

Newsletter, 30 November 2022

What you need to know: Foreign direct investment screening in Germany

Overview of the applicable German FDI rules in the context of multinational transactions with German target companies

German foreign direct investment (“FDI”) control, which is governed by the Foreign Trade and Payments Ordinance (“FTP-Ordinance”), was significantly reformed and expanded in 2020/2021.¹ Investors should consider possible notification obligations or subsequent review procedures of the German Federal Ministry of Economics and Climate (Bundesministerium für Wirtschaft und Klimaschutz “BMWK” or “Ministry”) if a planned transaction involves a target company located in Germany. This also applies to German investors (or corporate entities) that are either owned by international parent companies or affiliated with foreign shareholders. In case of a notification obligation the concerned parties must comply with a suspension obligation until clearance is granted by the Ministry (comparable to merger control rules). In addition, in the context of German FDI, violations can be sanctioned with criminal penalties.

What types of investments are covered by German FDI-rules?

The German FDI regime is triggered when a non-EU/EFTA or non-German investor directly or indirectly acquires a German target company (or its definable parts of operations or ordinary operating resources) or voting shares thereof which establishes a so-called “local nexus”. In general, the German investment screening regime distinguishes between the cross-sectoral and sector-specific review. The cross-sectoral review accounts for the majority of the proceedings.

The cross-sectoral review scheme (Sec. 55 et seq. FTP-Ordinance) applies to non-EU/EFTA investors when the target company is active in

critical infrastructure or critical sectors. Under the cross-sectoral regime, transactions must be notified to the Ministry when the non-EU/EFTA investor acquires a direct or indirect participation in voting rights of at least 10 % in case of critical infrastructure or 20 % in case of critical sectors over the target company (as well as in case of the acquisition of the full ownership).² The number of critical sectors has recently been massively increased.

The Ministry can still review transactions outside of the scope of critical infrastructure and sectors on its own discretion when a non-EU/EFTA investor acquires more than 25 % of the voting rights in a German target company (the so-called ex-officio review). This applies to all transactions with German target companies across all sectors that are not already covered by another FDI notification obligation under the German FDI regime (as well as in abusive constellations).³

In the field of national defense, the sector-specific review scheme (Sec. 60 et seq. FTP-Ordinance) additionally applies to all non-German investors. A notification obligation exists if an non-German investor acquires at least 10 % of the voting rights over a German target company with existing or past activities as mentioned in Sec. 60 para. 1 sentence 1 FTP-Ordinance. Relevant in this context are activities conducted by the target company in conjunction with

- goods subject to Part I, Sec. A of the German Export List⁴ (no. 1),
- defense technology covered by a patent or utility model rendered secret (no. 2),
- products with IT security functions for processing classified state material or corresponding essential components (no. 3), or

¹ 1st Act Amending the Foreign Trade and Payments Act (“FTP-Act”) and other Acts (Deutscher Bundestag, [Drucksache 19/20144](#), 17/6/2020), as well as the 15th ([BAnz AT 02.06.2020 V1](#)), 16th ([BAnz AT 28.10.2020 V1](#)) and 17th ([BAnz AT 30.04.2021 V1](#)) Ordinance amending the FTP-Ordinance (in German only); relevant legislation in English: [FTP-Act](#) and [FTP-Ordinance](#).

² Sec. 55a (4) FTP-Ordinance; critical infrastructure is listed in Sec. 55a (1) no. 1 to 7 FTP-Ordinance and critical sectors in the respective nos. 8 to 27.

³ Sec. 55 (1), (2) FTP-Ordinance.

⁴ Annex 1/AL of the FTP-Ordinance.

- if the target company is a facility vital to defense⁵ (no. 4).

In the following, we will summarize the relevant information on critical infrastructure and sectors covered by the cross-sectoral regime, the applicable test of acquisition, as well as details on the obligations and proceedings before the Ministry under the German FDI rules.

Which critical activities⁶ of a target company trigger an FDI filing requirement under the cross-sectoral review?

Critical infrastructure include:

- operators of critical infrastructure within the meaning of the German Act on the Federal Office for Information Security Act (“**BSI-Act**”) (no. 1) in the sectors of energy, information technology and telecommunications, transport and traffic, health, water, food, finance and insurance, or activities corresponding to critical components or software in this respect (no. 2);
- telecommunication system operators (insofar as they are obliged to monitor telecommunications) and companies for corresponding technical equipment (no. 3);
- specific cloud computing services (no. 4) and companies holding a license for providing telematic infrastructure, components or services for the German electronic health insurance card (no. 5);
- media companies that contribute to the formation of public opinion with particular topicality and breadth of impact (no. 6); and
- companies providing services for the operation and functioning of German state communication infrastructure (no. 7).

Due to the COVID-19 pandemic, **critical sectors in the healthcare sector** were added to the regime. The initial threshold of 10 % for the acquisition of voting rights has already been raised in 2021 to the currently applicable 20 %-threshold as part of the 17th FTP-Ordinance Amendment. The following development and production activities are covered:

- personal protective equipment, as well as equipment that can be used for the produc-

tion of filter fleeces for respective respiratory or medical masks (no. 8);

- essential medicines (no. 9), including their precursors and active ingredients (in this case also the distribution or holding of a license is covered); as well as
- medical devices (no. 10) for life-threatening or highly infectious diseases and corresponding in vitro diagnostics (no. 11).⁷

Additional 16 critical sectors (respectively activities) have been added through the 17th FTP-Ordinance Amendment to the cross-sectoral review to align the German FDI rules with the so-called EU-Screening Regulation⁸ and to conclude the extensive reform of the recent years⁹:

- high-resolution satellite technology (no. 12);
- artificial intelligence with the ability to conduct cyber-attacks, impersonation, or comprehensive analysis of highly sensitive data for surveillance purposes (no. 13);
- autonomous motor vehicles or unmanned aircraft, including components and software (no. 14) as well as radiation-hardened robots or robots for the handling of highly explosive materials or the use at extreme heights or depths (no. 15);
- semiconductors (integrated and optical circuits) and associated manufacturing and processing tools (no. 16);
- IT security products for the protection of IT systems, against cyber-attacks and for preserving evidence in this context (no. 17);
- aviation operators and certain aerospace goods (no. 18);
- specific dual-use goods (which are for civil and military use) (no. 19);
- quantum computer science, quantum communications and quantum-based measurement technology (no. 20);
- additive manufacturing technology (powder-based manufacturing with protective gas atmosphere and lasers or electron beams) (no. 21);
- certain network operation products (no. 22); and smart meter gateways (no. 23);
- employment of persons working in specific official vital facilities or safety-sensitive positions (no. 24);

⁵ Covered are facilities whose impairment may significantly jeopardize government or civil defense (including that of allied forces), see Sec. 1 (5) sentence 2 no. 1 Security Clearance Check Act.

⁶ For the exact definition of the referenced infrastructures/sectors, please consult the respective list item of Sec. 55a (1) FTP Ordinance.

⁷ See Art. 2 no. 1 and 2 of the [Medical Device Regulation \(EU\) no. 2017/745 of 5/4/2017](#) (consolidated version).

⁸ Cf. Art. 4 of the [Regulation \(EU\) no. 2019/452 of 19/3/2019 establishing a framework for the screening of foreign direct investments into the Union](#) (consolidated version).

⁹ Ministry, [Press Release of 27/5/2021](#) (in German only).

- raw materials and their ores according to the List of Critical Raw Materials published by the EU Commission¹⁰ (no. 25);
- (other) goods under protection of secret patents or utility models (no. 26); and
- farms cultivating more than 10,000 hectares (no. 27).

How is the test of acquisition and the calculation of the relevant voting rights structured?

The exact interpretation of the test of acquisition is currently still under debate. According to the wording of the law, a distinction is made between **direct and indirect acquisitions**. Consequently, in the first step, it must be assessed whether the company **directly acquiring the voting rights in the target company** is considered as a foreign investor (i.e. non-German or non-EU/EFTA). In the second step, it is necessary to examine whether there are other – **indirect – acquirers** along the chain of ownership (up to the parent company of a group and its owners) to which the status of a foreign investor could apply. This approach applies to full ownerships or 100%-shareholdings (respectively participation in voting rights).¹¹ Lower shareholdings "along the chain of shareholdings" are only attributable if the respective voting rights in the chain of shareholdings are above the relevant thresholds of voting shares (i.e. 10 %, 20 % or 25 %).¹² As a consequence, indirect acquisitions of foreign target companies or groups with German subsidiaries are equally relevant under German FDI law (so-called "foreign-to-foreign transaction" with an – in this case – indirect local nexus).

In case of **successive acquisitions** of voting rights by the same investor, German FDI control can be applicable (including a notification obligation or "ex-officio review") in case certain thresholds are met: 20 %, 25 %, 40 %, 50 % and 75 %.¹³ Correspondingly, the Ministry may, in its clearance decision, require foreign investors to notify any additional acquisition of voting rights, even below these thresholds, in the future.

In case only voting rights below the aforementioned thresholds are being acquired, a filing obligation can still be triggered if the conditions

for an **atypical acquisition of control** are met. Similar to the determination of control or competitive influence under merger control rules, potential so-called **"plus" factors**, such as committee participations, strategic veto rights or information rights in relation to critical activities of the company, can convey voting rights similar to the respective voting rights threshold.¹⁴ Due to the difficult assessment whether voting rights are conveyed by "plus" factors no notification obligation exists within the cross-sectoral review (Sec. 55 et seq. FTP-Ordinance). However, the Ministry can still conduct an "ex-officio" review and a notification obligation could still be triggered within the sector-specific review (Sec. 60 et seq. FTP-Ordinance)).

In addition, voting rights of a **third party company** in the target company will be attributed to the direct or indirect investor in the following cases:

- the direct or indirect investor itself holds voting rights in the third party above the relevant thresholds of voting rights;
- existing voting agreements (also if such agreements are concluded subsequently); or
- if it can be assumed for "other" reasons that the third party and the direct or indirect acquirer will jointly exercise their voting rights.

For the third option, a rebuttable presumption exists in cases where both, the third party and the investor, originate from the same third country and are controlled by its governmental authorities (for which state subsidies may already be sufficient). Due to the difficult self-assessment of this presumed attribution, such an acquisition shall also not be subject to a notification obligation within the scope of the cross-sectoral regime (Sec. 55 et seq. FTP-Ordinance) according to the explanatory memorandum.¹⁵

In which cases does German FDI control not apply?

Intra-group restructurings are not subject to cross-sectoral review (Sec. 55 et seq. FTP-Ordinance) if the target company and the direct acquirer are wholly-owned subsidiaries of the

¹⁰ See Annex 1 of the Communication from the EU Commission on Critical Raw Materials Resilience of 3/9/2020 ([COM \(2020\) 474 final](#)).

¹¹ Sec. 56 (1) resp. Sec. 60 (1) FTP-Ordinance.

¹² Sec. 56 (1), (5) FTP-Ordinance resp. Sec. 60 (2) FTP-Ordinance.

¹³ Sec. 56 (2) FTP-Ordinance.

¹⁴ Sec. 56 (3) FTP-Ordinance.

¹⁵ See [Cabinet version of the 17th Ordinance amending the FTP-Ordinance](#) of 21/4/2021, p. 36 (in German only).

same (parent) company with registered offices in the same country.¹⁶

Which criteria are relevant for the review by the Ministry in the case of a notification requirement or an “ex-officio” review?

The Ministry will examine within the cross-sectoral regime whether the **public order or security** of Germany, of another Member State, or in relation to projects or programs of EU interest as defined in the Annex to the EU Screening Regulation are **likely to be affected** by the proposed transaction. Within the sector-specific regime, the respective test is whether **essential security interests** of Germany are likely to be affected.

The term public order and security refers to "the basic interests of society, such as (national) security and (public) supply, as well as critical infrastructure". In this respect, the legislator assumes a dynamic interpretation of the term.¹⁷ Ultimately, this means a very much politicized interpretation, focused on avoiding foreign influence (i.e. by bodies of third countries, also through corresponding ownership or foreign subsidies) and leaking of know-how to foreign countries (especially outside the EU/EFTA). A recent example is the (retroactive) prohibition of the acquisition of Heyer Medical, a German manufacturer of respiratory equipment, by the Chinese investor Aeonmed as well as the prohibition of the acquisition of Elmos' chip manufacturing plant by the Chinese Sai Group. Also relevant for the review is whether an acquirer is controlled by state bodies from third countries, if the investor has been involved in disadvantageous activities, or if there is a significant suspicion of material crimes committed by the investor abroad.¹⁸

Who is responsible for notifying a transaction to the Ministry?

The notification obligation applies to the direct acquirer and is to be filed "immediately" after conclusion of the binding agreement (i.e. as of signing).¹⁹

What are the deadlines for the review by the Ministry?

In **Phase I**, the Ministry decides within a **two months** period (unlike in merger control, where a one-month period applies) whether it will approve the transaction – possibly subject to conditions – or whether it will initiate an in-depth review. The **Phase II**-review period of **four months** can be unilaterally extended by the Ministry for additional three plus one months. The deadline will be tolled in case of requests for information or negotiations between the parties and the Ministry. As a result, the review procedure can take a considerable amount of time in individual cases. The Phase II procedure for the acquisition of Siltronic (the only European manufacturer of wafers, which are a precursor for microchips) by GlobalWafers (Taiwan) was cancelled at the beginning of 2022 after a one-year review period. This was because the long-stop date of the deal had been reached before the review was completed.²⁰ However, according to the Ministry, 87 % of the proceedings (306 in total, 86 % cross-sectoral) were processed in 2021 within two months.²¹

Is there a standstill obligation under German FDI law?

Similar to merger control rules, in case an FDI notification obligation applies, the transaction may only be consummated after express clearance or after expiry of the respective review period (as of which it will be deemed as being cleared). In case of gun-jumping, all closing actions remain suspended and ineffective. As a consequence, the exercising of voting rights and the exchange of company-related information – *inter alia* on the parts of the company that are considered as "critical" under German FDI law – are prohibited. For securities transactions, specific exceptions were adopted in September 2021.²² Intentional violations of the standstill obligation can be punished as a crime with up to five years of imprisonment, whilst negligent violations may trigger fines of up to € 500,000.

¹⁶ See Sec. 55 (1b) FTP-Ordinance for the cross-sectoral review. For the sector specific review no such regulation exists.

¹⁷ Government draft of 31/3/2020 of the 1st Act amending the FTP-Act, p. 21 (in German only).

¹⁸ Sec. 55a (1), (3) resp. Sec. 60 (1b) FTP-Ordinance.

¹⁹ Sec. 55a (4), (5) resp. Sec. 60 (3) sentence 6 FTP-Ordinance; see [General Administrative Act of the Ministry of 27/5/2021](#) (in German only).

²⁰ Siltronic AG, [Press Release of 1/2/2022](#).

²¹ Ministry, [Investment Screening in Germany: Facts & Figures of 28/3/2022](#), p. 7.

²² Sec. 59a resp. 62 (2) FTP-Ordinance; cf. 1st Ordinance for the amendment of the FTP-Act/FTP-Ordinance ([BAnz AT 07.09.2021 V1](#)), in German only).

How can an investor mitigate the risk of an “ex-officio” review by the Ministry?

The investor can request a so-called “**certificate of non-objection**” from the Ministry.²³ The certificate is of significant practical relevance since it confirms that the Ministry will not raise any concerns with respect to the proposed transaction. For the certificate, the same deadlines as for formal notifications apply for the review procedure. Thus, the investor receives a binding assessment within two months as to whether any concerns of the Ministry regarding the proposed transaction exist. In case of material concerns, the Ministry would open a Phase II procedure. Without such an application or certificate, the transaction can still be opposed until five years after signing (or after a two month period when the Ministry obtains sufficient “knowledge” of the transaction via other means). Until then, the purchase agreement will be deemed conditional depending on German FDI control.²⁴ In that regard it should be borne in mind that the German Federal Cartel Office can communicate in the course of merger control proceedings certain information about notified transactions to the Ministry.²⁵

What happens if the Ministry has any concerns about a planned transaction?

If there are no concerns, the Ministry will clear the planned transaction (or will let the review deadline expire).²⁶ In case of concerns, the clearance decision can be issued subject to conditions. In addition, separate agreements between the Ministry and the parties to the transaction can be concluded. If remaining concerns cannot be eliminated, the Ministry can (partially) prohibit the acquisition or issue necessary orders for the protection of public order and security (e.g. by restricting the exercise of voting rights, reporting obligations or the appointment of a trustee for the reversal of the transaction).²⁷ In the recent past, restrictions were imposed in only 2 % of the cases.²⁸

²³ Sec. 58 resp. Sec. 61 sentence 3 FTP-Ordinance.

²⁴ Sec. 15 (2) FTP-Act.

²⁵ Sec. 50f (3) sentence 1 of the German Act against Restraints of Competition (ARC).

²⁶ Sec. 58a resp. Sec. 61 FTP-Ordinance.

²⁷ As recently occurred in the planned participation of the Chinese state-owned shipping company Cosco in the Port of Hamburg, cf. Reuters, [Article of 26/10/2022](#).

²⁸ Ministry, Investment Screening in Germany: Facts & Figures of 28/3/2022, p. 12.

Commentary

Last year’s reform of the German investment control regime has significantly expanded the sectors which can trigger a review under German FDI control. Ultimately, FDI control has become an integral part of M&A procedures (after a long existence in the shadows in the field of critical infrastructure and armaments only). The legislator’s attempt to align the provisions of both existing control regimes (i.e. to establish similar standards) and to clearly define the relevant sectors has been welcomed by companies and legal advisors. However, as just recently announced, the German government already plans another “recalibration” of the German FDI regime and strives for less dependency on foreign investors.

Investors must be aware that similar regulations with various covered sectors exist in other Member States of the EU and in other industrial countries as well and that they might go beyond the regulations in Germany. In some jurisdictions, investments by *local* residents are already subject to investment control. Moreover, local sales, employees or further connecting factors may result in a “local effect/nexus”. This must be taken into account in particular in multijurisdictional M&A transactions. Ultimately, investors should include an FDI control analysis in their transaction planning both in their national jurisdiction as well as abroad, especially for sectors under scrutiny.



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