

COVID-19: Germany Plans for Significant Increase of Foreign Investment Scrutiny

Changes will extend the scope of filing requirements in the healthcare sector and clarify factors for review of foreign investment in German companies.

Key Points:

- Acquisitions of at least 10% of German companies that develop, manufacture, or produce vaccines, drugs, protective equipment, and other medical goods for the treatment of highly infectious diseases will be required to be reported to the BMWi.
- The new rules clarify factors to be considered when analyzing whether a foreign investor may threaten German national interests.
- The new rules will likely enter into effect as soon as mid-May.

Background

On 28 April 2020, the Federal Ministry for Economic Affairs and Energy (BMWi) published a draft amendment to the Foreign Trade and Payments Ordinance (AWV). The amendment focuses on the healthcare sector. The intended changes to the AWV serve to protect German national interests in light of the COVID-19 pandemic and mark the third amendment to Germany's Foreign Direct Investment (FDI) control regime since 2017. The amendment constitutes the first step in a broader overhaul of the German FDI control regime which is expected to be completed within the next few months.

FDI control in Germany – a quick primer

Under the existing German FDI control regime, the BMWi may review any non-EU investor's acquisition of at least 25% of the voting rights in a German-based company on grounds of national security and/or public order. The BMWi may do so *ex-officio* within three months of learning of the transaction and for up to five years after signing. In addition, acquisitions of at least 10% of the voting rights in German companies active in certain areas of critical infrastructure and related technology (e.g. energy and transport infrastructure, financial institutions, health, telecoms, datacenters) or in the area of military and defense, may be subject to a mandatory filing requirement.

Under the existing rules, only mandatory filings relating to acquisitions of certain companies active in the area of military and defense have a suspensive effect, *i.e.* such acquisitions cannot be closed prior to clearance by the BMWi.

Expansion of FDI screening

Extension of critical business activities

The draft amendment published on 28 April 2020 extends the list of critical business activities triggering a mandatory filing. This means that once the new rules take effect, acquisitions of at least 10% in German companies active in the following areas must be reported to the BMWi:

- State communication infrastructure within the meaning of the German Act on Digital Radio of Security Authorities and Organizations ([BDBOS Act](#))
- Personal Protective Equipment (PPE) within the meaning of [Article 3 no. 1 der Regulation \(EU\) 2016/425](#) and related components or inputs
- Medicinal products essential for the guarantee of preventive healthcare as defined in the German Medicinal Products Act ([Arzneimittelgesetz](#)) including active agents and raw materials
- Inputs or components of medicinal products for life-threatening and highly infectious diseases
- In-vitro diagnostics for infectious diseases
- Certain raw materials or their respective ores pursuant to the European Union's Communication on the 2017 list of Critical Raw Materials of 13 September 2017 ([KOM\(2017\) 490 final](#))

Clarification of review criteria

The amendment sets out the following (non-exhaustive) list of factors to be considered when analyzing foreign investment in Germany (in any sector):

- Whether the acquirer is controlled by a non-EU government, government entity, or armed forces
- Whether the acquirer has in the past participated in activities with detrimental effects on the public order or security of Germany or another Member State of the European Union
- Whether the acquirer or one of its representatives have been involved in white collar crime or violations of the German Foreign Trade and Payments Act or the German War Weapons Act.

Outlook – more to come

The amendment, albeit triggered by COVID-19, is in line with a broader transformation of FDI control in Europe. In 2019, the European Union adopted Regulation (EU) 2019/452 on the screening of foreign investments. As of October 2020, the Regulation will require Member States to cooperate on FDI reviews and exchange relevant information. While the European Commission will have the right to issue non-binding opinions and to urge Member States to review specific transactions, it will not have independent jurisdiction comparable to the Committee on Foreign Investment in the United States (CFIUS). Many Member States, including France, Hungary, Italy, the Netherlands, and Spain, have already amended their respective FDI control regimes accordingly or are in the process of doing so.

The German government has introduced a respective draft bill in January 2020. The new rules which are expected to pass parliament within the next months, and after the amendment published on 28 April 2020, will effectively extend the list of critical technologies triggering a mandatory filing to artificial intelligence, biotechnology, semiconductors, and quantum mechanics. All mandatory filings will have

suspensive effect. In addition, Germany will lower the threshold for restrictions and prohibitions of foreign investments from “if the acquisition endangers” to “is likely to affect” public order or security.

In light of these developments and the economic ramifications caused by COVID-19, the authors expect an increase in FDI review activities not only in Germany but throughout Europe. Authorities have already started to protect strategically relevant companies from takeovers by carefully scrutinizing foreign investors. As of October 2020, EU Member States will be able to share information and coordinate their reviews.

Non-EU investors should stay mindful of these developments and develop strategies early on in a transaction to avoid delays.

Note: See [Latham’s Foreign Direct Investment Regimes \(FDI\) app](#)

This interactive tool summarizes key aspects of Foreign Investment for select countries around the world and includes new restrictions related to COVID-19. The FDI app is available as a free download in the Apple App Store and Google Play that can be used on iPhone, iPad, and Android devices.

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