the Member States must address the increased risk that may arise from foreign companies' efforts to acquire healthcare potential (for example, for the production of medical equipment or protective equipment) or related industries, such as research institutes (for example, for the development of vaccines) through FDI into EU territory. There is an urgent need to ensure that these FDI does not have a detrimental effect on the EU's ability to adequately cover the health needs of its citizens. Coordinated action both at EU and national level must be aimed at preventing the risk that the current crisis will lead to a loss of critical resources and technology.

To this end, Member States are called upon by the European Commission to make full use of the FDI control mechanisms they have put in place (or they will put in place) in order to take full account of the risks to critical health infrastructure, to the supply of critical factors of production, and other critical areas, as provided for in EU legal framework.

EU rules provide a framework for ensuring that legitimate public policy objectives, such as protection of public health, are pursued and achieved if those objectives are threatened by foreign investment. According to the FDI Screening Regulation provisions, EU member states may take measures to prevent a foreign investor from acquiring or taking control of a company if such acquisition or control would pose a threat to the security or their public order. This includes the circumstance where these threats are linked to a public health emergency.

The control of foreign direct investment does not necessarily imply the prohibition of the investment. There are cases where mitigation measures may be adequate. Such measures can be arrangements that shape the conditions insuring the supply of medical products as well as medical technology products. Member States are also given the power of imposing compulsory licences on patented medicines in the event of a national emergency, such as a pandemic.

8. Conclusions

From the previous analysis, it follows that the freedom of trade and investment is a fundamental principle of the EU. Within the framework of its internal market, both the free movement of goods and the free movement of capital are guaranteed. Member States may not impose restrictions capable of producing restrictive effects by making imports and exports more difficult and discouraging investors from investing in Member States.

However, exceptions are introduced. The EU law allows Member States to apply restrictive measures. It should be noted that this possibility is not unlimited. By implementing such measures, the authorities of a state must pursue objectives related to the protection of general essential interests of the society. The study demonstrated that the protection of public health has been recognized as an overriding reason of general interest into EU.

A key point of the study is the finding that in case of conflict between economic freedom and public health, when the question arises which of the two will prevail, the EU law favors protection of public health over free movement of goods and capital within internal market.

However, it is noteworthy that, as it emerged from the study of these issues, in order to justify the restriction of trade or investment, it is necessary to demonstrate that the principle of proportionality has been observed when taking the relevant measure.

An important parameter examined in the study concerns the issue of taking national restrictive measures to deal with the outbreak of a pandemic. Addressing the effects of a pandemic, which threatens the health and lives of people throughout the EU, necessitates the adoption of measures by the EU. In this case, the possibility for each Member State to implement its own national measures restricting trade is questioned. By taking action at EU level, the goal of protecting public health can be achieved more effectively. At the same time, the fragmentation of the single internal market caused by the implementation of unilateral national measures is prevented.

Also as pointed out above, in the field of foreign direct investment, the principle of freedom of investment bends and recedes in front of the need to control acquisitions of European companies by foreign investors, especially in areas of strategic interest. For this purpose, Member States may, based on an EU Regulation, may take measures to achieve legitimate public policy objectives such as the protection against threats related to a public health emergency

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