Coronavirus – screening of foreign direct investment- EU regs

- In practice, a **foreign investment completed now** (March 2020) **could be subject to** ex **post comments by Member**States **or** opinions by the **Commission** (between 11 October 2020 (date of full application of the Regulation) and June 2021 (15 months after completion of the investment)).
- Besides investment screening, **Member States may retain special rights in** certain undertakings ("**golden shares**"). In some cases, such rights may **enable the State to block or set limits to certain types of investments** in the companies concerned. Such measures are company specific, and their scope depend on the powers granted to the State by the golden share.
- The **justifications to restrictions** on capital movements:

    a. in case of "**predatory buying**" **of strategic assets** by foreign investors (e.g. with a view to limit supply to the EU market of a certain good/service), the most relevant exception is "public policy or public security" (energy supply, for instance), is **to ensure security of supply or threats to financial stability**.

    b. **public health** has been **recognised** by the Court of Justice of the European Union as an **overriding reason in the general interest**.

    c. safeguards in case of **serious difficulties**, or threat thereof, **for the operation of the Economic and Monetary Union** (Article 66 TFEU) and for balance of payments for Member States outside the euro area

- **Investments that do not constitute FDI**, i.e. portfolio investments, may be **screened by the Member States where they represent an acquisition** of at least qualified shareholding that confers certain rights to the shareholder or connected shareholders under the national company law (e.g. 5%), they might be of relevance in terms of security or public order.
- **Foreign acquisition** which is **likely to affect projects or programmes of Union interest** is subject to a **closer scrutiny by the Commission**, whose opinions have to be taken into utmost account by the Member States [Horizon, PCIs, IPCEIs…]
- The **screening of foreign direct investment does not necessarily result in a prohibition of the investment going ahead**. There are instances where mitigating measures may suffice (for instance, conditions guaranteeing the supply of medical products/devices).
- National **screening mechanism**s are already **in force** in 14 Member States:

    - Denmark
    - Germany
    - Spain
    - France
    - Italy
    - Latvia
    - Lithuania
    - Hungary
    - The Netherlands
    - Austria
    - Poland
    - Portugal

Romania
Finland