

COVID-19

Tightening of foreign direct investment (FDI) screening in the EU in light of Covid-19

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The Covid-19 outbreak is having a massive impact on the global and European economy. A new communication of the European Commission on 25 March 2020 calls upon EU member states to use national FDI screening tools to the full extent in order to prevent a sell-off of strategic EU assets, including healthcare-related assets, technologies and infrastructure. The communication relies on the recently introduced EU framework for national FDI screening schemes.

On 25 March 2020, the Commission issued a **communication** on screening of FDI and the protection of Europe's strategic assets and technologies (Communication)¹, including guidance on the role of such screening in a public health emergency². The Communication builds on the EU framework for national FDI screening schemes established by the **FDI Screening Regulation**³ in March 2019. The FDI Screening Regulation will become fully applicable on 11 October 2020.

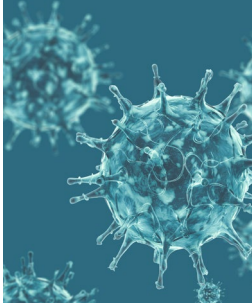
The FDI Screening Regulation aimed at **prompting the creation of further national FDI screening schemes and setting up new screening tools** in member states with confined screening schemes. The Communication renews this attempt in light of the Covid-19 crisis, supported by the European Council. Under the 14 existing national FDI screening schemes⁴, the respective 14 EU member states **can generally ban (certain)**

¹ Communication from the Commission C(2020) 1981 final, 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 Screening Regulation), OJ C 99I, 26 March 2020, p. 1.

² The guidelines are included in an Annex to the aforementioned Communication.

³ Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

⁴ In Austria, Denmark, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Netherlands, Poland, Portugal, Romania, and Spain; the United Kingdom also has rules on FDI screening; see overview retrievable at https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf



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foreign investments, or request security-related mitigation measures, if the foreign investment at issue is likely to **endanger public order or security**, including security of supply and technological sovereignty. The Communication calls upon the 14 member states with FDI screening schemes to use available tools to the full extent and appeals to the other 13 member states to establish screening schemes to prevent a sell-off of strategic EU assets in close cooperation with the other member states and the Commission.

A particular focus of the Communication is on **healthcare capacities, medical research, biotechnology and related infrastructure**. The Communication emphasises, for example, that EU interests may dictate that in transactions in the healthcare sector providers undertake supply commitments extending beyond the anticipated needs of the host member state. The Commission already noted in its FDI market study of 2019 that foreign ownership is “remarkably high in a number of sectors that are at the heart of the economy, such as [...] pharmaceuticals”.⁵

EU FDI Screening Framework under the FDI Screening Regulation

The FDI Screening Regulation of March 2019 established a European framework for national FDI screening schemes. It neither replaces the existing national screening schemes nor requires member states to introduce an FDI screening scheme. The FDI Screening Regulation only allows for **screening of FDI activities (excluding mere portfolio investments) based on security and public order concerns**.⁶

Key elements of the **FDI Screening Regulation** are

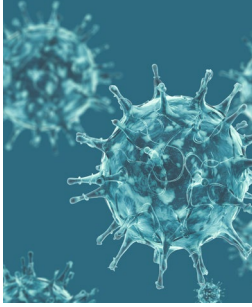
- a **cooperation mechanism** which enables member states and the Commission to exchange information and also raise concerns related to specific investments;
- certain **minimum requirements for national screening schemes**, including on transparency of rules and procedures, non-discrimination among foreign investors, confidentiality of information exchanged, recourse against decisions, and measures to identify and prevent circumvention;
- in case a foreign investment in a member state does not undergo a screening, **other member states may comment and the Commission may provide an opinion** within 15 months after completion of the foreign investment; and
- **member states have the last word** on whether a specific investment within the scope of their respective screening scheme should be allowed or not.

New Communication on FDI Screening

The new Communication aims to ensure a **strong EU-wide approach** to foreign investment screening with respect to the Covid-19 outbreak and related economic vulnerability. The Communication stresses, among others, that

⁵ Commission staff working document on foreign direct investment in the EU, SWD(2019) 108 final dated 13 March 2019, p. 2, retrievable at https://trade.ec.europa.eu/doclib/docs/2019/march/tradoc_157724.pdf.

⁶ See the case law referenced in the Communication and the non-authoritative FAQ published by the Commission, retrievable at https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157945.pdf.



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- the 14 member states with an existing FDI screening scheme should **make full use of available tools** to prevent non-EU investments that could undermine Europe’s security or public order;
- the other 13 member states should **set up fully-fledged FDI screening schemes** and in the meantime consider all other options for addressing cases where a foreign investment would create a risk to security or public order in the EU;
- the Covid-19 outbreak has highlighted the **need to preserve and enhance healthcare capacities in the EU**, and there could be an **increased risk of foreign attempts** to acquire European healthcare capacities, such as with regard to the production of medical or protective equipment or the development of vaccines, including healthcare capacities of SMEs; and
- the Covid-19 outbreak also poses **risks associated with the volatility or undervaluation of European assets** and that potentially adverse impacts of foreign investments on companies and the economy at large should also be considered in FDI screening proceedings.

The Communication highlights that the **notion of public order or security** is broad and **by no means limited to “predatory buying”** of strategic assets by foreign investors, *i.e.* transactions with a view to (potentially) limiting supply to the EU market.

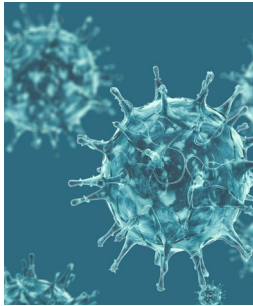
Further Development of National FDI Screening Schemes

The Communication sets the path for further measures by EU member states related to FDI, for example the **Spanish government** has already decided to strengthen the requirements for FDI (Decree Law 8/2020) and the **Italian government** is reviewing options to tighten its FDI screening.

Since 2016/2017, **Germany** has already broadened the scope of its FDI screening, and tightened the requirements for and increased the scrutiny of FDI. On 30 January 2020 (not yet related to Covid-19), the Federal Ministry for Economic Affairs and Energy published a **draft amendment bill on FDI screening rules**.⁷ The ministry then indicated that it intends to further tighten the German FDI screening framework⁸, in particular to **broaden the scope of defined critical assets and technologies** and to introduce **FDI clearance as a statutory closing condition** for transactions involving such critical assets or technologies. The draft amendment bill does not include grandfathering rules for transactions which are ongoing or which have even already been signed. The **number of German FDI screening proceedings** has been **rising steeply** in recent years, *i.e.* (rounded numbers) 40 in 2016, 65 in 2017, 80 in 2018, and 105 in 2019. It seems likely that the government will rather shortly amend the German Foreign Trade Ordinance (*Außenwirtschaftsverordnung*) in light of the Covid-19 crisis and the Commission’s Communication. Already for the time being, we expect a **further increased scrutiny in German FDI screenings**.

⁷ The draft bill (in German) is retrievable at https://www.bmwi.de/Redaktion/DE/Downloads/E/erstes-gesetz-zur-aenderung-des-aussenwirtschaftsgesetzes.pdf?__blob=publicationFile&v=6.

⁸ See the note (in German) retrievable at https://www.bmwi.de/Redaktion/DE/Downloads/J-L/kerninhalte-des-ersten-teils-der-novelle-des-aussenwirtschaftsrechts.pdf?__blob=publicationFile&v=4.



In addition, the Economic Stabilisation Fund Act (*Wirtschaftsstabilisierungsfondsgesetz*) of 27 March 2020 allows the German government as a last resort to make (temporary) equity investments not only as stabilization measures, but also to ensure technological sovereignty or security of supply, including for German companies active in **the sectors energy, water, IT, telecommunication, insurance, healthcare, transport and traffic, or foods**. If the German company has foreign subsidiaries, the German state participation and thereby indirect participation in such foreign subsidiaries could trigger an FDI screening of the relevant foreign state. Industry strategy and policies will remain a key concern of the Commission as well as of the national governments, specifically in light of the Covid-19 crisis.

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