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Covid-19: What consequences on foreign direct investments?

In the context of the Covid-19 epidemic and its impact on the European Union's economy, the European Commission published on March 26, 2020 a communication designed to alert Member States to the need to protect strategic European assets from foreign direct investments.

While reaffirming the European Union's openness to foreign investments, which is essential to its growth and competitiveness, the European Commission encourages Member States to protect assets that cover the health needs of their citizens (in particular the production of medical and protective equipment, medical research activities) and, more generally, to safeguard Europe's strategic capacities.

On March 26, 2020, the European Commission presented its "Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI[1] Screening Regulation)"[2].

"*The Covid-19 outbreak has highlighted the need to preserve and enhance the sharing of such precious capacities within the single market, as well as with those who need them elsewhere in the world. In this context, acquisitions of healthcare-related assets would have an impact on the European Union as a whole*" explained the European Commission on March 26.

As such, it called upon Member States (i) to make full use already now of their domestic FDI screening mechanisms to take fully into account the risks to critical health infrastructures, supply of critical inputs, and other critical sectors, and (ii) for those Member States that currently do not have a screening mechanism, to set up a full-fledged screening mechanism or to use all other available tools.

At the European level, a common legal framework for Member States, stemming from Regulation (EU) 2019/452 of March 19, 2019, introduces a screening of direct investments from non-EU countries and establishes a cooperation mechanism between Member States. It will enter into force on October 11, 2020.

This screening aims at coordinating, at the level of the Member States, the control of acquisitions by foreign investors and taking into account the effects of these acquisitions on the European Union as a whole.

As such, Member States may take measures to prevent a foreign investor from acquiring or taking control over a company if such acquisition or control would result in a threat to a public health emergency and, more generally, to their security or public order.

In its communication of March 26, 2020, the European Commission reiterated its intention to be consulted and to issue opinions, in particular if the investment in question is likely to affect projects or programs of Union interest.

These investments will be subject to a closer scrutiny by the European Commission, whose opinions have to be taken into utmost account by the relevant Member States. This screening will apply to all Horizon 2020[3] research projects launched in response to Covid-19 pandemic.

The European Commission has always sought to preserve the delicate compromise between a security approach and the promotion of free trade, but the Covid-19 has shot up the European Union's agenda, and Europeans cannot wait until October 2020 to implement the EU foreign investment screening mechanism.

It was therefore important for the European Commission to send a strong message to the Member States, especially since only 14 out of the 27 Member States have set up national mechanisms for the screening FDI[4].

France now has a highly developed legal framework for the control of foreign investments. For more than a year it has engaged in a reform in this area, the final part of which, resulting from Decree No. 2019-1590 of December 31, 2019 and from a Ministerial Order of the same date, came into force on April 1, 2020.

For more information on French regulations governing the screening of FDI, please refer to a separate publication of the author of this article[5].

As pointed out by researchers from the Jacques Delors Institute[6] in a very recent study on "*the urgent need to tighten foreign investment control*" in the context of the Covid-19, tighter controls must not lead to an increase in nationalist reactions which could ultimately lead to the fragmentation of the Single Market and undermine the visibility and stability that European companies need to maintain their attractiveness.

"Proportionality of measures is more essential than ever because FDI is as necessary for recovery as it is harmful if it further weakens the economy by targeting strategic assets, particularly in terms of technological know-how." [7]

[1] Foreign Direct Investments

[2] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020XC0326%2803%29

[3] EU Research and Innovation program: https://www.horizon2020.gouv.fr/

[4] For a presentation of the national screening mechanism, please see: https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf

[5] See article entitled Foreign Investment Control in France: Strengthened rules but greater clarity for investors published on our Blog in February 2020

[6] European think tank founded by Jacques Delors in 1996 at the end of his presidency of the European Commission: https://institutdelors.eu/

[7] https://institutdelors.eu/wp-content/uploads/2020/04/PP253_FDIscreening_Fabry_200427_FR.pdf (in French only).