

FDI Guide
Germany

Contact

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Foreword: A specific chapter is dedicated to the new Regulation (EU) 2019/452 of 19 March 2019 creating a framework for the screening of foreign direct investment (FDI) into the European Union through a combination of: (1) mandatory information by the Member State receiving a filing under its FDI regime of all other Member States and the European Commission; and (2) the possibility for the latter to make comments or issue opinions to the former.

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1.	Principle	Describe if the FDI regime is built by exception to a principle of freedom of investment or whether restrictions to transferring funds to and from your country apply generally.	<p>The Treaty on the Functioning of the EU guarantees the principle of free movement of capital between Member States of the EU and third countries. This fundamental freedom enshrined in primary EU law is directly applicable in the German legal system.</p> <p>As an exception to the principle of free movement of capital, the German Foreign Trade Act (<i>Außenwirtschaftsgesetz</i> or AWG) and the Foreign Trade and Payments Ordinance (<i>Außenwirtschaftsverordnung</i> or AWV) stipulate governmental powers to review and control foreign investment in German target companies and businesses. This FDI regime is designed to protect the ‘essential security interests of the Federal Republic of Germany’ and ‘the public order or security of the Federal Republic of Germany, of any other member state of the European Union or in relation to projects or programmes of Union interest within the meaning of Article 8 of the Regulation (EU) 2019/452’.</p> <p>The German FDI regime has a broad scope of application and covers a wide range of cross-border M&A transactions, even where Germany is affected merely indirectly. In addition, in 2020/2021, the scope of mandatory notification and approval requirements was considerably extended. Nevertheless, statistically, restrictions or even prohibitions of M&A transactions remain rare exceptions under the German FDI regime.</p>

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2.	Legal regime Authority(ies) in charge	Describe source(s). Name of authority in charge of applying the FDI rules (Minister/Agency/...).	The German FDI regime is set out in sections 4 and those which follow, sections 14 and those which follow of the AWG and sections 55 and those which follow of the AWW. It is administered by the German Federal Ministry for Economic Affairs and Climate Action (Bundesministerium für Wirtschaft und Klimaschutz or BMWK). In the course of its FDI screening, the BMWK regularly involves and consults with other federal ministries, offices and agencies.
3.	Transactions that may be subject to FDI <ul style="list-style-type: none"> • Type • Materiality thresholds • Rights of evocation 	Describe the nature of the transactions that may be subject to FDI rules. In the case of share acquisition, specify if the FDI regime is triggered only beyond a certain threshold and, if so, describe such a threshold.	In general, German FDI rules apply to both share deals (with certain thresholds) and certain asset deals. As regards <i>share deals</i> , the relevant thresholds depend on the specific business activities of the German target company; these thresholds relate to the relevant percentage of voting rights (not shares): A threshold of ten per cent or more applies if the German target company is active in particularly security-sensitive sectors defined in the law, such as the production or development of war weapons and military equipment, as well as certain encryption technology, the operation of critical infrastructure, the development of sectoral software for such infrastructure, cloud computing services or media business. A threshold of 20 per cent or more applies if the German target company is active in further business sensitive sectors defined in the law, such as, inter alia, healthcare and infection control or certain high-tech industries (eg, semiconductor, space, autonomous driving, nuclear, quantum technology, artificial intelligence (AI) software, additive manufacturing, cybersecurity and robotics). If the German target company is not active in any of the sensitive business sectors defined in the law, a threshold of 25 per cent or more applies. In this context, the voting rights held or acquired by different investors have to be aggregated in certain scenarios, most notably if such investors are affiliated with each other or if they have concluded an agreement on the joint exercise of voting rights or act in concert in some other way. Furthermore, the voting rights of investors controlled by the same foreign state are to be aggregated as well.

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			<p>Add-on acquisitions are also covered by the German FDI regime if they reach or exceed the additional thresholds of 20 per cent, 25 per cent, 40 per cent, 50 per cent and 75 per cent.</p> <p>In addition, there are other ways to trigger the FDI review and control powers of the BMWK without acquiring voting rights in German target companies exceeding the above-mentioned thresholds. For example, if an investor acquires voting rights below the relevant screening thresholds, but at the same time attains control and management rights that afford the investor a comparable level of influence over the company as an acquisition of voting rights reaching or exceeding such thresholds, such an investment can be reviewed and controlled by the BMWK.</p> <p>The German FDI regime applies equally to private M&A transactions and public M&A acquisitions.</p> <p>German FDI rules also cover a broad range of <i>asset deals</i>, namely acquisitions of: (i) a definable part of the operation of a domestic German company; or (ii) all the essential operating equipment of a domestic German company or of a definable part of the operation of a domestic German company that is needed to maintain the operation of the company or of a definable part of the operation.</p> <p>Under the German FDI regime, there are no materiality thresholds relating to the revenue generated or number of employees employed by the German target company or business. Finally, the AWV explicitly covers constellations that may circumvent German FDI rules.</p>
		<p>Are indirect acquisitions of assets or shares in the jurisdiction subject to the relevant FDI rules (acquisitions in a parent company outside the jurisdiction)?</p> <p>Are share transfers involving a group company internal restructuring covered?</p> <p>Are greenfield investments covered?</p>	<p>German FDI rules apply to both direct and indirect acquisitions of German target companies, their voting rights or their major assets. In particular, in the case of share deals, it has to be noted that the above-mentioned thresholds of voting rights are to be applied on each and every level of shareholding, that is, without the application of dilution principles. For example, if a United States investor acquires ten per cent of the shares and voting rights in a French company that in turn holds ten per cent of the shares and voting rights in a German company operating critical infrastructure, the ten per cent threshold applicable to operators of critical infrastructure would be triggered and German FDI rules would apply (even with a mandatory notification and approval requirement).</p> <p>In general, even internal restructuring is covered by the German FDI regime. However, there is a – limited – statutory exemption: outside the fields of production or development of war</p>

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			<p>weapons, military equipment and certain encryption technology, internal group restructuring is not subject to the BMWK's review and control powers if the relevant acquisition agreement is concluded exclusively between companies that are wholly owned by the same controlling company and if the contracting parties have their place of management in the same non-EU country.</p> <p>Pure greenfield investments are not covered by the German FDI regime.</p>
		<p>Does the FDI authority (or another type of governmental authority) have a power of evocation/ex officio/call-in powers? If so, please describe.</p>	<p>The BMWK may ex officio initiate an in-depth review of any transaction that falls under the German FDI regime within two months after becoming aware of the transaction. Such an in-depth review may result in restrictions or the prohibition of the transaction (or, if it has already been consummated, its reversal).</p> <p>However, the review and control powers of the BMWK are excluded by law if more than five years have passed since the execution of the transaction agreement.</p>
4.	<p>Sectors falling under the FDI scope</p>	<p>Describe the economic sectors for which the FDI regime will apply. If relevant, explain for each sector the level of flexibility that the authority may apply (or not) in evaluating whether FDI rules should apply.</p> <p>Are there sector-specific stricter limits on foreign investment that will apply, such as a lower threshold of investment by foreign interests or sectors for which no foreign investment is possible? If yes, which sectors (eg, nuclear energy/agriculture)?</p>	<p>In general, the German FDI regime covers foreign investment irrespective of the specific business sector in which the relevant German target company is active. However, as described above, the specific business activities of the German target company are specifically relevant for the determination of the applicable threshold in voting rights in the case of direct or indirect share deals.</p> <p>Furthermore, if the specific business activity of the relevant German target company is subject to a reduced threshold of ten per cent or 20 per cent of voting rights (see above), relevant acquisitions trigger a mandatory notification and prior approval requirement under German FDI rules. This statutory requirement is backed by a strict gun-jumping prohibition (see below). By contrast, transactions that are not notifiable in this sense with an applicable threshold of 25 per cent are 'merely' reviewable by the BMWK; they can be subject to a voluntary filing.</p> <p>The list of business activities of German target companies triggering a mandatory filing obligation and an FDI approval requirement has been extended over the past years and is now rather extensive. It comprises, inter alia:</p> <ul style="list-style-type: none"> • production or development of war weapons and military equipment;

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			<ul style="list-style-type: none"> • production or development of certain encryption technology; • operation of critical infrastructure or sophisticated earth remote sensing system, or development of sector-specific software for critical infrastructure; • cloud computing; • media; • certain business activities relating to healthcare and infection control, such as development or production of essential medicines or certain medicinal products or in vitro diagnostics; and • certain business activities in specifically defined high-tech industries, such as semiconductors, space, autonomous driving, nuclear, quantum technology, AI software, additive manufacturing, cybersecurity and robotics. <p>Very limited sector-specific restrictions apply to foreign investment, such as the EU law limitations on the foreign ownership and control of European air carriers. However, under the German FDI regime, no business sector is generally excluded from foreign investment.</p>
5.	Qualified investors	Describe the main characteristics of investors that fall under the FDI regime and if there are nuances depending on their origin (eg, EU v not EU).	<p>German FDI rules differentiate between investors based in the EU or European Free Trade Association (EFTA) and non-EU/EFTA investors. To qualify as an EU/EFTA investor, a natural person needs to have his/her residency in the EU/EFTA, whereas for legal persons, the registered office or place of management has to be located in the EU/EFTA.</p> <p>Direct or indirect acquisitions by foreign EU/EFTA investors are only subject to the German FDI regime if the German target company is active in certain particularly security-sensitive sectors, such as the production, development or possession of war weapons or military equipment, or the production or development of certain encryption technology (so-called ‘sector-specific FDI screening’). Within sector-specific FDI screening, investment reaching or exceeding a threshold of ten per cent is subject to a mandatory notification and approval requirement.</p> <p>Outside the scope of sector-specific FDI screening (ie, in relation to all other business activities of the German target company concerned), the German FDI regime only applies to relevant acquisitions by non-EU/EFTA investors (so-called ‘cross-sectoral FDI screening’). Within the scope of cross-sectoral FDI screening, investment in certain sensitive business</p>

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			sectors is subject to reduced thresholds of ten per cent and 20 per cent, and a mandatory notification and approval requirement; other investment is ‘merely’ reviewable under the German FDI rules.
6.	Procedure 6.1 Before or post-closing filing		<p>If the German target company’s business activities fall into the particularly security-sensitive or other sensitive business sectors as defined in the AWV, any investment by a relevant acquirer reaching or exceeding the applicable threshold of voting rights triggers a mandatory filing obligation, an approval requirement and a strict gun-jumping prohibition. In such cases, the filing has to be submitted to the BMWK pre-closing (without undue delay after signing) and the transaction may only be consummated once clearance has been obtained. Any consummation of the transaction without the BMWK’s approval is null and void under German law.</p> <p>If the German target company’s business activities do not trigger a mandatory filing obligation, a voluntary FDI filing can be submitted either pre-closing or post-closing in order to increase deal certainty. Without such clearance, the BMWK could potentially initiate an ex officio review for up to five years as of signing.</p>
7.	6.2 In the case of pre-closing filing	Mandatory/optional filing	See the answer above.
8.	6.3 In the case of post-closing, what are the powers of the authority?		<p>If no mandatory filing is required, the transaction is subject to the statutory condition subsequent to ministerial prohibition (provided the BMWK’s FDI review powers are not time-barred).</p> <p>The BMWK has the power, following an in-depth review of the transaction, to impose restrictions that are required, inter alia, to safeguard the public order or security of the Federal Republic of Germany. To this end, for example, restrictions regarding the investors influence on the management of the German target company are possible. In exceptional cases, the BMWK may even prohibit the transaction and require it to be unwound.</p>
9.	6.4 Advance ruling	Explain if it is possible to obtain a pre-ruling from the authority as to whether the transaction falls under the FDI rules and,	Under the German FDI regime, the BMWK does not have the power to issue binding pre-rulings on whether a transaction falls under the FDI rules. Thus, in cases in which the applicability of the German FDI regime is in some way uncertain, a full filing has to be

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		as the case may be, describe the process to be followed.	made if the investor seeks formal and legally binding clearance from the BMWK. However, even in the case of a formal filing, the BMWK does not issue a binding confirmation if it concludes that the transaction is outside its jurisdiction. In any case, with regard to questions of applicability and scope, an informal (and non-binding) alignment with the BMWK is possible and common practice.
10.	6.5 Timing of various steps (i) Filing	How much lead time is required?	The time required for the preparation of a German FDI filing is highly dependent on the complexity of the investment structure, the deal mechanics and the target company's business activities. Preparations may take between a few days in simple cases and several weeks in complex cases.
11.	(ii) Review by the authority	Specify the timing available to the authority; indicate if the timeframe is mandatory or not and describe what other flexibility may exist de facto or <i>de jure</i> .	The submission of the filing triggers an initial statutory review period for the BMWK of two months. By the end of this initial two-month period, the BMWK either has to grant a clearance decision or formally initiate an in-depth review of the transaction. If the two-month period expires without the BMWK taking a decision in this respect, the transaction is deemed cleared. This initial two-month period may only be extended with the agreement of the parties to the transaction.
			If an in-depth review is initiated by the BMWK, the acquirer is first obliged to submit additional information and documentation in relation to the transaction. The submission of such additional information and documentation starts a statutory period of four months in which the BMWK can review the transaction thoroughly and issue restrictions or even a prohibition. The practical impact of this statutory timeline is, however, limited, as there are various ways to 'stop the clock', for example, by requesting additional information and documentation, asking new questions of fact or entering into negotiations about the conclusion of a public law contract regarding the commitments of the investors. In particularly complex cases, the four-month period can be extended unilaterally by the BMWK.
12.	(iii) Negotiation with the authority	Describe how to handle the relationship with the authority, including when	The process is partially interactive. The BMWK (potentially together with other relevant ministries, offices and agencies) frequently involves the investor (or in some cases, also the

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		approval is subject to commitments from, or conditions imposed on, the investor.	seller and/or target company) in order to clarify the factual circumstances of the transaction. If a transaction cannot be cleared without agreeing on commitments, negotiated clearances – either by way of a unilateral undertaking of the investor or a public law agreement to be concluded with the BMWK – are far more common in Germany than restrictions unilaterally imposed by the BMWK. In the process of such a negotiated clearance, the investor (and its lawyers) may and should take an active role and enter into discussions with the BMWK on the content of the potential commitments required. As with all exercises of governmental power in Germany, the BMWK’s discretion in negotiating or imposing commitments for foreign investment in Germany is limited by the principle of proportionality.
		Are there any guidelines issued by the authority?	The BMWK has not issued any guidelines in relation to FDI-related commitments. However, ministerial guidance on frequently asked questions (FAQs) regarding general topics in relation to the German FDI regime is available (in German and English) on the BMWK’s homepage at: www.bmwk.de/Redaktion/EN/FAQ/Aussenwirtschaftsrecht/faq-aussenwirtschaftsrecht.html .
13.	(iv) Filing fees	Is there a filing fee?	There is no filing fee under the German FDI regime.
14.	(v) Information needed for filing	What information about the investor is required? Are there any thresholds for the identity and nationality of minority passive shareholders? Information on other FDI approvals by other authorities?	<p>The minimum information that needs to be submitted to the BMWK with an initial German FDI filing is set out in the General Administrative Act dated 27 May 2021, which can be downloaded (in an English convenience translation) from the BMWK homepage at: www.bmwk.de/Redaktion/EN/Artikel/Foreign-Trade/investment-screening.html.</p> <p>In the FDI filing, the name, the location of headquarters, the registered office and the full address has to be disclosed for every investor that is deemed relevant under the German FDI regime because he/she is acquiring, directly or indirectly, a German target company, a relevant share of voting rights in a German target company or its major assets.</p> <p>In addition, information has to be provided in the initial FDI filing on whether the investor: (1) is state-controlled or state-financed; (2) has been involved in activities that have or had a detrimental effect on the public order or security of the Federal Republic of Germany or another Member State of the EU; and (3) is or has been involved in any activities that would constitute a criminal offence or misdemeanour under certain competition rules, foreign trade law and war weapons control provisions.</p>

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15.	(vi) Final decision	Indicate if the final decision is to be issued within a set timeframe and what are the consequences if the authority does not issue a decision within the set timeframe.	<p>If the BMWK does not issue a decision within the two-month initial review period, clearance is deemed to be granted.</p> <p>Similarly, if the BMWK has initiated an in-depth review, but does not issue a decision within the statutory four-month period, clearance is deemed to be granted. However, as mentioned, there are various ways for the BMWK to suspend or extend this period.</p> <p>De facto, the BMWK usually issues a formal decision within the relevant (possibly extended) timeframe. In other words, ‘deemed clearances’ are not common under the German FDI regime.</p>
16.	Conditionality of approval (i) Type of conditions or commitments	Describe the type of conditions or commitments to which FDI approval may be subject. Specify their usual duration. Specify what powers the authority may exercise to control/monitor the satisfaction of such conditions/commitments.	<p>Under the German FDI regime, the BMWK may stipulate certain conditions or require certain commitments in relation to the transaction. These can be issued by way of unilateral administrative orders but are far more commonly negotiated and agreed on with the parties in a public law agreement.</p> <p>Such conditions and/or commitments must address the specific security concerns that would otherwise prevent the clearance of the transaction. They have to be suitable and necessary to achieve this aim and take into account the interests of the parties involved in a proportionate manner.</p> <p>In terms of content, the German FDI regime does not provide for a specific limited set of conditions or commitments. Thus, their content can be as diverse as the potential security concerns that the BMWK or other ministries or governmental offices or agencies may raise. While the conditions and commitments are subject to the administrative discretion of the BMWK, the process is open for proposals of and negotiations with the parties involved. Typical commitments or conditions include restrictions regarding the resale of shares/assets; limitations on shareholder influence and the composition of corporate bodies; ring-fencing of security-sensitive information and technology; restrictions on certain business activities, such as export of sensitive goods or commitments regarding the continuation of certain operational activities in Germany; or essential supplies to governmental bodies or agencies. In a public law agreement, commitments of this kind are commonly secured by a contractual framework, inter alia, by way of contractual penalties.</p>

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17.	(ii) Level of discretionary power of the authority	Indicate if it exists and, if so, describe exceptional circumstances that have led to the use of such discretionary power.	<p>The decision to initiate FDI reviews ex officio (if no filing has been submitted) or an in-depth review as a consequence of a filing, as well as any decisions about the clearance of transactions, or about restrictions or prohibitions are subject to the administrative discretion of the BMWK. The BMWK must, however, exercise this discretion in a lawful way, taking account of the principle of proportionality. On this basis, restrictions or even prohibitions of foreign investment are only feasible in exceptional circumstances in which they are required to either protect the security interest of the Federal Republic of Germany (in the context of the sector-specific screening) or to safeguard the security and order of the Federal Republic of Germany, of any other Member State of the EU or in relation to projects or programmes of EU interest within the meaning of Article 8 of Regulation (EU) 2019/452 (in the context of cross-sectoral screening). Such exceptional circumstances may, for example, be given (and have in fact in the past been deemed to be given by the BMWK), where the transaction concerned would provide powers that are not military allies of the Federal Republic of Germany with access to key enabling technology of the German defence industry.</p>
18.	(iii) Risk of veto	<p>Describe a topical case.</p> <p>Statistics</p>	<p>The BMWK does not publish its decisions to veto or restrict a transaction. On its website, it only provides information about statistical data on the number of cases in which restrictive measures (including prohibitions and restrictions which fall short of prohibitions) have been imposed either by way of administrative orders or public law agreements. In the years 2017 – 2021, such restrictive measures have been imposed by the BMWK in 6.4 per cent of the cases filed.</p> <p>Although prohibition decisions are not published by the BMWK, in the last few years, some vetoed transactions have become publicly known. In particular, the BMWK prohibited the indirect acquisition of IMST, a German developer of radio communication technology with (indirect) military relevance, by Addisino Co, a Chinese high-tech industrial company also active in the defence sector. Furthermore, it became known recently that the BMWK prohibited the indirect acquisition of Heyer Medical, a German manufacturer of anaesthesia and respiratory therapy equipment, by Aeonmed Group, a Chinese medical equipment manufacturer. In addition, although not a prohibition per se, the public takeover of Siltronic, a German wafer manufacturer, by the Taiwanese competitor Globalwafers failed because deadlines under capital market law expired without a clearance decision being issued by the BMWK.</p>

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19.	Role of other national authorities	Indicate if other authorities or administrations (eg, Army or Defence Minister) can get involved and, if so, how (by the authority or otherwise) and how much influence it may exercise.	<p>In the course of the review process, the BMWK usually consults with other German federal ministries, offices and agencies, in each case, depending on the specific business activities of the German target company. In this way, there is standing cooperation with, inter alia, the Federal Ministry of Defence, Federal Foreign Office, and Federal Ministry of the Interior and Community. These and other governmental players are commonly involved if commitments or conditions have to be negotiated in order to secure the clearance of a reviewed transaction. In substance, the other ministries, offices and agencies have considerable influence on the screening and negotiation process. If a transaction is to be prohibited or restricted, the BMWK is subject to certain alignment requirements within the Federal Government.</p> <p>In addition, regarding in-depth reviews under the cross-sectoral FDI screening regime, the BMWK shares information with other Member States, as well as the European Commission under EU Screening Regulation 2019/452.</p>
20.	Sanctions	Describe the type of sanctions that may be imposed by the authority in the case of: breach of conditions and/or commitments attached to the approval; and investment carried out without prior approval.	<p>There is no specific set of sanctions applicable to breaches of conditions or commitments. However, both public law agreements and administrative orders containing such conditions or commitments usually provide for mechanisms to secure the enforcement of relevant obligations, in particular by way of contractual penalties.</p> <p>If a transaction is subject to a mandatory filing and approval requirement under the German FDI regime, the consummation of the transaction without prior approval of the BMWK would be null and void under German law. In addition, certain actions related to closing (eg, the exercise of voting rights in the German target company by the investor or the transfer of sensitive information to the investor) are punishable as criminal offences.</p>
21.	Covid – special regime	Please describe specific rules applicable as a result of the Covid-19 pandemic.	Although there are no Covid-specific rules in the German FDI regime, this regime was adapted to meet the challenges posed by the Covid-19 pandemic. In particular, certain healthcare-related business activities have been included in the list of business activities that trigger a mandatory filing and approval obligation. These include, inter alia, the development or manufacturing of certain personal protective equipment; the development, manufacturing or marketing of certain medicines or active pharmaceutical ingredients; and the development or manufacturing of certain medicinal products or <i>in vitro</i> diagnostics.

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