

Foreign Direct Investment Control Tightened Again – German Cabinet Approves Amendment to the FTPA

9 April 2020

The German government has been pushing for stricter national rules on foreign direct investment control. This is against the background of the “Industrial Strategy 2030” presented by Mr Altmaier, Federal Minister for Economic Affairs and Energy, in November 2019. In parallel, the EU FDI Screening Regulation ([EU 2019/452](#)) came into force in April last year. For the first time, it sets binding requirements with respect to investment control for member States. In light of these developments, in January, the Federal Ministry for Economic Affairs and Energy (BMWi) presented a draft bill for legislation amending the Foreign Trade and Payments Act (FTPA). The German Cabinet adopted this draft in its meeting on 8 April 2020. It will now proceed to the German parliament.

Overview of the Changes

The adopted draft legislation tightens foreign direct investment control in three different ways. The most far-reaching amendment concerns the **requirements for imposing restrictions** on acquisitions within the scope of investment control. In line with the EU FDI Screening Regulation, it will become possible to restrict acquisitions even in cases of only “likely impairment” of public order or security. To date, the threshold for restrictions has been an “actual and sufficiently serious danger affecting a fundamental interest of society”. Moreover, it will no longer be solely the interests of Germany that are taken into account in this lower standard of “likely impairment”. The BMWi will be able to consider the interests of other EU member States and the Union's interest in certain projects and programmes when justifying restrictions or prohibitions on the acquisition of companies and shares. The combination of both changes gives the BMWi broad powers to intervene in transactions.

A second revision concerns the **legal consequences** associated with investment controls for transactions. In future, all acquisitions subject to reporting requirements – i.e. those involving particularly sensitive areas – are to be suspended until the BMWi's approval. To date, this has only been the case in the defence and security sector. This change is accompanied by an amendment to Section 15 (4) of the FTPA, which will soon contain prohibitions currently only applicable to merger control law. Notably, their violation will be subject to criminal sanctions. In practical terms this means that the acquisition may not be executed – neither de jure nor de facto – until it is cleared. In particular, granting the acquirer an owner-like position in the company or access

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to security-sensitive information ahead of clearance is prohibited. In this way, the German government wishes to ensure that circumvention strategies do not thwart the purpose of investment control.

Finally, a third amendment would bring the examination of foreign investments in the field of **satellite** and other **remote sensing technology** within the FTPA and the Foreign Trade and Payments Ordinance (FTPO). The separate Satellite Data Security Act previously regulated investment control in this area. Now, the protection standards will be harmonised. This change must be seen in light of the EU's interest in joint satellite programmes such as Galileo.

Evaluation

The German government is continuing to tighten investment control. It remains to be seen whether the "right judgement", as claimed by the government in its draft legislation, was applied. In addition, the new assessment standard of only "likely impairment" is so vague and broad that the scope of investment control does currently not appear to have any clear limits. At present, Germany's appeal as an investment location does not seem to enjoy political priority.

Companies must continue to adjust to increasing investment control and carefully examine implications for their transactions. This is particularly true in view of the newly introduced threat of criminal penalties applicable to notifiable acquisitions within the meaning of Section 55 (4) FTPO. In order to give companies more legal certainty, the BMWi should clarify, as quickly as possible, the scope of reporting obligation in light of the announced amendments to the FTPO. For a final assessment of the amendments to the FTPA, however, it will be necessary to await the upcoming amendments to the FTPO. Changes to the detailed regulations contained in the FTPO will decide, together with the enforcement practice of the BMWi, how strict the tightening will actually play out for companies.

BLOMSTEIN will monitor further developments. If you have any questions about the potential impact on your company or your industry, [Roland M. Stein](#) and [Leonard von Rummel](#) will be happy to answer them.