

# COVID-19: THE COMMISSION PROVIDES GUIDANCE TO MEMBER STATES ON THE PROTECTION OF EU'S CRITICAL ASSETS AND TECHNOLOGIES FROM ACQUISITIONS AND INVESTMENTS BY NON-EU COMPANIES IN THE CONTEXT OF THE COVID-19 OUTBREAK

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## **Brussels Regulatory Alert**

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On March 25, 2020, the Commission issued guidelines concerning foreign direct investment (“FDI”) and free movement of capital from non-EU countries (the “Guidelines”). The Guidelines provide helpful guidance to EU Member States to effectively protect “Europe’s strategic assets” in light of the current COVID-19 crisis and its severe implications for the EU economy.

For many years, the Commission has been concerned by the lack of an adequate level of protection of EU’s strategic assets and technologies from potential hostile takeovers and investments by non-EU companies. To that end, it has established a mechanism of cooperation and coordination of national screening procedures for new FDI (“FDI Screening Regulation”), which will enter into force on October 11, 2020.

The rationale behind the FDI Screening Regulation is to keep the EU open to foreign investment in strategic sectors (e.g., energy, transport, and communications) while granting each Member State the ability to block foreign investment that may represent a risk to their security or public order. This regime applies on top of normal merger control procedures and provides an additional tool to EU Member States to scrutiny transactions and investments in key sectors.

With the adoption of the Guidelines, the Commission seeks to further raise the importance of protecting critical assets that are essential for European’s security, namely in healthcare-related industries, and to avoid a “sell-off of Europe’s business and industrial actors, including small and medium-sized enterprises” to non-EU companies. The Guidelines also refer to “potential risk to strategic industries.” This suggests that the Guidelines are intended to apply well beyond the health-care sector.

In the Guidelines, the Commission calls on Member States to make full use of their domestic FDI screening mechanisms. In particular, the Guidelines stress the importance of protecting the healthcare and related sectors in light of the COVID-19 outbreak when reviewing FDIs.

The Commission also points out that only 14 Member States have FDI screening mechanisms in place and urges the remaining 13 to set up effective screening mechanisms. In that respect, certain Member States such as Italy

or Germany have already begun to tighten the existing FDI screening rules. To the extent that FDI screening mechanisms have not already been adopted, the Commission invites the Member States to use all the other available options to protect critical assets. For instance, the Commission suggests that Member States could impose conditions on strategic investments to ensure continuity in the supply of medical products and devices or require compulsory licenses on patented medicines.

In addition to FDI screening mechanisms, the Guidelines refer to the possibility for Member States to make use of golden shares powers (i.e., special rights) to block or limit investments by non-EU companies in strategic companies.

The Guidelines will result in an increased scrutiny by national governments on acquisitions and investments involving strategic companies and assets. It remains to be seen whether the Commission will adopt additional measures to protect the EU's critical assets and technology in the context of the COVID-19 outbreak. In light of the above, both EU strategic companies and non-EU companies should carefully consider the impact of the Guidelines on FDI and take into due account the political sensitivity of Member States when planning acquisitions in certain key sectors.

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