

# Update on Foreign Direct Investments in Germany

October 29, 2020

Today, the 16th Amending Regulation of the Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung – AWV*) came into effect but it came somewhat differently than expected over the last months.

Only the part that concerns the lowered test standard for Foreign Direct Investment (FDI) review in Germany was implemented in the AWV. Probable impairment of public order or security (instead of a concrete threat) in Germany, in other EU member states or in relation to specific EU programs and projects will be the new FDI review scale for the German Ministry for Economic Affairs and Energy (Ministry) now.

The critical part of this third reform (!) in 2020 of FDI control in Germany, however, i.e. the expected notification requirement for FDI of 10% or more in so-called “critical technologies”, needs some extra time. Obviously, it is very difficult to define “critical technologies” for the purposes of FDI control. This is because the right balance between national security interests and an investor-friendly environment must be found. This is a challenging task, especially when it comes to critical technologies, such as e.g. artificial intelligence, robotics, semiconductors, biotechnology and quantum technology. There are a number of federal ministries and trade associations involved in the process of finding this right balance by setting up appropriate definitions and thresholds. The technical complexity is high and the interests and points of view are diverse. Accordingly, it remains to be seen when this long-announced reform will find its way into the AWV and hopefully, this 17th amendment of the AWV will be drafted in a way that avoids mandatory filings for each foreign investment in German targets dealing with technological developments.

## What should foreign investors in “critical technologies” in Germany consider in the meantime?

The postponement of the notification requirement for FDI of 10% or more in “critical technologies” in Germany does not necessarily make life of foreign investors in start-ups or other companies active in these fields easier.

Since October 11, 2020 the EU Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union applies in all Member States. “Critical technologies” are regarded by the Regulation as a factor that may be taken into consideration by Member States or the Commission in determining whether a foreign direct investment is likely to affect security or public order. The Regulation relates to artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies. We expect that the Ministry will examine certain FDI in these fields - depending on the exact circumstances - even without notification requirement (*ex officio* review). The instrument of voluntary application for a clearance certificate will therefore be recommended more strongly for FDI in critical

technologies. In addition, foreign investors have to consider that the cooperation mechanism between Member States and EU Commission as well as among Member States, as it is established by the Regulation is now fully implemented and we expect more interaction with regard to FDI within the EU. This will make FDI control more complex and time consuming.

We will continue to monitor the reform process of the German FDI rules and will keep you posted. If you have questions regarding this alert or about regulatory matters in Germany, our Public and Regulatory Practice Group will be happy to assist you – please contact Dr. Maria Brakalova (Berlin), Dr. Julia Pfeil (Frankfurt) or Andreas Haak (Düsseldorf).

## Your Key Contacts



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