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The EU Framework for the Screening of Foreign Direct Investment as a Response to the Belt and Road Initiative in the Post-COVID Era

Abstract

After the limbo caused by the COVID-19 pandemic, Chinese investments have picked up in the first quarter of 2023. Investments through China's Belt and Road Initiative are carried out by approaching potential participants individually, or via dedicated platforms outside the EU's legal and institutional framework. Thus, the EU Framework for the Screening of Foreign Direct Investment – which is likely to get its so-called "baptism of fire" after its COVID-induced hibernation – can be seen as an implicit response to said Chinese initiative. This framework should be considered a message directed simultaneously towards foreign actors, discouraging them from attempting to carry out investments in the EU with the intention of bypassing the relevant European rules, and also towards Member States, cautioning them against facilitating such operations. The author will argue that the regulatory model has too many in-built unknowns that could prevent the framework from achieving its objectives.

Keywords: Foreign Direct Investment, Security, Internal Market, EU Law, EU Interest

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Introduction – The FDI Regulation in a Post-COVID Context

The European Union (EU) strives to provide a welcoming climate for foreign direct investments (FDIs), and to capture the value-adding benefits that inward projects would bring to its economy, but despite such an absorptive stance toward foreign capital, there are the increasingly vocal concerns over certain types of investments. The argument runs that giving control of critical assets to foreigners can disrupt access to goods and services and even provide access to channels of infiltration and surveillance into critical infrastructure. Another concern is that a foreign investor may share some critical technological know-how (Das, 2017, p. 295; Zhang, Van Den Buckle, 2014, p. 159). Over recent years, industry as well as the general public have become increasingly vocal about these attempts which has contributed to the adoption of the Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (FDI Regulation, 2019). In the European Commission's (EC, the Commission) words, it will provide (among others) "a tool to protect projects and programmes which serve the Union as a whole" (FDI Regulation, 2019, recital 19).

Even a cursory look at *ratione materiae* of the FDI Regulation will reveal overlaps and potential sources of tension with China's Belt and Road Initiative (B&R). Launched with much fanfare in 2013, the Initiative is an extensive political and economic project of the People's Democratic Republic of China involving trade expansion and increasing economic ties by engaging in the construction of infrastructure projects in target countries. Following a significant fall in foreign direct investment resulting from the pandemic, the FDI Regulation was left in limbo. Now, however, despite an uncertain global situation, and after COVID restrictions were eased, China's economic activity picked up in early 2023 with a renewed wave of foreign direct investment. At the same time, a mounting wave of protectionist sentiment in Europe manifested itself through increased fears of Chinese state-sponsored economic expansion (James, 2018; Fratzscher, 2020; Babić, Dixon, 2022); a generally unfavourable reception of the B&R Initiative in Europe; attempts to develop the Union's own counter-strategy – *EU-Asia Connectivity Strategy* (2018); and, finally, an apparently indefinite pause on the EU-China Investment Agreement. When seen together, one can reasonably assume that the FDI Regulation will soon get the opportunity to receive the aforementioned baptism of fire.

In the light of these developments, in this paper, the author would like to put forward the argument that the FDI Regulation should be seen as an implicit response to the B&R Initiative (Barton, 2021, p. 1). It should be seen in the interlinked politico-legal context as a message directed, on the one hand, towards Member States to remind them about their Treaty obligations and to caution them about engaging in bilateral investment projects possibly undermining European interests, especially in the light of the apparent halt on the EU-China investment deal. On the other hand, it should also be seen as a message directed at foreign actors – both States and businesses – discouraging them from any attempts at carrying out investments in the EU's Internal Market with the intention to bypass the relevant European rules (Bismuth, 2020, p. 103). However, with the approach taken in the FDI Regulation, the implication being that it is the initial stage of the building process, a *ballon d'essai* for a broader, more comprehensive EU FDI screening mechanism, especially owing to the yet-to-be-defined concept of EU security as its substantive backbone and opinion-based model, the author will argue that the EU policymaker is trying to accomplish too many goals at once and thus may fail to achieve any of them thanks to the tools chosen to achieve them interfering with one another.

The Belt and Road Initiative as a Source of Tension With the European Union

The mentioned tension between the European acquis and the Belt and Road Initiative is evident in two interconnected aspects – those of the political and legal. These aspects revolve around the issues of what the subject of Chinese investments could be and how these investments will be carried out.

The initiative in question is currently the main area of strategic interest for China (Kowalski, 2018, p. 79; Zhang, Xu, 2016, ch. 1). Although its implementation has a checkered history, the B&R's agenda is still very much alive after the COVID-induced limbo. Its main, declared goal of facilitating trade links is supposed to be fulfilled by investments in critical transport and energy infrastructure such as roads, ports, railway lines or power plants in target countries (Zhang, Xu, 2016).

Here, security threats may arise from foreign investments that grant access to control systems of critical infrastructures, such as power generation. Simultaneously, conflicts with EU law may occur – this being the more plausible scenario – when a B&R infrastructure project, due to being established through international, bilateral agreements between

a target State and China, potentially violates preexisting EU rules, for example, those related to public procurement. Additionally, the location of a B&R project may interfere with existing or planned European infrastructures, such as trans-European networks for transport and energy (Verhoeven, 2020, p. 283).

Additionally, Chinese economic expansion often involves attempts at taking over or at least acquiring shares in businesses possessing valuable technological know-how, such as military technologies, microchips, etc. In such cases, investments may also be utilised to gain access to these technologies and transfer them to other domestic operators. The Chinese takeover of German robot maker KUKA in 2016 is considered a pivotal moment in this context (Braw, 2020). The case caused political upheaval and is cited as a *cause célèbre* by supporters of the need for preventive FDI screening mechanisms (European Parliament, 2017). It is important to note that this mode of expansion predates the B&R initiative and is only tangentially linked to it, serving as a separate component of Chinese expansion, nevertheless being relevant in this context.

The already-mentioned second aspect pertains to how Belt and Road projects are being launched. China has adopted a strategy of approaching potential European participants individually through bilateral agreements or via dedicated political platforms (such as CEEC, the so-called "16/14 + 1 Initiative"). In any case, these agreements are established outside the EU legal and institutional framework (Chaisse, 2020, p. 560). Some view this approach as one which erodes the EU's unity along the lines of a "divide and conquer" strategy (Ploberger, 2019, p. 4.3).

Based on the synoptic overview above, one can conclude that nomothetic knowledge suggests a likelihood of security threats arising from certain Chinese investments as being intuitively understood. However, to proceed with further discussion, these vague and superfluous notions need to be clarified and translated into a legal concept of security. Subsequently, a control mechanism must be developed – based on this concept – to effectively use it as a yardstick for FDI control.

FDI Regulation – An Overview

Assuming that the European Commission, acting under the FDI Regulation, finds that a foreign investment targeted at projects or programmes of Union interest constitutes a threat to public security/order, it may address an opinion to the Member States. Article 9(5) of the FDI Regulation explicitly states that „The Member States where the foreign direct investment is planned or has been completed shall take

utmost account of the Commission's opinion and provide an explanation to the Commission in case its opinion is not followed". The Explanatory Memorandum further explained that Member States „should consider ways of taking [the EC's opinion] into account whether through their domestic screening mechanism or (…) in their broader policy making" (Explanatory Memorandum, 2017).

Even a cursory look at this procedure reveals an in-built ambiguity pertaining to the impact the EC screening may have on Member States. According do Article 288(5) TFEU, opinions shall have no binding force (Treaty on the Functioning of the European Union , 2012, p. 47). Typically, EU legislators resort to non-legally-binding instruments in the absence of clear-cut, attributed competencies in the matter. But that is not the case here. Although, prior to the adoption of the FDI Regulation, the mechanisms for screening inbound investments were left to the Member States, the EU holds exclusive competence concerning foreign direct investment. This is included in the list of matters falling under the common commercial policy, as outlined in Article 207(1) TFEU. Then the following argument would deserve consideration; if the Commission finds that a foreign investment targeted at projects or programmes of Union interest constituted a threat to public security/ order, by implication, this means that a Member State had infringed the duty of loyal cooperation. According to this principle, Member States must not only effectively implement EU law, but also refrain from acting unilaterally in contravention of that law from the very moment that the EU makes a rule on an issue. For the above reasons, allowing foreign investment contrary to the EC's opinion could be easily interpreted as hampering the effective exercise of EU law in a particular policy area. As a result, the opinion could possibly trigger an infringement procedure under Article 258 TFEU.

In the light of the above overview, and in the context of this paper's research question, the following issues emerge: how should the concept of European security be fleshed out, considering that its endangerment may trigger State liability; how can the Regulation's opinion-based mechanism ensure access to judicial review; and, ultimately, how does all this translate into the act's effectiveness? These issues will be discussed in turn.

Security – A European or National Concept?

The concept of security – the primary substantive criterion in the FDI Regulation – is lexically, and rather intuitively, understood as a certain state of mind, i.e., the absence of fear (Wolfers, 1952, p. 481). Such a description

indicates a high degree of case-specificity and ambiguity which makes it difficult to forge into a legal concept – one which is definable, predictable, and repeatable. Its interpretation in EU law gleaned from the Court of Justice's (CJEU, the Court) case law present broad strokes at best. While these cases are not FDI Regulation-related (no cases yet exist), they ought to provide the closest available analogy since they deal with restrictions to free movement in the EU's Internal Market. The reason for this is that all FDIs fall under the free movement of capital that itself can be restricted on the ground of security and public order, and the security criterion under the FDI Regulation is formally anchored in free movement rules thus modelled after the corresponding Treaty provision (Hindelang, 2009, p. 81).

As an exception, *ordre public* criterion must be interpreted restrictively (Jäger, 2008; Arens-Sikken, 2008). It means, firstly, that a derogation measure is not permitted if there are less intrusive remedies available (Albore, 2008; Reisch, 2002). Secondly, it means that a threat must be real and tangible (Hindelang, 2009, p. 253; Jipa, 2008), and must be corroborated by facts or circumstances. Consequently, a system of prior authorisation for FDIs which confines itself to defining, in general terms, the affected investments as representing a threat to public policy and public security, with the result that the persons concerned are unable to ascertain the specific circumstances in which prior authorisation is required is not permissible under Article 65(1)(b) TFEU – the Treaty provision governing investments (Scientologie, 2000). In other words, a mere statement by the Member State that a given investment may pose a risk to security is insufficient to invoke this exception.

Overall, all these permissible *ordre public* justifications share a common denominator, which may be summarised as the objective of ensuring continuity in public services and safeguarding the functioning of a State's institutions (Barnard, 2016, p. 546). Notably, in a series of cases, the Court held that a measure essentially allowing the authorities to oppose any significant investment into certain predesignated strategic companies by requiring prior authorisation before an individual was entitled to hold share capital exceeding a specific ceiling is, in principle, justifiable under the security exception (Golden Shares I, 2002; Golden Shares II, 2002; Golden Shares III, 2002; Golden Shares IV, 2003).

Although national measures restricting free movement must be seen and assessed in the European context, the *raison d'être* for these restrictions originate entirely from domestic policies (Scientologie, 2000). That is to say, measures are taken in response to threats to national interests. Conversely, scrutiny carried out under the FDI Regulation seeks to

counteract threats to "projects and programmes of Union interest" on the grounds of security or public order (FDI Regulation, 2019, recital 19). Such a *ratio legis* poses a problem, because despite the fact that *ordre public* criterion appear in the text of the Treaty, the Union's public security does not exist as a self-standing category, detached from its counterparts in Member States (Van Duyn, 1974). It is merely an amalgamation of various national security-related justifications. The FDI Regulation's *ratione materiae* necessitate a possible re-evaluation of this position by exploring the question of whether a particular instance of foreign investment can negatively affect the Union's interests without causing any marked detrimental effects on the Member States. Otherwise if there was a threat, domestic authorities would block said investment on the grounds of their national policy.

In principle, even assuming that an investment project could be contrary to EU interests, the principle of loyal cooperation should have precluded the Member States from pursuing that course of action (Klamert, 2014, p. 71 et seq. and the cases cited therein). In practice, it hinges on the premise that authorities are able to *ex ante* ascertain and identify infringing activity with reasonable certainty. A straightforward task, as long as either the substantial criterion is clearly defined or when CJEU case law is capable of providing sufficient guidance. None of these conditions are met for the EU security criterion. The lack of intentional wrongdoing is not a valid defence, but then an infringement would be addressed at a later stage through Article 258 TFEU's procedure at which point the harm from an FDI would possibly have been done already (Tachographs, 1979; Spanish Strawberries, 1997).

If the States had not seen the need to block an investment on domestic policy grounds, then the very existence of the FDI Regulation leads to the conclusion that the EU's public security must be independent from that of its Member States. Although the concept remains ill-defined, without it one could question the very *rationale* of the FDI Regulation. Such „Europeanised" security is indispensable to the regulation's applicability because the act at issue essentially reversed the paradigm of control over national measures restricting the Internal Market's freedoms; typically, the Commission cannot challenge the Member States' decision not to invoke the exception, whereas, under the FDI Regulation, the assessment seeks to establish whether these exceptions should apply (assuming this exception is not enshrined in EU Law).

The regulation in question can therefore be viewed as an attempt to introduce a new concept of „EU security" in relation to „projects and programmes of Union interest". There is no interpretive precedent to rely

on, and in any case, an attempt to create *in abstracto* one-size-fits-all sets of exhaustive criteria, given the multitude of possible scenarios whereby each sector and each type of investment poses unique risks, seems futile. Vague, open-ended notions such as security will remain indefinable in absolute terms, thus the understanding must inevitably, and to a large degree, depend upon judicial acquis (Engberg, 2016). It takes time to develop. In this context, the FDI Regulation's role may arguably be to flesh out this so-far-undefined notion of the EU security by acting as a „trip wire" for the Member States, providing a warning before they commit themselves to navigating a course contrary to that of European interests. While it goes without saying, in the interim, legal certainty will likely be adversely affected before the concept is sufficiently elucidated, but this may explain why the EU legislator has opted for a light-handed, opinion-based model; it should allow for the smoother development of case law as opposed to interpretations issued through infringement proceedings under Article 258 TFEU.

Yet a cautionary note must be sounded about adequacy of the aforementioned approach. Firstly, if experiences with national screening mechanisms (around half of the Member States have one) is any indication, then one may venture an educated guess that FDI Regulation case-law will not be extensive. Secondly, it remains unclear the degree to which the EC's opinion indicating a threat to the EU security will be followed – they are formally non-binding – and whether the Commission will pursue any action for infringement for acting against the EU's interests when said opinion is disregarded. This latter point will be further elaborated upon.

Operationalising European Security

Attempts to operationalise (or rather decode) the concept of the EU security, drawing from existing case-law and available documents, in such a way that they fit the FDI Regulation's *ratio legis*, necessitate addressing the salient points given below.

The key objectives the Commission aims to implement through the FDI Regulation has been described in the associated Explanatory Memorandum as protecting critical technologies in response to "concerns about foreign investors, notably state-owned enterprises, taking over European companies with key technologies for strategic reasons" (the associated Explanatory Memorandum is silent on what "critical technologies" entail. However, the FDI Regulation itself, in Article 4(1)(b), contains a reference to Council Regulation (EC) No 428/2009 of 5th May 2009, setting up a Community regime for the control of exports,

transfer, brokering, and the transit of dual-use items, Official Journal L134, 29 May 2009, p. 1; the regulation non-exhaustively lists the following critical technologies: artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies, as well as nanotechnologies and biotechnologies.).

This brings up the question of whether relinquishing some key technologies would adversely affect the Union's interests but on the specific ground of security and/or public order. On the one hand, it can be convincingly argued that having access to some, for instance, defence-related or dual-use technologies or access to control systems for critical infrastructure could indeed compromise European security. A separate issue is what causal connection between technology and security is required, but, generally speaking, this line of reasoning is defensible. On the other hand, however, the more plausible scenario involves technologies that affect the business capabilities of companies, which in turn translate into a competitive advantage. According to this competition-oriented view of the EU's interests, the requirement of being „on the grounds of security" – when taken literally – appears not to be satisfied.

In furtherance of the above, the scope of security with regard to infrastructure investments and „projects and programmes of Union interest" – the two protected categories under the FDI Regulation – also raise interpretive questions [FDI Regulation, 2019, Art. 8(3)]. At some level of generality, one could convincingly argue that „typical" investments carried out under the B&R Initiative – road and rail infrastructure, electricity grids, and power plants – have a prominent security dimension to cyber threats, surveillance, and so on. However, it does not necessarily mean that a particular project poses any sort of security risk. Consider the following situation; a foreign investor is participating in an infrastructure project acting as a prime contractor. It does not pose any apparent security risks owing to the nature of involvement and subsequent operations arrangements – for instance, the building of a port's pier or a segment of a highway – but that project (primarily due to its location) interferes with one of the European networks' programmes – TEN-T, TEN-E etc. Under the principle of loyal cooperation, Member States should refrain from any measure which could jeopardise the attainment of the Union's objectives so such a project should have never been allowed to go ahead regardless of the FDI Regulation which would have been *prima facie* inapplicable due to the lack of security-related concerns [FDI Regulation, 2019, Art. 8(1)]. However, the mere fact that a project of this nature could, in principle, pose a security risk, compounded with the blurred notion of security, means that it is relatively easy to justify preventive control of practically

every project which overlaps with any of the EU's policies instead of *ex post* through infringement proceeding which lends some credence to its role as a „trip wire" as referred to earlier.

Underlying all these considerations is the question – asked previously in an exclusively national context – of whether there exists a clear-cut and easily distinguishable security criterion *per se* or whether, under this label, restrictions can be imposed in order to protect some other legitimate interests. Although non-security-related public interest may constitute a valid, objective justification – in a general sense – rules governing the permissible restrictions on the freedoms of the Internal Market, when read literally, do not provide legal grounds for an open-ended "rule of reason-like" exceptions (Hindelang, 2009, p. 255). In practice, however, under the case law stemming from the landmark *Cassis de Dijon* case (introducing the so-called „mandatory requirements"), it is submitted that that exceptions to free movement provisions are not limited to those expressly mentioned in the Treaties (Cassis de Dijon, 1979). As a result, the public security/public policy criterion allows a high degree of interpretative flexibility (Barnard, 2016, pp. 159–160).

Due to the lack of dedicated case-law, one can only speculate as to whether the same interpretive approach will be adopted in FDI Regulation cases. One may lean toward an affirmative answer. Firstly, foreign direct investments fall within the scope of the TFEU provisions on the free movement of capital. Secondly, the so-called „mandatory requirements" evoked by the Court are well established in the case law of the Internal Market. And thirdly, there are no objective, factual grounds on which a different approach under the FDI Regulation as compared to other areas with the ambit of the Internal Market's freedoms, especially with regard to other FDIs before the regulation came into force, could be justified.

Access to Judicial Review

All of these questions about the scope of security criterion under the FDI Regulation are compounded by the opinion-based model adopted by the EU legislator which simultaneously waters down the States' obligations and impede parties' (investors and investees) access to courts should an investment become blocked. Referring to the hypothesis set out earlier, the author would argue that a choice for this specific regulatory setup should be viewed as an unsuccessful (if not downright self-defeating) attempt at conveying a message to both the Member States as well as to foreign investors.

Formally speaking, even though the FDI Regulation stipulates that "The Member State should take utmost account of the opinion received from the Commission", according to Article 288 TFEU, opinions have no binding force. "The Member State" is thus under no obligation to block an investment despite the EC's opinion and also given that the FDI Regulation explicitly states that it should be applied "without prejudice to sole responsibility of Member States for safeguarding their national security" (FDI Regulation, 2019, recital 19).

However, this does not preclude the possibility of starting an infringement proceeding under Article 258 TFEU; since FDIs remain a part of the exclusive EU common commercial policy, then under the non-derogable principle of loyal cooperation, Member States must refrain from any action which is contrary to the interests of the Union (Centro-Com, 1997). According to well-established case-law, the Member State's ability to take final decisions on FDIs provided for in secondary legislation should not be construed as precluding any review, especially through the lens of general principles (Watts, 2006; FKP Scorpio, 2006). Consequently, an infringement action could be launched not for disregarding the EC's opinion, but for hindering the attainment of the objectives of the EU despite being given a warning in the form of said opinion.

Assuming the Commission can indeed credibly threaten the Member States with being taken to Court on the basis of Article 258 TFEU, then that must mean that the notion of security is interpreted in a flexible, mandatory requirement-type manner with greater emphasis on EU interests. Otherwise, an action based purely on a narrow, literal interpretation of security would be inadmissible, or unwinnable, since it has been mentioned that the Member States retain the final say over their national security. All these factors provide some justification for a tentative conclusion that one of the FDI Regulation's roles, though not explicitly stated, is to convey a message of caution and serve as a „trip wire" to the Member States about entering into bilateral investment projects outside the Union's framework since all of them could ultimately lead to Article 258 TFEU action.

As regards to a message directed towards foreign countries and businesses, an onerous and potentially ineffective path to judicial review, could be seen in this context. Opinions are unchallengeable through action for annulment brought under Article 263 TFEU. Should a Member State then act upon the Commission's opinion and block an FDI, then, by implication, recourse should be sought from national courts. This presents the following problems; assuming domestic courts deemed

themselves competent to review whatever national legislation has been adopted to block an FDI following the EC's opinion, this, by implication, would lead to an indirect legality review of the opinion at issue and these courts would de facto decide what constitutes the EU's interests with regards to security and „projects and programmes of Union interest". At that point, the subsequent applicability of Article 258 TFEU is unlikely but not totally excluded. Alternatively, a declaration of inadmissibility by a national court may violate the right of access to judicial protection, because, at the same time, the EC's opinions are directly unchallengeable at the EU level.

These controversies could, in principle, be avoided through the Preliminary Question procedure before they become contentious issues (Foto-Frost, 1987). Alternatively, a national court may request the Commission to indirectly participate in the proceedings, by way of providing „evidence and information" (Eurobolt, 2019). Such a request should, ideally, complement the Preliminary Question, and at the very least could provide a somewhat viable alternative if the Article 267 TFEU route is not used. However, in practice, national courts enjoy considerable discretion in their decision regarding whether or not to refer a case to the CJEU even if, in principle, they should do so. This is further compounded by the observable tendency to frame cases pending before the courts of Member States as one of national law – purely domestic – so these courts traverse familiar terrain (Jakab, Kochenov, 2017, p. 44). Since the EC's opinion is not legally binding, meaning there is no formal implementation, a national act blocking FDI in response to that opinion would have to have a separate legal basis in a domestic act, so an argument for a non-EU case – which would settle the preliminary question issue – is somewhat defensible. Even though the opposite view is much more justifiable, it creates just enough doubt as to whether the case is predominately domestic or whether EU law is mostly at issue, so Article 267 TFEU cannot fully be relied upon.

Conclusions – Known Unknowns

If one were to view the FDI Regulation in the context of a Chinese investment push exemplified by the B&R Initiative, as a message both *in foro interno* and *in foro externo,* then the choice of an opinion-based regulatory model is the primary source of problems affecting all other functional characteristics of the regulation in question.

It can be somewhat explained primarily by the vague nature of the notion of security, in its Union aspect, constituting the main substantive

criterion. But it's not entirely justified since the EU has competencies to regulate the matter through so-called „hard-law". The framework could have been decision-based (within the meaning of Article 288 TFEU). Of course, it can be argued that this particular model has also been selected to accommodate domestic political considerations, essentially to ameliorate concerns over intervening too deeply in the Member States' legal orders. However, if this factor were indeed to be decisive as regards the area which falls within the exclusive competence of the Union, then it would be better to dispense with this framework altogether.

Ambiguous criteria such as security will always remain open to varying interpretations coloured by political motivations. The questions of whether the new regulation may in fact serve to hide protectionist intentions indicative of mounting economic nationalism in Europe are unavoidable, regardless of actual intentions. The choice of regulatory model will not change that because underlying calculations follow a political logic whereby the adoption of such a framework restricting inward investment flow FDIs is a signal by itself for any investment-oriented countries. In the politicised world of international trade, a regulation like this must always be viewed through a political lens. So, the question is not whether it sends a signal to potential investors, but what that message may actually be.

In this context, the only thing that this opinion-based model does is to add uncertainty to the EU's policy. Because while the framework in question can potentially be used to effectively block almost every investment and includes an indirect threat of resorting to Article 258 TFEU against the Member States, its regulatory thrust – the message it means to convey – becomes essentially blunted since its ultimate effectiveness depends on too many unknowns; firstly, how security will be interpreted, secondly, how Member States and national courts would approach the EC's opinion, thirdly, how militant the EC's approach would be in pursuing infringement action once its opinion gets disregarded, and fourthly, the fact that its ultimate effectiveness depends on what stance the Court would take during such infringement proceedings.

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