

COVID-19: PRESSURE POINTS: NEW GERMAN FDI RULES (GERMANY)

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Legal Briefings

1. INTRODUCTION

Germany is continuing to tighten its FDI regime: Most recently, the Foreign Trade and Payments Act (AWG) has been amended by the legislator, only weeks after the German Foreign Trade and Payments Ordinance (AWV) has been implemented, introducing new filing obligations for several case groups. The AWV amendment clearly focused on the health sector as a direct consequence of the COVID-19-pandemic. It aimed to contribute to the permanent maintenance of a functioning health care system in the Federal Republic of Germany. The AWG amendment now implements in a first step the EU Screening Regulation, introduces standstill obligations for all acquisitions that underlie a filing requirement and adjusts the timeframe for the administrative proceeding.

Investors must be aware that the German FDI regime will continue to grow in its significance. In the light of the recent amendments, the filing obligations are expanded, a standstill obligation introduced under threat of criminal punishment, the intervention threshold lowered. Each transaction with a German angle must be analyzed thoroughly to understand potential filing obligations and to initiate all required steps in due time to avoid any delay.

Finally, the recent changes described below are not the last word in upcoming FDI amendments, the Federal Ministry of the Economics already declared that another draft amendment will be published soon.

2. MOST SIGNIFICANT CHANGES DUE TO THE AWV AMENDMENT

The current AWV amendment introduces new case groups to the catalogue of categories, triggering a filing obligation at the Federal Ministry of the Economics. This is especially true for the acquisition of German companies being active in one of the following fields:

- Manufacturers or developers of personal protective equipment (so called PPE as defined by Art. 3 No. 1 Regulation (EC) 2016/425));
- companies that develop or manufacture, market or hold a corresponding marketing authorisation for specific medicinal products and vaccines, including starting materials and medical compounds;
- companies that develop or manufacture medical devices (inter alia surgical masks and respiratory equipment);
- companies that develop or manufacture in-vitro-diagnostic tests for the diagnosis, prevention, monitoring, prediction, prognosis, treatment or alleviation of life-threatening and highly contagious infectious diseases;
- companies which are considered indispensable for the interference-free operation of the communications infrastructures operated by the Federal Authority for Digital Radio of Security Authorities and Organisations (BDBOS).

The AWV amendment contains various other stipulations, which are (at least in parts and according to the Government's opinion) of clarifying character:

- The AWV now includes a specific stipulation, clarifying that asset deals (by acquiring essential operating resources or components of a domestic company and not the company itself) fall under the scope of the German FDI regime;
- Furthermore, for the first time the AWV includes clarification regarding the criteria "danger to the public order and security". Even though it is not designed as a comprehensive list, the AWV amendment clarifies that (inter alia) circumstances relating to the acquirer itself may be of particular relevance for the underlying risk assessment of the acquisition. The AWV lists the following examples:

- The acquirer being controlled by a foreign government or other governmental

authorities or the armed forces of a third country (whereas control can be exercised by the ownership structure or by financial resources);

- The acquirer has been involved in activities which had an adverse effect on public order or public security in the Federal Republic of Germany or any other member state of the European Union;
- A significant risk exists that the acquirer or the individuals acting on his behalf have been involved in specific criminal acts (e.g. financing of terrorism, money laundry, fraud, bribery or corruption) or have been committing a crime or administrative offence under the scope of the AWG War Weapons Control Act.

The current AWV amendments lack off various changes, that were expected (based on an unofficial pre-pandemic draft). These comprise inter alia new case groups (such as AI) under the critical infrastructures or an amendment and clarifications of the covered acquisition of voting rights.

Again, the current amendment to the German FDI regime can only be considered as one component within a series of amendments, which will (presumably later this year) end in a new FDI regime.

3. MOST SIGNIFICANT CHANGES DUE TO THE AWG AMENDMENT

Mid-June, the German parliament passed the most recent amendment of the AWG, which contains two truly fundamental innovations: a I standstill obligation and a lowering of the intervention threshold.

The main objectives of the current AWG amendment are:

- The AWG lowers the intervention threshold for official orders of the Federal Ministry of Economics. Previously, investment restrictions required an actual threat to public security or public order in the Federal Republic of Germany, whereas it is now sufficient if the foreign investment is likely to impair security or public order. It is remarkable, that the lowering of the intervention threshold provided for in the draft AWG has not (yet) been implemented in the current AWV amendment.
- The AWG amendment introduces a standstill obligation for all transactions subject to a German FDI notification requirement. Any violation of this obligation is punishable by law. This concerns both sector-specific and cross-sectoral transactions (especially critical infrastructure facilities such as energy, water and food supply, transport, health care, finance and insurance). The penalty is up to 5 years imprisonment or a fine. It is still unclear and in some cases incomprehensible who is to be the addressee of the penalty

information system provided for in EU Regulation 2019/452. However, the implementation of this mechanism is only prepared in first step and not reflected on the current AWV amendment. It is therefore expected for the next amendment.

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KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



DR MARIUS BOEWE
PARTNER, GERMANY

+49 211 975 59066
marius.boewe@hsf.com

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