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COVID-19: EC Ready to Cooperate with Member States on FDI Screening to Prevent Predatory Takeovers During Crisis

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The EU's trade commissioner had urged member states to ramp up screening levels of foreign investment (FDI) in order to prevent predatory takeovers of key businesses during the coronavirus pandemic. Mark Hogan made the assurances during videoconference of the EU's trade council, comprising representatives of member state governments. It comes in the same week that Margrethe Vestager, Competition Commissioner at the European Commission (EC), urged national governments to proactively acquire stakes in strategically important companies to combat the threat of opportunistic takeovers from third countries – particularly state-backed enterprises.

The EC's tone has grown increasingly urgent as the pandemic and economic slowdown have progressed through Europe. In March, the EC issued official guidance to member states warning of increased investment attention in Europe's "healthcare capacities" and "research establishments" via third-country FDI. "The COVID-19 outbreak has highlighted the need to preserve and enhance the sharing of such precious capacities within the single market", the official communication stated.

FDI was already a major issue of concern in the EU before the coronavirus pandemic, with a new FDI framework giving the EC more information-sharing powers and the ability to give non-binding advice on FDI scheduled to come into force in October 2020. Hogan has now urged national governments to begin "informal cooperation" with the EC in advance of the new mechanism's arrival, citing the need for immediate action to protect Europe's "strategic assets".

FDI reforms were developed in response to concerns about investments from third countries in strategic industries including infrastructure, defence, media and critical technology. The major EU economies, France, Germany, Italy and Spain, have mandatory pre-closing approval requirements. Whilst Member States retain their own screening regimes, thresholds for notification and scope of investments requiring screening, the EU reforms were designed primarily to facilitate information-sharing – for instance, where more than one Member State's security is deemed likely to be affected by the investment.

"Remember, the acquisition of a company in your country may have a security effect in other Member States or it may negatively affect a project of union interest," Hogan said. National trade ministers present on the call expressed their support for increased cooperation.

The collapse in share prices has prompted fears of opportunistic takeovers by investors based outside of the EU, which could exacerbate supply chain issues and raise national security concerns in the future. EC president Ursula von der Leyen said last week that the crisis had demonstrated that the EU should “reduce dependencies by shortening and diversifying our supply chains”.

Other countries are also refining their FDI screening regimes. The US recently strengthened its long-established Committee on Foreign Investment in the US (CFIUS) review system with further federal legislation, while the UK is moving to replace powers that are closely linked to its competition merger control regime with a standalone security screening encompassing FDI which would give UK authorities broader scope to review investments.

The COVID-19 crisis has highlighted the importance of having domestic capacity to produce important materials and products, not least critical health equipment such as hand sanitiser and personal protective equipment (PPE). Whilst Hogan stressed that full “self-sufficiency” was unrealistic, he regards the construction of shorter supply chains allowing for “strategic stockpiling” as important objectives for the future.

The Trade Commissioner’s comments are reflected by others in the EC. Describing the prevention of predatory FDI as one of the EC’s “main priorities”, Competition Commissioner Vestager made the striking admission that “We don’t have any issues of states acting as market participants if need be” in efforts to combat FDI threats. She added that the EC was considering implementing measures to deter predatory FDI from third countries, particularly state-backed entities.

At a national level, officials are beginning to echo the EC’s stance. Germany’s Economy Minister Peter Altmaier has just announced plans to strengthen screening of FDI in high-tech sectors such as robotics and artificial intelligence (AI). Following Germany’s reforms in 2019 to drop the mandatory filing thresholds from 25% to 10% for defence and critical infrastructure, Altmaier plans to extend the scope to include companies involved in technological R&D and production.

In terms of state aid, the EC has acted quickly to revise its guidelines to allow member states to grant aid to struggling businesses. Last week, it issued a “comfort letter” concerning a relaxation of antitrust enforcement for companies collaborating to avoid shortages of key medical supplies. The Commission plans to publish an economic analysis next month on the pandemic’s trade impact.

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