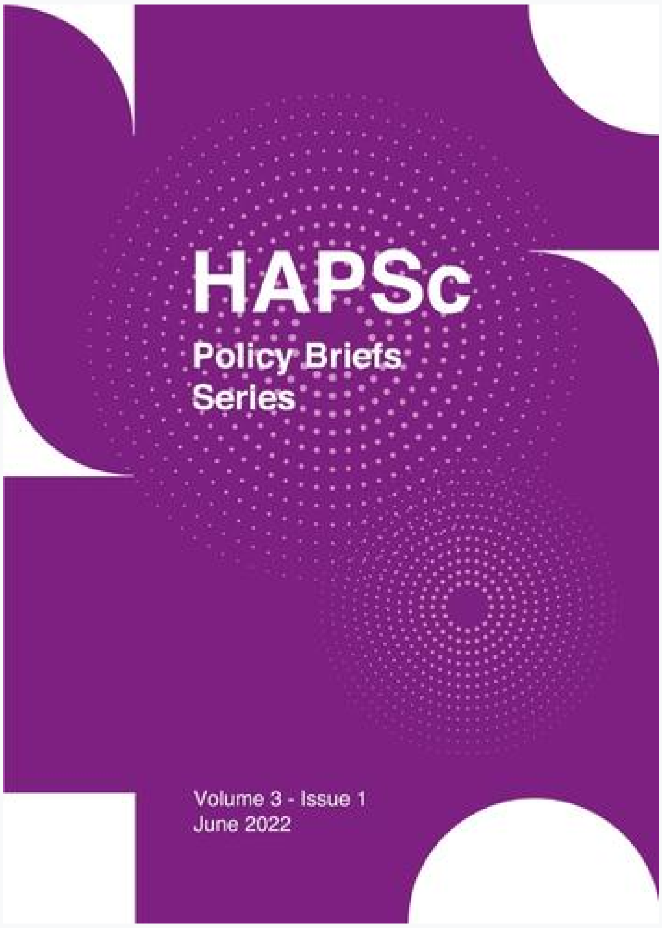
HAPSc Policy Briefs Series

Vol 3, No 1 (2022)

HAPSc Policy Briefs Series



The Greek Law on Strategic Investments in Light of the FDI Screening Regulation: Will the Greek Investment Regime's Openness Endure?

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doi: 10.12681/hapscpbs.30991

ISSN: 2732-6578 (print version) 2732-6586 (online)

The Greek Law on Strategic Investments in Light of the FDI Screening Regulation: Will the Greek Investment Regime's Openness Endure?[1]

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Abstract

Attracting Foreign Direct Investment (FDI) is vital for Greece's growth in the aftermath of a lengthy economic crisis and the Covid-19 pandemic. Concurrently, the European Union (EU) seeks to safeguard essential bloc-wise security interests that are compromised by third country investors, especially Chinese ones, sprawling across member states – a policy concern substantiated in normative text as recently as 2019 by the enactment of Regulation 2019/452. The latter set the basic pan-European contour in terms of member states' cooperation for the screening of FDI. A year later, the Greek Parliament voted for Law 4864/2021 on Strategic Investments, with a view to incentivizing aspiring high-profile investors. In that regard, the main objective of the present policy paper is to examine how Law 4864/2021 interplays with Regulation 2019/452. The paper will conclude that the Greek liberalized framework will have to align in the future with the European trend of extended screening over FDI, notwithstanding Law 4864/2021 moving into the opposite direction.

Keywords: FDI; strategic investments; legal framework; incentives; screening; Greece; European Union.

Introduction

The mainstream definition for FDI, in economic terms, lies with the direct acquisition of an asset by a foreign natural person or legal entity in the territory of another nation state (the host state) that is projected in the long-run and gripped with a certain business risk (Moosa, 2002; Dolzer & Schreurer, 2012: 60). As has been repeatedly affirmed, FDI is of tremendous importance for prosperity and development – to name just few of the benefits, FDI is a vehicle for the transfer of technology, stimulates employment, boosts a country's balance of payments vis-à-vis its trading partners, and may increase productivity (Moose, 2002: 73). Traditionally, and in view of the benefits gained, nation states have been competing in the international market for the attraction of FDI, especially against the backdrop of economic globalization (Broome, 2014: 171). As per Greece, the attraction of FDI has long been proclaimed by politicians, technocrats, and employers' organizations, as the gateway to exit the post-2008 crisis and as the path to level up the country's development paradigm (Hellenic Republic, 2020: 191; Tsitouras et al., 2019: 45; SEV, 2021; IME GSVEE, 2019).

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[1] To cite this paper in APA style: Fotopoulos, D.N. (2022). The Greek Law on Strategic Investments in Light of the FDI Screening Regulation: Will the Greek Investment Regime's Openness Endure?. *HAPSc Policy Briefs Series, 3*(1), 70-77. https://doi.org/10.12681/hapscpbs.30991

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In that regard, one of the most prominent and emblematic investments made in recent years in Greece was the acquisition of the majority stake (51%) of the Piraeus Port Authority by the COSCO Shipping Group, a state-owned Chinese multinational, for 280.5 million euros (HRADF, 2016) and the acquisition of another 16% of stake as of October 2021 for 88 million euros (HRADF, 2021). The total value of the Share Purchase Agreement is expected to reach 1.5 billion euros, including the expected earnings for the Greek State as well as additional investment that is agreed to be made by the COSCO Shipping Group (HRADF, 2016). Other significant investments have also been carried out in Greece by Chinese undertakings in crucial areas, such as energy and information technology, and by other third countries' entities (Tonchev, 2020: 537).

However, the benefits for the Greek economy notwithstanding, concerns were raised by other European member states, particularly by the most technologically advanced, and the EU itself, as to what the impact of such investments, which comes down to the control over strategic infrastructure – as the Piraeus Port is – by third country government-led entities, would be on security (Qianqian & Davarinou, 2019: 117; Chan & Meunier, 2021). In response to this growing concern, and in the context of its exclusive competence on FDI under common commercial policy pursuant to Articles 3(1) and 207(1) of the Treaty on the Functioning of the EU (TFEU) (European Union, 2007), the EU enacted Regulation 2019/452 (European Parliament and Council of the EU, 2019) to establish a framework for the screening of FDI at Union level. Subsequently, absent a national universal screening mechanism, the Greek Parliament voted for Law 4864/2021 (Government Gazette 237/A, 2021) on strategic investments, aiming at attracting investors by offering legal security and incentives.

This policy brief will attempt to shed some light upon the main features and facets of those two legislative texts. Particularly, our analysis will be swinging between two polars; *on the one hand*, the EU-led policy concern to secure essential interests within the bloc that are intertwined with security and public order; and *on the other hand*, the member states', especially Greece's, quest for FDI and the openness of their investment regimes. The paper will argue that Greece, despite its pursuit for investment and the recent legislative developments, will need to align with the European trend and pressure for an established and more coordinated FDI screening.

EU FDI screening Regulation: Conceptualizing in context

The EU, as a supranational bloc, had the highest inward stock of FDI in 2020, which amounted to 11,424 billion USD, compared to other superpowers, such as the US and China, according to OECD (2020). Interestingly enough, FDI screening laws had long remained in shadows, while almost every investment was being accepted in the European market as a confirmation that the market is competitive (Hindelang & Moberg, 2020: 838) – the EU itself was considered as one of the most open regimes for foreign investment (OECD, 2022). Nevertheless, Regulation 2019/452, which entered into force on 11 October 2020, is but the most intense proof that the direction of European investment-related policy making has undergone an unprecedented swift. As the Commission's Executive Vice-President, Valdis Dombrovskis, eloquently commented, '*[t]he EU is and will remain open to foreign investment. But this openness is not unconditional'*, claiming also that the Regulation equips properly the Union towards external threats against its collective security (European Commission, 2021a).

Notably, at the critical times of Covid-19, as early as March 2020, the European Commission communicated with the member states that they should make full use of any existing FDI screening mechanism, while it also urged the ones lacking such mechanisms to proceed with their development (European Commission, 2020). Put differently, the message was that protection of the EU internal market should be the priority, whereas the critical moments of Covid-19, and the ensuing effect on the critical healthcare products' industry, necessitated inbound FDI to undergo extensive investigation and assessment.

In fact, the Regulation's very preamble ascertained that a comprehensive framework at Union level was not in place, while the major trading partners of the Union had already developed such frameworks, as was indeed the case with the U.S. and Canada. So, the Regulation's imperative was to fill in an EU-wide legislative gap in order to catch up with EU competitors. According to the European legislators' perspective, the comparatively low restrictiveness level on foreign FDI was necessary to go up.

Pursuant to Article 1(1), the Regulation's subject matter is twofold: **a)** the establishment of framework for the screening by the member states of FDI on the grounds of security and public order; and **b)** the establishment of a mechanism for multilateral cooperation between member states and the European Commission. Expressly stipulating in Article 1(3) that '*nothing shall limit the right of each Member State to decide whether or not to screen a foreign direct investment*', the Regulation can only be understood as a product of compromise between the EU and member states – as Carcy (2021: 6) puts it, the Regulation reflects the member state's pursuit to preserve competences at national level and the Commission's target, in light of concerns for third country investors sprawling across EU, to create more integrated tools at Union level. Indeed, the Regulation does not establish a common EU framework of FDI screening, nor does it harmonize national legislations – instead, it creates a cooperation facility among member states and the Commission in the context of which exchange of information is upgraded and the possibility for making reservations is accorded.

Institutionally, however, the Commission is not granted with any power to reject or suspend investment plans. If such a power was ultimately granted, this would mean that third country FDI would be subject to a European level screening, and consequently there could have been a possibility for rejection or suspension for want of compliance with public order or security requirements at the discretion of an EU organ. The Commission was careful not to touch on national competences as is the national security (Article 4 Treaty on the EU), while it was because of that reason that critics argued that the Regulation was nothing more than a mere political declaration rather than an effective legal instrument (Gadocha, 2020: 38).

Article 4(1) of the Regulation provides for factors to be taken into consideration in order to determine whether an FDI is *likely* to affect security or public order. The factors assessed include, in particular, the potential effects that the FDI would bring about on critical infrastructure (i.e., energy, transport, health, communication, media, data processing or storage, aerospace, defense, electoral or financial infrastructure, sensitive facilities, land and real estate), on critical technology (artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, nuclear technology, nanotechnology, etc.), on the supply of critical inputs (e.g., energy, food security, etc.), on the access to sensitive information, and on the freedom and pluralism of media. The Regulation genuinely provides for broad indicative categories of kinds of infrastructure/industries/functions, which virtually include any contemporary field of public concern and interest that must be entrenched vis-à-vis private power and influence – *a fortiori*, the entrenchment is assumed necessary by the Regulation, if the entity seeking to invest therein is controlled, either directly or indirectly, by the government of a third country.

Greek Law 4864/2021 on Strategic Investments: Perspectives and policy orientation

Regulation 2019/452 paved the way – even tentatively – for tightening screening within EU. Almost a year later, Greece did not take the step to align with that trend when voting Law 4864/2021 on Strategic Investments. For the purpose of Law 4864/2021, which entered into force within the Greek jurisdiction as of 1 December 2021, *Strategic Investments* are the investments which, because of their strategic importance for the national or regional economy, may boost the employment, the productive resurrection, and the promotion of the natural and cultural environment of Greece, with respect to sustainable development (Article 2).

It is worth noting that Law 4864/2021 does not set out any nationality restriction, meaning that it may cover both European and third country investors. It classifies the investments into the five following categories: **1)** *Strategic Investments I*, **2)** *Strategic Investments II*, **3)** *Emblematic Investments of High Importance*, **4)** *Strategic Investments of Fast-track Permit Granting*, and **5)** *Strategic Investments by*

ISSN: 2732-6578 (print version) 2732-6586 (online)

default. The main factors for the classification are the total budget of the investment and the creation of Annual Employment Units (AEU).[3] For instance, the threshold budget may be €75,000,000 with not AEU needed for Strategic Investments I, or €20,000,000 along with 30 AEU created each year for Strategic Investments of Fast-track Permit Granting.[4]

Law 4864/2021 also provides for substantial incentives, such as spatial planning incentives, taxation incentives, fast permits' granting incentives, and state aid incentives (Articles 7-10). In essence, the type and pecuniary amount of incentives granted to investors is dependent on the project's classification into one of the above 1 to 5 categories.

Further, a legal framework for the assessment and screening of strategic investments is stipulated by Law 4864/2021, but no provision is inclusive of screening on the grounds of security or public order. The process kicks off by a submission of an investment plan proposal before Enterprise Greece S.A., which is the body competent for the administrative assessment of the investment's legality and expediency and the issuance of an opinion thereof. The administrative legality check mainly involves whether the proposal fulfils the criteria and documentation required by law, while the broader administrative expediency check involves the reasons why the investment should be characterized as strategic for the purposes of Greece's growth and development.

The licensing process goes on by forwarding the investment plan to the competent department of the Ministry of Development and Investments. The Inter-ministerial Committee for Strategic Investments has the final say for the integration of the proposal into the Law's scheme and the granting of incentives – its decision is issued in the Government Gazette.

The Greek investment regime's openness

Analyzing the determinants for national preferences for EU-wide FDI screening, Chan and Meunier (2021) classify Greece as a country initially opposing screening, because of its dependence on third country investment – particularly Chinese investment – as a result of its recent economic turbulence. As of 1 July 2021, Greece remains one of the 9 member states that have not yet introduced a national FDI screening mechanism. According to the Commission's Annual Report on the screening of FDI dated November 2021 (European Commission, 2021b), Greece is classified as a '*member state having initiated a consultative or legislative process expected to result in the adoption of a new mechanism*'.

[3] The AEU express the number of persons employed in a business. Anyone who worked full-time in a business, or on behalf of a business, during the reference year, is counted as one AEU.

[4] For reasons of brevity, the particular categories' characteristics are omitted but they may be found in Law 4648/2021 (Article 1).

The only legislative process made until now is that of Law 4781/2021 (Government Gazette 31/A, 2021), as amended, which *inter alia* provides that a Department for Special Investments' Attraction will be operating within the B1 Directorate for Extroversion Planning and Coordination of Extroversion Bodies of the Ministry of Foreign Affairs (Article 166). The said Department will be the Greek contact point for the implementation of Regulation 2019/452, will coordinate the checking on FDI pursuant to EU legislation, and will draft and submit with the Commission the annual report on the FDIs that took place in Greece for the determined calendar year (Article 169).

It is surprising why Greece, in the aftermath of the EU FDI Regulation's enactment, did not opt for some kind of tightened screening to be integrated into its new legal instrument for investments that came into force in December 2021. Overall, Law 4864/2021 is a contemporary legislative text that embeds dispersed provisions and reflects a high level of flexibility. Yet, by no means does the type of administrative screening of Law 4864/2021 assess the investment plan's potential effects on Greek critical infrastructure, critical technologies etc., nor does it consider such factors as the investor's direct or indirect links with third country governments. It can be said that all investment plans and proposals submitted pursuant to Law 4864/2021 will be licensed and granted facilities and incentives, provided that they get through the legality and expediency administrative checks, and there would be no legal grounds to be suspended or rejected based on security concerns. In that regard, Law 4864/2021 falls short of the notions set by Regulation 2019/452, and it depicts a member state's unequivocal – and in a way unconditional – openness to FDI.

Notwithstanding the intense desire for investment and its importance for the Greek economy (Vargiu, 2020), it is sure that Greece, as a participant country in the European project, will be under pressure in the forthcoming years to tighten its investment screening regimes for the sake of security – this would be a pan-European imperative necessitated by the rise of China and other international actors. We could expect in the future that the Commission would extend its efforts to consolidate member states' screening mechanisms – this task embeds a high level of difficulty as the Commission will need to balance between, on the one hand, national interests and national competences (i.e., security affairs), and, on the other hand, the European quest for integration and unified stance vis-à-vis third countries.

Conclusions

Law 4648/2021 inaugurated a new era for Greek strategic FDI, providing foreign investors with an invaluable legal tool for their operations in the Greek market. It is unfortunate that Greece did not align with the EU trend and selected not to develop FDI screening mechanisms in the context of Law

4648/2021 – instead, it prioritized national perspectives that require the country to absorb as much as inbound FDI as possible for its development and growth, without giving due consideration to security concerns.

Arguably, the desire for inbound FDI is not to be condemned *per se*. However, from the entry into force of Regulation 2019/452 onwards, the signal for both EU Member States and third country investors has been rendered explicit – Greece, as said, was urged by the Commission to put an end to unconditional, non-screened on security grounds, FDI, and develop a national screening mechanism. If not in strictly legally enforceable terms as the critics argue, the message was sent by the Commission at least *politically*. As said, Greece is one of the Member States that have initiated a consultative or legislative process for a new mechanism. This, of course, provides for some optimism but the recent Greek legislative practice has suggested otherwise. In view of the international developments, it is plausible to expect that Greece will ultimately align in the future with the European trend, and any new FDI legislation will be giving due consideration to security concerns.

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