

Germany Adopts New Sweeping Revision of FDI Control Regime

The latest amendments provide new criminal gun jumping rules, broaden the standard of review, and expand EU-wide cooperation.

Key Points:

- New gun jumping rules prohibit certain pre-closing cooperation as well as information exchanges and provide for significant fines and criminal sanctions.
- The substantive test (theory of harm) is lowered. Even minority investments can be restricted if public order or security is likely to be affected as a result of the acquisition.
- New filing requirements for transactions in the areas of artificial intelligence, robotics, semiconductors, biotechnology, and quantum technology will be implemented by October 2020.

New rules for Germany's FDI control regime entered into effect on 17 July 2020 and apply to transactions that are signed after that date. The sweeping revision follows amendments made in 2017, 2018, and June 2020, and further expands the Ministry for Economic Affairs and Energy's (Ministry's) procedural powers when reviewing foreign investments. The revision also includes criminal sanctions for gun jumping, a first for German FDI control.

Overview

Under the FDI control regime, the Ministry may review any acquisition of at least 25% of the voting rights in a German-based company by a non-EU/EFTA investor on grounds of national security and/or public order. The Ministry may do so *ex officio* within two 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. In the area of military and defense, acquisitions by any foreign investors (*i.e.*, also from other EU Member States) will trigger a mandatory filing.

Expansion of FDI screening

Standard of review

The new rules effectively lower the standard for the Ministry to impose remedies or to prohibit transactions. While the Ministry previously had to show a “threat to public order or security” arising from the transaction, this standard has now been lowered to a “likely effect on public order or security”. In addition, the standard of review has been extended to the public order or security of another EU Member State, and to “projects or programs of Union interest” as defined by the EU Commission.

Gun jumping

So far, only mandatory filings relating to certain transactions in the area of military and defense had a suspensive effect. Such acquisitions were considered provisionally ineffective and could not be closed prior to clearance by the Ministry. The new rules extend the suspensive effect to all mandatory filings. Further, the consummation of a transaction is deemed invalid until the Ministry has issued its clearance decision. In the case of mandatory filings, even certain steps towards implementation of a transaction are now prohibited and subject to fines, as well as criminal sanctions. This includes:

- Enabling the acquirer to exercise voting rights in the target
- Granting the acquirer claims to payment of dividends by the target or any economic equivalent
- Providing or disclosing information on the target to the acquirer, insofar as this information relates to business activities or assets that give rise to the filing requirement, or that must be given special consideration by the Ministry when reviewing the transaction for an impairment of public order or public security
- Providing or disclosing information on the target to the acquirer that the Ministry has designated as significant information by a separate administrative decision

Intentional violation of these new gun jumping rules may be punished with a fine or imprisonment of up to five years. In the case of negligent infringements, the Ministry can impose fines.

Streamlined review periods

The new rules further streamline the relevant review periods for foreign investment reviews in the case of mandatory filings. Previously, the time periods were dependent on the target’s activities. Now the Ministry has two months upon filing (phase I) to decide on the initiation of an in-depth review (phase II). When conducting an in-depth review, the Ministry has four months to make a decision. If this period expires without a decision, the transaction is deemed to have been cleared. In the event of legal or factual difficulties, the Ministry may unilaterally extend phase II reviews by three months. Requests for information by the Ministry stop and restart the clock.

EU-wide cooperation

The new rules introduce a so-called National Contact Point for the coordination of FDI screening with other EU Member States. Beginning in October 2020, Member States will coordinate their national FDI reviews under the EU FDI Framework Regulation (Regulation No. 2019/452), which sets out detailed obligations regarding information sharing in ongoing FDI reviews. In addition, Member States will have the right to submit statements in the context of review proceedings conducted by other Member States. For instance, the Ministry will inform all Member States and the EU Commission of the initiation of

phase II review proceedings. The Member States, as well as the Commission, will then have the right to submit statements to the Ministry, which the Ministry will take into account when conducting its review.

Plans for further expansion of German FDI review

Within the next few months, the Ministry, in line with the EU Framework Regulation, will expand the list of critical business sectors to include the fields of artificial intelligence, robotics, semiconductors, biotechnology, and quantum technology. Acquisitions of at least 10% of the voting rights in companies operating in these areas will trigger a filing requirement. The expansion will take place by a separate governmental ordinance that is expected to become effective by October 2020. This will mark the second expansion of the list of critical sectors in 2020. On 3 June 2020, the Ministry had already expanded the list of critical sectors to include personal protective equipment, medical devices, pharmaceuticals, government communication infrastructure, and in vitro diagnostics.

Conclusion

The latest amendments mark yet another milestone in the rapid expansion of FDI control in Germany. For the first time, Germany has introduced criminal gun jumping rules in FDI control. This raises the stakes for parties to inbound M&A transactions regarding information exchanges and pre-closing cooperation. As such, investors should develop coherent strategies, taking into account the various stand-still obligations under FDI control and merger control law in order to avoid the risk of ineffectiveness of a transaction, or even fines and criminal sanctions.

As of October 2020, investors will have to take into account the new FDI cooperation mechanism among EU Member States. National FDI authorities will become aware of transactions through reports from other Member States. This could lead to an uptick in *ex officio* investigations, particularly in jurisdictions where FDI filing requirements may be difficult to identify because filing thresholds are not straightforward. Investors should look into potential FDI filing requirements early on in the deal process and carefully consider the impact on deal certainty and timing.

Note: [Latham & Watkins' Foreign Direct Investment Regimes \(FDI\) app](#) is an interactive tool that summarizes key aspects of foreign investment for select countries around the world, including new restrictions related to COVID-19. The FDI app is available as a free download in the [App Store](#) and [Google Play](#).

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