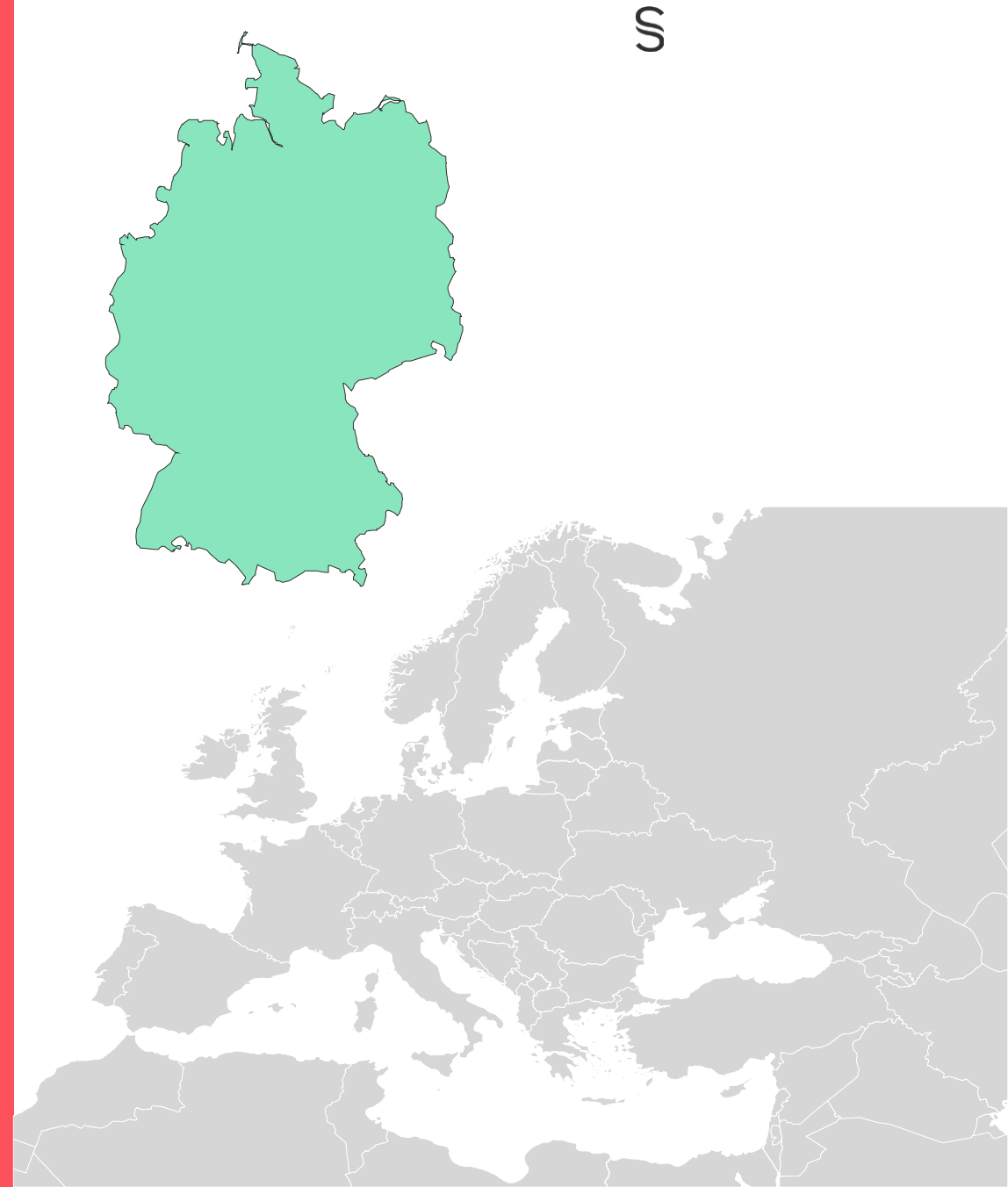


SIMMONS' COMPETITION/ANTITRUST PRACTICE

Foreign Direct Investment Regimes in Europe

Germany



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Scope of FDI Regime: Companies subject to review

The German FDI Screening mechanism applies different rules for the review of the (indirect) acquisition of a domestic company:

- a) **sector specific review** applicable to any direct or indirect acquisition of 10% or more of the voting rights of a domestic company active in the military field and in the field of encryption technologies by a foreign investor;
- b) **cross-sectoral review** applicable to any direct or indirect acquisition of 10% or 20% or more of the voting rights of a domestic company active mostly in relation to “critical technologies” and “critical inputs” by a foreign investor.

Domestic Companies are:

- Legal entities and partnerships with their seat or headquarters in Germany;
- Domestic branches of foreign legal entities or partnerships with their own headquarters in Germany;
- Permanent establishments of foreign legal entities or partnerships in Germany if these are managed in Germany.

Foreign Investor:

- The cross-sectoral review is applicable to any acquisition meeting the thresholds by an investor residing outside the territory of the EU or the EFTA.
- The sector specific review is applicable to any acquisition meeting the thresholds by any investor residing outside of Germany (including investors from EU or EFTA territories).

Scope of FDI Regime: Companies subject to review

Sector-Specific Review

The sector-specific rules apply to the acquisition of companies that operate in sensitive security areas:

- Companies that develop, manufacture, modify or possess goods referenced in part 1, section A of the export list (namely military goods) or did this in the past and still have access to the relevant knowledge and technology
- Companies that develop, manufacture, modify or possess military technologies which fall in the scope of protection of a patent or utility model declared classified or did this in the past and still have access to the relevant knowledge and technology
- Companies that manufacture goods with certain IT-security functions for the processing of classified information or essential components for the IT-security functions of such goods which have been cleared by the Federal Office for Information Security;
- Companies that are a defence-important facility as defined in the German Security Clearance Act

Scope of FDI Regime: Companies subject to review I/III

Cross-Sectoral Review

The cross-sectoral review can examine transactions in all business sectors. The review rules contain a non-exhaustive list of activities whose acquisition may endanger public order or security and which trigger a notification requirement:

1. operators of critical infrastructure (in particular energy, information technology and telecommunications, transport, health, water, food, infrastructure used for banking or insurance activities) meeting defined thresholds;
2. companies developing or modifying industry-specific software for the operation of critical infrastructure;
3. companies entrusted with organisational monitoring measures for telecommunication facilities;
4. companies providing cloud computing services meeting defined thresholds;
5. companies engaged in the area of telematics infrastructure;
6. media companies (broadcasting, telemedia and print) with a wide circulation and influence on public opinion;
7. companies providing services regarding state communications infrastructures;
8. companies designing or manufacturing personal protective equipment (Regulation (EU) 2016/425) or developing and manufacturing production facilities for fleece filters for personal protective equipment;
9. companies developing, manufacturing or distributing medicinal products which are essential for ensuring public healthcare, including their starting materials and active ingredients, or companies who are the holder of a corresponding marketing authorisation under pharmaceutical law;
10. companies developing, manufacturing or distributing medical devices which are intended for the diagnosis, prevention, monitoring, prediction, prognosis, treatment or alleviation of life-threatening and highly contagious infectious diseases;

Scope of FDI Regime: Companies subject to review II/III

Cross-Sectoral Review

The cross-sectoral review can examine transactions in all business sectors. The review rules contain a non-exhaustive list of activities whose acquisition may endanger public order or security and which trigger a notification requirement (cont.):

11. companies developing, manufacturing or distributing in vitro diagnostic medical devices in connection with life-threatening and highly contagious infectious diseases.
12. operators of high-quality earth remote sensing system (satellite systems);
13. companies developing or manufacturing goods related to artificial intelligence systems that may be used for cyber attacks, imitating and identifying people or for surveillance activities;
14. companies developing or manufacturing automated / autonomous vehicles or unmanned drones;
15. companies developing or manufacturing certain robots to handle explosives or nuclear material as well as to operate in high elevation or under high water pressure;
16. companies developing, manufacturing or refining semiconductors and optoelectronics (including certain equipment for their production);
17. companies developing or manufacturing certain IT-security equipment or systems
18. companies operating air carriers as well as the manufacturing or developing of aerospace goods or technologies; ;
19. companies developing, manufacturing, modifying or using certain goods related to nuclear technology;
20. companies developing or manufacturing certain goods that apply quantum technologies;
21. companies developing or manufacturing goods for additive manufacturing processes (i.e. 3D printing of metallic or ceramic components);

Scope of FDI Regime: Companies subject to review III/III

Cross-Sectoral Review

The cross-sectoral review can examine transactions in all business sectors. The review rules contain a non-exhaustive list of activities whose acquisition may endanger public order or security and which trigger a notification requirement (cont.):

- 22. companies developing or manufacturing goods for the operation of wireless or wireline data networks;
- 23. companies manufacturing smart meter gateways which are cleared/certified by the Federal Office for Information Security (BSI);
- 24. companies employing personnel with certain security clearances;
- 25. companies extracting or processing certain raw materials and their ores;
- 26. companies developing or manufacturing goods based on classified patents or utility models;
- 27. large agricultural producers (cultivating more than 10,000 hectares).

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Thresholds

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The German review mechanism applies to the acquisition of a domestic company (also by way of asset deal) or the direct or indirect acquisition of a form of participation that meets the below thresholds:

- In the **sector-specific review**, a notification is required for direct or indirect acquisitions reaching or exceeding 10% of the voting rights of a relevant target.
- In the **cross-sectoral review**, a notification is required for direct or indirect acquisitions reaching or exceeding 10% (for activities 1 to 7 above) or 20 % (for activities 8 to 27 above) of the voting rights.
- In the **cross-sectoral review**, a review can also take place of direct or indirect acquisitions reaching or exceeding 25% of the voting rights in all other companies but these transactions do not require a notification.

In addition to the initial threshold of 10%, 20% or 25% respectively, a separate notification and review procedure is triggered in case of increases of the shareholding reaching or exceeding 20%, 25%, 40%, 50%, 75% or all shares depending on the activity of the domestic company.

Review of Atypical Control

Section 56(3) of the AWW provides that the review mechanism also applies to acquisitions of effective control over a domestic company even if the voting rights threshold of 25% is not exceeded.

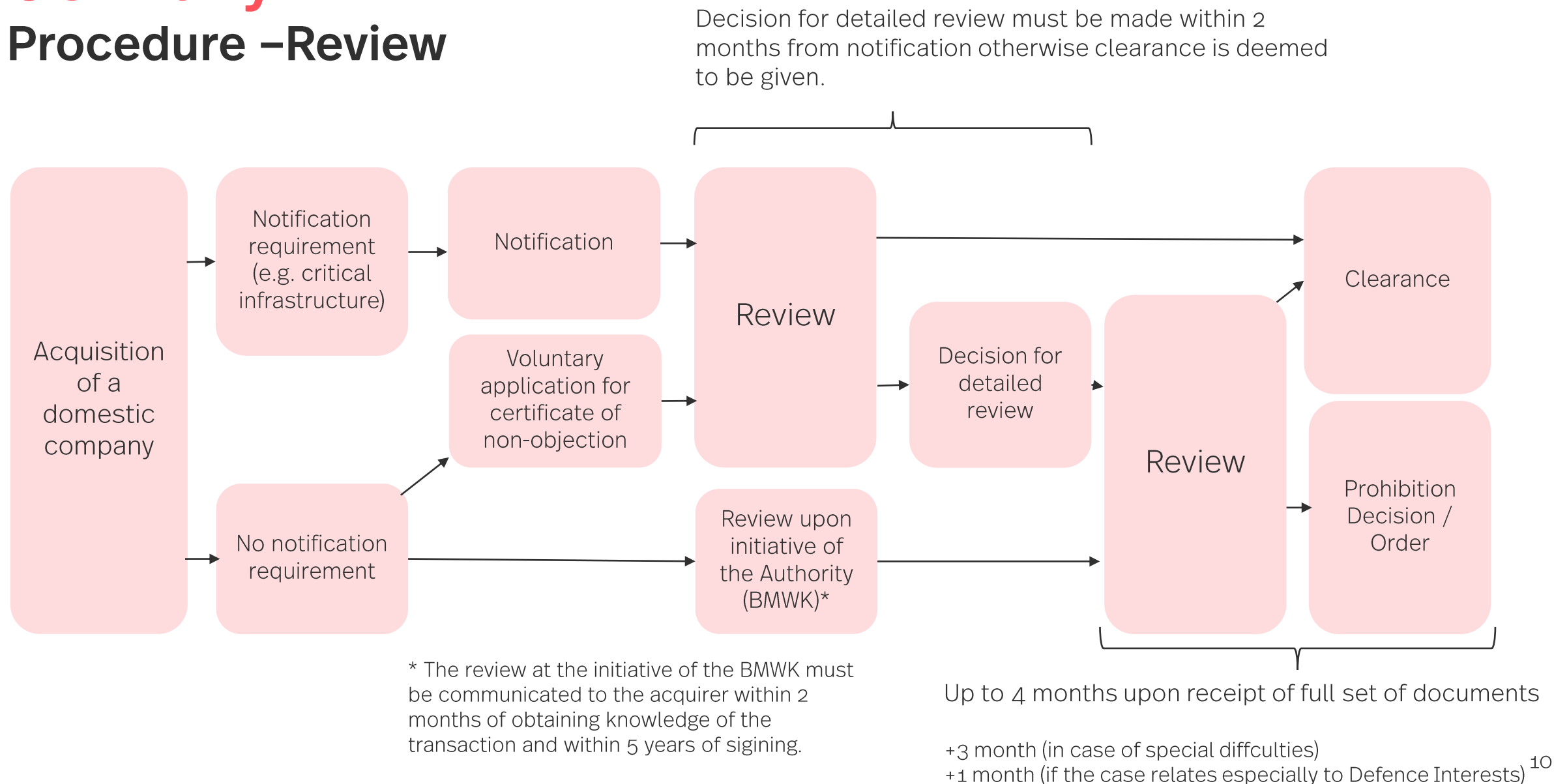
This is particularly the case if an acquisition of voting rights is accompanied by

- the guarantee of additional seats or majorities in supervisory bodies or in the management;
- the granting of veto rights in strategic business or personnel decisions; or
- the granting of information rights. Such rights must go beyond the influence which would ordinarily result from a 25% stake.

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Procedure –Review

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Impact on M&A

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- The German FDI regime has undergone far reaching revisions and amendments:
 - Specific cases of “critical technology” as outlined in the EU Screening Regulation (Regulation (EU) 2019/452) have been included and are now subject to a mandatory notification requirement in case of transactions.
 - Political decisions may lead to a broadening of the regime in the future.
- The German FDI regime can have a big impact on M&A transactions:
 - An FDI review will have to be carried out for all transactions by (non-EU) foreigners in order to identify reporting obligations and avoid enforcement risks.
 - Delay of transactions can occur due to reporting requirements.
 - Violations of the FDI regime can be criminal offences under German law.
 - Transactions falling under a notification requirement and completed without prior approval may not be legally valid.

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Contacts

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