ECONOMIC AND LEGAL REGULATION OF COMPETITION: THE EUROPEAN COUNTRIES EXPERIENCE

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Abstract: The research aims to reveal the relationship between the investment flows from major partners (the United States and China) and the indicators of competition regulation in EU countries (as in the case of France and Germany, where the need to protect national markets is advocated) at the international level in the context of geopolitical issues. The research identifies a non–linear relationship between the PMR 2018 score and Inward FDI, indicating differences between countries in terms of competition regulation impact on FDI attraction. According to the level of competition regulation impact, three groups of countries have been distinguished: 1) countries where competition regulation has an adverse impact on attracting FDI; (2) countries where competition management has minor impact on attracting FDI; (3) countries where competition regulation affects FDI.

Keywords: competition regulation, competition law, geopoliticization, digitalization, product market regulation in the EU.

1 Introduction

Economic digitalization, geopoliticization of EU investment and trade policies (e.g. The securitization of foreign direct investment in China), and the need to support European industry have necessitated a transformation of competition policy. The transformation envisages the modernization of the legislative framework, meaning political and economic factors affect the legal and, as a result, competition regulation mechanisms of European countries. An example of this causal relationships is the adoption of a European FDI screening framework in 2019 aimed at the FDI strong verification, the protection of European assets and collective security (European Commission, 2019). The significant impact of foreign investors on the EU economy via inflow and control of the high–tech sectors of European enterprises required an upgrade of the legislative framework for competition regulation. For instance, Chinese firms' investment inflows jeopardised European companies, since one of the rules for financing is the transfer of technology and production methods to Chinese investor companies. The government aid to Chinese companies operating in the European Single Market reinforces the issue of competition regulation and protection of European companies, becoming a geopolitical issue. The next problem for the EU is the influence of such technology giants as the US and China and the need to develop competition law in the field of information and communication technologies to mitigate the risks of technological expansion by the developed world leaders. Above mentioned represents the relevance of assessing the relationship between legal, economic factors and competition regulation in Europe.

The purpose of the article is to measure the relationship between competition regulation and legal, economic factors affecting the European countries' competitive environment.

2 Literature review

Legal factors of competition regulation
The nature of the legal system determines the EU competition law (Hefti, 1993), which is relatively young and has started development with the Treaty on the Functioning of the European Union ("TFEU"). The legal framework of EU competition regulation has been formed since the beginning of the unification of the EU member states and the establishment of a single market, strengthening institutions and harmonizing legislation (Hefti, 1993; Wise, 2007).

Characteristics of competition law in Europe are: 1) regulation of vertical competition mechanisms; (2) Articles 81 and 82 of the EU Treaty address provisions aimed at ensuring private business reputation and non–discrimination; 3) the constant interest of state authorities to preserve rivalry while protecting companies from intensive competition.

In his book, Nazzini (2011) examines the normative theory of competition law, distinguishing the vagueness of the competition concept, whose rules are based on the prevention, restriction or "distortion" of competition, and abuse of dominant position. The meaning of these concepts varies depending on the political and economic environment. Therefore, competition law can be used to pursue various objectives. Geradin & Petit (2010) claim the use of conservative approach to Article 102 of the Treaty on the Functioning of the European Union (General Court, "GC"), which indicates the lack of modernisation, development of regulatory standards for competition regulation in the EU. The essence of the problem is that a firm with a dominant position cannot overturn the European Commission's decision to admit the abuse of this position, and the European Commission is entitled to decide whether the conduct of firm violates Article 102 TFEU. Therefore, barriers to economic growth–oriented reforms can arise. Kadar (2015) points out that competition law cannot solve all the issues in various markets. However, legislation is an effective tool to combat distortion of competition for market power (Zapara et al., 2021; Marchenko et al., 2021). The current legal framework is flexible enough for the European Commission to intervene and eliminate abuse.

Economic factors of competition regulation
The establishment of a common market for trade and economic purposes is a prerequisite for the formation of competition law within the EU (Gifford & Kudrle, 2003). Individual countries have a significant impact on competition policy and control the EU's central management structures, which limits the development of the legal framework. Nevertheless, supranational institutions make the most significant decisions in EU competition policy (McGowan & Wilks, 1995).

Since the beginning of the 21st century, due to the development of democracy and the free market, EU competition policy has been implemented through the operation of an extensive network of national authorities (Wise, 2007). In 2001, the EU's competition policy aimed to protect the consumer welfare (Gifford & Kudrle, 2003). Yet in literature, such goal is considered vague, sufficiently general and abstract, leading to the development of competition law (Odudu, 2010). Cengiz (2016) notes the absence of citizen participation in competition policy with a specific objective of "consumer welfare", which exacerbates the problematic legitimacy of EU competitive law.
Traditionally, the EU develops market competition by providing government aid and foreign subsidies (Meunier & Mickus, 2020). However, amidst the pandemic, the EU policy is changing (Denysov et al., 2021). The UK's exit from the EU, the digitisation of the global economy (Preta, 2018) and the geopoliticisation of competition regulation have reinforced transformational change (Meunier, 2019). Under the new socio–economic conditions, member states should aim for protection of national industries in the domestic market by strengthening the supranational legislative framework. Nevertheless, discussions between EU member states (in particular France, Germany, Poland) concern only certain aspects of competition law, in particular horizontal merger policy, BigTech issues and industry. The main objectives of a potentially new competition policy are to overcome foreign competitors – state–owned industrial companies in other countries; to support the regulation of large technology companies (Heim, 2019).

Thus, legal and economic factors of competition regulation have been discussed in the academic literature since the establishment of the EU: the impact of the EU legal system on competition law, characteristics of European competition law, the objectives and

approaches to competition policy, the need to modernise the law through new challenges (digitalization, geopoliticization), formation of a common market, democratization, consumer welfare as economic factors of the need to regulate competition. However, there is an absence of quantitative research on the relationship between current legal and economic factors and competition policy, which guarantees market regulation within the EU. Therefore, this study aims to reveal the relationship between the investment flows into the EU from major partners (the United States and China) and the competition regulation indicators of EU countries (such as France and Germany, which advocate the protection of national markets) at the international level in the context of geopolitical issues.

3 Materials and research methods

The Product Market Regulation (PMR) framework of indicators has been used in the research to evaluate the level of competition regulation in national markets. Indicators on the level of market competition and government regulation are collected through the OECD 2018 PMR questionnaire (2018A). The questionnaire includes over 1,000 questions on economy–wide or industry–specific regulatory provisions. The information collected through the questionnaire is assessed and aggregated into the PMR indicators according to 2018 Economy–wide PMR schemata and the sector PMR schemata.

The OECD's Product Market Regulation (PMR) indicators allow for benchmarking and measuring the promotion or retardation of competition through legislation and policies in goods and services markets. These indicators assess the de jure regulatory environment in 34 OECD countries and a number of non OECD countries in 2018. The general economic indicators include the level of state intervention in market regulation, provide an opportunity to reveal the causes of competition 'distortion' and the level of barriers to entry, expansion of domestic and foreign firms in different economic sectors.

The questionnaire results enable the assessment of the product market regulation level in different countries in the three sectorssuch as energy, transport and E–Communications (Figure 1). In each sector, the legal framework regulates certain aspects (entry, vertical integration, retail prices, foreign entry, public ownership).

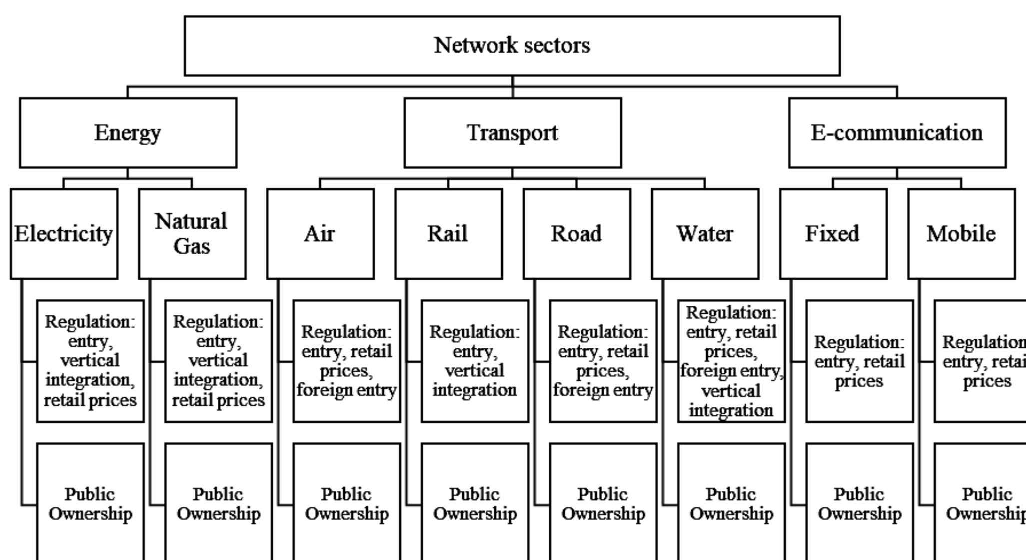

Figure 1 – The tree structure of the new PMR Network Sectors indicators

Source: OECD (2018b)

Results

Legal factors of European competition management

The formation of the EU Common Market required the development of a legislative framework to regulate competition, in particular the adoption of White Paper on Modernisation of the Rules Implementing Articles 101 and 102 TFEU and a new enforcement regulation. On 30 March 2004 the Commission finalized the modernization package of notices and guidelines aimed at clarifying the application of Article 101 TFEU (European Commission, 2004). Union competition law has been subject to an extensive reform process that transformed the enforcement of rules against anticompetitive mergers (EU Merger Regulation No.139/2004), anticompetitive agreements (Art. 101 Treaty on the Functioning of the European Union, hereinafter 'TFEU') and abuse of dominance (Art. 102 TFEU). The policy objective in this extensive reform process was to protect 'consumer welfare'. The European Commission, the pioneer of the reform process, relied primarily on soft multi–level governance1 methods in the reform process, including coalition building with the epistemic community2 and network governance.

Therefore, the European Competition Network (ECN) was established in 2004. This network has been jointly formulated by the national competition authorities of the EU Member States and the European Commission on the provisions of EU Council Regulation No 1/2003. The ECN is a forum for discussion and close collaboration in the application and enforcement of Articles 101 and and 102 of the TFEU. The ECN aims to ensure consistent application of EU competition rules. Furthermore, it provides means for the European competition authorities to share experience, discuss competition–connected topics, and distinguish best practices. On 9 February 2009 the European Commission formally adopted Guidance on the enforcement priorities in applying Article 102 TFEU (European Commission, 2009).

Article 102 of the TFEU prohibits the abuse of a dominant market position by undertakings as incompatible with the internal market through its potential impact on trade between countries. Such abuse may consist in (Consolidated version of the Treaty on the Functioning of the European Union):

1. Imposing unfair purchase or selling prices directly or indirectly or other unfair trading conditions;
2. Limiting production, technical development or markets to the prejudice of consumers;
3. Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
4. Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which have no connection with the subject of the contract.

Economic factors of competition regulation in Europe

Germany and France were selected to evaluate the economic factors of competition regulation. The total PMR in 2018 was 1.08 and 1.57 respectively (Figure 2). Compared to France, Germany regulates the competitive market environment less markedly: all competition regulation sub–indicators have lower values (Figure 1). The state ownership regulation, in particular the scope of enterprises' regulation, state embeddedness in network structures, direct management, public enterprise management, is less regulated in Germany with corresponding indicator values of 2.98 in France and 2.15 in Germany.

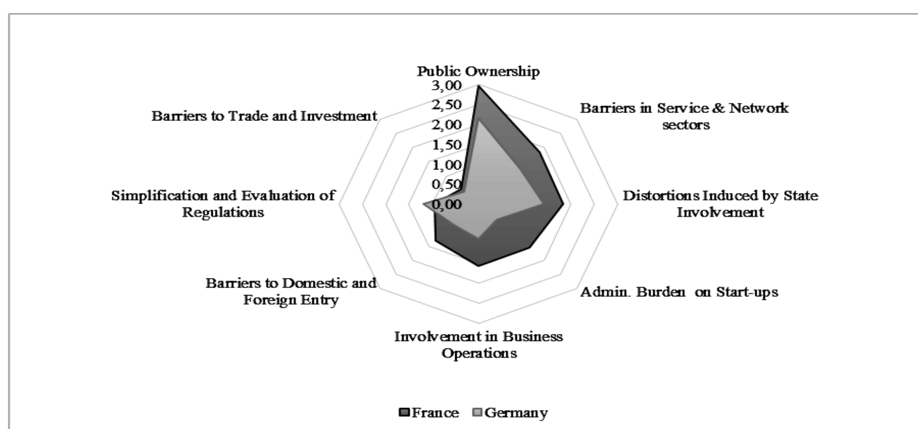

Figure 2 – The value of PMR sub-indicators in France and Germany in 2018

Source: OECD Stat (2021).

Barriers to entry in service industry and network economic sectors are estimated at 1.85 and 1.26, respectively. Specifically, this sub–indicator measures Barriers in Services sectors (2.70 and 1.66 respectively) and Barriers in Network sectors (1.01 and 0.87 respectively). The competition distortion caused by government intervention is more obvious in France with a score of 1.83, while in Germany the score is 1.41. The level of administrative workload on start–ups is 1.56 and 0.56 respectively, in particular administration requirements for Limited Liability Companies and personally–owned enterprises–1.13 and 1.13; licenses and permits–2.00 and 0.00, respectively. Estimates of participation in business operations of companies (business activities) are 1.56 and 0.87, respectively. In particular, government participation is evident in Price controls (1.39 and 0.27), Command & Control regulation (1.41 and 1.59), and Public procurement (1.88 and 0.75). Barriers to internal and external market entry also differ between countries; France has larger barriers to entry (1.32), while in Germany they are insignificant (0.76). Simplification and evaluation of rules is more evident in Germany – the indicator is 1.2, while in France it is 0.96. Specifically, this sub–indicator is expressed in the assessment of impact on competition (0.75 and 0.75), interaction with interest groups (0.95 and 2.36) and complexity of regulatory procedures (1.17 and 0.50). In other words, France has a higher complexity of procedures whereas Germany has a higher level of interaction with stakeholders. The countries' barriers to trade and investment are almost equal (0.54 and 0.44, respectively). The sub–indicator includes the following indicators: barriers to FDI (0.27; 0.14) tariff barriers (0.00; 0.00), barriers to foreign suppliers (1.14; 1.00) barriers to trade facilitation (0.74; 0.62).

Inward FDI financial flows in Germany as a whole fell by 117% over 2010–2019 with some growth in 2017–2018 (Table 1), also due to a 29% decline in FDI from Europe on average over the period under study. Compared to France, however, German FDI is significantly higher in volume. China's share of FDI is only 1–3% on average over the years 2010–2019 (Table 2), whereas the EU–27 share of FDI is 87% and that of the USA 8%. Figure 2 – The value of PMR sub–indicators in France and Germany in 2018.

Table 1 – Germany Inward FDI statistics by partner country group, billion dollars

Count–ries	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Growth rate, %
FDI financial flows – Total											
World	65,6	67,6	28,2	12,8	–3,2	30,5	15,6	60,2	73,5	57,8	– 117%
US	9,3	9,0	10,3	11,4	4,3	1,8	0,0	23,5	– 3,9	10,7	7614%
EU–27	41,4	39,4	6,6	–9,1	–14,3	29,5	7,1	26,7	65,7	42,8	–29%
China	0,5	0,5	1,2	2,5	2,0	0,1	0,5	0,0	0,0	1,4	1061%
US share	14%	13%	37%	90%	–134%	6%	0%	39%	–5%	19%	–
EU–27 share	63%	58%	24%	–71%	447%	97%	45%	44%	89%	74%	–
China share	1%	1%	4%	20%	–64%	0%	3%	0%	0%	3%	–

Source: OECD Stat (2021).

In France as a whole, FDI from the rest of the world increased by 189%, with the US FDI decreasing by 8%, China's – by 230% and the FDI of 27 EU countries rising by 54%. The share of the US FDI in France averaged 7.8% from 2010 to 2019, Chinese FDI 0.2% and the EU-27 share of FDI was 78.5%.

Table 2 – France Inward FDI statistics by partner country group, billion dollars

Countries	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Growth rate, %
FDI financial flows - Total											
World	13,9	31,7	16,1	34,3	2,7	45,4	23,1	24,8	38,2	34,0	189%
US	5,2	–2,1	4,3	8,2	1,4	–6,8	–7,9	–0,6	–8,1	6,2	–8%
China	0,0	0,1	0,1	0,4	–0,1	0,6	0,2	0,1	–0,6	0,3	–230%
EU–27	4,8	23,4	20,0	17,3	9,4	23,7	25,6	24,0	40,8	19,1	54%
US	37%	–7%	27%	24%	51%	–15%	–34%	–2%	–21%	18%	–
China	0%	0%	1%	1%	–3%	1%	1%	1%	–1%	1%	–
EU–27	35%	74%	125%	51%	352%	52%	111%	97%	107%	56%	–

Source: OECD Stat (2021).

The dynamics of FDI in France and Germany suggests a correlation between barriers to trade and investment and foreign investment. Figure 2 illustrates the non–linear relationship between the PMR 2018 score and Inward FDI, indicating that there are differences between countries in the level of competition regulation impact on FDI attraction. Figure 3 clearly identifies three groups of countries according to the level of regulatory instruments impact: 1) countries where competition regulation has an adverse impact on attracting FDI; 2) countries where competition regulation has minor impact on attracting FDI; 3) countries where competition regulation affects FDI (Figure 3).

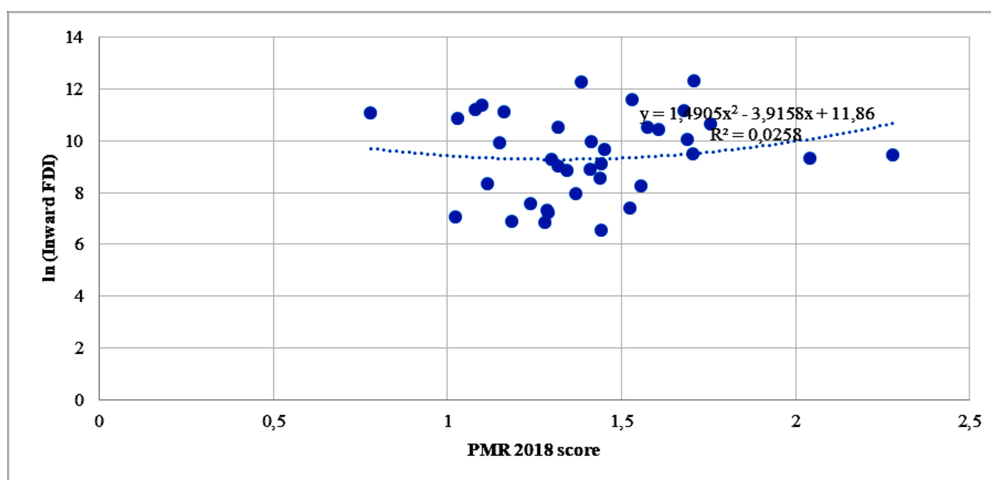

Figure 3 – Relationship between PMR 2018 score indicator and Inward FDI (based on OECD countries 2018 data)

Source: calculated by the author.

The correlation matrix for the relationship direction between FDI and FDI barriers indicates a strong direct relationship between FDI financial flows and attitudes towards foreign investors (0.277) (Table 3). Between other indicators of competition regulation and FDI exists an insignificant direct relationship (between FDI barriers and flows – 0.042; between tariff barriers and FDI – 0.048; between trade barriers and FDI – 0.04).

Table 3 – Correlation matrix between Inward FDI financial flows and sub–indicators of barriers to trade and FDI

Years	*PMR 2018*	*ln (Inward FDI)*	*Barriers to FDI*	*Tariff Barriers*	*Treatment of Foreign Suppliers*	*Barriers to Trade Facilitation*
PMR 2018	1,000					
ln (Inward FDI)	0,101	1,000				
Barriers to FDI	0,165	0,042	1,000			
Tariff Barriers	0,265	0,048	0,357	1,000		
Treatment of Foreign Suppliers	0,627	0,277	0,360	0,500	1,000	
Barriers to Trade Facilitation	0,395	0,040	0,389	0,389	0,603	1,000

Source: calculated by the author.

5 Discussion

Over the past decade (2010–2019), EU countries have strengthened national FDI screening mechanisms, in particular through the adoption of the European FDI screening framework in 2019. In accordance with Chan & Meunier's (2021) research on options for establishing a FDI screening system in Europe shows that, countries with higher technological development are more conducive to FDI screening due to the risk of technology transfer. Chan & Meunier (2021) have also detected no correlation between the overall amount of Chinese FDI and the particularity of FDI screening mechanisms. Countries with high levels of Chinese investment in European national strategic sectors are more likely to support screening and verification, while countries with a high level of Chinese FDI in low–tech sectors tend to be against FDI screening.

Chan & Meunier (2021) have also identified a correlation between technology intensity and China's FDI to the EU countries and Member States' support for the FDI screening mechanism: the value–added percent increase of the economy, production and export technology sectors is correlated with the support level for the investment screening mechanism (correlation 0.69). According to the data of the World Bank, Germany's share of high–tech exports to the EU accounts for 28% in 2020 (2010–2020 average of 31%) and France – for 14% in 2020 (2010–2020 average of 17%) (World Bank, 2021).

These EU countries take the lead in supporting the protection of national security and economy, and promote the investment screening mechanism.

Long before the EU began to develop a legal framework in 2017, individual EU Member States had national FDI verification. Countries differ in the verification procedures: voluntary or mandatory, wide economic coverage or specific sectors, ex ante or ex post (Grieger, 2017). France and Germany, with the support of the European Commission, have contributed to the supranational institutionalization of the investment verification mechanism. due to France's long history of dealing with problems related to foreign investor financing of national companies ("Disneyfication", "Cocacolonization", etc.). The reason for strengthening the country's FDI screening mechanism is the political dispute with the United States over the development of the technology and ICT sectors.

Since China's share of FDI in France is also high (China is the fourth largest investor in the French economy), the government is again tightening the screening rules and procedures. According to this research, the level of competition regulation in France and Germany is generally decreasing in the different network sectors (Table 4). However, the regulatory mechanisms in France are generally stricter, especially in the transport and energy fields.

Table 4 – Regulation in network sectors (energy, transport and communications) in France and Germany 1975–2018 (based on PMR methodology for regulation competition evaluation)

Years	Total Network Sectors	Total Energy	Ecommu–nications	Total Transport
France				
1975–1998	5,162	4,973	5,578	5,150
1999–2010	2,767	3,136	1,646	2,894
2010–2018	2,049	1,838	1,075	2,514
Germany				
1975–1997	4,803	3,473	5,279	5,530
1998–2010	1,513	0,976	1,125	2,001
2010–2018	1,103	0,533	0,852	1,566

Source: OECD (2018b).

France is tightening FDI screening rules to cope with the rise of Chinese investment in 2015–2017, which caused a decline in 2018, particularly in the cybersecurity and artificial intelligence sectors. The main reason for strengthening the verification mechanism is the absence of investment effect and the transfer of production technology from Europe to China (Fouquet et al., 2018).

Germany has been China's major FDI partner, especially in 2016, in 2019 with investments reaching $1.4 billion, which has led to government anxiousness about technology transfer and the use of domestic high–tech companies as a source of China's production technology. The country has therefore supported France in strengthening competition regulation and promoting the European investor selection system (Chazan, 2018). By the middle of the first decade of the 21st century (up to 2010), Chinese FDI had grown rapidly, in particular, as demonstrated in this research, due to the reduction in competition regulation (Table 4). Investment has contributed to Germany's economic growth driven by synergy between the Chinese and German economies, and China's investment in small and medium–sized enterprises. In 2016, however, there has been an acquisition of the German company Kuka for $4.5 billion by a Chinese investor (appliances manufacturing company Medea). The German government did not cancel the acquisition transaction. However, this has resulted in rising anxiousness in the country about purchasing technology to strengthen Chinese business operations (Tsang, 2016).

The Ministry of Economy, in particular, debated the national security issue, which prompted an attempt to obtain guarantees to protect Kuka's intellectual property rights. In 2016, the Chinese company Fujian Grand Chip attempted to acquire the German chipmaker Aixtron. However, the U.S. authorities have blocked the deal in the CFIUS process because Aixtron was managing a U.S. subsidiary. These two cases show the transcendence of national economic security concerns in certain industries and the need to regulate competition internationally. In addition, these security issues also affect the relationship between Europe and the United States, the largest investor in the EU. Several other acquisitions of German companies in high–tech sectors by Chinese investors have been exposed in connection with the Kuka and Aixtron acquisitions. Along with France, Germany has tightened investment screening procedures. In particular, the board is authorized to block foreign investment in critical infrastructure where transactions exceed 25% foreign participation. For instance, in the energy and transport sector, Germany's level of competition regulation has increased from 1.09 in 2017 to 1.56 in 2018 and from 1.11 in 2017 to 1.65 in 2018 (OECD, 2018b).

6 Conclusion

The research proves that due to the investment of the United States and China in the French and German economies, it is necessary to establish an FDI verification mechanism. Compared with France, Germany regulates the competitive market environment less markedly. From 2010 to 2019, China's FDI share in Germany averaged 1–3%, whereas the EU–27 FDI share was 87% and that of the United States was 8%. The US FDI share in France averaged 7.8% in 2010–2019, China's FDI share was 0.2%, and the EU–27 share of foreign direct investment was 78.5%. The research identifies a non–linear relationship between the PMR 2018 score and Inward FDI, indicating differences between countries in terms of competition regulation impact on FDI attraction. According to the level of regulatory instruments impact, three groups of EU countries have been distinguished: 1) countries where competition regulation has an adverse impact on FDI attraction; 2) countries where competition regulation has minor impact on FDI attraction; 3) countries where competition regulation affects FDI. A strong direct relationship between FDI financial flows and attitudes towards foreign investors have been identified (0.277). An insignificant direct relationship exists between other indicators of competition regulation and FDI (between FDI barriers and flows – 0.042; between tariff barriers and FDI – 0.048; between trade barriers and FDI – 0.04).

Further research is worthwhile in assessing the quantitative relationship between the EU economic digitalization as an economic factor in competition regulation. Moreover, the regulatory environment in the largest economies of the EU that most support the FDI screening mechanism is worth studying.

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Primary Paper Section: A

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