

Safe Course through the Deal

The new Foreign Direct Investment (FDI) Control Regime in Germany

Companies involved in transaction projects are challenged by the new and tightened German FDI control regime effective since 17 July 2020.

Foreign investments can be subject to the new FDI control regime from acquiring 10 % of the voting rights in a German company onwards. Missing out mandatory filing and clearance requirements may imply serious consequences, in particular pending invalidity of the transaction, substantial fines and even criminal sanctions.

Foreign investment projects should be assessed in terms of an FDI filing requirement at an early stage, since such a requirement has a significant impact on the setup and timing of the project. Besides mandatory notifications, the parties to the project must observe restrictions on information exchange and pre-closing cooperation.

1. Which investments need to be filed and cleared before closing?

The German Federal Ministry for Economic Affairs and Energy ("BMWi") may review acquisitions of German companies by foreign investors. In principle, the legal provisions distinguish between so-called "cross-sector" investments and "sector-specific" investments and oblige for different application procedures.

As a basic rule, any acquisition implying non-EU investors acquiring ownership of at least 25 % of the voting rights in a company resident in Germany, can be subject to such a review. The review procedure applies in principle to all sectors, regardless of the size of the companies involved in the acquisition.

If the German company operates in a so-called critical infrastructure (e.g. entities in the IT, telecommunication, energy sector or producers of

certain medical products) the threshold for the review is lowered to 10 % of the voting rights. The same lowered threshold applies to investments in German companies active in the IT security, military and defense sectors. Typically, investments by foreign non-EU investors are subject to a mandatory filing. However, for "sector-specific" investments related to the military and defense sectors filings are mandatory for acquisitions by any foreign investor, including those based in other EU Member States.

A forthcoming legislative change will extend the scope of categories affected by the "sector specific" investment review to critical technologies as defined in the EU FDI Screening Regulation 2019/452. These will comprise sectors such as artificial intelligence, robotics, semiconductors, biotechnology and quantum technology. Again, 10% of the voting rights will be the relevant foreign investment threshold

2. What are the relevant decision criteria?

Before the amendments, the BMWi assessed (and had to establish) if and that a foreign investment implied a "threat to public order or security" for the Federal Republic of Germany. With the new regulation, the criteria for an assessment and possible restrictions or a prohibition were extended:

First, a "likely effect" is sufficient instead of a "threat". Second, such effects are relevant not only regarding the public order or security of the Federal Republic of Germany, but also regarding other EU Member States or projects and programs of the EU.

3. What are the review and decision periods?

The initial review period was shortened to two months upon notification (pre review period to decide whether to initiate an in-depth review or to grant clearance). Notified investments are deemed to have been cleared if the period elapses without any decision of the BMWi.

If the BMWi decides to initiate an in-depth review, the main review period is set to four months upon filing; it may be extended by another three months in delicate cases implying factual or legal challenges (respectively four months, if the case affects German defense interests). Requests for information by the BMWi may “stop and restart the clock”. Again, investments are deemed to have been cleared if the applicable period elapses without a timely decision of the BMWi.

4. Which restrictions apply?

All foreign investments subject to a mandatory filing are also subject to a suspensive effect. Until clearance, respectively the expiry of the applicable review period and regardless of the sector affected (i.e. “cross sector” and “sector-specific”), the legal transaction aligned with the investment shall be provisionally ineffective. Such transactions may not be closed before that date, otherwise the closing is deemed invalid.

The suspensive effect is further enforced by fines and even criminal sanctions (prison sentence of up to five years) in cases of infringements (so called “Gun Jumping”).

Gun Jumping sanctions also apply at earlier stages before closing, if certain steps towards implementation of a transaction are taken before clearance, in particular: (i) if the acquirer is enabled to exercise (directly or indirectly) voting rights in the target, (ii) if the acquirer is granted claims to receive any profit distribution rights associated with the acquisition or any economic equivalent, (iii) if information about the target is provided or disclosed to the acquirer relating to activities which trigger the FDI filing requirement or which are substantial for the BMWi’s assessment in terms of public order or security, and (iv) if information about the target is provided or disclosed to the acquirer, that the BMWi has designated as significant information by a separate administrative decision.

5. Which steps and actions should be taken?

- Check with competent support and at an early stage if your intended transaction must be filed and cleared before closing according to the new German FDI control regime. In case of doubts, consider (informal) coordination with the relevant authorities.
- Don’t incur risks: The BMWi may initiate a full FDI review of the transaction (including the sanctions for infringements) up to five years after signing once it becomes aware of it.
- Early filings are often followed by early clearance. Following a notification, the BMWi will issue a certificate of non-objection (“Unbedenklichkeitsbescheinigung”) during the initial decision period of two months, if the foreign investment does not imply concerns regarding the decision criteria.

- FDI screenings, filings and approval procedures may take up considerable time and tie up resources. Hence, you should file transactions as soon as possible.
- If the investment is subject to an FDI filing obligation, make sure that any further steps towards the implementation of the transaction before FDI clearance do not infringe the new Gun Jumping prohibitions to avoid severe sanctions.

6. Our consulting services

KPMG Law supports you in M&A transactions and all aspects of foreign trade law and foreign investment screenings. We analyze the transaction and business activities of the targets involved, assess the legal requirements, manage the communication with the BMWi and represent you in all proceedings required. With our Global Legal Services Network, we also support you with our services in international transactions and proceedings as a one-stop shop provider.

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