

# Foreign Investment in Germany

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A Note setting out the legal regime governing foreign direct investments in Germany.

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This Note sets out the legal framework governing foreign direct investments (FDI) in Germany. It describes:

- Key legislation regulating such investments.
- Types of transactions that are subject to regulation.
- Roles and powers of the relevant regulatory authorities.
- Penalties for non-compliance.
- Practical implications for private M&A transactions.
- A summary of related ownership disclosure requirements.

This Note focuses on transactions where a foreign entity directly or indirectly acquires:

- A domestic company (either by means of a share or asset deal) (see *Types of Investors Caught by the German FDI Regime*).
- A shareholding in a German company.

It does not comment on any specific restrictions in Germany relating to merger control, anti-trust, and competition law which are not dependent on the nationality of the buyer or investor, international free trade agreements, or international investment treaties.

## Legal Framework for Foreign Investment in Germany

The foreign investment regime in Germany is governed by the following legislation:

- *Foreign Trade and Payments Act* (*Außenwirtschaftsgesetz* (AWG)).
- *Foreign Trade and Payments Ordinance* (*Außenwirtschaftsverordnung* (AWV)).

In addition, the competent authority, the Federal Ministry for Economic Affairs and Climate Action (*Bundesministerium für Wirtschaft und Klimaschutz* (BMWK)) regularly publishes general rulings (*Allgemeinverfügungen*) and circulars (*Runderlasse*), each providing guidance to the BMWK's interpretation of the AWG and AWV and its regulatory practice (see *Competent Authority*).

## Competent Authority

The BMWK is the competent authority for the investment review under the AWG and AWV and regularly consults with other ministries and authorities whose areas of responsibility are affected by the investment.

Prohibitions or restriction orders issued by the BMWK in the cross-sector regime require the approval of the entire federal government (see *Cross-Sector Review*). In the sector-specific regime the additional approval of the Federal Foreign Office (*Auswärtiges Amt*), the Federal Ministry of the Interior and Community (*Bundesministerium des Innern und für Heimat*), and the Federal Ministry of Defense (*Bundesministerium der Verteidigung*) is required (see *Sector-Specific Review*).

## Meaning of Domestic Company

The term domestic company (*section 55 para 1; 60 para 1 AWV*) includes all legal entities and partnerships, as well as sole traders (*Einzelkaufleute*), irrespective of their capital market capability. In particular, the following may be treated as resident:

- Natural persons, if their habitual residence is in Germany (*section 2(15) No.1, AWG*).
- Legal entities and partnerships with their registered office or place of management in Germany (*section 2(15) No.2, AWG*).
- Branches and permanent establishments of foreign individuals or entities in Germany, provided they have their management or administration in Germany (*section 2(15) No.3 and 4, AWG*).

## EU FDI Regulation

On 19 March 2019, the EU adopted the Regulation 2019/452/EU establishing a framework for the screening of FDI into the Union (*FDI Regulation*). Under the FDI Regulation, natural persons or companies of a third country (that is, non-EU states) intending to make, or having made a foreign direct investment must be screened by local authorities. The FDI Regulation sets out a set of baseline principles by which EU member states such as Germany must abide when maintaining, amending, or adopting FDI mechanisms. The FDI Regulation establishes an EU-wide FDI cooperation framework through which the European Commission and the EU member states can coordinate their actions on FDI, for example by sharing information.

Under the FDI Regulation, Foreign Direct Investment means an investment of any kind by a foreign, non-EU investor that aims to establish or to maintain lasting and direct links between the foreign investor and a party in an EU member state to carry on an economic activity in a member state.

Each member state screening foreign direct investment must notify the European Commission if they investigate a (proposed) qualifying investment. They must also notify other member states "whose security or public order is deemed likely to be affected" (*Article 6, FDI Regulation*). If the Commission or the member state believes that the proposed investment is likely to affect security and public order in another member state, or holds relevant information on the transaction, they may provide an opinion or make comments. These comments or opinion must be provided within 35 days of the initial notification from the member state's government (*Article 6(7), FDI Regulation*). The member state's government remains in control of the final decision regarding the investment or transaction.

Accordingly, the term of duration of the screening process under the FDI Regulation is suspended if another EU member state, or the Commission, indicates its intention to provide comments or issue an opinion on the investment or transaction under review under the FDI Regulation. The suspension ends, and the term starts anew, when the opinion is received by the member

state's government. Similarly, the term is suspended if the government requests the Commission, or another member state, to make comments or issue an opinion on the proposed investment.

## German Implementation of the EU FDI Regulation

To implement the FDI Regulation, Germany has amended the provisions of the AWG and AWV intensely between 2019 and 2021 and introduced substantial revisions, further adding to the complexity and scope of the review process. A stricter review and notification regime has been put in place, focusing on the potential use of future and key technologies.

## Types of German Foreign Investment Review

Germany's foreign investment review is divided into the following types:

- Cross-sector review (*section 55 et seq, AWV*) (see [Cross-Sector Review](#)).
- Sector-specific review (*section 60 and 62a, AWV*) (see [Sector-Specific Review](#)).
- General review, which applies to any investment by a non-EU/non-EFTA investor in a domestic business or company where the investor acquires at least 25% of the voting rights (see [General Cross-Sector Review](#)).

Investments involving a security sensitive business listed in the Cross-Sector-List, or a business subject to the sector-specific review, carry a mandatory pre-closing notification (*Meldung*) with the BMWK which is flanked by an enforcement ban (*Vollzugsverbot*) for the transaction underlying the investment (see [Notification and Authorization Requirements](#)).

## Types of Investors Caught by the German FDI Regime

The cross-sector review generally covers all non-EU/non-EFTA investors.

In contrast, the sector-specific review is applicable if the investment is made by any (also Union-resident) foreign investor. In both cases, it is irrelevant whether the investors are private or state-owned.

Investments by German or other EU/EFTA investors may also become subject to review if the transaction structure is chosen to circumvent the applicability of the German FDI regime. As a result, direct investments in a German business or company by EU/EFTA incorporated investors with non-EU/EFTA shareholders and controlling entities are subject to the scope of the German FDI regime. In such cases, the BMWK regularly assumes that the investment is (indirectly) controlled by the non-EU/EFTA investor.

## Types of Investments Caught by the German FDI Regime

As defined in further details below (see [Cross-Sector Review](#) and [Sector-Specific Review](#)), the following investments can be subject to the BMWK's review:

- **Acquisition of voting rights:** Investments resulting in a shareholding amounting to at least 25%, or in the case of share acquisitions in certain sensitive industries, 10% or 20% of the voting rights in a domestic company.
- **Asset deals:** the acquisition of a domestic business or company by means of an asset deal.

- **Acquisition of non-voting rights** (including put/call options, pre-emptive rights) only if the investor acquires an effective participation in the control of the domestic company which is accompanied by either:
  - additional seats or majorities in supervisory bodies or in the management;
  - veto rights in strategic business or personnel decisions; or
  - rights over certain security relevant information (*section 15(4), sentence 1, No.3, AWG*).

Such acquisition of atypical control is equivalent to the acquisition of voting rights in the corresponding amount. Acquisitions of non-voting rights which do not also fulfil these criteria are generally not subject to review.

- **Third-party/multi-level investment structures**, where the voting rights of third parties in the domestic company are fully attributed to the direct investor who holds at least the voting threshold which applies to a direct acquisition (that is, 10, 20 or 25%, as the case may be). The same applies if there is either:
  - an agreement between multiple investors or investors and third parties on the joint exercise of voting rights, or
  - there is reason to assume that voting rights will be exercised jointly.
- **Acquisition of additional voting rights** by investors who already hold a relevant shareholding in the domestic company (this also applies if the BMWK has already reviewed and cleared the initial acquisition), if the investor thereby acquires additional voting rights in the amount of at least 20%, 25%, 40%, 50% or 75% (in each case depending on the industry sectors concerned).
- **Intra-group restructurings** leading to the acquisition of relevant voting rights may be exempt from the cross-sector review in exceptional cases only and under the condition that the parent company remains unchanged, only the chain of ownership changes, and no additional, previously uninvolved shareholders enter the existing group structure.

## Cross-Sector Review

The BMWK's cross-sector review applies if a non-EU/non-EFTA investor directly or indirectly acquires either:

- A domestic business or company (either by means of a share or asset deal).
- A shareholding amounting to at least 25%, or in the case of share acquisitions in certain sensitive industries, 10% or 20% of the voting rights.

There is no target size or transaction value threshold.

The thresholds and respective sensitive industries defined in section 55a and 56 of the AWV are as follows (Cross-Sector-List):

- **10%-threshold:** applies to a domestic company in a particularly security-relevant sector (*section 55a(1) No.17, AWV*). This includes, for example, companies operating in critical infrastructure within the meaning of the Act on the Federal Office for Information Security (*BSI-Kritisverordnung (BSI-KritisV)*), are of major importance to the community, and whose failure or impairment could result in significant supply shortages or threats to public safety (for example, energy, transportation, or health care services). In addition, the 10% threshold covers acquisitions involving:

- critical components of software designed for the operation of critical infrastructure;
  - cloud computing services;
  - telematics, certain media companies contributing to the formation of public opinion; and
  - services in relation to the safety and functionality of the government's communications infrastructure.
- **20%-threshold:** applies to companies with a high security significance for technology and health care sectors such as:
    - critical infrastructure of the health care sector (for example, personal protective equipment and in vitro diagnostics);
    - future and key technologies (artificial intelligence, cybersecurity, autonomous driving and flying, semiconductors, optoelectronics or quantum technology); and
    - critical raw materials, secret patents or utility models, and agricultural land of over 10,000 hectares.

Relevant investments in businesses subject to the cross-sector review must be notified to the BMWK (see *Transactions With a Notification and Clearance Requirement*).

## General Cross-Sector Review

The general review applies to all transactions where a foreign (non-German resident) investor directly or indirectly acquires:

- A domestic business/company (either by means of a share or asset deal).
- A shareholding amounting to at least 25% of the voting rights in a domestic business or company.

The general review serves as a catch-all for domestic businesses/companies that are not included in the Cross-Sector-List due to their minor importance, but which should nevertheless be reviewed by the BMWK.

Transactions subject to general review do not carry a notification requirement, see *Transactions Without Notification Requirement*.

## Scope of Cross-Sector Review

In the cross-sector review, the BMWK reviews if the investment is likely to affect (*voraussichtlich beeinträchtigt*) the public order or security of the Federal Republic of Germany, of another EU Member State or in relation to projects or programmes of Union interest within the meaning of Article 8 of the EU Screening Regulation.

"Public order or security" is interpreted in line with the EU Screening Regulation. The sensitive industry sectors included in the Cross-Sector-List (*section 55a, AWW*) are based on Article 4(1) of the EU Screening Regulation and are of relevance to the BMWK's assessment of a likely effect on public order and security.

The BMWK may also include investor-related factors in its review. Particularly relevant are:

- Control/influence by a non-EU/non-EFTA state.
- Any past activities of the investor that had a negative effect on the public order or security of an EU member state.
- The potential risk of criminal violation (for example corruption, fraud and certain offences punishable under the AWG).

### **Additional Covid-19 Restrictions**

Following the COVID-19 health crisis, the Cross-Sector-List subject to a mandatory notification with the BMWK has been expanded. The amendments cover industries that:

- Develop and manufacture personal protective equipment.
- Develop, manufacture and market essential medicines (including their precursors and active ingredients) to ensure the provision of healthcare to the population or possess a corresponding license under pharmaceuticals law.
- Develop or manufacture medicines which are intended for diagnosis, prevention, monitoring, predicting, forecasting, treating or alleviating of life-threatening and highly infectious diseases.
- Develop or manufacture in vitro diagnostics which serve to supply information about physiological or pathological processes or conditions, or to stipulate or monitor therapeutic measures relating to life-threatening and highly infectious diseases.

### **Sector-Specific Review**

The sector-specific review applies if a foreign (non-German resident) investor directly or indirectly acquires either:

- A domestic business/company operating in the relevant industries (either by means of a share or asset deal).
- A shareholding amounting to at least 10% of the voting rights in such a company.

There is no target size or transaction value threshold.

The industries covered by the sector specific review are defined in section 60 and 60a of the AWV and include in particular:

- Certain types of military or defense equipment (including war weapons).
- IT products with security features relevant for the functioning and processing of classified information (*Verschlusssachen*).
- Companies/businesses vital to defense (*verteidigungswichtige Einrichtung*) as defined in the Security Clearance Check Act (*Sicherheitsüberprüfungsgesetz*) (whereby in the former examples it may be sufficient that the domestic company has operated accordingly in the past).

Relevant investments involving the industries subject to the sector-specific review must be notified to the BMWK (see [Transactions With a Notification and Clearance Requirement](#)).

## Scope of Sector-Specific Review

The BMWK reviews if the investment is likely to impair (*voraussichtlich beeinträchtigt*) essential security interests (*wesentliche Sicherheitsinteressen*) of the Federal Republic of Germany.

In interpreting the term "essential security interests", the BMWK has a wide margin of discretion. According to the government's explanatory memorandum, essential security interests of the Federal Republic of Germany are at risk in particular if the security policy interests (*sicherheitspolitischen Interessen*) or military security precautions (*militärische Sicherheitsvorsorge*) of the Federal Republic would likely be impaired.

The investor-related criteria set out under the cross-sector review also apply to the sector specific review (see [Scope of Cross-Sector Review](#)).

## Notification and Authorization Requirements

### Transactions With a Notification and Clearance Requirement

If the investment involves a security sensitive business listed in the Cross-Sector-List (for example, voting rights threshold of 10% or 20%), or is subject to the sector-specific review, the transaction is subject to a mandatory pre-closing notification (*Meldung*) with the BMWK which is flanked by an enforcement ban (*Vollzugsverbot*) for the transaction underlying the investment.

Transactions subject to a notification requirement may not be implemented prior to the BMWK's clearance (*Freigabe*).

While the BMWK is exercising its review and has not cleared or prohibited the investment, all legal transactions that serve to implement the investment are pending and ineffective. Thereby it is also prohibited to exercise the voting rights associated with the acquisition and to disclose to the acquirer company-related (security sensitive) information.

### Transactions Without Notification Requirement

If the transaction is not subject to notification but falls within the BMWK's general cross-sector review, there is no obligation for the direct investor to notify the BMWK of either signing or closing. There is also no enforcement ban. Nevertheless, in such cases the BMWK has the right to review the transaction two months from the date on which it obtained knowledge of the transaction, but at the longest until the expiry of five years from the date of signing.

In these cases, the direct investor can voluntarily apply for a certificate of non-objection (*Unbedenklichkeitsbescheinigung*) confirming that the BMWK has no concerns with regard to public order or safety (*Öffentliche Ordnung oder Sicherheit*) and thereby excluding the risk of subsequent measures or prohibitions by the BMWK. After receiving the application, the BMWK reserves the right to initiate an in-depth review. If this is not done within two months, the certificate is deemed granted and can only be revoked in exceptional cases. In simple cases, the certificate of non-objection can often be obtained after a few weeks.

For smaller investments with little or no security relevance, instead of applying formally for a certificate of non-objection, the investor can submit a courtesy notification by e-mail to the BMWK to set the two-month review period in motion.

## Review *Ex Officio*

Without notification, any investment subject to the German FDI regime can be reviewed by the BMWK on its own initiative within two months from the date on which it obtained knowledge of the transaction, but at the longest until the expiry of five years from the date of signing. If the BMWK becomes aware of an investment that is to be assigned to the cross-sector or sector specific review and is concerned that there may be a risk to public order or security, the BMWK contacts the contracting parties or their legal representatives.

## Notification and Application Process

The (direct) investor must make both, the mandatory notification of an investment or the application for a certificate of non-objection. The filing documents can be provided to the BMWK via e-mail. There are no filing fees.

A mandatory notification (cross sector and sector specific review) must be made without undue delay after the conclusion of the agreements underlying the investment (signing) or, in the case of an offer within the meaning of the German Securities Acquisition and Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz (WpÜG)*), without undue delay after publication of the decision to make the offer.

There is no deadline for the application for a certificate of non-objection, it can be submitted even after closing.

Both procedures can also be initiated prior to signing, provided that the transaction and investment structure has already been determined and remains free of material change in the parts relevant to the BMWK's review.

After being notified of the transactions, the BMWK must determine within a two-month period whether an in-depth review (see [Phase 2 Review](#)) is required or not. In uncomplicated cases, a certificate of non-objection can usually be obtained within a few weeks. Binding notifications and the issuance of a clearance certificate (*Freigabeentscheidung*) can take more time.

Without the BMWK taking any action, the transaction is deemed cleared (*freigegeben*) or a clearance certificate deemed issued if the BMWK has not initiated an in-depth review within two months of receipt of the notification.

## Phase 2 Review

If the BMWK decides to conduct a more in-depth phase 2-review, additional documents must be submitted to the BMWK. The BMWK may decide that entities that are directly or indirectly involved in the transaction must also submit documents. In addition, certain data/information on the transaction must be submitted to the BMWK by means of an excel spreadsheet provided on the BMWK homepage

The deadline for the duration of the phase 2-review is set at four months (with the possibility of extension by up to another four months) starting with the receipt of the complete documentation. Due to powers of suspension and extension of deadlines, there is in fact no fixed maximum duration for the phase 2-review. A suspension of procedural deadlines may also occur if the BMWK requests additional documents from the parties during its review. This was recently confirmed in a decision by the administrative court of Berlin, which concerned the BMWK's review of a Taiwanese acquisition of a German silicon wafer manufacturer. The acquisition ultimately failed because the BMWK's decision was pending when the contractually agreed long-stop date had passed.

The BMWK's general ruling on "the Information and Documents to be submitted pursuant to Sec. 14a AWG, Sec. 55a, 58 and 60 AWV" provides more detail on the notification process (in particular information on the documents to be submitted).

## Possible Decisions by the BMWK



Investments that are subject to a notification requirement (sector-specific and cross sector review and security sensitive acquisitions of companies included in the Cross-Sector-List) must not be implemented before a clearance has been granted by the BMWK, or until the clearance is deemed to have been granted following the expiry of the two-month deadline.

The BMWK can clear the transaction subject to conditions or restrictions, such as:

- Stipulations related to the amount of shareholding (including restrictions on increases) to be acquired.
- Mandatory minimum holding requirements.
- Restrictions on the investor's rights.
- Consent or veto rights of the Federal Republic of Germany for material business decisions (for example, the sale and transfer of voting rights).
- Conditions or restrictions relating to the operation of the acquired business.
- Corresponding assurances of continued operation within Germany/EU/EFTA or other security-related assurances.

Any measure introduced by the BMWK must be suitable, necessary, and proportionate to achieve legitimate public order or safety objectives.

Alternatively, the BMWK may negotiate with the affected parties and regulate the appropriate public policy or safety concerns in an agreement under public law (*öffentlich-rechtlicher Vertrag*). During the negotiation phase, the review periods are suspended.

Prohibitions are rare and are subject to wide-ranging consent requirements within the federal government. A prohibition has the effect that the underlying purchase agreement is ineffective. Transactions that have already been implemented must be unwound. The BMWK may order supporting measures, for example:

- Prohibitions or restrictions on the exercise of voting rights in the acquired company.
- Appointing a trustee to carry out and supervise the unwinding.

To prevent foreign investment in critical infrastructure, the German government has on several occasions used an alternative method: the acquisition of the respective shares via the state-owned Reconstruction Loan Corporation (*Kreditanstalt für Wiederaufbau* (KfW)).

The BMWK's decisions are not made public.

## Failure to Notify and Penalties

The violation of the notification requirement itself is not subject to a fine and is not punishable under criminal law. However, if the investor implements the transaction and thereby violates the enforcement ban, such violations may be subject to both a fine and criminal penalties (up to five years imprisonment depending on severity). Investors should keep in mind that the BMWK has the right to start a review within two months from the date it becomes aware of the transaction, and until the expiry of five years from the date of signing.

## Remedies

Orders or prohibitions issued by the BMWK are administrative acts (*Verwaltungsakte*) against which an action can be brought before a German (administrative) court. However, the court does not conduct its own investment review, but rather reviews the decision or decision-making of the BMWK. In this context, it should be noted that the BMWK has a rather wide margin of discretion in its own decision-making and in assessing a potential threat to public order and security, which the courts will generally not overrule. For this reason, court proceedings directed against decisions of the BMWK are often not popular with the parties to a transaction.

## Practical Implications of Foreign Investment Restrictions on Private M&A Transactions

In cases where a transaction is subject to a notification requirement, the transaction remains provisionally invalid and cannot be implemented during the review period. Any agreement or arrangement between seller and investor aimed at implementing the transaction, remains provisionally invalid until clearance has been (deemed) granted. The parties should strictly avoid any measures aiming at implementation of the investment.

### Impact on the Transaction Timeline

If an acquisition (potentially) triggers an investment review by the BMWK the regulatory approval should be agreed as condition precedent for the transaction's implementation. This is typically done by either referring to the expiration of the applicable review period, the clearance by the BMWK (in case there is a notification requirement) or the issuance of a certificate of non-objection.

In more complicated cases potentially triggering a phase 2-review, the parties can further negotiate warranties and indemnities in the acquisition agreement to cover potential additional risks for the parties (see *Phase 2 Review*). Further, the parties should be aware that a phase 2-review may take longer than planned due to the far-reaching rights of the BMWK to request additional documents from the parties. This should be considered when drafting and negotiating warranties or indemnities, (unilateral) rights of withdrawal, claims for damages, conditions and long-stop dates.

### Unclear Notification Requirements

Since the definitions of the sensitive industries included in the Cross-Sector-List are very broad and there is still no uniform practice of interpretation, it is often not clear whether a transaction affects a sector with notification requirements or not.

If a notification requirement cannot be ruled out with certainty, it is advisable to notify the transaction on a precautionary basis (in view of the enforcement ban and possible consequences under criminal law) and combine this with an alternative application for a certificate of non-objection (see *Transactions Without Notification Requirement*). The reverse is also possible, but in unclear cases and without further guidance provided by the BMWK, a prudent investor should act as if the transaction was notifiable until the clearance or certificate of non-objection is issued.

### Transaction Security and Extensive Review Periods

Due to the long review period of up to five years, investors should be aware that the BMWK may become aware of the transaction even without any action taken by the investor or the parties to the transaction. This is particularly the case if the transaction (or parts thereof) must be reported to other authorities, for example the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* (BaFin)) or the Federal Cartel Office (*Bundeskartellamt*) which in turn inform the BMWK about the transaction.

Especially in the case of large multinational transactions and transactions involving listed companies, the BMWK investment review should always be considered, even if a major part of the investment is carried out abroad and the German target is commercially insignificant (with limited domestic activity). This is all the more true as the BMWK is increasingly monitoring the M&A market and relevant transactions itself.

## Registration and Disclosure of Foreign Ownership and Payments

A further reporting obligation for domestic companies can arise from section 65 of the AWV. This obligation serves the statistical recording of assets located in the German economic territory but owned by foreigners or several commercially associated foreigners. The reporting obligation applies to domestic companies in which foreigners hold certain amounts of shares/voting rights (at least 10%) and includes the obligation to report the respective assets to the German Federal Bank (*Deutsche Bundesbank*) on an annual basis.

Section 67 of the AWV requires German residents (meaning every institutional unit) to report incoming and outgoing payments from and to foreigners to the Federal Bank of Germany (*Bundesbank*). No notification requirement exists for:

- Payments not exceeding EUR12,500 or the equivalent value in other currency.
- Payments for the import, export, or transfer of goods.
- Payments for the grant, receipt, or repayment of loans, including the justification and repayment of credit balances, with an originally agreed term or termination deadline of no more than twelve months.

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