

European Commission Urges Member States to Protect Suppliers of Essential Products from Foreign Takeovers

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In a March 25, 2020 [communication](#), the European Commission (“EC”) issued guidance on the screening of foreign direct investments (“FDI”) in the context of the COVID-19 pandemic. The communication identifies an increased risk of attempts by non-EU acquirers to obtain control over suppliers of essential products, in particular healthcare sector products. The EC calls on Member States to make use of pre-existing FDI regimes, and to introduce robust screening mechanisms where they do not already exist, to protect “*critical health infrastructure, supply of critical inputs, and other critical sectors.*” The communication builds on the increasing coordination among Member States that was already encouraged by the EU FDI Screening Regulation that comes into effect in October 2020.

This alert memorandum provides a brief summary of the FDI Screening Regulation, identifies the principal points of interest from the EC’s new communication, and discusses how governments have been considering the use of FDI rules to secure healthcare and other assets in the context of the COVID-19 pandemic.

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The FDI Screening Regulation

The FDI Screening Regulation (Regulation (EU) 2019/452) was approved by the European Parliament on February 14, 2019, and entered into force on April 11, 2019. The new rules take effect on October 11, 2020, and are discussed in more detail on our [trade blog](#).

The Regulation is designed to coordinate FDI screening among Member States. FDI regimes remain the responsibility of individual Member States, although Member States that are reviewing a given transaction will be obliged to notify the EC and other Member States. The EC may then intervene or issue an opinion in certain circumstances. While EC opinions will be non-binding, Member States are required to “take utmost account” of them and provide an explanation if they are not followed.

If a foreign investment does not undergo national screening, the EC or any Member State that considers the investment is likely to affect its security or public order can provide comments up to 15 months after completion. The Member State in which the investment takes place must then give “due consideration” to such comments.

The Regulation will also require national FDI screening regimes to abide by certain minimum requirements, including:

- Transparency of rules and procedures;
- Non-discrimination among third countries;
- Confidentiality of information provided in notifications;
- Judicial review of screening decisions; and
- Rules preventing circumvention of the screening mechanisms.

As of March 2020, 15 Member States had notified the EC of their FDI screening regimes (*see* the EC’s dedicated web [page](#)).

EC Communication of March 25, 2020

The EC’s communication notes that the COVID-19 pandemic could give rise to “an increased risk of attempts to acquire healthcare capacities (for example for the productions of medical or protective equipment) or related industries such as research establishments (for instance developing vaccines) via foreign direct investment.”¹ It further states that “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.”

Because “acquisitions of healthcare-related assets would have an impact on the European Union as a whole,” the communication urges Member States that do not have screening mechanisms, and have not yet implemented the FDI Screening Regulation, “to set up a full-fledged screening system and in the meantime to use all other available options to address cases where the acquisition or control of a particular business, infrastructure or technology would create a risk to security or public order in the EU, including a risk to critical health infrastructures and supply of critical inputs.”

The EC gives particular emphasis to the possibility of post-completion enforcement under a mechanism introduced by the FDI Screening Regulation. As noted above, if a foreign investment does not undergo a national screening process, the EC or another Member State can provide comments up to 15 months after completion, which triggers an obligation by the Member State in which the investment takes place, to give “due consideration” to such comments. The communication goes further, noting that this “can lead to the adoption of measures by the Member State where the investment has taken place, including the necessary mitigating measures.” Though the Regulation does not take effect until October 2020, the communication takes the position that it could apply to investments completed in March 2020 due to the 15-month comment period.

¹ The communication refers to “critical health infrastructures and supply of critical inputs [to healthcare systems].” Critical health infrastructure is specifically noted in Article 4, paragraph 1(a) of the FDI Screening Regulation as a factor that may be considered to affect

security or public order. “Critical inputs” are not defined, but in this context might include medicine and medical equipment, including personal protective equipment and ventilators.

The communication signifies a further development of the EC's position on foreign investment control, which has become steadily more interventionist. The EC has traditionally been opposed to interference by Member States in transactions on political grounds. The FDI Regulation was a significant step in encouraging coordination, but left it to Member States to decide whether to adopt screening mechanisms. The communication goes further and actively "*calls upon Member States ... to set up a full-fledged screening mechanism.*"

Other Measures Addressing COVID-19

Various countries have already adopted or are considering measures to strengthen FDI screening in light of the COVID-19 pandemic, including:

- On March 17, 2020, the Spanish government suspended the liberalized regime for certain foreign direct investments, which now require *ex ante* authorization. The suspension will remain in force until lifted by the Council of Ministers, so may persist longer than other economic measures adopted in response to the COVID-19 pandemic.
- On March 29, 2020, the Australian government introduced temporary changes to its foreign investment review framework in response to the COVID-19 pandemic. In particular, the government effectively removed the turnover threshold that determined whether transactions require clearance from the Foreign Investment Review Board.²
- The German government is considering measures to protect German companies in economic distress from hostile takeovers by providing direct support, by taking participations, or by full takeovers.³
- Italy is also considering enhancing the existing framework on screening foreign investments,

including by extending the categories of strategic assets whose acquisition must be notified to, and authorized by, the Government (currently limited to defence and national security (including 5G), and communications, transport, and energy).⁴

- France already has in place an FDI screening mechanism, which was overhauled and strengthened in 2019. The French FDI regime also requires prior approval for foreign investments in activities related to equipment, products, and services that are "*essential to guarantee the French national interests*" including "*protection of public health.*" In the context of the COVID-19 outbreak, the French Minister of the Economy stated that temporary nationalizations could also be used, as a "*last resort,*" when necessary to protect the French "*industrial heritage.*"⁵

Conclusion

The EC communication and measures adopted or considered by Member State governments make clear that potential acquirers of European healthcare companies (and possibly companies in other sectors that may emerge as "critical" in the current context) should anticipate an enhanced level of monitoring and screening over the coming months. This is likely to create additional complexity and could also lead to an extension of transaction timelines. Acquirers should also be aware of the risk of post-completion enforcement, particularly once the FDI Regulation has taken effect in October 2020.

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² Changes to foreign investment framework, FIRB, March 29, 2020, available at: <https://firb.gov.au/about-firb/news/changes-foreign-investment-framework-0>.

³ Germany will block foreign takeovers to avoid economy sellout, Reuters, March 20, 2020, available at: <https://de.reuters.com/article/health-coronavirus-germany-fund/update-3-germany-will-block-foreign-takeovers-to-avoid-economy-sell-out-idUKL8N2BD3P0>.

⁴ Coronavirus, Conte: ready to exercise our "golden power" to defend our assets, AGI, March 25, 2020, available at: <https://www.agi.it/politica/news/2020-03-25/coronavirus-conte-golden-power-7843626/>

⁵ Coronavirus: quatre questions sur les possibles nationalisations d'entreprises, LesEchos, March 25, 2020, available at: <https://www.lesechos.fr/economie-france/budget-fiscalite/coronavirus-quatre-questions-sur-les-possibles-nationalisations-dentreprises-1188715>.