

Germany: Control of Foreign Investments



Key Items

Right to review, prohibit and restrict acquisitions of German businesses or interests therein by non-EU investors

Not sector specific, but most likely to affect acquisitions in the infrastructure sector (e.g. telecoms, utilities, ports, airports)

High threshold – prohibition or restriction requires actual and severe risk to public order or security

Right to review acquisitions within three months after conclusion of acquisition agreement or publication of offering or notice of acquisition of control

Right to prohibit or restrict acquisitions within additional two month period after receipt of complete documentation

Indirect acquisitions also trigger review and prohibition rights – includes acquisition of foreign parent companies with business activities in Germany

Pre-clearance process available to avoid closing uncertainty and delays of the period between signing and closing

The German Foreign Trade Act (*Außenwirtschaftsgesetz*) and the respective implementation regulation (*Außenwirtschaftsverordnung*) enable the German federal government to prohibit or restrict certain foreign investments in Germany. This form of acquisition control was introduced in 2009 as a measure to control acquisitions by foreign investors in individual and exceptional circumstances. It is not intended to restrict foreign investment in Germany generally.

Which transactions will be affected?

The law aims at controlling the direct and indirect acquisition of domestic German businesses by investors based outside the European Union (EU) or the European Economic Area (EEA). The Ministry of Economics and Technology ("**BMWi**") may review and prohibit or restrict acquisitions that it finds create a risk for the public order or security of the Federal Republic of Germany.

The term "acquisition" is to be interpreted broadly and covers the direct or indirect acquisition of 25 per cent. or more of the voting rights of a domestic German business by private deal or public take-over, by share or asset deal or by way of merger. The acquisition of a foreign parent with business activities in Germany (e.g. a US group with business activities in Germany) would constitute an indirect acquisition.

Which sectors are likely to be most affected?

The law is not limited to any particular sector. An acquisition may only be prohibited if there is an actual and sufficiently severe risk to public order or security that impacts a basic interest of German society. Investments in public infrastructure, such as telecom and energy networks, facilities and operations, gas and water infrastructure, ports and airports, as well as public services with strategic importance (e.g. air traffic control) are the most likely to be subject to review in the future. The BMWi stresses that Germany remains open to foreign investment and

that measures under the new regulations are only intended to be taken in individual and exceptional cases.

Who is deemed to be a non-EU investor?

The “nationality” of an investor will be determined by the location of its main centre of business (*Sitz*), the location of its headquarters (*Hauptverwaltung*) or, in the case of individuals, their principal place of residence. German and EU entities will be deemed to be non-EU entities if a non-EU investor holds 25 per cent. or more of the voting rights in such entity. Voting rights in the acquired business that are held by other entities will be attributed to a non-EU investor if a non-EU investor holds 25 per cent. or more of the voting rights in such other entity or has entered into a voting rights pooling (or similar) agreement with such other entity.

What is the process?

The BMWi has to notify an investor about its intention to review and assess an acquisition within a period of three months

- following the execution of the acquisition agreement or
- in the case of public offerings, following the publication of a decision to make an offer, or publication of notification of an acquisition of control (*Veröffentlichung der Kontrollerlangung*).

The BMWi may object to or restrict an acquisition within an additional two-month period following receipt of the complete documentation (specific details not provided), if it has notified the purchaser about its review and assessment within the initial three-month period. A prohibition or restriction will require approval by the German Federal Government. Other ministries, in particular the Ministry of Foreign Affairs and the Ministry of Domestic Affairs, may participate in the decision-making process.

Neither purchasers nor sellers are obliged to notify the BMWi about an acquisition, but other authorities, such as the German Federal Financial Supervisory Authority may inform the BMWi about acquisitions that are filed with them.

However, a purchaser may, before or after signing, apply for the so-called non-objection letter by the BMWi that an acquisition does not raise concerns in respect of public order or security. The application must include general information about the envisaged transaction, the purchaser and the purchaser’s business activities. The acquisition will be deemed cleared if the BMWi does not commence a review within one month after receipt of the application.

Any decision by the BMWi may be challenged before the German courts, but proceedings will be time-consuming and results will be difficult to predict.

How does this impact M&A transactions?

The consummation of M&A transactions is not prohibited, but individual transactions may need to be unwound if, following closing, the BMWi prohibits the acquisition of a German business by a particular investor. The transfer of a business pursuant to an acquisition agreement will be deemed to be subject to a condition subsequent (*aufflösende Bedingung*) until the three- or two-month review periods described above have expired.

A non-objection letter is obtained in many M&A transactions, in particular in the infrastructure sector. The filings can usually be based on the merger control notification and the non-objection letter is usually granted before merger control proceedings are completed, so that the transaction is usually not delayed (unless the BMWi initiates a review).

In cross-border transactions, if a review process is undertaken, hold-separate or carve-out arrangements could be made in respect of German subsidiaries in order not to delay the transaction and to address restrictions or prohibitions the BMWi may impose.

What are the sanctions for non-compliance?

The BMWi may impose measures to enforce prohibitions or restrictions, including appointing a trustee or restricting voting rights.

The following may result in an administrative fine:

- Breach of the obligation to file correct and complete documentation if the BMWi exercises its right to review.
- Violation of enforceable restrictions or prohibitions imposed by the BMWi.

Is this unique to Germany?

Many countries, including the US, the UK and France, have similar regulations in place to protect essential industry sectors against foreign influence and control. However, these often only apply to certain industry sectors which are considered to be of strategic importance.

In addition, German foreign trade law also requires mandatory notification of and provides for the possibility of restricting or prohibiting acquisitions by non-German investors in the domestic defence and cryptology sectors.

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