

Foreign investment control – current developments

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During the corona crisis public interest focuses on the instrument of foreign investment control especially concerning planned takeovers of system or security-relevant German companies. At the end of March the European Commission took a clear position and requested Member States to make full use of all tools available to control foreign direct investments. In April the German Federal Ministry of Economics (Bundeswirtschaftsministerium - BMWi) presented two draft proposals for far-reaching amendments of the current German legal framework for foreign investment control. The proposed amendments provide for a significant expansion of the notification requirements, especially in - conceivably broad understood - health care sector.

EU Commission issues Guidelines on foreign direct investment

Against the background of the corona pandemic, the European Commission has issued "Guidelines for the screening of foreign direct investment into the Union" on 26 March 2020, urging member states to examine foreign investments in European companies, especially in system-relevant sectors. Concerns have been expressed that the crisis must not lead to a sell-off of the European or German economy. The Member States should now use all available tools to control foreign direct investments.

According to the Commission's clear statement the European Union will remain open to foreign investment - however, it must be examined in detail who is investing and for what purpose in order to prevent strategic assets from being sold.

According to the Guidelines issued by the European Commission, foreign direct investment in European companies in "strategic industries" must be screened in detail. The EU Member States are to make use of existing national control mechanisms. The aim is "to prevent capital movements from non-EU states that could undermine Europe's security or public order". The EU Commission is referring primarily, but not exclusively, to healthcare (medical or protective equipment) and research (such as the development of vaccinations).

At the same time, the EU calls on all Member States that have not yet adopted mechanisms for foreign investment control to set up screening mechanisms as soon as possible. In the meantime, all other available options in line with European and international law must be considered to prevent European companies and key technologies from being sold to investors from outside the EU.

At present, only 14 EU Member States have mechanisms to control foreign investments, as the adoption of screening tools will only become mandatory on 11 October

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2020 under Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investment within the Union ("FDI Screening Regulation").

The current legal situation in Germany

In Germany, many foreign investments are already subject to examination by the BMWi. Whether the authority must be involved in the transaction depends on §§ 55 ff. Foreign Trade and Payments Ordinance (AWV). The law itself identifies some particularly sensitive areas, e.g. the defence and IT security sector (e.g. encryption technologies) or particularly (security) relevant civil industries, such as telecommunications, health or energy. The threshold for examination is low; even a direct or indirect foreign participation of 10% of voting shares leads to the involvement of the authority.

If the activities of the company to be acquired do not fall within the above-mentioned particularly security-relevant areas, but the company is active in areas that are relevant to public safety and order in Germany, the authority can initiate an examination if the direct or indirect (non-European) foreign participation exceeds 25%.

At the beginning of April, the Federal Minister of Economics presented a draft proposal to amend the Foreign Trade and Payments Act (AWG) to implement the requirements of the FDI Screening Regulation into German law. Only some weeks later the BMWi further presented a draft amendment to the Foreign Trade and Payments Ordinance (AWV). Both projects will lead to far-reaching amendments of German foreign investment control.

Proposed changes of the AWG

The draft proposes to expand the auditing standard. The BMWi is currently examining whether the transaction poses a threat to the public order or security of the Federal Republic of Germany. In future, it will be sufficient that the acquisition leads to a "probable impairment" of public safety and order. As cooperation of national and European authorities in foreign investment control is encouraged (security) interests of other member states and EU programmes or projects should be given greater consideration in addition to national interests.

Furthermore, notifiable foreign investments are to be suspended ineffective until BMWi's final clearance. So far, this only applies to particularly security-relevant transactions (mainly defence and IT security sector), which are examined within the framework of the so-called sector-specific examination. The draft amendment also provides for penalties to prevent access to security-relevant technologies and know-how before the BMWi's final decision. However, those amendments shall not apply for transactions that must not be notified to the BMWi.

The draft also provides for the establishment of a national contact at the BMWi, as provided for by the FDI Screening Regulation.

Draft amendment to the Foreign Trade and Payments Regulation

The draft for the revision of the AWV presented at the end of April provides for far-reaching changes, especially in the health sector.

Significant changes for acquisitions of companies in the healthcare sector

In future, acquisitions of companies that develop vaccines, drugs, medical protective equipment and other medical goods for the treatment of highly infectious diseases must be notified in writing to the BMWi. This applies for an acquisition of 10% of the voting shares or more. The proposed amendment to the Foreign Trade and Payments Act (AWG) provides that acquisitions subject to notification requirements will remain pending ineffective until the BMWi's final decision.

The draft does not only target manufacturers and development of such products but in several constellations also suppliers. Regarding personal protective equipment, medical devices and in-vitro diagnostics for the treatment of highly infectious diseases also the acquisition of manufacturers of components and preliminary products as well as manufacturers of manufacturing plants used for production must be notified. This extends the scope of application considerably beyond the "classic" health sector. In future BMWi might for example be interested in transactions involving manufacturers of nonwoven products as a necessary intermediate product for the production of masks or manufacturers of spunbond lines as a necessary production plant.

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New reporting requirements also in other sectors

In addition to companies in the healthcare sector, the group of "critical infrastructures" shall in future also include companies that are indispensable for the interference-free operation of the communication infrastructures operated by the Federal Agency for Digital Radio of Security Authorities and Organisations (BDBOS), as well as companies that process certain critical raw materials and ores.

Reporting requirements for asset deals

The amendment clarifies that asset deals can also constitute a notifiable business acquisition. This includes the transfer of an independent part of a business or all of the operating assets necessary to maintain the business or part of a business.

Clarification of the criteria for the existence of a threat to public order and security

Under current law, the BMWi can prohibit foreign acquisitions that pose a threat to public safety and order. Until now, however, there has been no explicit standard as to when such a threat has been established. Now, the Regulation itself is to provide for criteria in the person of the acquirer, the existence of which can be assumed to constitute a threat to public safety and order. These include, in particular, control by (foreign) state authorities as well as the participation of the acquirer in previous offences or acts which constituted a threat to public safety and order or a violation of the AWG.

Comment

Foreign investments in Germany, especially in the aforementioned areas of health care and medical research, will be subject to increased control by the BMWi in the upcoming weeks and months. The planned amendments to German law (AWG and AWV) will lead to a further increase of the number of investment control proceedings by BMWi. Against the background of the current corona crisis, significant resistance to the plans of the BMWi is hardly to be expected.

Foreign transactions targeting industries and companies that are strategic under the current circumstances will be

monitored more closely. This is especially true for the - conceivably broad understood - health care sector that shall become a key industry ("critical infrastructure") according to Section 55 para. 1 sentence 2 AWV – without timely limitation to the duration of corona crisis. Whether foreign investments must be notified or whether it is recommendable to contact the authority for other reasons should be clarified at an early stage for every planned foreign investment in Germany.

[Commission press release of 26.03.2020](#)

[Guidelines of the European Commission for the verification of foreign direct investment](#)

[Regulation \(EU\) 2019/452 establishing a framework for the verification of foreign direct investment within the Union](#)

[BMWi press release of 08.04.2020 \(German language only\)](#)

[Draft law AWG, processing status 31.03.2020 \(German language only\)](#)

[Press release, Federal Ministry of Economics 27.04.2020 \(German language only\)](#)

[Draft 15th AWV amendment, 27.04.2020 \(German language only\)](#)

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