Newsletter, 9 September 2026

The new EU FDI Screening Regulation

New developments and their implications for German legislation and M&A practice

The new Regulation (EU) 2026/1386 of the European Parliament and of the Council of 17 June 2026 on the screening of foreign direct investment in the Union ("FDI Screening Regulation")[1] elevates the EU's investment control provisions – in the words of Advocate General Tamara Ćapeta regarding the FDI Screening Regulation 2019, which is currently still in force[2] – from a sort of "platypus" and "strange creature" without a mandatory scope of application[3] to a "proper" regulation within the meaning of Article 288 TFEU. Member States must now introduce national FDI screening regimes, comply with minimum requirements regarding their design, and ensure that certain investments by foreign investors subject to screening are mandatorily notified to the existing EU-wide cooperation mechanism for joint screening by the Member States and the European Commission ("Commission").

Background

The FDI Screening Regulation sets out an EU legal framework for the design of the Member States' investment screening regimes. This will also have implications for the investment screening of transactions in Germany (Sections 55 et seq. of the Foreign Trade and Payments Ordinance ("**FTP-Ordinance**")), as well as for the application of the EU-wide cooperation mechanism by the competent Federal Ministry for Economic Affairs and Energy ("**BMWE**").

Minimum requirements

Member States are now required to establish an investment screening mechanism that covers investments by foreign (i.e. non-EU) investors in domestic companies registered within their territories, that

(a) develop, produce or commercialise goods listed in the current Annex I to Regulation (EU) 2021/821 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfers of dual-use items ("**Dual-Use List**"); or

(b) develop, produce or commercialise products or technologies listed in the current Annex to Directive 2009/43/EC simplifying terms and conditions of transfers of defence-related products within the Community (**"Common Military List**"),

(c) produce, conduct research into or develop certain semiconductor, AI or quantum technologies as set out in Annex I to the FDI Screening Regulation,

(d) operate transport, energy or digital infrastructure defined as critical by the Member States,

(e) explore, (re)gain, process or store materials as set out in Section I of the current Annex I to Regulation (EU) 2024/1252 establishing a framework for ensuring a secure and sustainable supply of critical raw materials (List of Critical Raw Materials),

(f) constitute or operate certain financial infrastructures or systems, or distribute financial news globally, or

(g) develop, maintain or operate certain databases, electoral systems or information systems for public elections.

Foreign investors are defined as (i) natural or legal persons whose nationality or law of incorporation is outside the EU, and (ii) subsidiaries established in the EU (i.e. incorporated under the law of a Member State) controlled by such persons. This expansion of the scope of application is intended to ensure that indirect foreign investments made through local subsidiaries of a foreign investor are also subject to effective national FDI review. This follows the Court of Justice of the European Union's ruling in the case of Xella M., which held that investments made by EU-based subsidiaries benefit from the EU's freedom of establishment and, in the absence of explicit provision at this time, do not

[1] Available at: Link.

[2] Advocate General Tamara Ćapeta, Opinion of 30 March 2023 in the preliminary ruling proceedings in Case C-106/22 – *Xella M.* (para. 32), available at: Link.

[3] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, available at: Link.

constitute a foreign investment under the applicable definition of the 2019 FDI Screening Regulation.[4]

Relevant investments in EU-based target companies are defined as the acquisition of a lasting, direct and effective interest in the management or control, whereby capital is provided for the purpose of carrying out an economic activity. Internal restructurings are exempt from the screening requirement provided that no new legal entity from a third country enters the chain of shareholdings.[5]

Investments covered by the above minimum requirements ("**Notifiable Investments**") must be reviewed by the Member States prior to closing under a two-stage review mechanism (Phase I: simplified review within 45 calendar days; Phase II involving an in-depth review with no specified time limit) to assess their compatibility with security and public order, whilst ensuring confidentiality of information and being subject to the right of appeal.[6]

In addition, Member States must ensure that their national FDI screening regimes enable them to review foreign investments that are not subject to a national filing requirement (so-called "ex officio" review) for at least 15 months after closing and limited to a maximum of 5 years. For foreign investments that were originally subject to screening (i.e., in cases of "gun-jumping"), a minimum period of 2 years for retrospective review applies, with no maximum time limit.[7]

It is within the discretion of the Member States to exceed the minimum requirements or enact more specific legislation (including for greenfield investments, which are not covered by the minimum requirements).[8] It is to be assumed that the Member States will enact or specify filing requirements in particular in the following technology sectors that are to be "taken into account" during the screening process based on the FDI Screening Regulation:

Projects and programmes of Union interest (Annex II FDI Screening Regulation), critical technologies (Annex III, including biotechnologies, advanced digital and sensor technologies, fibre-optic cables, space, aviation and energy technologies, robotics and autonomous systems, advanced materials and manufacturing or recycling technologies), critical facilities, critical infrastructure and assets, sensitive data, media, electoral processes, public health, food security and sensitive facilities.

Cooperation mechanism

The existing cooperation mechanism between the Member States and the Commission for FDI screening is to be extended in a way that it will be mandatory to report certain foreign investments to the joint mechanism during the national screening process.[9] This will include Notifiable Investments where

(1) the acquirer is directly or indirectly controlled by (a) a third country, (b) a person subject to sanctions or is economically owned by such a person,[10] where a previous foreign investment by the acquirer (directly or indirectly) has been prohibited, or where the acquirer has materially breached risk-mitigation measures in another Member State,

as well as foreign investments subject to national notification requirements where

(2) the national FDI authority initiates a Phase II procedure and the target company (a) is involved in one of the projects or programmes of Union interest listed in Annex II FDI Screening Regulation, or (b) has subsidiaries or sister companies in at least one other Member State, or

(3) the national FDI authority (a) intends to prohibit a foreign investment or to impose risk-mitigating measures in Phase I, or (b) considers that the investment could have an adverse effect on the security and public order of another Member State, in particular where the acquisition of subsidiaries or sister companies in another Member State constitutes a Notifiable Investment.

The application of the cooperation mechanism has the following implications for the screening procedure:

- Investments falling under point (1) must be notified to the cooperation mechanism by the national FDI authorities within 15 calendar days ("**Days**") of the start of the proceedings. Other Member States / the Commission may then submit comments within 20 / 30 Days, respectively, or request additional information within 15 / 20 Days, respectively, and submit comments within 15 / 25 Days of receiving such information (these deadlines may be extended by 20 Days). The Commission may also propose restrictive measures

[4] See, regarding the CJEU judgment of 14 July 2023 in Case C-106/22 – *Xella M.*: COMMEO Newsletter, The European Commission is getting serious – current developments in EU and German FDI control dated 9 July 2024.
[5] Art. 1 (5) (b) FDI Screening Regulation.
[6] Art. 4 (15), (9), (2) and (6), (7) FDI Screening Regulation.
[7] Art. 4 (4) and (5) FDI Screening Regulation.
[8] Art. 3 (1), 4 (17) FDI Screening Regulation.
[9] Art. 5 (1)-(3) and (5) FDI Screening Regulation.
[10] See, inter alia, the current Annex I to Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

on the investment (so-called risk mitigation measures).[11] The national FDI authority's review period is extended by the above procedure to up to 80 Days, without taking into account the time required for the national authority to gather information, for example by making enquiries of the foreign investor or target company.

- Investments falling under point (2) must only be notified to the mechanism upon expiry of Phase I (after 45 Days), which is why the total time limit here is up to 110 Days.
- Investments falling under point (3) may, in practice, be reported to the cooperation mechanism until the end of Phase I or Phase II respectively, which is why the applicable national deadline may be extended by up to 65 Days in such cases.

In the case of cross-border transactions subject to FDI screening requirements in several Member States, all parties involved (including the investor) should "endeavour" to conduct the proceedings in parallel.[12]

Member States are authorised to submit comments on foreign investments that have not been notified to the cooperation mechanism, i.e. foreign investments not subject to national filing requirements, filed foreign investments not falling under any of the above cases (1) to (3), or investments that have been unlawfully omitted from notification. Such comments may be issued within 15 months of closing (while a risk of an in-depth review based on comments of other Member States remains for the parties).

Implications for Germany

The German FDI screening regime (Sections 55 et seq. of the FTP-Ordinance) already provides for an established cross-sectoral FDI screening mechanism.[13] It is currently planned by the German legislator to consolidate such rules into a standalone "Investment Screening Act" in the course of the implementation of the new FDI Screening Regulation.

The sectors already protected under the current German FDI regime already largely cover the minimum requirements of the FDI Screening Regulation; however, comprehensive tightening will be required in the following areas:

- Coverage of all products and technologies listed in the Dual-Use List and/or the Common Military List. To date, only specific dual-use goods may trigger filing requirements (e.g. with regard to aviation and aerospace, as well as certain nuclear dual-use technologies),[14] whilst defence-related goods refer to the German export list or "classified" defence technology.[15]
- Semiconductor, quantum and AI technologies have, in principle, been covered to date;[16] however, there will be significant extensions to the scope of application. In the case of semiconductors, the scope will now explicitly cover intellectual property rights, core components (i.e. critical parts) and software for semiconductor manufacturing, consumables (e.g. chemicals) and related know-how. In the field of AI, the scope will cover technologies and know-how relating to general AI models, models adapted for the space and defence sectors, and models that are determined as posing a systematic risk (rather than, as previously, exclusively specific AI capable of carrying out targeted cyber-attacks, disinformation or repression).
- Infrastructure for public elections has not previously been covered by the German regime; in the future, relevant databases, electoral systems or other information systems must be included within the scope of application.

In addition, the following aspects of the regulatory framework require particular adjustment:

- The group of persons covered by the definition of a foreign investor: Under the current German regime, the nationality of a natural person is determined on the basis of their place of residence[17] (rather than their citizenship), and investors from EFTA countries[18] are treated equally to investors from the EU, which will no longer be permissible in accordance with the minimum requirements of the FDI Screening Regulation, that must be applied to foreign investors in a non-discriminatory way.
- In future, the mere acquisition of control without acquiring voting rights – for example, through contracts – must be covered by the German regime. Currently, the definition of an "acquisition" strictly requires the acquisition of voting rights.[19] Such change may be

[11] Art. 6, 8-11 FDI Screening Regulation.
[12] Art. 7 FDI Screening Regulation.
[13] See the COMMEO Newsletter, [What you need to know: Foreign direct investment screening in Germany, dated 30 November 2022](#).
[14] Sec. 55a (1) no. 18 (variant 2) and no. 19 FTP-Ordinance.
[15] Sec. 60 (1) no. 1 and 2 FTP-Ordinance.
[16] Sec. 55a (1) no. 13, 16 and 20 FTP-Ordinance.
[17] Sec. 2 (15) no. 1 and (18) no. 1 Foreign Trade Act.
[18] Sec. 55 (2) FTP-Ordinance).
[19] Sec. 56 and 60a of the Foreign Trade Regulation.

implemented by removing the requirement for the "acquisition of voting rights" in the existing scheme for an "atypical acquisition of control", which is already linked to the factors relevant for the assessment of control, namely the composition of supervisory bodies and company management, veto rights and rights to information.

Since the BMWE so far only reports Phase II procedures to the cooperation mechanism, the mechanism and relevant deadlines will become significantly more important in the future.

Implications for M&A practice

The reform of the FDI Screening Regulation marks the most far-reaching step to date towards a harmonised European investment control regime. For companies investing in the EU, and in Germany in particular, the broader scope of scrutiny, stricter minimum requirements and closer cooperation between Member States and the Commission will have implications for deal timing, due diligence and contract drafting.

Initially, the minimum requirements in many Member States, including Germany, will lead to an expansion of the relevant sectors. Sellers should therefore assess in good time whether the prospective target company falls within the scope of any relevant FDI regimes.

The cooperation mechanism, and also the Commission's potential earlier involvement, may also lead to more time-consuming FDI procedures. More intensive exchanges between the authorities generally result in more queries during the procedure. M&A parties should also bear in mind that, as a result of the cooperation mechanism, the authorities in the Member States are aware of transactions more quickly and comprehensively. This may result in authorities raising queries regarding the filing requirement in Member States where a transaction has not been notified within the EU – whilst the review is pending in other Member States. In cases of doubt, where a filing requirement cannot be fully ruled out, it is therefore advisable to clarify the filing requirement in a timely manner. In Germany, this can also be done by submitting an application for a certificate of non-objection. In summary, there remains a need for careful examination and clarification of EU-wide FDI notification requirements.

With regard to deadlines and procedures, the FDI Screening Regulation aims for greater harmonisation. Whilst this has the advantage, on the one hand, of improving the predictability of the procedures, it also increases the pressure to submit notifications complete, consistent and simultaneous across the various Member States. For the parties and advisers, this means even closer coordination during the filing process.

With regard to the drafting of contracts, the following aspects remain relevant:

- Clear provisions regarding the necessary FDI filings and authorities concerned.
- Clear provisions regarding the extent of cooperation in response to requests for information, meetings with authorities and any commitments made.
- Agreement of realistic long-stop dates in the event of parallel scrutiny in several Member States (with extension mechanisms where necessary).


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