

On March 25, 2020, the European Commission published guidance (FDI Guidance) addressed to member states on the application of [foreign direct investment \(FDI\) Screening Regulation 2019/452](#) in the EU and restrictions on free movement of capital from third countries. The FDI Guidance relates the coronavirus disease 2019 (COVID-19) pandemic. The Commission is concerned by new FDIs in the EU health and health-related sectors and technologies, as well as new FDI aiming at EU strategic companies weakened by the pandemic.

The FDI Guidance provides some explanations on the Screening Regulation (applicable as of October 11, 2020). Although the FDI Guidance has limited scope, it might affect member states' screening procedures:

- The Commission publicly – for the first time – calls member states that have not established any FDI screening procedure to introduce one to address effectively cases where the acquisition or control of a particular business, infrastructure or technology would create a risk to security or public order.
- The Commission reminds member states that health facilities and supply of critical inputs are enumerated by the Screening Regulation as factors that should be considered during the screening procedures. The Commission stresses that member states should use available legal tools to avoid that the EU and its member state lose control over assets and technologies that are crucial for public health.
- In light of the FDI Guidance, member states should prevent the situation when – as a result of the COVID-19 pandemic – EU businesses would be “sold-off,” affecting EU public order and security. The Commission calls member states to take into account – during its screening procedures – all interdependencies that exist between businesses on the EU common market, and screen all FDIs in strategic sectors, even in SMEs. The Commission states that a necessity to screen some investments “may indeed be independent from the value of the transaction itself.”

- The FDI Guidance is not binding; however, it outlines a stringent approach the Commission may take when the Screening Regulation applies. In particular, the Commission emphasizes the necessity of screening mechanisms in member states that have not introduced them yet. The FDI Guidance also indicates that the Commission might exercise its power to intervene into member states' screening mechanisms and may actively engage with member states to maximize the use of currently existing frameworks and to develop further procedures.

### Screening Regulation

The Screening Regulation has established a mechanism of cooperation and coordination of national screening procedures for new FDIs that are maintained by member states. The Screening Regulation does not replace member states' screening mechanisms and confirms the ultimate power of member states to admit or introduce restrictions/conditions for new investments. However, the Screening Regulation allows the European Commission and member states to intervene in national screening procedures and submit opinions/comments on FDIs in member states that have not been subject to screening but could have impacted public order and security in the EU/other member states. Any interventions of the European Commission or other member states may impact final decisions about the admission of screened investments by other member states.

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