Foreign Direct Investment Regimes in Europe

Germany
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Contents

- Scope of FDI Regime: Companies subject to review
- Thresholds
- Procedure – Sector-specific Review
- Procedure – Cross-sectoral Review
- Impact on M&A
- Contacts
Germany
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 by Foreign Investors according to the target’s business activity:

a) **cross-sectoral review** applicable, in principle, to all business sectors and irrespective of the size of the target but there are size thresholds when a notification requirement is triggered; and

b) **sector specific review** applicable to certain defence and IT security companies.

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).
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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:

- manufacturers and developers of war weapons and other key military technologies specified in export control lists
- manufacturers and developers of specially designed engines and gearboxes for battle tanks and other armoured military tracked vehicles
- companies developing products with IT security functions for processing government classified information or essential components of such products for IT security and still owning the technology if the entire product has been approved by the Federal IT Security Agency
- companies operating satellites with a high-grade earth remote sensing system
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Scope of FDI Regime: Companies subject to review

Cross-Sectoral Review

The cross-sectoral review examines all business sectors in which the acquisition may be deemed a threat to public order or security. The review rules contain a non-exhaustive list of companies whose acquisition may endanger public order or security:

- operators of critical infrastructure (in particular energy, information technology and telecommunications, transport, health, water, food, infrastructure used for banking or insurance activities);
- companies developing or modifying industry-specific software for the operation of critical infrastructure;
- companies entrusted with organisational monitoring measures for telecommunications facilities;
- companies providing cloud computing services;
- companies engaged in the area of telematics infrastructure;
- media companies (broadcasting, telemedia and print) with a wide circulation and influence on public opinion;
- companies providing services regarding state communications infrastructures;
- companies designing or manufacturing personal protective equipment (Regulation (EU) 2016/425);
- 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;
- 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;
- companies developing, manufacturing or distributing in vitro diagnostic medical devices in connection with life-threatening and highly contagious infectious diseases.
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Thresholds

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% of the voting rights of a target operating a critical infrastructure or otherwise defined as critical company.

- 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.
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Procedure – Sector-specific Review

Acquisition triggering a notification → Notification → Review → Decision for detailed review and request of a detailed notification → Review → Clearance

Up to 3 months upon receipt of Notification

Decision for detailed review and request of a detailed notification

Up to 3 months upon receipt of full set of documents
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Procedure – Cross-sectoral Review

Acquisition of a domestic company

Notification requirement (eg critical infrastructure)

No notification requirement

Notification

Voluntary application for certificate of non-objection

Review

Review upon initiative of the Authority (BMWi)*

Decision for detailed review

Certificate of non-objection

Prohibition Decision / Order

Decision for detailed review must be made within 2 months from notification otherwise certificate of non-objection is deemed to be given.

* The review at the initiative of the BMWi must be communicated to the acquirer within 3 months of obtaining knowledge of the transaction and within 5 years of signing.

Up to 4 months upon receipt of full set of documents
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Impact on M&A

• A process of far-reaching adjustments to the German FDI regime has begun and further amendments are pending:
  
  • A definition of “critical technology” as outlined in the EU Screening Regulation (Regulation (EU) 2019/452) will lead to more companies being subject to a mandatory notification requirement in case of transactions.

• 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 due to reporting requirements possible

  • Violations of the FDI regime can be criminal offences under German law

  • Completed transactions falling under a notification requirement may not be legally valid.
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