

The European Commission and the German BMWK evaluate the screening of foreign direct investments

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The German Federal Ministry for Economic Affairs and Climate Action (*BMWK*) released its report on the evaluation of the current legal framework for the screening of foreign investments (“Evaluation of the First Act Amending the Foreign Trade and Payments Act as well as of the 15th - 17th Ordinance amending the Foreign Trade and Payments Ordinance”) in September this year. The European Commission (“*Commission*”) followed shortly thereafter and released its third “Annual Report on the screening of foreign investments into the Union” on 19 October 2023. Both underline that there is an ongoing need for an effective screening of foreign investments, especially during times of crisis, such as Russia’s war of aggression against Ukraine.

Decrease of global investments

According to the Commission, in 2022, the global FDI totalled EUR 1.2 trillion, which shows a year-on-year decrease of 14.3% compared to 2021. The EU contributed to this decrease, with EUR -140 billion of inward FDI, compared to the EUR +142 billion recorded for 2021. There was also a decline in deal making, especially in the second half of 2022. The US and the UK remained the top foreign investors into the EU; the US accounting for 32.2% of all acquisitions and 46.5% of all greenfield investments, the UK for 25.1% of all acquisitions and 19% of all greenfield investments.

Germany and Spain as top destinations for foreign acquisitions and greenfield investments

The Commission states that Germany remained the first destination for foreign direct investments in 2022, with a share of 17.2% of all acquisitions. Germany is followed by Spain (13.5%) and Italy (10.6%). Regarding greenfield investments, Spain was the number one destination in the EU (17.2%), followed by France (14%) and Germany (11.4%). Information and Communication (*ICT*) was the sector receiving the highest share of investments in acquisitions in 2022; the highest share of new greenfield investments concerned the retail sector. The five main sectors (ICT, manufacturing, professional and scientific activities, finance, and retail) experienced in general a decrease in the number of acquisitions, while greenfield investments saw increases in all but one sector (manufacturing).

Increasing numbers of investment screening in the EU and the EU cooperation mechanism

According to the Commission, in 2022, Member States have considered more requests for authorisations as sensitive. A total of 1,444 requests for authorisations of acquisition made by foreign investors and *ex officio* cases were handled in 2022. Out of all these cases around 55% were formally screened, which marks a significant increase compared to 2021. 45% of the applications were deemed ineligible or did not require formal screening. Most of the cases formally screened (86%) were authorized without conditions, 9% of the decisions involved an approval with conditions or mitigating measures, 4% were withdrawn and 1% were ultimately blocked. The Commission concludes that this confirms that the EU remains open to foreign direct investments and Member States only deny transactions that pose serious threats to security and public order.

Furthermore, the Commission states that the processing of cases through the EU cooperation mechanism continues to function well. Of the 423 cases notified by 17 Member States in 2022, the vast majority (81%) were closed in Phase 1, with only 11% of the notified cases closed in Phase 2 and less than 3% of cases resulting in Commission's opinions. Six Member States, one of them Germany, were responsible for more than 90% of the notifications. Most cases are assessed rapidly, within the prescribed 15 calendar days. The duration of cases entering Phase 2 shows significant differences (from 1 to 126 days). The four sectors with the highest number of transactions in Phase 1 were manufacturing (27%), ICT (24%), professional activities (12%), wholesale and retail (9%). The main sectors for Phase 2 examinations were manufacturing and ICT. Together they accounted for 82% of all Phase 2 cases. The Commission finally emphasizes that particular attention must be given to investments into critical EU assets from entities or persons related to the Russian or Belarusian governments. In 2022, Russia accounted for less than 1.4% of the cases notified to the Commission and Belarus for 0.2%.

Legislative developments in the EU

The Commission made clear that it expects all Member States to establish a comprehensive national FDI screening mechanism soon. In 2022, one country (Slovakia) adopted a new national FDI screening mechanism, eight countries updated their national FDI screening mechanism (e.g., Austria, France) and several other countries had a consultative or legislative process expected to result in the adoption of a new mechanism. Furthermore, the Commission is evaluating the current framework of the FDI Screening Regulation. A revision proposal of the Regulation is expected before the end of 2023.

Increasing numbers of investment screening in Germany

The BMWK notes, similar to the Commission, that the number of investment screenings in Germany has been increasing continuously in recent years. Compared to the years 2018 and 2019, the number of investment screenings has tripled in 2022 to a total of 306 cases. The number of sector-specific and cross-sectoral foreign acquisitions that had to be notified, increased to 138. In comparison to that, in 2019, there were only 19 cases. According to the BMWK, the expansion of the scope of the German investment screening since 2019 and the EU cooperation mechanism contributed to this development.

However, the percentage of cases with an opening notice (Phase 2) is declining. In 2019, Phase 2 procedures were opened in 28.3% of all cases. In 2022, the Ministry only started this procedure in 8.5% of cases. According to the BMWK, the new possibility to extend deadlines (in Phase 1) could be one reason for the decreasing numbers of Phase 2 procedures. From June 2020 to the end of 2022, there were two cases that were blocked and in 30 cases the Ministry has imposed restrictive measures. It is to be noted that there could have been more transactions blocked, as the parties withdrew their cases 13 times. Overall, the duration of the investment screening procedures has been considerably shortened in Germany. In 2022, the average duration was 48 days (in 2019: 108 days). The duration of Phase 2 proceedings amounted to 184 days (in 2019: 216 days).

The scope of the German investment screening

In order to evaluate the legal framework of the foreign investment screening, the BMWK conducted a survey among German authorities and the business community. The results of the survey show that many of the new implemented case groups have not been used at all. This includes satellite systems, artificial intelligence, robotics, smart meter gateways, classified patents as well as agriculture and food. On the other hand, according to the German Ministry, the topics of education, gaming and data centres were missing in the list of sensitive sectors. Regarding potentially harmful types of acquisitions, authorities have stated that greenfield investments, outbound investments and research cooperations as well as licensing agreements could be made subject to reviews in future.

German authorities also stated that several descriptions of the existent case groups need to be improved. For example, the scope of application for critical infrastructure, critical components and industry-specific software as well as artificial intelligence is, in the Ministry's opinion, not precise enough. It is also of the opinion that the medical case groups may not be necessary any more following the Covid19-pandemic's end. Regarding the case groups of robotics, semiconductors, quantum technology and critical raw materials, the Ministry is discussing about a lowering of the entry threshold to 10% of the voting rights. The case group of semiconductors has proven to be particularly relevant in practice. German authorities seem to favour a clarification regarding the inclusion of wafers into this category. Also, the case group of service providers for commu-

nications infrastructure has proven to be unsuitable in practice. Furthermore, the authorities assessed that the scope of application of cloud computing services, artificial intelligence, autonomous driving, cybersecurity as well as data networks and security-related IT and communications services overlap.

Both German authorities and the German business community criticized the new acquisition of “atypical control”. 75% of the German business community is of the opinion that its scope of application is not precise enough and ask for FAQs containing concrete examples. According to German authorities, the scope of application should include atypical acquisitions of control even if no additional voting rights are acquired. After all, the BMWK concludes that the German framework of investment screening has to be revised.

Conclusion

Accordingly, further tightening of foreign direct investment regulations is to be expected at both German and EU level. We will continue to monitor any developments and are at your disposal to assist you with any questions you might have in this respect. Please do not hesitate to contact [Roland Stein](#), [Leonard von Rummel](#) or [Sarah Beischau](#).