

VOLATILITY OF SECURITIES, STRATEGIC ASSETS AND FOREIGN INVESTMENTS

Wealth and asset management European law Dispute Resolution Public Law and Public Procurement Law Environmental law Real Estate and Construction | 27/03/20 | Vincent Brenot Pierre Sella Emmanuel Weicheldinger



The European Commission encourages Member States to control foreign direct investments as strategic companies are weakened by the decline of their stocks caused by the COVID-19 crisis

On March 25, 2020, the European Commission (the "**Commission**"), published, as announced, guidance, concerning mainly foreign direct investments ("**FDI**") and protection of European strategic assets[1].

This communication[2] (the "**Communication**") should retain the attention of any company operating in France whose business is considered strategic under the French Monetary and Financial Code[3] (the "**FMFC**"). It is also an important benchmark for foreign investors and their acquisition or stake held projects. It deals not only with companies that would be of critical importance in terms of health infrastructure or in terms of supply of health equipment and facilities, but also with all the companies whose share value would currently be subject to high volatility or undervaluation as a result of the stock market crisis following the Covid-19 pandemic. Indeed, these companies are, in the current context, particularly likely to be the target of operations that could, either immediately or later, modify their majority shareholders in an undesired way.

Hence, France and other Member States ("**MS**") are in risk of losing control of critical and strategic assets, which are not only essential to meet the needs, in particular health needs, of their citizens, but whose activity will also be decisive for the economic recovery and for the European strategic interests.

In this regard, the Communication reminds that MS may limit, in compliance with European Union ("**EU**") law[4], the FDI that could create such risks. The Communication also mentions that health emergencies are among the security and public order risks set out by Regulation 2019/452 of 19 March 2019 *establishing a framework for the screening of foreign direct investments into the Union* (the "**2019 Regulation**"), which will enter into force on 11 October, 2020.

Therefore, the Commission asks MS which have one (i.e. 14, including France), to fully implement their FDI control systems[5]. It recommends that they do so with the objectives of ensuring that the controlled FDI's targets remain resilient and be able to continue to meet the needs of EU citizens, in order to save, more broadly, the strategic capacities of the European economy. MS are invited, in accordance with the 2019 Regulation, to assess each FDI with regard to its potential consequences for the whole EU.

France already has the tools to meet this request and thus to protect strategic French companies that are likely to be targeted for undesirable FDI.

French rules were deeply overhauled in 2019[6]. They require the prior approval of the Minister in charge of the Economy for (i) certain share held or acquisitions made by foreign investors or French investors established abroad (ii) in entities governed by French law (including European companies[7]) (iii) that carry out certain strategic activities. The list of the activities considered strategic under French FDI regulation has been expanded in order to be adapted to contemporary issues.

Thus, may be considered as such activities, those relating to public health, fight against the illicit use of pathogenic or toxic agents, supply of energy or water, operation of transport networks and services, electronic communications or certain agricultural products. Companies who may not be able to determine their status regarding this regulation can ask the Minister in charge of the Economy services for advice.

The Minister in charge of the Economy may refuse the authorization or make it subject to conditions. The aim of those conditions may be, for instance, to ensure the sustainability and security of protected activities on the national territory, or to ensure the preservation of the target entity's knowledge and know-how and to impede from their appropriation. He also has a power of injunction. Finally, he may also take protective measures, such as temporarily suspending, restricting or prohibiting the free disposal of all or part of the assets related to strategic activities.

Given the current health crisis context, the Communication logically emphasizes on companies in the health sector, which would e.g. produce medical products or protective equipment or carry out medical research activities (in particular vaccines). The Communication underlines the fact that any undesirable FDI in these sectors is likely to have negative repercussions for the whole EU, given the interdependence of the MS.

In line with its action in this period of crisis, the Commission intends above all to support the MS in the policies they implement at a national level. Its own action will therefore be limited and will, at the appropriate time, take place within the framework of the 2019 Regulation, unlike what the Commission has done in the field of State aids, where it has, but because it has the legal competence to do so, practically put the usual rules on hold.

Thus, the Commission will, in particular, issue opinions, which MS will have to take the utmost account of, when it considers that a FDI is likely to undermine projects or programs of interest to the EU. The Communication states in particular that the Commission will exercise more in-depth monitoring of companies (under Article 8 of the 2019 Regulation), especially in the health sector, which have received or will receive subsidies, e.g. in the context of the fight against Covid-19, under the EU Research and Innovation program Horizon 2020.

However, by the tone and inspiration of this Communication, it is suggested that the Commission may, in the future, take a relatively more open attitude when it will be faced with measures taken by a MS to protect strategic assets.

Following an informal video conference on 26 March 2020, the members of the European Council adopted a statement on the EU actions in response to the COVID-19 outbreak whereby they welcomed the Commission guidelines on the screening of FDI and called on the MS to take all necessary measures to protect strategic assets and technology from FDI that could threaten legitimate public policy objectives. The European Council states that it will contribute to the EU's strategic autonomy, during the crisis and afterwards.

[1] The Communication mentions, in a subsidiary way, the possibility of introducing specific shares ("*golden shares*") and also includes reminders on the possibility of limiting portfolio investments and the free movement of capital.

[2] European Commission, March 25, 2020, C(2020) 1981 final.

[3] The list of the strategic activities will be set out, from 1 April 2020, in the new Article R. 151-3 of the FMFC.

[4] In short, restrictions must be made necessary by a legitimate public interest objective and need to be proportionate to the aim pursued.

[5] The Commission also invites MS which do not have such system to set up one. It states that if an FDI has not been subject to such monitoring, the Commission and MS are likely to make ex-post comments between October 2020 and June 2021, in accordance with Article 7 of the 2019 Regulation.

[6] We would like to take the liberty to advise you to read our publications on the subject "*Contrôle des investissements étrangers en France : le temps de la maturité ?*", Revue Lamy Droit des Affaires, n.151, September 2019 and "*Réforme du contrôle des investissements étrangers : dernier acte ?*", Options Droit & Affaires, 29 January 2020.

[7] Within the meaning of Regulation 2157/2001 of 8 October 2001 *on the Statute for a European Company*.

