

Introduction of a European Investment Control: European Commission presents Regulation Proposal

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The control of foreign investments has become increasingly important in the last few years. In Germany, the Foreign Trade and Payments Ordinance (Außenwirtschaftsverordnung – AWV) has recently been amended. Moreover, for the first time, foreign investments in Germany were prohibited. In the USA, prohibitions have increasingly been issued by CFIUS and extremely long durations of proceedings are being reported. On the initiative of Germany, France and Italy, the European Commission (Commission) has now also taken up the issue: On 13 September 2017, the Commission submitted a Proposal for a Regulation Establishing a Framework for Screening of Foreign Direct Investments into the European Union (Regulation Proposal).

The Regulation Proposal intends to regulate the control of company acquisitions by foreign investors in certain sensitive areas for the first time at Union level (Articles 1 and 2 of the Regulation Proposal). The Regulation Proposal does not oblige the Member States to introduce a system of investment control, but merely lays down the framework within which the Member States can provide for such an instrument in their national legislation. Thus, the Regulation Proposal is similar to a Directive. In addition, in certain cases, the Regulation Proposal grants the Commission powers of inspection, which, however, merely authorises the Commission to give an opinion, not to issue a prohibition of acquisition.

The impact of the Regulation Proposal on German investment control under the AWV is likely to be very limited at least as regards the substantive provisions. This is because the most recent version of the AWV, by and large, already meets the requirements laid down in the Regulation Proposal.

In the following, we will give an overview of the main points of the draft regulation:

Scope of application

The Regulation Proposal aims at establishing a framework for foreign direct investment control on grounds of security or public order within the European Union (Article 1 of the Regulation Proposal).

“Foreign direct investment” in this sense encompasses investments of any kind aiming to establish lasting and direct links to the undertaking (legal definition in Article 2 of the Regulation Proposal). In particular, the term thus covers investments enabling effective participation in management or control of the company. However, it remains unclear

what kind of corporate relationships shall be considered “permanent and direct connections”. At first glance, this term seems to be broader than the acquisition of at least 25 percent of the voting rights required by section 56 AWW.

A threat to security or public order, according to the Regulation Proposal, may exist in particular in the following cases:

- critical infrastructure, including energy, transport, communications, data storage, space or financial infrastructure, as well as sensitive facilities;
- critical technologies, including artificial intelligence, robotics, semiconductors, technologies with potential dual use applications, cybersecurity, space or nuclear technology;
- the security of supply of critical inputs; or
- access to sensitive information or the ability to control sensitive information.

This non-exhaustive catalogue of examples largely corresponds to that of section 55 para. 1 sentence 1 AWW. What is new, however, is that technologies with potential dual-use applications (which under the AWW are in particular subject to export control) are also mentioned. Also, the term, “semiconductors” is very broad. Moreover, it remains unclear what the terms, “critical inputs” and, “sensitive information” mean. Worth mentioning is also Article 4 sentence 2 of the Regulation Proposal. This stipulates that for the determination whether an investment is likely to affect security or public order, it can be taken into account whether the foreign investor is controlled by the government of a third country, including through substantial financing. However, the meaning of the term, “substantial financing” remains unclear.

Investment control by the Member States

Article 6 of the Regulation Proposal lays down essential procedural provisions, which the Member States are required to respect and implement when maintaining, amending or creating national rules on investment control. The aim is to create transparency and prevent discrimination between different third countries. These procedural provisions concern, in particular, fixed deadlines for decisions on the admissibility or restriction of investments as well as the safeguarding of effective legal protection against decisions taken by Member States.

The German provisions on investment control generally meet these requirements. However, it should be noted that Article 8 of the Regulation Proposal lays out a so-called “cooperation mechanism”. This creates an obligation for a Member State in the process of undertaking an investment review to notify the Commission and the other Member States of the investment project concerned within five days. Where other Member States consider its security or public order likely to be affected by this investment, they

may provide comments, which must be duly taken into account in the investment control decision.

Also, the Commission is entitled to give its opinion on the investment under review. This may be issued up to 25 working days after the other Member States have provided their comments. In light of these delays, it is questionable to what extent the German deadlines need to be adapted. Since the most recent AWW reform, the deadline is two months for the issuance of a certificate of non-objection (section 58 para. 2 AWW) and four months for the examination procedure (section 59 para. 1 sentence 1 AWW). In cases where both Member States and the Commission were to provide an opinion, the time available to the Federal Ministry of Economics and Energy for the examination could thus be considerably shortened, as the Ministry would have to take account of these opinions when making its decision. It therefore seems likely that the deadlines in the AWW will be extended.

Irrespective of this, it will need to be clarified whether the notification requirement in Germany will be triggered by the examination of applications for a certificate of non-objection or whether it will only be triggered when an actual review procedure is instigated.

Obligation of the Member States to notify

Article 7 of the Regulation Proposal requires Member States to notify the Commission about their national investment control system as well as any amendments. In addition, the Member States must provide the Commission with annual reports containing information on the investment reviews carried out or – if they do not have a national investment control system – on the foreign investments made in their country. The Regulation Proposal does not yet provide for the publication of statistics on foreign investments and foreign investment controls in the Member States. However, such a publication would – with view to transparency and legal certainty – be welcome.

Investment control by the Commission

The Regulation Proposal provides for investment control by the Commission in cases where foreign direct investments are likely to affect projects or programmes of Union interest on the grounds of security or public order (Article 3 sec. 2 Regulation Proposal). Pursuant to the Proposal, such projects or programmes include those that serve the EU as a whole and make an important contribution to economic growth, jobs and the competitiveness of the economy. This applies, in particular, to projects or programmes that are either receiving substantial EU funding or fall under the EU regulations on critical infrastructure, critical technologies or critical inputs. A non-exhaustive list of such projects and programmes can be found in Annex 1 of the Regulation Proposal.

Within its power of inspection, the Commission can neither restrict nor prohibit projected investments. Rather, the Commission can only communicate its opinion to the

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Member State in which the investment in question is to be made and which then has to take “utmost account” of it (Article 9 of the Regulation Proposal). The Commission's power of inspection is not very convincing in conceptual terms, as it can only take effect if a Member State has an investment control mechanism.

Conclusion

Even though the Regulation Proposal essentially reflects the current legal situation in Germany, the intended harmonisation is to be welcomed. In addition, it eliminates the (last) objections to German legislation under EU law. However, in order not to be exposed to accusations of protectionism, the EU and its Member States should exercise their investment controls cautiously.

BLOMSTEIN will monitor and inform about further developments. For further information, please contact [Roland M. Stein](#) and [Pascal Friton](#).