SLAUGHTER AND MAY

COVID-19: EU COMMISSION URGES FDI SCREENING TO PREVENT A SELL-OFF OF CRITICAL EUROPEAN ASSETS

C-19

March 2020

On 25 March 2020 the European Commission issued guidance to Member States calling on them to screen foreign direct investments in strategic companies – particularly healthcare businesses – in the light of the extreme economic uncertainty caused by COVID-19. This briefing explains the Commission's guidance and what it may mean for investing in the EU.

The guidance singles out foreign direct investment screening as an important part of the EU's toolkit to respond to the COVID-19 crisis.

In particular, the Commission highlights the risk that the economic effects of the pandemic could result in a sell-off of European strategic healthcare capabilities. Manufacturers of medical or protective equipment and research and development firms, for example, could be at risk of hostile acquisition via foreign direct investment.

The Commission's call-to-arms was issued later on the same day that the leaders of nine EU Member States wrote to European Council President Charles Michel, noting the need to ensure that "*essential value chains can fully function within the EU borders and that no strategic assets fall prey of hostile takeovers during this phase of economic difficulties*".[1]

It also comes after media reports of foreign investors taking an interest in European medical innovations related to COVID-19.

> *"Vigilance is required to ensure that any such FDI does not have a harmful impact on the EU's capacity to cover the health needs of its citizens."*
>
> **European Commission guidance to Member States, 25 March 2020**

There is, at present, no regime for screening foreign direct investment at EU-level (as there is for merger control in the shape of the EU Merger Regulation).

In February 2019 the European Parliament approved the adoption of a new regulation establishing a framework for screening of foreign direct investments into the European Union on the grounds of security or public order (the FDI Regulation, which we discussed in this briefing). It is due to apply fully as of 11 October 2020.

However, the FDI Regulation only went so far as to introduce a mechanism for cooperation and information sharing between the Commission and EU Member States in respect of the latter's national-level screening of foreign direct investments – it did not attempt to harmonise regimes across Member States

[1] Letter of 25 March 2020, signed by the Prime Minister of Belgium, the President of the Republic of France, the Prime Minister of Greece, the Taoiseach of Ireland, the President of the Council of Ministers of Italy, the Prime Minister of Luxembourg, the Prime Minister of Portugal, the Prime Minister of Slovenia, and the Prime Minister of Spain.

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nor establish an FDI equivalent of the EU Merger Regulation. Indeed, it did not introduce a requirement for Member States to have a foreign investment regime at all – currently, only 14 of them do.

In Wednesday evening's guidance, the Commission is now calling on Member State national governments to:

- **Make full use, "already now", of their foreign direct investment screening mechanisms** to address the risks to critical health infrastructures, the supply of critical inputs, and other critical sectors; and
- For those Member States that currently do not have a foreign direct investment screening mechanism, or whose screening mechanisms do not cover all potentially relevant transactions, **to set up a fully-fledged screening regime**. In the meantime, the Commission calls on those Member States to use all other available options to address risks to security or public order in the EU, including to critical health infrastructures and the supply of critical inputs.

And if there is no screening?

If a foreign investment does not undergo a national screening process, the FDI Regulation allows for other Member States and the Commission to provide comments within 15 months after the deal has completed.

In practice, that means that a foreign investment completed now (March 2020) could be subject to ex post comments by Member States or opinions by the Commission from 11 October 2020 (the date of full application of the FDI Regulation) until June 2021.

The Commission's new guidance points out that this could ultimately lead to the adoption of "necessary mitigating measures" by the Member State where the investment has taken place. However, the FDI Regulation does not provide for any power to unwind a completed transaction or impose any other remedies – any such measures would fall under the national laws of the Member State in question.

Beyond foreign investment screening

Aside from investment screening, the Commission's guidance also reminds Member States what else they can do to restrict flows of foreign capital – which is striking, in the context of the bloc's overarching objective of opening up trade flows.

Article 63 TFEU provides for free capital movements not only within the EU but also with third countries; any restriction needs to be suitable, necessary and proportionate to achieve legitimate public policy objectives.

The Commission explicitly notes in its guidance that Member States could be justified on public security or public health grounds in taking measures to restrict "predatory buying" of strategic assets by foreign investors. It also reminds Member States that they could take "golden shares" in certain undertakings, which could allow them to block or set limits to certain types of investments.

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Accelerating the "new normal" of interventionism

The Commission's call-to-arms for Member States to apply vigorously their foreign investment screening regimes - or set new ones up, if they do not already exist - is likely to accelerate the existing global trend towards the expansion and politicisation of foreign investment controls.

In the UK, for example, investors are awaiting the Government's proposed National Security and Investment Bill, which underwent a public consultation that closed in October 2018, and which will introduce a new regime for reviewing deals on national security grounds that would apply to all sectors and all sizes of business.

Although governments and investors alike do not know how long the COVID-19 crisis will last, it seems unlikely that foreign investment screening regimes that are created, or bolstered, in response to the pandemic will cease to be used once it has passed. Tempering this climate, however, will be the likelihood that national governments, rebuilding post-crisis, will be on the lookout for as much investment as they can get.

Whether government intervention results in increasing scrutiny, or a fast-track for emergency relief investment, investors may expect politicisation of foreign direct investment to become the new normal.

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