

Foreign Investment Screening:

Germany

Recent years have seen a significant increase in foreign investment screening procedures in Germany as statistics published by the Ministry in March 2022 confirm.¹ A large number of these cases concern information and communication technology as well as the healthcare sector.

FDI Regime

Foreign direct investment (FDI) screening in Germany is governed by the Foreign Trade and Payments Act (Aussenwirtschaftsgesetz) and the Foreign Trade and Payments Regulation (Aussenwirtschaftsverordnung or AWV). The Ministry for Economic Affairs and Climate Action (the Ministry) carries out the reviews in consultation with the Foreign Office, the Ministry of Defense and the Ministry of the Interior. Acquisitions carried out through internal restructurings are not subject to FDI screening. On the other hand, asset deals are caught by FDI screening if the acquisition concerns a separable part of a company or all essential operating resources of a company or of a separable part of a company.

Notification Thresholds

German law distinguishes between cross-sector and sector-specific reviews. The industry sector in which the target company is active and the nationality of the investor determines which procedure is applicable.

Sector-specific review

If the target is active in the defense or crypto technology sector, any acquisition by a non-German investor of at least 10 percent of the target's voting rights is subject to a mandatory filing obligation. The defense and crypto technology sectors include the manufacture and development of weapons of war, ammunition, military equipment and technology for processing classified government information, covering all military items listed in Part 1, Section A of the German Export List.

Cross-sector review

An acquisition in any of the 27 economic sectors designated as "critical infrastructure" is subject to mandatory filing obligation if the voting rights threshold is met. Out of these 27 critical infrastructure sectors, seven are considered to be more critical than the others and if the target is operating in any of those seven infrastructure sectors, any acquisition by a non-EU or non-EFTA investor of at least 10 percent of the target's voting rights is subject to a mandatory filing obligation. These seven critical infrastructure sectors comprise, for example, energy, water, finance, healthcare or transport, telecommunications, cloud computing services, telematics or certain providers in the media industry.

If the target is active in any of the remaining 20 critical infrastructure sectors, a threshold of 20 percent applies. These include, for example, essential pharmaceuticals, artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, quantum-based technologies and nanotechnology, in line with Article 4(1) of the EU FDI Regulation (2019/452).

Further, any acquisition of a German company active in any sector by investors located outside the territory of the EU or EFTA whereby investors acquire at least 25 percent of the company's voting rights can be subject to a cross-sector review (regardless of the transaction value or turnover of the parties). In these cases filing is, however, voluntary.

¹ Investment Screening in Germany: Facts and Figures, 24 March 2022, available [here](#).
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Incremental share acquisitions

For both cross-sector and sector-specific reviews, incremental share acquisitions can trigger a notification obligation as well, even if the Ministry already approved the initial acquisition. In this regard, the government has set specific thresholds (20, 25, 40, 50 or 75 percent of the voting rights).

Atypical acquisitions

Investments resulting in an effective participation in a domestic company (so-called atypical acquisitions of control) through obtaining additional influence in supervisory bodies or management, veto rights on strategic decisions or rights to sensitive information are also subject to review. The notification of an atypical acquisition in a cross-sector review is voluntary whereas an atypical acquisition in a sector-specific review will be subject to a mandatory filing obligation.

Review Procedures

Any transaction for which a mandatory filing is required is subject to a standstill obligation until clearance is granted. Pursuant to an amendment adopted on August 25, 2021, stock market transactions are exempt from the standstill obligation. They nevertheless remain subject to a notification obligation and the exercise of acquired voting rights as well as the exchange of sensitive information with the purchaser are prohibited until the investigation has concluded. An infringement of such an obligation may constitute a criminal offence and is punishable by a fine or imprisonment of up to five years. Transactions implemented in breach of a standstill obligation are provisionally invalid until the Ministry grants its approval. Investors can close transactions that are not subject to a mandatory filing obligation without waiting for approval, though transactions can be unwound or subjected to conditions retroactively.

In both cross-sector and sector-specific reviews, the authority has two months after obtaining knowledge about the acquisition either to approve the transaction or to

open a second-phase investigation. If the authority does not open a second-phase investigation within two months, the transaction is deemed to be approved. A second-phase investigation must be completed within four months after receipt of complete documentation. The deadline can be extended by three months in individual cases if the assessment procedure reveals particular actual or legal difficulties. An extension by a further month is possible if defence interests are affected. Procedural deadlines are suspended during any negotiations on possible commitments by the parties to obtain approval. The opening of a review procedure is legally precluded five years after conclusion of the acquisition agreement.

In situations where a filing is voluntary, parties can request a certificate of non-objection to obtain legal certainty.

Substantive Tests

As regards the standard for substantive assessment, in a cross-sector review, the authorities examine whether the acquisition is likely to impair the public order or security of Germany, another Member State of the European Union or projects or programmes of Union interest in the sense of Article 8 of the EU FDI Regulation. The authority can take into account the control exercised by foreign governments/public authorities over the acquirer; previous activities by the acquirer that damaged the public order or security of Germany or other EU Member States; and risks that the acquirer might be involved in specific criminal activities. In the case of a sector-specific review, the authority will examine whether essential security interests of Germany are likely to be impaired. If the Ministry concludes that the transaction is likely to generate undesirable effects (e.g. impairment of public order or security), it can prohibit it or approve it with conditions. Conditions can include the obligation to notify the Ministry of future incremental share acquisitions. The Ministry's decision can be appealed to the Administrative Court of Berlin.

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