

# Europe and the UK Race To Protect Businesses Impacted by the Coronavirus Pandemic: Foreign Investment, State Aid and Antitrust Rules Adjusted

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State measures to combat the spread of COVID-19 have brought many countries across Europe to a standstill. While health care systems struggle to respond, the pandemic has also provided “a major shock for our economies.”<sup>1</sup> Insufficient liquidity and a risk of insolvency threaten a rising number of businesses.

The European Commission (EC) and its member states have adopted a range of measures (i) to protect domestic industry from the perceived predatory attentions of foreign acquirers seeking to buy assets at crisis prices and (ii) to support domestic industries through state subsidies. Both types of measure would normally be firmly circumscribed by EU law, which provides that both investments must be free of state intervention (per EU rules on allowing free movement of capital) and markets must be undistorted by state subsidy (per state aid rules). However, the EC — nominally the guardian of the EU treaties’ free trade rules — has been swift to issue new guidance on screening foreign investments in EU companies and a more lenient approach to state subsidies.

Similarly a number of competition authorities have signaled preparedness to tolerate collaboration in the food and health care sectors where required to manage shortages. Firms should not see this, however, as tolerance for illegal conduct, such as colluding on prices or allocating markets. A lesson of past crises is that antitrust regulators are quick to clamp down on businesses cutting legal corners. It’s important for legal and compliance teams to remind business colleagues that a crisis is not a time to let the company’s guard down.

## Foreign Investment Controls

A number of EU states have raised the concern that predatory investors might take advantage of vulnerable businesses through heavily discounted takeovers. Preempting this, the Spanish government published the Spanish Royal Decree-Law 08/2020 on March 17, 2020. Non-EEA investments (larger than 10%) in key domestic assets related to public health and public security (the “strategic industries”) such as infrastructure, technology and media must now be authorized by the Spanish government. Further measures restrict foreign direct investment by investors (i) controlled by the government of a non-EU member state, (ii) that already have invested in the strategic industries of another member state, and (iii) that have been brought before administrative or judicial proceedings for illegal conduct.

<sup>1</sup> President of the European Commission, Ursula von der Leyen, “[Von der Leyen on Coronavirus Response: EU To Be Determined and United](#)” (March 13, 2020, accessed March 23, 2020).

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Germany and Italy are expected to introduce similar provisions. In particular, Germany is considering further support measures to protect its national industrial sector, including restricting foreign direct investment in significant assets such as automotive companies.<sup>2</sup> The Italian deputy economic minister stressed that the government would not allow Italy “to become someone’s shopping territory.”<sup>3</sup> He noted that the government is considering how to strengthen existing instruments to protect from stake-building in strategic industries, such as defense, energy and telecommunications networks.

The EC issued guidelines on March 25, 2020, that call upon member states that already have a foreign investment “screening mechanism in place to make full use of tools available to them under EU and national law to prevent capital flows from non-EU countries that could undermine Europe’s security or public order.”<sup>4</sup> Member states that lack such screening mechanisms were urged to establish some and to “consider all options, in compliance with EU law and international obligations,” to address any potential foreign investment in a business, infrastructure or technology that would “create a risk to security or public order in the EU” in order to eliminate the risks to critical health infrastructures, supply of critical inputs and other critical sectors.

The EU Foreign Direct Investment Screening Regulation (Regulation (EU) 2019/452) already enables member states to coordinate the screening of foreign investments affecting the relevant sectors through an exchange of information between states and with the Commission. President of the European Commission Ursula von der Leyen stressed that “if we want Europe to emerge from this crisis as strong as we entered it, then we must take precautionary measures now. As in any crisis, when our industrial and corporate assets can be under stress, we need to protect our security and economic sovereignty. ... [T]he EU is and will remain an open market for foreign direct investment. But this openness is not unconditional.”<sup>5</sup> The guidelines also highlight further possible restrictions to capital flows, such as the possibility for member states to hold “golden shares” in companies and other measures that can be accommodated under the derogation of public health

protection. The EC guidance followed a joint letter from nine European heads of state asking for EU measures in reply to this pandemic crisis.

Nationalization would offer an alternative approach to preserve the autonomy of domestic companies from foreign investment. The U.K., for example, has already indicated that it has not ruled out the possibility of the government taking equity stakes in flailing airline businesses.<sup>6</sup> The French economic minister also said that temporary nationalization would be used as “a last resort” where necessary and would be particularly aimed at saving companies that form part of France’s “industrial heritage.”<sup>7</sup> The Commission has also indicated this kind of action may be appropriate to protect domestic companies, although it should not be taken for overtly protectionist reasons, which would generally contradict EU law on free movement of capital if outside of narrowly defined public interest justifications.<sup>8</sup> The Commission has indicated that protection against “predatory buying” of strategic assets may be justified on grounds of public policy or security in limited circumstances.<sup>9</sup>

## State Aid

Several European governments have already announced measures to aid domestic businesses in need of short term liquidity. The U.K. has pledged to prevent the collapse of its airlines, having already committed £330 billion of loan guarantees to industry.<sup>10</sup> Last week, President Macron also announced that €45 billion would be made available in immediate aid for struggling businesses in France.<sup>11</sup> Similarly, Spain and Germany have unveiled respectively a €200 billion and €500 billion rescue package for companies, and the German government stressed that it will not set any limits on the volume of measures it may take.<sup>12</sup>

<sup>6</sup> David Crow and Jim Pickard, “UK Draws Up Plans To Buy Into Airlines,” *Financial Times* (March 24, 2020).

<sup>7</sup> Arezki Yaïche, “French Auto, Aerospace Industries Will Need Much More State Aid After COVID-19, Le Maire Says” (March 24, 2020, accessed March 24, 2020).

<sup>8</sup> See “Golden Share” case law: Case C-367/98 *Commission v. Portugal* (2002) ECJ; C-483/99 *Commission v. France* (2002) ECJ; and C-503/99 *Commission v. Belgium* (2002) ECJ.

<sup>9</sup> Guidance to the member states concerning foreign direct investment and free movement of capital from third countries as well as the protection of Europe’s strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation) C(2020), 1981 final, page 3.

<sup>10</sup> David Crow and Jim Pickard, “UK Draws Up Plans To Buy Into Airlines,” *Financial Times* (March 24, 2020).

<sup>11</sup> Sam Schechner, “France Pledges €50 Billion in Aid for Businesses as Country Goes Under Lockdown,” *Wall Street Journal* (March 17, 2020).

<sup>12</sup> Charles Riley, “European Countries Are Writing Blank Checks To Save Their Economies From Coronavirus” (March 17, 2020, accessed March 23, 2020).

<sup>2</sup> Thomas Escritt, Christoph Steitz, “Germany Will Block Foreign Takeovers To Avoid Economy Sell-Out” (March 20, 2020).

<sup>3</sup> “Italy To Defend ‘Strategic Companies’ From Foreign Takeover” (March 18, 2020, accessed March 23, 2020).

<sup>4</sup> Guidance to the member states concerning foreign direct investment and free movement of capital from third countries as well as the protection of Europe’s strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation) C(2020), 1981 final.

<sup>5</sup> European Commission, “Coronavirus: Commission Issues Guidelines To Protect Critical European Assets and Technology in Current Crisis” (March 25, 2020, accessed March 26, 2020).

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President von der Leyen provided assurance last week that the EU would do whatever was necessary to support Europeans and the European economy.<sup>13</sup> The EC noted, however, that “given the limited size of the EU budget, the main response will come from Member States’ national budgets.”<sup>14</sup>

As covered in the recently published Skadden alert [“European Commission Delays Merger Notifications Until Further Notice, Develops Emergency State Aid Response to COVID-19 Outbreak,”](#) many of these measures qualify as “state aid” under the EU rules and must be vetted by the EC before their implementation to limit any harm to the EU single market. This may be the case not only for subsidies but also for tax advantages, reductions in social security contributions, capital injections, loans, guarantees, etc.

As anticipated, on March 19, 2020, the EC published a dedicated Temporary Framework “to enable Member States to use the full flexibility foreseen under State aid rules to support the economy in the context of the COVID-19 outbreak.” The Temporary Framework recognizes the outbreak as a “serious disturbance in the economy” of all EU member states and sets out the conditions under which member states’ state aid schemes can be swiftly approved by the Commission. The Temporary Framework complements the many other possibilities already available to member states as described in our client alert on March 16, 2020 (referenced above). The framework covers:

- Aid not exceeding €800,000 per undertaking in the form of direct grants, selective tax advantages and advance payments;
- State guarantees for loans taken by companies from banks;
- Subsidized public loans to companies; and
- State aid channeled through banks.

State aid measures must be necessary, appropriate and proportionate, and to ensure such conditions, the Temporary Framework imposes safeguards, such as requiring available guarantees and loans to be made in reference to turnover and liquidity needs.

The Temporary Framework also anticipates that companies may have to accept deferred payments for goods from foreign businesses as a result of cash flow difficulties. The established practice is for domestic companies to insure this risk with

private insurance companies where possible, as contributing state resources in this case could constitute unlawful state aid. The state should only intervene to insure the risk of nonpayment from a foreign customer where the export country is a “non-marketable risk” under the 2012 short-term export credit communication. This definition has limited scope. Commercial and political risks with a maximum risk period of less than two years for public and nonpublic buyers will typically be “marketable.” However, the Temporary Framework creates greater flexibility for member states to prove that public insurance is required. Following this and in response to member states’ concerns about the effect of the crisis on availability of private credit insurance, the EC opened an emergency public consultation on March 23, 2020, to review “marketable risk countries” under the 2012 short-term export-credit communication. Based on the outcome of this consultation, “marketable risk countries” may temporarily be characterized as “non-marketable,” enabling state insurers to offer coverage to exporting domestic companies.<sup>15</sup>

The Temporary Framework will be in place until December 31, 2020, though the Commission retains the power to extend this deadline as it sees fit.<sup>16</sup>

While member states welcome these measures, concerns will likely remain regarding to what extent they can abate the economic crisis. The French economic minister has suggested that “the EU should do more.”<sup>17</sup> With this in mind, further relaxation of state aid rules may in time need to be considered.

Understanding whether subsidies fit within the temporary legal framework, now and as it evolves, is important for companies to ensure compatibility with EU state aid rules. The risk of accepting incompatible state subsidies is that at a later date the state may be forced to claw back the aid from the recipient, leading to potentially substantial liabilities that can arise long after the immediate crisis has abated.

## Antitrust Leeway

Competition authorities have also shown greater leniency with an aim to enable national stability. In Norway, where the airline industry, as in other countries, is facing particular strain, SAS and Norwegian Air have been allowed to coordinate schedules

<sup>13</sup> President of the European Commission, Ursula von der Leyen, “Von der Leyen on Coronavirus Response: EU To Be Determined and United” (March 13, 2020, accessed March 23, 2020).

<sup>14</sup> European Commission, “Communication From the Commission” (March 17, 2020, accessed March 23, 2020).

<sup>15</sup> European Commission, “Daily News 23/03/2020” (March 23, 2020, accessed March 24, 2020).

<sup>16</sup> European Commission, “State Aid: Commission Adopts Temporary Framework To Enable Member States To Further Support the Economy in the COVID-19 Outbreak” (March 17, 2020, accessed March 23, 2020).

<sup>17</sup> Arezki Yaiche, “French Auto, Aerospace Industries Will Need Much More State Aid After COVID-19, Le Maire Says” (March 24, 2020, accessed March 24, 2020).

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to provide a minimum level of service.<sup>18</sup> To ensure consumers do not face food shortages, authorities in the U.K. and Germany have indicated that supermarkets will not be penalized for cooperating in order to maintain supply levels and facilitate deliveries to meet demand appropriately.<sup>19</sup> The European Competition Network echoed this approach in a recent statement, noting that it “will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply,”<sup>20</sup> and the CMA issued similar guidance on March 25, 2020.

Still, firms should be cautious not to assume that exceptional times justify a departure from strict competition law compliance. Competition authorities warned that they will take swift action against companies taking opportunistic steps to collude to raise prices or otherwise take advantage of the crisis through illegal means:

- The U.K.’s Competition and Markets Authority (CMA) directly addressed the pharmaceutical and food and drink industries in an open letter warning them against “seeking to capitalise on the current situation by charging unjustifiably high prices for essential goods or making misleading claims around their efficacy.” The CMA made clear that it retains a range of recourses to tackle what it deems “bad behaviour” among these companies.<sup>21</sup>
- In Greece, consumer complaints and reports of significant price increases in high-demand commodities such as surgical masks and gloves have already prompted the Hellenic Competition Commission (HCC) to launch an investigation into numerous health care companies. The HCC stressed that “in the current situation in which the country is being afflicted by the coronavirus pandemic, the HCC will continue to intervene, wherever and whenever necessary.”<sup>22</sup>

Tension may arise between national and EU level interests. In times of shortage, suppliers, for example of pharmaceuticals or medical necessities, may want to ensure that domestic demand is suitably served and that supplies are not diverted via parallel trade arbitrage to countries where they command a higher price. Countries such as Greece and Spain have emergency laws to prevent pharmaceutical shortages in order to limit parallel trade, and Norway has followed suit in March 2020, requiring parallel

traders to seek approval from the Norwegian Medicines Agency. However, these state measures do not mean that suppliers can seek to agree to restrict parallel trade with wholesalers or distributors, which remains strictly illegal.<sup>23</sup> Suppliers may wish to revise or update their lawful stock management planning systems or other logistics arrangements to ensure that they reflect changes in demand during the crisis. They should clear with the legal and compliance teams any changes to distribution arrangements that might restrict parallel trade. While domestic governments might tolerate private efforts to curtail parallel trade, the EC can be expected to remain vigilant.

Moreover, there may be varying degrees with which different agencies view collaborations as sufficiently necessary and temporary to “ensure the supply and fair distribution of scarce products to all consumers.”<sup>24</sup> Interpretations and priorities have already proven different between states. To date, the competition authority in the Netherlands has stated broadly that it would be ready to answer questions about collaborations that companies wished to launch in order to combat the crisis.<sup>25</sup> By contrast, in Norway, exceptions to restrictions on anticompetitive agreements and practices are aimed specifically at the transport sector and will be limited to a period of three months in order “to maintain the transportation of passenger and goods in Norway in order to secure the population access to necessary goods and services.”<sup>26</sup> In other states, including the United Kingdom, competition regulators have shown leniency to retailers and supermarkets to prevent a shortage in food supply in the “current situation,”<sup>27</sup> with no more specific time frame given.

Particular tensions have emerged over supplies of face mask and personal protection equipment with the EU (i) interceding with member states over measures reserving protective equipment for domestic use<sup>28</sup> and (ii) requiring that such equipment not be shipped outside the EU. On March 15, 2020, the EC announced the Commission Implementing Regulation (EU) 2020/402 banning exports of such equipment outside the bloc without authorization from a member state “to ensure adequacy of supply in the Union in order to meet the vital demand.” The regulation

<sup>18</sup> Lewis Crofts and Michael Acton, “Comment: European Antitrust Law May Not Emerge Unscathed From COVID-19 Crisis” (March 23, 2020, accessed March 23, 2020).

<sup>19</sup> Competition and Markets Authority, “COVID-19: CMA Approach to Essential Business Cooperation” (March 19, 2020, accessed March 24, 2020).

<sup>20</sup> European Competition Network, “Antitrust: Joint Statement by the European Competition Network (ECN) on Application of Competition Law During the Corona Crisis” (March 23, 2020, accessed March 24, 2020).

<sup>21</sup> CMA, “An Open Letter to the Pharmaceutical and Food and Drink Industries” (March 20, 2020, accessed March 24, 2020).

<sup>22</sup> Hellenic Competition Commission, “Official Statement” (March 22, 2020, accessed March 24, 2020).

<sup>23</sup> See *inter alia*: Joined Cases C-468/06 to C-478/06 *Sot. Lélou kai Sia EE and Others v. GlaxoSmithKline AEE Farmakeftikon Proionton* (2008) ECR I-7139; Case T-41/96 *Bayer AG v. Commission* (2000) ECR II-3383.

<sup>24</sup> European Competition Network, “Antitrust: Joint Statement by the European Competition Network (ECN) on Application of Competition Law During the Corona Crisis” (March 23, 2020, accessed March 24, 2020).

<sup>25</sup> Authority for Consumers & Markets, “ACM’s Oversight During the Coronavirus Crisis” (March 18, 2020, accessed March 24, 2020).

<sup>26</sup> Norwegian Competition Authority, “Transportation Sector Is Granted Temporary Exception From the Competition Act” (March 19, 2020, accessed March 24, 2020).

<sup>27</sup> Competition and Markets Authority, “COVID-19: CMA Approach to Essential Business Cooperation” (March 19, 2020, accessed March 24, 2020).

<sup>28</sup> Carmen Paul and Jillian Deutsch, “Health Ministers Squabble Over Face Masks at Coronavirus Talks,” *Politico* (March 7, 2020).

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will apply regardless of where the equipment was produced and will be in place for six weeks. It comes after member states such as Germany, France and Poland imposed national measures restricting supply of this key equipment to the state itself. President von der Leyen criticized these protectionist measures in favor of cooperation between member states: “National bans on selling protective equipment to other member states are not good. We need to help each other. ... [T]oday it is Italy that rapidly needs large quantities of medical goods, but in a few weeks other countries will need it too.”<sup>29</sup>

Past crises have shown the authorities’ views on crisis management measures after the event show little tolerance for misconduct. The EC, for example, opened a long-running investigation into insurers’ efforts to reinstate aviation terrorism cover after the 9/11 terror attacks.<sup>30</sup> Similarly, the authorities’ forbearance does not shield companies from liability to civil law suits.<sup>31</sup> Therefore companies should carefully assess any collaborative initiatives, and where relevant, discuss with relevant competition agencies.

## Conclusion

Legal and compliance teams should take this opportunity to warn business colleagues that antitrust rules continue to apply in a crisis:

**(i) Investors should be aware that states are taking steps to safeguard potentially underpriced domestic assets from foreign investment.** Investors should carefully consider how investments are structured and whether additional approvals may be required.

<sup>29</sup> Lili Bayer, Jillian Deutsch, Jakob Hanke Vela and Paola Tamma, “EU Moves To Limit Exports of Medical Equipment Outside the Bloc,” *Politico* (March 15, 2020).

<sup>30</sup> European Commission, “[Competition: Aviation Insurers Commit to Reforms To Promote Competition and Transparency](#)” (March 23, 2005, accessed March 24, 2020).

<sup>31</sup> CMA, “[CMA Launches COVID-19 Taskforce](#)” (March 20, 2020, accessed March 24, 2020).

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**(ii) Companies should ensure that state aid measures (such as loans, grants or tax relief) fit within the EU revised framework.** While noncompliant aid may be an important lifeline, later clawback proceedings can be expensive and create substantial liabilities for the company.

**(iii) Companies can explore needed collaborations but must avoid improper communications with rivals concerning pricing, customers, markets or business opportunities.** Competitors remain independent and each should make business decisions independently. In times of crisis it is particularly important that companies do not let their guard down.

**(a) Collaborative arrangements to efficiently manage shortages or joint procurement may be legal, but companies must take prior legal advice on the structure and scope of agreements at an early stage.**

**(b) Joint lobbying — for example, for sectoral tax relief or legislative relaxation — can be entirely proper, but should not be used as a forum for collusion.** Companies should apply strict safeguards, involving legal counsel as appropriate, using appropriate industry fora (with a professional secretariat that understands and can provide guidance on compliance risks) and recording in meeting minutes any meetings or contacts to ensure there is evidence that improper topics were not discussed.

**(c) National measures may restrict exports of essential medical supplies, but companies should not take matters into their hands.** The EC can be expected to remain vigilant in taking action against agreements with distributors or wholesalers to prohibit exports. Companies may wish to update and revise their stock management plans to take account of changing demand during the crisis, but any changes to distribution arrangements should be subject to prior legal review.

Keshara Hallock contributed to this article.