NORTON ROSE FULBRIGHT

COVID-19 crisis inspires global tightening of Foreign Investment Screening

European Union

In early 2019, the EU adopted Regulation 2019/452 (the FDI Regulation), which created a new framework for screening foreign direct investments (FDI) into the European Union (EU). The FDI Regulation creates a new cooperation mechanism in which Member States, and the EC itself, may issue comments and opinions on transactions involving FDI in another Member State's territory, and the Member State in question must give those comments and opinions "due consideration." In the case of investments deemed to be of "Union interest," the EC will have greater authority, as Member States in which an FDI is planned will have to take "utmost account" of EC opinions and explain any non-compliance.

The FDI Regulation represented a bold step, inserting the European Commission (EC) into a hitherto jealously guarded area of Member State authority. The FDI Regulation will apply only as from October 2020, and the EC's internal structures and procedures to implement the FDI Regulation are not yet in place. In response to the COVID-19 crisis, however, the EC has urged EU Member States to step up their investment screening efforts, in particular in the health sector.

On March 25, 2020, the EC published its first official guidance (the Guidance) on the application of the FDI Regulation, noting that there could be an increased risk of attempts to acquire healthcare capacities (for example for the production of medical or protective equipment) or related industries, such as research establishments (for instance developing vaccines). The Guidance calls on each EU Member State to:

- "Make full use already now of its FDI screening mechanisms to take fully into account the risks to critical health infrastructures, supply of critical inputs, and other critical sectors as envisaged in the EU legal framework.
- "For those Member States that currently do not have a screening mechanism…to set up a full-fledged screening mechanism and in the meantime to 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…"

The Guidance's call for the 13 Member States without an FDI screening mechanism to adopt one is a significant departure for the EC. The EC's encouragement for Member States to use other tools, such as imposing compulsory licenses of prescription medicines or "golden shares" to protect local companies is even more remarkable. Although the use of such mechanism is subject to general EU anti-discrimination and free-movement-of-capital rules, such mechanisms are outside the framework of EC review created by the FDI Regulation.

The EC's call for more aggressive FDI screening and the use of other tools to protect EU companies is understandable in the current extraordinary circumstances, but its approach is likely to have lasting effects in at least two ways. First, the EC is taking a more prominent role in FDI screening policy than was originally anticipated, and it will likely continue to do so when the crisis is past. Second, Member States using tools like golden shares and compulsory licensing may be tempted to maintain those tools to advance other EU and national industrial policy goals. As a result, foreign investors wishing to invest in EU companies in the health and other strategic sectors are likely to face higher hurdles not only during the crisis but after.

By **Jay Modrall**