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# The European Commission is getting serious – current developments in EU and German FDI control

## New draft regulation of the EU Commission on the review of foreign investments and impacts on the current German legislation

**In January 2024, the European Commission ("Commission") published a draft for a new regulation on the screening of foreign investments in the EU.[1] The previous Regulation establishing a framework for the screening of foreign direct investments in the EU ("FDI Screening Regulation") came into force in 2020.[2] It only provides a voluntary framework for the implementation of national FDI regimes in the EU Member States. Based on the new draft regulation, Member States will be obliged to implement national FDI regimes. The objective of both regulations is to review (and avoid) possible negative impacts on security or public order by foreign investments in national target companies (so-called FDI control). The scope of covered transactions and critical sectors has been expanded and clarified in the new draft. The existing cooperation mechanism between the Commission and the Member States for ongoing FDI proceedings will be strengthened, as well. Finally, there are parallel reform plans in Germany.**

### Since 2020: FDI Screening Regulation

The current FDI Screening Regulation provides minimum requirements for national FDI regimes, which are to be implemented voluntarily, as well as a cooperation mechanism for the coordination of ongoing national FDI proceedings between the Commission and the Member States. The cooperation mechanism was established to avoid possible negative impacts of foreign investments in more than one Member State, in the EU and in relation to certain projects and programmes of the EU.

According to the rather broad wording of the regulation, the scope of application of the proposed minimum requirements for national FDI regimes and the cooperation mechanism covers "*investments*" of a non-Union (i.e. foreign) investor "*of any kind to create or maintain lasting and direct relationships*" in economically active Union-based target companies by providing capital, in particular by means of effective participation in management or by acquiring control ("**foreign direct investment**").

In particular, the activities of the target company in one of the critical sectors listed in the FDI Screening Regulation must be taken into account for the material assessment of the Member States. These include critical infrastructures, critical technologies (dual-use products and current high technologies such as AI, robotics, semiconductors, cyber security, energy storage, bio-, nano-, and quantum technology, aerospace, defence and nuclear technology), critical resources, sensitive information and media. Investor-specific criteria are also relevant for the review. These include, for example, foreign investors who are closely linked to the governments of third countries, as well as past critical investments or illegal or criminal activities by a foreign investor.

To date, 24 out of 27 Member States[3], including Germany[4], have implemented regulations in accordance with the FDI Screening Regulation or adapted their previously existing regimes. Such national FDI regimes are commonly linked to national filing obligations, suspension obligations prior to clearance, subsequent review of transactions that are not subject to filing obligations at the discretion of the national authorities (so-called *ex officio* review), as well as severe penalties or fines.

[1] European Commission, Proposal for a Regulation of the European Parliament and of the Council of 24.1.2024 on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 of the European Parliament and of the Council (COM(2024) 23 final).

[2] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19.3.2019.

[3] Croatia (draft law), Cyprus (draft law), and Greece have not implemented FDI-Regimes, yet.

[4] See COMMEO Newsletter, What you need to know: FDI screening in Germany of 30.11.2022.

**Draft 2024: New draft Regulation**

In the current draft of the regulation on the review of foreign investments in the EU, the Commission intends to implement even stricter and mandatory minimum standards on the implementation of national FDI regimes and usage of the cooperation mechanism by the Member States. In addition to direct investments of foreign investors, the Commission now explicitly included in the new draft indirect investments by foreign investors.

*New minimum standards for the design of national investment control regimes*

Member States are now required to implement legislation for the review not only of (a.) direct foreign investments in EU-based target companies by foreign non-EU investors, but also of (b.) indirect foreign investments where non-EU foreign investors acquire EU-based target companies using their EU-based subsidiaries.

Indirect foreign investments (new category (b.)) are now, for the first time, explicitly included in the regulation. Its introduction is the Commission's response to the CJEU's judgement in the case Xella M.[5] In its decision, the CJEU found, among other things, that the scope of application of "foreign direct investments" as defined in the current FDI Screening Regulation (category (a.)) only refers to direct acquisitions by non-EU investors in EU-based target companies and explicitly does not cover indirect acquisitions by EU-based acquiring companies, even if these are ultimately controlled or otherwise influenced by foreign investors (who would, in fact, indirectly acquire the target company or respective shares).

This interpretation follows the idea that every company seated in the EU benefits from the freedom of establishment and has the right to hold or acquire shares in any other company in the EU. This freedom does not depend on the beneficial or controlling foreign non-EU ownership behind EU-based companies. With the new category (b.), this loophole will be explicitly regulated by the EU legislator in favour of the protection of public safety and order while restricting the associated freedom of establishment for foreign-controlled EU-based target companies.

The new draft also provides for the mandatory introduction of national filing obligations combined with suspension obligations until clearance by national FDI authorities, if the EU-based target company

- is involved in or participates in one of the projects or programmes of Union interest listed in Annex I of the new draft, or

is economically active in one of the areas listed in Annex II of the new draft, i.e. within the

- Common List of dual-use goods subject to export controls in the EU,
- Common Military List of the EU,
- List of technology areas critical to the EU's economic security (which, in addition to the currently listed infrastructures and sectors, now includes, i.e., advanced connectivity, navigation, digital, sensor, material, manufacturing and recycling technologies),
- List of critical medicines in the EU, or
- in certain critical institutions or areas of the EU financial system.

As a general approach of the draft, the relevant sectors that were already protected under the FDI Screening Regulation are expanded and defined in more detail and made subject to a notification requirement.

Additionally, Member States must provide for subsequent review possibilities by national authorities within at least 15 months after closing (*ex officio review*) for relevant investments in EU-based target companies. This applies even if such target companies are not active in any of the above-mentioned critical sectors and, consequently, not subject to a filing obligation. As a result, Member States will be in the position to review all relevant foreign investments in EU-based target companies with regard to possible negative effects on public security and order.

*Cooperation mechanism*

The scope of application of the existing cooperation mechanism is extended in the new draft. As a consequence, not all reviewed foreign direct investments will have to be reported to the round of Member States/Commission, but only those transactions that are subject to filing obligations or that are being examined by a Member State in Phase II-proceedings and transactions where the foreign investor either fulfils the already known investor-specific criteria or is subject to economic sanctions of the EU.

[5] See Christopher Brendel, Commentary on the CJEU judgement of 13.7.2023 (C-106/22), Betriebs-Berater 2023, 2384.

To speed up the coordination procedure, the notification in the cooperation mechanism should be made in the new draft within 15 days after receipt of the notification or 60 days after the opening of a Phase II-procedures by the respective Member States (instead of only "*as soon as possible*" as previously required). To avoid mixed deadlines, the draft also introduces a new mechanism for transactions that have to be notified in several Member States (so-called "multijurisdictional transactions"): All required FDI notifications are to be filed by the parties in all Member States on the same day. Consequently, such transactions are also to be reported by the Member States to the cooperation mechanism simultaneously.

**Effects of German investment control**

Besides direct acquisitions by non-EU or non-German foreign investors in German target companies, the German FDI regime (Sections 55 et seq. of the German Foreign Trade and Payments Ordinance ("FTP-Ordinance")) already comprehensively covers indirect acquisitions: a potential foreign investor is defined as any company or natural person that holds more than 10%, 20% or 25% (depending on the affected sectors) of the voting rights in a German target company post transaction or in the direct foreign investor (or any intermediate company) along its chain of shareholding respectively. In addition, the mere acquisition of control by any other reasons (e.g. contracts or board appointments) is not yet regulated and the existing so-called "atypical" acquisition of control—in which the actual influence goes beyond the amount of voting rights held—is only subject to a filing requirement within sector-specific review (Sections 60 et seq. FTP-Ordinance).

With regard to the relevant sectors and investor-specific criteria that are considered critical in Germany, specific lists based on the current (rather broad) FDI Screening Regulation are already implemented in Sections 55a and 60 FTP-Ordinance. In light of the Commission's new draft (which consistently refers to official EU lists), the existing case groups will presumably decrease in their selectivity and cover even more transactions in the future. Finally, the inclusion of EU sanctions as a critical factor is a new criterion from a German perspective.

Further changes will result from the revision of the cooperation mechanism—Germany had previously been reluctant to report only Phase II-procedures to the mechanism. In this respect, the new draft will set out precise requirements for the Member States to utilise the mechanism.

The German Ministry of Economics and Climate Action announced the introduction of an Investment Control Act (IPG) last year, which is intended to stress the importance of German FDI control as standalone legislation (which is currently mainly regulated in the FTP-Ordinance). Within the new legislation, the relevant critical areas will be scrutinised, and greenfield investments as well as licensing agreements will be included as relevant transactions in its scope. The main reason for this is to avoid regulatory gaps. In addition, German officials are considering to extend existing exemptions to internal reorganisations and to shorten the review period in Phase I from 2 months to 45 calendar days.

**Implications for future M&A-transactions**

For the purpose of M&A-transactions, the new draft could specify a framework of critical sectors to be determined for transaction parties in advance, which would then initially be standardised within the EU and relevant as a "lower limit" for notification obligations in all Member States. This would result in a higher degree of planning certainty for M&A-transactions in the area of FDI control. However, as only a minimum level would be specified based on the draft, national peculiarities—which may be excessive—remain relevant for the final determination of FDI notification obligations.

The simultaneous filing of FDI notifications in multijurisdictional transactions as required by the draft demands greatly increased coordination efforts from the parties to the transaction not only during the preparation of the notification, but also for the period of national examination procedures that runs simultaneously. In this respect, possible comments of the Commission or third Member States within the cooperation mechanism could also play a greater role in future procedures.

## Comment

Even with the introduction of the Commission's new draft regulation on the screening of foreign investments in the EU as a (now higher) minimum standard, investment control will ultimately remain in the hands of the Member States, many of which have already implemented corresponding FDI regimes. In this respect, the remaining Member States are also expected by the Commission to implement national FDI regimes in the near future—at the latest when the implementation obligation of the new draft applies. Ultimately, however, the details of the draft still need to be agreed between the various EU officials involved and the Member States. Accordingly, changes could still arise in the further drafting process. Its implementation is therefore not expected until next year or the year after. However, the additional criteria and procedures introduced by the draft already provide a good insight into the current trends in the area of investment control in the EU. The Member States can, of course, anticipate such trends through national legislation if they deem it necessary.

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