Commission calls for greater protection in EU against takeovers by non-EU investors

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The European Commission has published guidance for EU member states encouraging them to take measures against the unwarranted acquisitions of strategic companies, infrastructure and technology, by non-EU investors. The Commission warns against private investors or foreign states planning such hostile takeovers, especially in healthcare-related sectors, as they could negatively affect the EU's ability to respond to and recover from, the growing coronavirus crisis. To address the issue, member states with existing FDI-screening regimes are expected to apply these regimes stringently, while others are encouraged to set up similar measures in the short term. Legislative gaps are no excuse, according to the Commission. Governments must "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". Non-EU investors should therefore expect increased scrutiny of M&A deals in Europe, both in healthcare-related sectors and beyond.

FDI still welcome in EU but subject to scrutiny and conditions

The guidance to member states, which was published on 25 March, encourages screening of foreign direct investments (FDI) in the wake of the heightening coronavirus crisis and the resulting economic vulnerability in the EU. According to the guidance, EU businesses form part of the EU's response to the crisis and must be protected from hostile takeovers by non-EU investors that would threaten European citizens being deprived of critical needs. The Commission's president, Ursula von der Leyen, has underlined that the EU will remain an open market for foreign direct investment but that this openness is conditional.

FDI regulation

EU rules already provide a framework for FDI screening through the FDI Screening Regulation (see also our Best Friends' summary and guide). The responsibility for review under the regulation falls to member states which are given the power to prevent, or impose conditions on, FDI investments. Screening does not necessarily result in a prohibition. Often, mitigation measures suffice, such as conditions to guarantee the supply of products and services. Member states must start enforcing the regulation as of 11 October 2020.

In its guidance, the Commission now calls on member states not to wait, but to take immediate action to protect strategic European companies and technology. In the event that a member state does not have its enforcement rules in place yet, the Commission underlines that the regulation provides for a 15-month retrospective scrutiny regime, with the possibility to comment on completed FDI which were not screened. This means that an investment that is currently made, can still be reviewed by the member states and the Commission after October 2020, when the FDI-screening regime becomes effective across the EU.

Healthcare and beyond

The Commission's guidance is clearly focussed on protecting the EU's healthcare industry, but it is by no means limited to this sector. The Commission wants to protect a broader scope of businesses that may become vulnerable for hostile takeovers as a result of the crisis:

- The Commission explicitly mentions FDI risks faced by critical healthcare-related industries and technology, as possible grounds to ban, or impose conditions on, an acquisition by non-EU investors. The aim is to avoid predatory acquisitions that could limit the supply of certain goods or services into the European market.
- In other areas of the EU economy, the Commission also foresees a risk that European companies, infrastructure or technology could become prone to acquisition by non-EU investors. The Commission's guidance urges member states to be vigilant towards FDI in all business and industry sectors, including SMEs and start-ups. For example, member states may take measures to avoid foreign investors from taking-over European companies whose valuation on capital markets is considered below their true or intrinsic value.

Not all European companies may fall under the screening regime – only those involving a public interest. The guidance therefore suggests that a broad meaning of public interest may apply because various strategic assets could be crucial to ensure that the EU economy can recover rapidly from the crisis.

Pan-European implications and solutions for FDI

The Commission's guidance also notes that in the European internal market, risks created by foreign investment do not necessarily stop at the border. Many European companies have fully integrated, cross-border supply chains, and the acquisition of healthcare-related assets in one member state may have an impact on another member state or on the EU as a whole. To address pan-European implications, the guidance requires member states to seek advice from the Commission and other member states and to coordinate in cases where foreign investments could have a cross-border effect. According to the Commission, the EU's interest may dictate that any commitments imposed by a member state will be extended beyond the predicted needs of the one member state that is hosting the investment.

FDI as a shield or a sword?

The Commission's guidance is important to non-EU investors contemplating acquisitions in Europe, as well as to European companies fearing hostile takeovers because of their strategic value or weakened position, as a result of the coronavirus. Both sides can rest assured, neither the Commission or member states will remain idle when it comes to FDI transactions: they are expected to closely scrutinise any transactions that threaten to affect strategic business.

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