

## Germany Significantly Expands Its Foreign Investment Control Regime

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### Introduction

With foreign investment screening tightening around the world, Germany has further expanded the scope of its foreign investment regime. The new rules entered into force on 1 May 2021 and apply to all transactions signed thereafter.

The changes implement the [EU FDI Screening Regulation](#), especially targeting “critical technologies” such as artificial intelligence, network technologies, semiconductors, autonomous mobility, robotics, aerospace, cybersecurity as well as many others. Mandatory foreign investment filings will now be required for a larger number of M&A transactions involving German targets (or targets with a German subsidiary) active in future-oriented technologies.

### Most Important Changes

- **Expanded catalogue of relevant target activities:** The amended regime significantly expands the catalogue of target activities that trigger a mandatory foreign investment filing. It extends the number of categories triggering a mandatory filing from 11 to 27, with the 16 additional categories relating mostly to the manufacturing and development of “critical technologies” and “critical inputs”. The German government has decided against simply copying the very broad terms used in the EU FDI Screening Regulation and has instead included a list of very detailed and concrete individual target activities (in an attempt to make the list more “user-friendly”). In the sector-specific review, new notification requirements

apply to companies that operate with goods that are export-controlled or that are based on secret IP rights in the field of military technology.

- **New 20% threshold for mandatory notifications:** Under the existing regime, a direct or indirect acquisition of at least 10% of the voting rights in a German company active in certain areas of critical infrastructure (e.g., energy and transport infrastructure, financial institutions, healthcare, telecoms, data centers), or military and defense, requires a mandatory notification. In addition, the German Ministry for Economic Affairs and Energy (BMWi) is entitled to scrutinise any direct or indirect acquisition of at least 25% of the voting rights in a German company by a non-EU investor (which, post Brexit, includes UK investors) on grounds of national security and/or public order. The BMWi may do so *ex officio* within two months of becoming aware of the transaction, up to five years after signing. In addition to the existing 10% and 25% thresholds, the new rules introduce a mandatory notification obligation for direct or indirect acquisitions by a non-EU investor of 20% of the voting rights in a German company active in the newly introduced categories of target activities as well as the existing COVID-19 related healthcare categories. This 20% threshold (which is a welcome increase from the 10% threshold originally proposed) will exempt many minority investments in the tech sector from mandatory filings to facilitate the financing of start-ups and other fast-growing companies in investment rounds.
- **New thresholds for incremental share acquisitions:** The new rules introduce additional thresholds that trigger a notification obligation once they are reached, even if the initial transaction was already approved by the BMWi.
  - For “traditional sensitive sectors” that are subject to an initial mandatory notification if 10% of the voting rights are acquired (e.g., defence, critical infrastructure, cloud computing services, media companies, etc.), the subsequent thresholds are 20%, 25%, 40%, 50% and 75%;
  - For the “newly introduced sensitive sectors” that are subject to an initial mandatory notification if 20% of the voting rights are acquired (e.g., the new tech-related sectors captured by critical technologies, critical inputs and the COVID-19 related healthcare sectors that were introduced in 2020), the subsequent thresholds are 25%, 40%, 50% and 75%; and
  - For all other transactions that fall within the scope of the German foreign investment control rules (where the initial threshold is 25% of the voting rights) the subsequent thresholds are 40%, 50% and 75%.
- **Acquisition of “atypical control” may trigger foreign investment review:** In addition to the acquisition of voting rights, certain governance / veto rights can now, for the first time, also trigger an *ex officio* review by the BMWi and, therefore, warrant a voluntary filing. The new regulation extends the BMWi’s power to review

transactions if the governance rights afforded to a foreign investor (e.g., board seats, veto rights over strategic decisions and/or extensive information rights) gives it disproportionate weight compared to its voting rights and, therefore, a degree of influence over the target that is comparable to a larger shareholding.

- **New safe harbour for intra-group restructurings:** German foreign investment rules capture mere intra-group transactions within an existing corporate group. This will continue under the new regime, however, going forward an exemption will apply where (i) the German target is transferred between two entities that are both wholly owned by the same ultimate controlling parent company and (ii) the two entities have their place of management in the same country.

## Conclusion

The new rules are part of an EU-wide process of introducing stricter foreign investment screening rules that are much broader in scope. Over the past four years, the review of foreign investments by the BMWi has developed from a niche topic to one of the key considerations in Germany-related M&A. While the review of transactions under German merger control rules has been considerably simplified by increased thresholds at the beginning of this year, the new foreign investment rules clearly indicate the German government's desire to apply stricter scrutiny to inbound investments and, in particular, for those that involve targets in the high-tech industries. Dealmakers should therefore identify at an early stage whether the envisaged transaction falls within the scope of the expanded German (and other) foreign investment regimes in order to take necessary precautions early in the transaction process to avoid delays and obtain contractual protections where appropriate.

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## Related Services

### Practices

- Antitrust & Competition

## Suggested Reading

- 23 April 2021 Kirkland Alert U.S. Supreme Court Rejects Federal Trade Commission's Ability to Seek Restitution in Antitrust and Consumer Protection Cases
- 02 April 2021 Kirkland Alert Small Shift in EU Merger Policy: High Impact on Nascent Competitor Deals
- 17 March 2021 Kirkland Alert New Dose of Antitrust Scrutiny for Pharmaceutical Mergers

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