

# Increased Scrutiny: Germany Again Tightens Its Foreign Direct Investment Regime

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Germany has again amended its foreign direct investment (“FDI”) regime. On 1 May 2021, the latest amendment to the [Foreign Trade and Payments Ordinance](#) (“Ordinance”) came into effect. It is the accompanying legislation to the [Foreign Trade and Payments Act](#) (“Act”), which, together with the Ordinance, stipulates the German FDI regime.

The Ordinance vastly expands the list of industries that are subject to a mandatory FDI screening before a transaction may be implemented. Amongst others, investments by a non-EU/EFTA investor in German future and high-tech sectors such as artificial intelligence, autonomous driving, semiconductors or quantum technology will require a filing with the German Ministry of Economics and Technology (“BMW<sub>i</sub>”) before completion. Filings must be made without delay upon signing.

The Ordinance also introduces new and detailed thresholds that trigger a filing, and additional filings may be required for follow-up investments. The Ordinance vests the BMW<sub>i</sub> with new *ex officio* powers to “call in” transactions.

This is the third in a series of changes to the German FDI regime over the past year. The Ordinance has only been amended on 25 May 2020, and, on 17 July 2020, the Act introduced considerable changes to the applicable test and administrative procedure.

As previously reported in our [in-depth note](#), these changes are triggered *inter alia* by the [EU Screening Regulation 2019/452](#) (“Screening Regulation”), the COVID pandemic and the resulting Commission [guidance paper](#) of 25 March 2020 calling upon national governments to vigorously enforce, and adopt if necessary, their FDI screening mechanisms to protect sensitive European assets during the crisis. While the German government stresses that it welcomes and remains open for investment, it recognizes the geopolitical and strategic implications of foreign investments for national security and public order (see [statement of 27 April 2021](#)).

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## Industries Subject to Mandatory FDI Review

The Ordinance extends the scope for both “sector-specific” review (relevant in the defense and military sectors, and related IT matters) as well as “cross-sector” review (relevant in all other “civil” fields that may impact national security or public order).

### Cross-Sector Review Substantially Expanded

In line with the Screening Regulation, the Ordinance expands reporting obligations for investments in next-generation technology for non-EU/EFTA investors. However, differing from the Screening Regulation, where the industries subject to review are defined very broadly, the Ordinance very clearly defines the industries subject to a filing to avoid uncertainties and ensure that only such transactions that may pose a risk to Germany’s national security or public order are subject to FDI screening.

The Ordinance enlists 16 new additional industries that the German government sees as especially relevant for protecting public order and national security (in addition to the already existing 11 industries). **Acquisitions of 20% of the voting rights**, or of certain assets, in a German company must therefore be filed by a non-EU/EFTA investor with the BMWi if they affect **critical technologies** such as:

- High-end remote **earth-sensing technologies** under the German Satellite Data Security Act;
- **AI applications** for automated cyber attacks and mimicry or surveillance of persons by analyzing communications or movement;
- Motor vehicles or unmanned aerial vehicles capable of automated or **autonomous driving or navigation**, or relevant key components or software;
- Specially designed **robots** that can withstand or handle extreme conditions (i.e., explosions, increased radiation, altitudes or depths);
- Integrated circuits, semiconductors, **micro- or nanostructured optical circuits** and tools used for manufacturing such devices;
- **IT security products** or components used for cybersecurity or computer forensics;
- **Air carriers** licensed under EU Regulation 1008/2008;
- **Nuclear technology** products listed in Appendix 1 to EU Regulation 428/2009/EC;

- **Quantum technology**, including quantum computing and simulation, cryptography, sensors and metrology;
- Additive manufacturing for industrial applications (i.e., **3D printers**);
- **Network technology**, including components for wireless and wired networks;
- Specially licensed **smart-meter gateways** and security components for such gateways;
- **Employers of persons** working on IT infrastructure of agencies tasked with national safety;
- **Natural resources and ores** classified as critical by the European Commission;
- Products that are protected by **classified patents**; and
- **Food supply** covering an agricultural area of more than 10,000 hectares.

The Ordinance facilitates certain foreign investments by increasing the threshold from 10% to **20%** for **health-related sectors** that have been included into the Ordinance in May 2020 in reaction to the COVID-19 pandemic. These include:

- Personal protective equipment (e.g., protective clothing, face masks);
- Essential drugs for medical care to the general population;
- Medical devices or products aimed at diagnosing or preventing life-threatening and highly infectious viral diseases;
- In vitro diagnostics that provide information on life-threatening and highly infectious viral diseases.

**Additional investments** in all of the above **critical technologies and healthcare** sectors are subject to screening just like initial acquisitions and need to be **refiled** if the following thresholds are exceeded: 25, 40, 50 and 75%.

As before, **acquisitions of 10% of the voting rights**, or of certain assets, by a non-EU/EFTA investor remain subject to a mandatory filing if a German company is active in **critical infrastructure**, e.g.:

- Critical infrastructure in the areas of energy, water, food, information technology and telecommunications, health, finance and insurance, and transport and traffic, that reach a certain legally defined minimum of significance;
- Software specifically designed for critical infrastructure;
- Telecommunication facilities and surveillance of telecommunications;
- Large data centers and cloud-computing providers;
- E-healthcare providers that possess a special telematics license;
- Media companies (e.g., radio, television, newspapers).

**Additional investments in critical infrastructure** need to be **refiled** if the following thresholds are exceeded: 20, 25, 40, 50 and 75%.

### Transactions May Be “Called In”

As is already the case, investments of **25% of the voting rights**, or of certain assets, in **all other sectors** (i.e., that are not subject to a mandatory filing) may be filed to the BMWi. If uncertain whether a transaction may pose a risk to national security or public order, the foreign investor may decide to apply to the BMWi for a **certificate of non-objection** as a precautionary measure and to remove legal uncertainty. If not notified, the BMWi may “call in” and review a transaction up to **five years** after its signing.

Under the amended Ordinance, transactions can now also be “called in” in cases of **“atypical” acquisitions of control**. This is the case where the investment in a German entity stays below the relevant thresholds but grants an influence comparable to the share of voting rights stipulated by the law, for example, by granting governance rights such as:

- Additional seats or majorities in supervisory boards or the management;
- Veto rights in strategic business or personnel decisions; and
- Information rights that allow an investor to exercise a level of influence comparable to an outright acquisition of shares, or assets.

## Applicable Test

Investments in the above sectors are approved if they do not raise concerns regarding the national security and public order of Germany or any Member State of the European Union, and certain EU projects and programs.

## Sector-Specific Review Extended

The range of reportable investments in the **defense and military sector** (“sector-specific review”) has also been expanded to cover:

- All products included in Part I Section A of the German Export List (annexed to the Ordinance, which includes weapons, military tracked vehicles and relevant safety IT products, drones, military flight simulators, cameras, certain robots and construction equipment for military purposes);
- Defense products that are specially protected by classified patents;
- Defense products with IT security functions for processing government classified information;
- Investments in German companies that modify defense goods or have de facto control over such goods, or that still possess know-how or have access to the underlying technologies.

The amended Ordinance has tightened the applicable test, which is now whether an investment would likely affect material security interests of Germany. The BMWi may particularly consider whether the foreign investor (that in the context of the sector-specific review is any non-German investor) is a state-owned entity or is controlled by a state through financing arrangements. It may also look at whether the foreign investor has been involved in activities detrimental to the public order or national security of Germany or another Member State of the European Union. The same applies if there is a substantial risk that a foreign investor (or its agents) has committed certain crimes, violated the Act or the Military Weapons Act.

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## PROCEDURAL AMENDMENTS

### Review Periods

Another novelty is the new timeline for review. The BMWi has to start preliminary proceedings within **two months** of receiving the application (or learning of the

transaction). This period is now universally applicable to all proceedings, whether they regard the sector-specific or cross-sector review.

If the BMWi then decides to carry out an **in-depth review**, it has **four months** to do so, starting from the time it obtains all documentation requested. The period may be extended by another **three months** (and in defense-related matters by **one further month**) if the BMWi finds the case particularly complex. It may then either grant permission, with or without remedies, or block the deal.

Permission is **deemed granted** if the BMWi does not initiate an in-depth review within the initial two months, or in case of an in-depth review does not communicate a decision within the applicable four-month period.

### Monitoring Remedies

Another major change regards the supervision of remedies, which is a novelty in the German FDI regime. While only very few transactions have been blocked in the past, there have been an increasing number of deals that have raised concerns and therefore been cleared, subject to conditions.

The amended Ordinance now allows the BMWi to appoint third persons to monitor compliance with such conditions. Monitors must be competent, reliable and independent, and are vested with certain powers, including the right to request parties to produce documents and to enter parties' premises.

### Standstill Obligation and Gun-Jumping Prohibitions

Other major changes introduced by the Act in July 2020 are new gun-jumping penalties. Transactions subject to a filing obligation may not be closed unless permitted by the BMWi (a so-called standstill obligation). If prohibited, the transaction becomes legally void.

Bypassing the standstill obligation can be sanctioned in the form of monetary fines and imprisonment of up to five years. Particularly, without the (deemed) approval of the BMWi, it is expressly prohibited to allow the foreign investor to exercise voting rights over the domestic company. The domestic entity may also not, distribute earnings to the foreign investor and grant access to information related to national security interests.

The BMWi has the right to declare certain information of the domestic company significant to security or public order so as to prevent the premature closing of the transaction.

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## Final Remarks

The amended Ordinance brings 16 new sectors into the scope of the German FDI regime. Therefore, non-EU/EFTA investors need to be aware of enhanced notification obligations at an early stage of their investment.

For M&A transactions, FDI screening continues to become an important element in M&A planning when the target has European operations. This requires coordination and management in parallel to merger control proceedings and applies not only to Germany. A number of other European countries have either tightened or introduced a new FDI regime, for example France, Spain, Italy, Poland, Czech Republic, Hungary, the Netherlands, etc., as reported in our [in-depth note](#). In April 2021, the United Kingdom has passed the [National Security and Investment Act](#), which is expected to come into force later this year (for details see our [note](#)).

We also expect enhanced scrutiny as a result of the Screening Regulation, as it enables EU Member States and the European Commission to coordinate, exchange information and raise concerns related to specific investments. This will inevitably also lead to longer timelines in certain deals if several European regulators are involved.

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Please do not hesitate to contact us with any questions.

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