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INCREASED REGULATION AND SCRUTINY OF FOREIGN INVESTMENT IN EUROPE ON THE HORIZON

The European Commission and a number of Member States are responding to the coronavirus (Covid-19) pandemic by reforming foreign (direct) investment (FDI) rules to support EU companies. Europe's mood is shifting and becoming more protective. Member States are calling for greater coordination of EU and national measures to prevent foreign buyouts, particularly of companies targeted for their know-how in sensitive sectors such as energy, health and robotics. These moves are unprecedented and bold, like many recent steps to address the coronavirus crisis.

Across many jurisdictions, views on foreign investment are drastically changing. The last few decades have been characterised by liberalisation and openness towards foreign investment, with governments generally welcoming international capital and encouraging cross-border mergers. However, the current crisis and recent developments in Brussels, Rome, Paris, Madrid and Berlin show that this trend is reversing. Particularly where investments could affect national security, FDI initiatives are increasingly subject to stricter tests and requirements.

EUROPEAN UNION: NATIONAL COMPETENCE, EUROPEAN COOPERATION

The EU Regulation establishing a framework for the screening of FDI into the EU will become applicable on 10 October 2020. The EU Regulation will allow the Commission to review (but not block) certain investments of "Union interest" and to issue a non-binding opinion to the Member State in which the investment takes place.

Given the current crisis, the Commission has decided to offer guidance to Member States ahead of the application of the EU Regulation, and therefore published its EU FDI Guidance on the 25 of March.

The Guidance encourages Member States that already have a FDI screening mechanism in place to make full use of tools available to them under EU and national law to prevent capital flows from non-EU countries that could undermine the EU's security or public order. It also encourages the remaining Member States to set up a fully-fledged screening mechanism and in the meantime to consider all options, in compliance with EU law and international obligations, to address potential cases where the acquisition of control by a foreign investor of a particular business, infrastructure or technology would create a risk to security or public order in the EU.

EU MEMBER STATES: CALL FOR GREATER ASSISTANCE

Italy, France and Spain have all announced they stand ready to protect companies active in sensitive sectors from foreign takeovers. Spain has already reformed FDI rules applicable to investors from outside the EU and the EFTA, establishing that investments in certain sectors (or depending on the nature of the investor) by residents of countries outside the EU and the EFTA, when the investor comes to hold a stake equal to or greater than 10% of the share capital of the Spanish company, or when as a result of the corporate operation, act or legal transaction it gains effective participation in the management or control of said company are subject to prior authorization.

From 1 April, the existing French FDI regime will also see its scope significantly broadened – among other changes, the scope of "strategic sectors" will be extended to include additional activities, and the ownership threshold that triggers an approval requirement for non-EU/EEA investors will be lowered to 25%.

According to public statements, the German government intends to closely scrutinize takeovers of German undertakings by non-EU acquirers as a consequence of the current crisis. Given the current circumstances, this particularly applies to the healthcare sector, but this scrutiny is not limited to a certain industry. The existing German FDI regime provides the German government with sufficient powers to review and block the such acquisitions. Nevertheless, the regime is expected tightened further later this year.

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