

Germany Further Expands FDI Control Regime

The latest amendments build on last year's reform, extensively expanding the sectors subject to a mandatory review.

Key Points:

- The list of sectors in which investment in a German business triggers a notification obligation now includes *inter alia* “critical technologies” such as artificial intelligence and 3D printing as well as the extraction or processing of certain critical resources, large agricultural producers, and businesses that deliver certain IT or communication services. If non-EU investors acquire 20% or more of the voting rights in companies active in these sectors, the investment triggers a notification obligation.
- The higher notification threshold compared to the existing rules (the threshold remains at 10% for critical infrastructure and the defense sector) is intended to relieve the burden on minority investments in startups and for certain financial investors. At the same time, the power of review is extended to certain acquisitions below the applicable thresholds.
- Existing filing requirements in the defense sector are expanded to include all defense goods that are either export-controlled or based on secret IP rights.

The amendments will come into force in the next few days and will apply to all transactions signed thereafter. Transactions that have been signed but not closed upon entering into force of the new rules will not be affected. However, these transactions may be candidates for voluntary filings in the interest of legal certainty and to avoid *ex officio* reviews.

Overview

Under the existing foreign direct investment (FDI) control regime, the German Ministry for Economic Affairs and Energy (BMWi) may review any acquisition of at least 25% of the voting rights in a German-based company by a non-EU/EFTA investor on grounds of national security and/or public order. The BMWi may do so *ex officio* within two months of learning of the transaction, and for up to five years after signing. In addition, acquisitions of at least 10% of the voting rights in German companies active in certain areas of critical infrastructure (e.g., energy and transport infrastructure, financial institutions, healthcare, telecoms, data centers), or in the area of military and defense, may be subject to a mandatory filing requirement.

New sectors under FDI scrutiny

The new rules add a mandatory filing requirement for 20% voting share acquisitions (direct or indirect) in any German undertaking active in the field of satellite systems, cybersecurity capabilities, artificial intelligence, autonomous vehicles, robotics, the semiconductor value-chain, aviation, quantum technologies, nuclear technology goods, 3D printing, wireless or wireline data networks, smart-meter gateways, security relevant employment, critical natural resources, and cultivated agricultural land.

Furthermore, the reform expands the sector-specific mandatory filings for non-German investors to encompass German targets developing, modifying, or possessing defense goods that are either export-controlled or based on secret IP rights.

More types of transactions subject to FDI scrutiny

The new rules expand the power of review to acquisitions below the applicable thresholds (now 10%, 20%, or 25% depending on the sector concerned) if the foreign investor acquires other means of influence, more specifically board seats, veto rights, and/or certain information rights. The acquisition of such “atypical control” is not subject to a mandatory filing requirement, but still carries the risk of an *ex officio* review by the German government so that a mandatory filing should be considered. In addition, the new rules clarify the existing practice of the BMWi to require an additional filing if investors increase their existing voting rights. If, for example, the investor previously acquired 10% of the voting rights in a German entity that operates critical infrastructure, a further filing requirement will be triggered once additional acquisitions result in an increase of the shareholding to 20%, 25%, 40%, 50%, or 75%. This exempts investors acquiring minimal additional voting rights, in particular via the stock exchange, from submitting another filing.

Conclusion

The newly introduced areas of scrutiny bolster the BMWi’s ability to review investments into critical new technology as well as into more traditional supply-critical areas concerning agricultural land and certain raw materials.

The expansion of the mandatory filing regime occurs against the backdrop of what is perceived as increasing global economic competition and ensuing politically strategic investments. Emphasis is therefore put on the ability of the German government to become aware of and subsequently review acquisitions relevant to national security, rather than increase enforcement in the private sector.

Investors should be aware of these developments and take precautions early in the transaction process to avoid delays and obtain contractual protections where appropriate.

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