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New EU rules to protect strategic companies

Introduction

"We continue to work closely with Member States to ensure that European businesses have access to urgently needed liquidity", said the vice-president of the European Commission ("Commission") Margrethe Vestager in connection with the amendment to the Temporary Framework on State aid adopted on 8 May 2020.[1] This change will offer Member states enhanced tools for protecting their strategic undertakings, complementing the rules on foreign investment screening according to EU Regulation n. 2019/452 (the "Communication").[2] Below we outline these two instruments.

1. The new rules on State aid in form of recapitalization and subordinated debt

With the new rules, the Commission, amending the preexisting Temporary Framework of 19 March 2020,[3] aims at leaving greater flexibility to member States to intervene through recapitalizations and acquisitions of equity, or similar securities, in companies which are in difficulties due to the Covid-19 outbreak. In particular, the Commission can authorize measures having the following features:

(i) ***Conditions on the necessity, appropriateness and size of intervention.*** Recapitalisation aid should only be granted if no other appropriate solution is available, and it must be in the common interest to intervene (e.g. to avoid social hardship and market failure due to significant loss of employment, the exit of an innovative or a systemically important company, or the risk of disruption to an important service). Moreover, the aid must be limited to enabling the viability of the company and should not go beyond restoring the beneficiary's capital structure to the situation prior to the coronavirus outbreak.

(ii) ***Conditions on the national authorities' entry in the capital of companies and remuneration.*** The national authorities must be sufficiently remunerated for the risks they assume through the recapitalisation aid. Moreover, the remuneration mechanism needs to incentivise beneficiaries and/or their owners to buy out the shares acquired by the public authorities to ensure the temporary nature of the intervention.

(iii) ***Conditions regarding the exit of the State from the capital of the companies concerned.*** Beneficiaries and Member States are required to develop an exit strategy, in particular as regards large companies that have received significant recapitalisation aid. If six years after recapitalisation aid to publicly listed companies, or up to seven years for other companies, the exit of the State is in doubt, a restructuring plan for the beneficiary will have to be notified to the Commission.

(iv) ***Conditions regarding governance.*** Until the public authorities have exited in full, beneficiaries are subject to bans on dividends and share buybacks. Moreover, until at least 75% of the recapitalisation is redeemed, a strict limitation of the remuneration of their management, including

[1] The text of the new amendment is available here .

[2] Communication of the Commission n. 2020/C 99 I/01 on the "*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)*".

[3] The Framework has already been amended on 3 April 2020 (for further information, click here).

a ban on bonus payments, is applied.

(v) ***Prohibition of cross-subsidisation and acquisition ban.*** Until at least 75% of the recapitalisation is redeemed, beneficiaries, other than SMEs, are in principle prevented from acquiring a stake of more than 10% in competitors or other operators in the same line of business, including upstream and downstream operations.

Recapitalizations worth more than EUR 250 million will have to be individually notified to the Commission. Instead, for transactions below such threshold, national authorities can notify aid schemes.

The amendment to the Temporary Framework also introduces the possibility for Member States to support companies facing financial difficulties due to the coronavirus outbreak by providing subordinated debt at favourable terms.

It should be recalled that these rules apply to companies experiencing difficulties after 31 December 2019. Instead, for companies already in difficulty on 31 December 2019, the ordinary rules set out in the Commission's Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, apply.[4]

2. The Communication on foreign investment screening

EU Regulation n. 2019/452 of 19 March 2019 on direct FDI screening will fully enter into force on 11 October 2020. However, given the current circumstances, the Commission adopted a Communication to help Member States to bring forward the effects of the Regulation, strengthening their ability to protect strategic companies. In particular, the Commission called upon member States to make use of their FDI screening mechanisms to take fully into account the risks to critical health infrastructures, supply of critical inputs, and other critical sectors.

Moreover, for those member States that do not have a screening mechanism, or whose screening mechanisms do not cover all relevant transactions, the Commission recommended amending their national rules and/or to use all the available options provided by the EU Regulation.

The Commission also recalled that restrictions to free capital movements have to be suitable, necessary and proportionate to attain legitimate public policy objectives.

Several member States are amending their national rules following the Communication of the Commission. For instance, Italy has decided to extend the scope of application of its FDI screening rules (the so-called 'Golden Power' legislation), by making a reference to the sectors listed in the EU Regulation.[5]

3. Conclusion

EU law offers member States a wide array of tools to protect their strategic companies. The latest changes will enhance Member States' ability *"to uphold European values and the need for a level playing field to be able to bounce back strongly from this crisis".*

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4 Commission's Communication of 31 July 2017 (2014/C 249/01).

5 Articles 15-17 of Law Decree of 8 April 2020, n. 23. For more information please click here

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