

PLANNED NEW REGULATION IN GERMANY STATES STANDSTILL OBLIGATION AND LOWER THRESHOLD FOR FOREIGN INVESTORS

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Legal Briefings - By **Dr. Marius Boewe**

Germany is planning to further tighten its FDI regime and screen investments by investors from outside the EU more closely. More acquisitions of German companies will be subject to a notification obligation, and a standstill obligation will prohibit an execution of the deal before the Ministry gave his approval, according to a draft amendment to the Foreign Trade and Payments Act (“AWG”), recently adopted by the German Federal Cabinet ([press release here](#)).

Comparable to filing obligations in competition law, FDI filings will become a very important part of acquisitions, depending on a continuously growing variety of case groups affected by the business of the German target company.

This draft is the first step of a massive amendment of the current German FDI regime. The main purposes of the current draft are:

- Initializing the establishment of a European cooperation mechanism (following the rules in EU Regulation 2019/452) and by that deepening the European perspective of the German FDI regime;
- Lowering the intervention threshold for state measures in the field of foreign trade;

- Implementing a standstill obligation until the end of the official proceeding for all acquisitions being subject to a filing obligation pursuant the Foreign Trade Ordinance (“**AWV**”).

The most important aspects being subject to this current draft can be summarized as follows:

- The draft introduces a standstill obligation for all transactions, which are subject to a German FDI filing obligation. A breach of this obligation will be punishable by law. This concerns both, sector-specific and cross-sector 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 currently unclear and to some extent not understandable, who shall be the addressee of the penalty and what specific actions are subject to this. Should this wording become binding law, we expect a respective legal uncertainty, which must either be clarified by the legislator itself or by court.
- The draft lists the following case groups as punishable violations of the standstill obligation:
 - to enable the acquirer to exercise voting rights directly or indirectly, in particular by handing over bearer securities, by endorsing registered securities, by transfer in accordance with the provisions of the Deposit Act or the Securities Trading Act, by entering into voting agreements, accepting instructions to exercise voting rights or similar acts,
 - to grant the acquirer the right to receive any dividends, or any economic equivalent thereof, that accompany the acquisition,
 - to provide or otherwise disclose to the acquirer any company-related information, including electronically or otherwise stored data, of the domestic company, insofar as such information relates to divisions or objects of the company which are subject to the German FDI procedure; or
 - to provide or otherwise disclose to the acquirer company related information of the domestic company that has been separately classified by the Ministry as significant

- and for which the Ministry has ordered special security relevance
- The draft also lowers the intervention threshold for official orders by the Federal Ministry of the Economics. Previously, investment restrictions required an *actual threat* to public safety or order in the Federal Republic of Germany whereas now it is sufficient if the foreign investment *is likely to affect* the security or public order.
- The draft creates the basis for the introduction of the European-wide information system set out in the EU Regulation 2019/452. However, the implementation of this mechanism is only being prepared in the draft; the actual introduction will take place with the subsequent amendment of the AWV.
- This draft does not include an extension of the reporting obligations (in particular, no further critical infrastructures are defined). This is expected to happen with the subsequent amendment to the AWV.
- It is not yet clear when the current draft will be passed by parliament (i.e. become binding law) and when the subsequent amendment of the AWV will be initiated.

In summary, the current draft contains two truly fundamental innovations: the cross-sectoral standstill obligation and the lowering of the intervention threshold. Other measures to be expected like the extension of the filing obligations will take place in a second step.



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



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