European Commission steps up efforts to protect critical European assets and infrastructure from foreign investors in the wake of the Corona pandemic

Background

The corona pandemic results in **unparalleled state intervention** in key social and economic areas. Governments became acutely aware of the imperative to ensure the provision of critical services, goods and infrastructure. Press reports about a suspected US administration's attempt to acquire German biopharmaceutical company CureVac resulted in vocal calls for state intervention. On 25 March 2020, the Heads of State of Belgium, France, Greece, Ireland, Italy, Luxemburg, Portugal, Slovenia and Spain, in a letter to the President of the European Council, asked to ensure that the "essential value chains can fully function within the EU, and that **no strategic assets fall prey of hostile takeovers** during the phase of the economic difficulties".

Foreign Direct Investment Control

Against this background, it does not come as a surprise that the European Commission on 25 March 2020 issued a **Guidance** that calls for **more action in relation to foreign direct investment** ("FDI") **control**. FDI control relates to the screening of foreign direct investments on the grounds of security or public order, in particular where critical infrastructure, technologies (including key enabling technologies) and inputs which are essential for security or the maintenance of public order are concerned.

Guidance

The Guidance is a **political commitment** to **preserve EU companies and critical assets**, notably in areas of **health**, **medical research**, **biotechnology** and **infrastructures** that are essential for the **security and public order**. Beyond healthcare, the Guidance recognizes that the economic situation caused by the corona pandemic poses increased risks to broader strategic industries and capacities. The risks may be exacerbated by the volatility or undervaluation of European stock markets, and the undervaluation of distressed companies. The Commission is explicitly concerned that the corona pandemic results in a sell-off of Europe's business and industrial actors, including SMEs.

Member States should make full use of existing screening schemes

The Commission itself does not have the competence to investigate, let alone to prohibit, a foreign investment – this power rests with Member States. In that regard, the Guidance demands that **Member States make full use of their existing FDI screening mechanisms** to take fully into account the risks to critical health infrastructures, supply of critical inputs, and other critical sectors.

Member States without screening scheme are urged to create it

As a matter of fact, national screening mechanisms are in force in only 14 EU countries. Hence, the Commission **urges Member States** that do not have a screening mechanism, or whose screening mechanisms do not cover all relevant transactions, to **set up a full-fledged screening mechanism** – or in the twittered words of Commission President *Ursula von der Leyen*: "Now is the time to create it". In the meantime, such Member States should use all **other available options** to address the risks of a foreign investment to security or public order in the EU, including a risk to critical health infrastructures and supply of critical inputs.

Powers of Commission and Member States to intervene in foreign direct investments

The Guidance notably makes reference to powers that the Commission and Member States pursuant to the Regulation (EU) 2019/452) ("FDI Screening Regulation") may use to interfere in transactions that concern strategically important assets.

Foreign direct investments under investigation

Member States shall notify the Commission and other Member States of any foreign direct investment in their territory under screening. The Commission may **provide comments** where, inter alia, it considers that a foreign direct investment likely affects security or the public order in more than one Member State, or where EU funding programs are concerned. Member States may also comment. The Member State undertaking the screening shall give "**due consideration**" to the comments of the Commission and the Member States.

Foreign direct investments not under investigation

In relation to a foreign direct investment planned or completed in a Member State where no screening regime exists or no screening occurs, the **Commission** may **submit an opinion** on such investment, where, *inter alia*, it likely affects the security or public order in more than one Member State. Member States can comment as well. Again, the

Member State, in which the foreign direct investment is planned or completed, shall "**duly consider**" the views of the Commission and the Member States.

Ex-post screening

The Guidance highlights the power of any Member State and the Commission to get involved in foreign direct investments that have not been screened (for whatever reason). The Guidance recalls that Member States and the Commission may **provide comments and opinions within 15 months after the foreign investment has been completed**. This could lead to the adoption of measures by the Member State where the investment has already taken place, including the **mitigating measures** (e.g., conditions guaranteeing the supply of medical products/devices) or even full scale ex post prohibitions quite long time after a given deal has been closed potentially.

Golden Shares

Interestingly, the Guidance suggests that Member States may retain special rights in companies which enable the State to block or set limits to certain types of investments. Such preferred participation – commonly referred to as "**Golden Share"** – traditionally has been seen very critically by EU institutions and the European Court of Justice.

The Guidance notes that any concerns of the European courts related to intra-EU capital restrictions that may not apply to investments by non-EU acquirers. Nevertheless, the Commission acknowledges that any golden share must be suitable, necessary and proportionate to attain legitimate public policy objectives, such as: **public health**; **protecting consumers**; preserving the financial equilibrium of the **social security system**; achieving **social policy objectives**, that could possibly be relevant in emergency situations; the operation of the **Economic and Monetary Union** or the balance of payments for Member States outside the EURO area. The Guidance encourages Member States to consider such policy objectives in their screenings of transactions that, in particular, involve **undervalued companies**. Where non-EU acquirers seek to buy assets with a view to **limit supply of certain products to the EU** markets, Member States could impose **conditions** to ensure the security of supply (e.g. energy), the provision of essential public services or the financial stability.

Conclusion

In relation to **pending or recent foreign direct investments**, we may see Member States **re-evaluating** their positions taken. In case the Commission and/or Member States were to submit comments to such investments, Member States undertaking the screenings may feel **inclined to take a tougher stance** (e.g. by initiating lengthy investigations, or imposing conditions). Thus, **foreign investors** are well advised to **carefully assess the FDI screening obligations** and **options**.

More broadly, the Guidance marks a **paradigm shift** towards **stricter** and **more FDI regimes** in the entire EU. While the FDI Screening Regulation of April 2019, in principle, left it to the Member States to introduce and operate FDI screening mechanisms, the Guidance sends an unambiguous and strong signal to Member States to enforce existing regimes, to set up the right mechanisms, and to use all available legal instruments to prevent the selling-off of strategically relevant assets.

Therefore, we may see the **rise of more and more national screening schemes** that foreign investors will have to navigate through (cf. the comprehensive operation of merger control regimes throughout the EU), tighter rules and an **increasing desire of the Commission to get involved** in individual screenings. We may also see the **renaissance of golden share programs** that foreign investors have to deal with.

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