



# Mixed picture: Germany clarifies its FDI regime in view of high-tech and further sensitive companies

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On 1 May 2021, the latest amendment of the German Foreign Direct Investment (FDI) regime entered into force, following a decision of the German government as of 27 April 2021.

The key element of this amendment is the expansion of the mandatory clearance requirement for transactions by which a Non-EU or Non-EEA investor acquires directly or indirectly **20 % or more of the voting rights** in German companies active in specific sensitive sectors, most of them usually referred to as **high-tech industries**. Consequently, the German FDI regime will in the future **differentiate between four categories** of relevant acquisitions, each of these categories covering different target companies and focussing on different groups of investors. These categories provide for different thresholds which trigger either a mandatory clearance requirement or a screening right of the German government, which may make a voluntary filing advisable.

The latest amendment also clarifies in which situations **add-on acquisitions** fall under the German FDI regime, i.e. where a clearance is mandatory or may be advisable even though the initial threshold has already been reached or exceeded. Moreover, the amendment provides for more clarity with regard to **internal restructurings** which should not be subject to a clearance requirement.

Further amendments of the German FDI regime are expected to be enacted within the next weeks and months, particularly relating to the **acquisition of shares via stock exchanges**.

The following chart summarises the specific features of the four categories building the new German FDI regime:

Category 1	Category 2	Category 3	Category 4
<ul style="list-style-type: none"> <li>Defence &amp; Encryption</li> <li>Non-German investors</li> <li>Mandatory clearance at 10 – 20 – 25 – 40 – 50 – 75 %</li> <li>Stand-still obligation</li> </ul>	<ul style="list-style-type: none"> <li>Critical infrastructure</li> <li>Non-EU/EEA investors</li> <li>Mandatory clearance at 10 – 20 – 25 – 40 – 50 – 75 %</li> <li>Stand-still obligation</li> </ul>	<ul style="list-style-type: none"> <li>New sensitive sectors</li> <li>Non-EU/EEA investor</li> <li>Mandatory clearance at 20 – 25 – 40 – 50 – 75 %</li> <li>Stand-still obligation</li> </ul>	<ul style="list-style-type: none"> <li>Catch-all category</li> <li>Non-EU/EEA investors</li> <li>Right to review / notification at 25 – 40 – 50 – 75 %</li> <li>No stand-still obligation</li> </ul>

## The German FDI regime at a glance

Back in 2004, German companies active in the defence sector were the first ones caught by regulations allowing the German government to screen foreign investments. In 2009, the German government extended its screening powers to all German companies that might be of relevance for the German public order or security. For a long time, these rules were of no practical relevance.

The 2016 acquisition of the German robotics company *Kuka* by the Chinese investor *Midea* was the game changer. This deal became a landmark transaction that triggered a new political and administrative approach vis-à-vis FDI screenings in Germany.<sup>1</sup> In a first step taken in September 2017, the German

government defined a number of sectors and business activities as particularly critical to the German public order or security.<sup>2</sup> In December 2018, the media sector was added to this critical infrastructure category and the thresholds were lowered from 25 % to 10 % in relation to those German companies falling into the critical infrastructure category or into the defence and encryption category.<sup>3</sup> In reaction to the Covid-19 pandemic, German companies active in the health-care and life science sectors were added to the critical infrastructure category with effect as of June 2020.<sup>4</sup> In December 2020, the strict mandatory clearance requirement was extended from the defence and encryption category to the critical infrastructure category; relevant acquisitions must be cleared prior to closing and infringements of this stand-still obligation are punished harshly.<sup>5</sup>

The latest amendments that took effect on 1 May 2021 provide for changes in the German Federal

<sup>1</sup> An overview on early landmark cases can be found in our briefing: [Foreign direct investment screening: Germany is getting tougher with non-European investors](#)

<sup>2</sup> Please refer to our briefing: [Foreign investment control in Germany: Berlin Wall rebuilt or storm in a water glass?](#)

<sup>3</sup> Please refer to our briefing: [German government lowers FDI screening threshold for certain industries](#)

<sup>4</sup> Please refer to our briefing: [Health care sector becomes part of critical infrastructure](#)

<sup>5</sup> Please refer to our briefing: [Foreign Direct Investment Screening in Germany – most recent developments](#)

Trade and Payment Ordinance (*Außenwirtschaftsverordnung* – **AWV**).<sup>6</sup> The new rules extend the German FDI regime to a number of newly defined sensitive sectors, most of them part of what is usually referred to as “high tech” sectors, and re-group some of the sectors that previously fell into the critical infrastructure category and now are allocated to the newly formed sensitive sectors category.

At the same time, the thresholds triggering filing requirements are re-defined.

Finally, the clearance requirements in cases of add-on acquisitions are clarified as well as in cases of internal restructurings.

## New sensitive sectors

By way of the latest amendment of the German FDI regime, the German government provides for a new category of relevant German companies. This new category comprises

- 4 sectors that since September 2020 have fallen under the critical infrastructure category (Personal Protective Equipment, Medicinal Products, Medical Devices, In Vitro Diagnostics) and
- 1 sector that was caught by sector specific regulations so far (Satellites) and
- 15 **new** sectors that have been defined to be of a particular sensitive nature (Artificial Intelligence; Automated and Autonomous Driving; Robotics; Semiconductors; IT Security; Airlines; Dual-use Products; Quantum Technology; Additive Manufacturing; Wireless Networks; Smart Metering; Security Clearance related Activities; Raw Materials; Secret Patents; Agriculture).

It is important to note that the new sensitive sectors – like the defence, encryption and critical infrastructure sectors – are *not caught as such* by the German FDI regime. As opposed to the broad and vague list of industries laid down in Art. 4 of the EU Screening Regulation<sup>7</sup>, the German government specified in detail which relevant activities (R&D, manufacturing,

placing on the market, etc.) and which specific goods or services are deemed to be of relevance.

This results in a quite detailed and extensive description that we enclose **below**. A careful technical and legal due diligence will therefore become necessary to conclude whether or not a German company active in any of the said sectors does fall under the German FDI regime.

## Re-defined thresholds

The direct or indirect acquisition of voting rights of German companies active in the new sensitive sectors by a Non-EU/EEA investor is subject to a mandatory clearance requirement if this investor acquires 20 % or more of the voting rights in such German target company.

The 20 % threshold is a newly defined investment limit that is different from the 10 % and 25 % thresholds that are known since December 2018. This means, on the one hand, that a number of sectors have been subjected to a more restrictive screening regime: This is true particularly in view of the 15 newly defined sectors which have been caught before by the 25 % threshold applicable to the catch-all category. On the other hand, filing requirements for minority investments in the 4 (health care) sectors that were moved from the critical infrastructure category to the new sensitive sectors category have been eased as the applicable threshold increases from 10 % to 20 %.

## Add-on acquisitions

The latest amendments also provide for more clarity as regards add-on acquisitions, i.e. on the question whether a new clearance is needed in cases where an existing shareholder aims at increasing the number of voting rights held (directly or indirectly) in a German company.

Until now, the German government has claimed the right to review each and every acquisition of any fur-

<sup>6</sup> [BAnz AT 30 April 2021 V1](#)

<sup>7</sup> [Regulation \(EU\) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework](#)

[for the screening of foreign direct investments into the Union](#)

ther share, irrespective of whether this add-on acquisition had any impact on the actual influence of that investor in the German company. There was no materiality threshold at all.

The latest amendment provides for more clarity and flexibility. The new rules define “staggered” thresholds. 10 % is the entry level in the areas of defence, encryption and critical infrastructure (Categories 1 and 2). 20 % is the entry level as regards the new sensitive sectors (Category 3) and the first gate in relation to add-on acquisition in companies belonging to Categories 1 and 2. 25 % is defined as the entry level applicable to the catch-all category (Category 4) and at the same time a gate under Categories 1 to 3. Subsequent gates in all four categories are 40 %, 50 % and 75 % shareholdings.

## Internal Restructurings

Another issue that the new rules deal with are internal restructurings. Until now, there had been no clarity as to whether a clearance was required if the shareholder structure of a German company was changed directly or indirectly whilst the existing and the new shareholder were controlled by the same entity or by the same ultimate beneficial owner.

In the future, the German FDI regime exempts internal restructurings from its scope of application if

- the existing shareholder and the new shareholder are wholly owned subsidiaries of the same parent company *and*
- the existing shareholder and the new shareholder are managed from the same country.

Conversely, any other internal restructurings may trigger the need for a clearance.

Anyhow, the added value of the new provision on internal restructurings seem to be limited:

- First, it is a quite narrow exemption.
- Second, it is unclear whether the existing and new shareholder must be direct subsidiaries or

can be indirect subsidiaries of the same parent company.

- Third, whilst the letters of the law focus on the same country relating to the location of the management, the explanatory memorandum refers to the same jurisdiction in which the existing and new shareholder must be incorporated. It needs to be seen whether the German government will issue any guidance providing for more clarity in the future on this point.

## Further amendments to come

In addition to the approved amendments of the AWV, the German government proposed in March 2021 further amendments to the German Federal Trade and Payment Act (*Außenwirtschaftsgesetz – AWG*). Those proposals are still pending in the legislative procedures, in particular their parliamentary approval is outstanding.

A key element of the German government’s proposals from March 2021 is the introduction of a legal basis allowing the German government to charge fees for FDI clearance procedures as of 1 January 2023.<sup>8</sup> Details will be stipulated by a federal ordinance to be proposed by the German government on the basis of the new law.

Even more important: In the course of the legislative process, the German Parliament’s Committee for Economic Affairs and Energy proposed further amendments in relation to the acquisition of shares in German companies via stock exchanges<sup>9</sup>:

- The lawmakers acknowledge that acquisitions of shares via stock exchanges cannot be subjected to a condition precedent according to which the acquisition must be cleared before it can be closed.
- Whilst the lawmakers insist on the need to screen and clear relevant transactions, the acquirer shall be entitled to dividends paid out by the company prior to clearance; the acquirer shall, however, not be entitled to exercise voting rights prior to clearance.

<sup>8</sup> [BT-Drs 19/27451](#) respectively [BAnz AT 30 April 2021 B2](#)

<sup>9</sup> [BT-Drs. 19/28838](#)

- The lawmakers authorise the German government to issue more detailed rules on how to align the needs of stock exchange transactions with the interest in conducting effective FDI screenings.

In other words: The next revision of the German FDI will be coming, probably after the federal elections that will be held in September 2021.

## In detail: FDI relevant business activities of German companies

**Category 1** – Defence and encryption as defined by Sec. 60 (1) of the German Foreign Trade and Payment Ordinance (Außenwirtschaftsverordnung – **AWV**), i.e. German companies

1. **[Defence Goods]** develops, manufactures or modifies goods within the meaning of Part I Section A of the Export List or has actual control over such goods,
2. **[Secret Patents in the Defence Sector]** develops, manufactures or modifies goods of defence technology or has actual control over such goods to which the scope of protection of a patent that is secret according to Section 50 of the Patent Act or a utility model that is secret according to Section 9 of the Utility Model Act extends,
3. **[Encryption Technology]** manufacture products with IT security functions to process classified state information or components essential to the IT security function of such products or has manufactured such products and still disposes of the technology if the overall product was licensed with the knowledge of the company by the Federal IT Security Agency,
4. **[Security Clearances in the Defence Sector]** is a defense-critical facility within the meaning of Section 1 (5) sentence 2 number 1 of the Security Review Act (*Sicherheitsüberprüfungsgesetz*).

In cases of sentence 1 no 1 and no 2, this also applies to companies that have developed, manufactured, modified or actually exercised control over such goods in the past and still have knowledge of

or other access to the technology that these goods are based on.

**Category 2** – Critical infrastructure as defined by Sec. 55a (1) no 1 to 7 AWV, i.e. each German company that

1. **[Critical IT Systems and Sites]** operates critical infrastructure within the meaning of the Act on the Federal Office for Information Security (*BSI-Gesetz*),
2. **[Software]** in particular develops or modifies software that is used in specific sectors for operating critical infrastructure within the meaning of the Act on the Federal Office for Information Security,
3. **[Telecom Systems]** is obliged to carry out organisational measures pursuant to Section 110 of the Telecommunications Act (*Telekommunikationsgesetz*) or produces or has produced technical equipment used for implementing statutory measures to monitor telecommunications and has knowledge about or other access to the technology underlying such technical equipment,
4. **[Cloud Computing]** provides cloud computing services and the infrastructure used for this reaches or exceeds the thresholds set out for the relevant cloud computing service in Annex 4 Part 3 Number 2 Column D of the Ordinance to Determine Critical Infrastructures pursuant to the Act on the Federal Office for Information Security (*BSI-Kritisverordnung*),
5. **[Telematics in Social Security Systems]** holds a licence for providing telematics infrastructure components or services pursuant to Section 325 or Section 311 subsection 6 of Book V of the Social Code (*Sozialgesetzbuch*),
6. **[Media]** is a company of the media industry which contributes to the formation of public opinion and is characterised by particular topicality and breadth of impact,
7. **[BDBOS – Digital Radio for Security Agencies]** provides services which are required to ensure the absence of disturbances and the functionality of state communication infrastructures within the meaning of Section 2 subsection 1 sentences 1 and 2 of the Act on the Foundation of a Federal Agency

for Digital Radio of Security Authorities and Organisations (*Gesetzes über die Errichtung einer Bundesanstalt für den Digitalfunk der Behörden und Organisationen mit Sicherheitsaufgaben*),

**Category 3** – High tech and other sensitive sectors as defined by Sec. 55a (1) no 8 to 27 AWW, i.e. each German company that

8. **[Personal Protective Equipment]** develops or produces personal protective equipment within the meaning of Article 3 number 1 of Regulation (EU) 2016/425 of the European Parliament and of the Council of 9 March 2016 on personal protective equipment and repealing Council Directive 89/686/EEC (OJ L 81, 31.3.2016, p. 51), to the extent that such equipment serves to protect against risks of Category III of Annex I of Regulation (EU) 2016/425, or develops or produces facilities for the production of nonwoven filter fabrics which allow the production of nonwoven filter fabrics that are suitable as constituent material for respirators as personal protective equipment for protection against harmful biological agents within the meaning of Category III of Annex I of Regulation (EU) 2016/425 or for medical face masks according to DIN EN 14683 "Medical face masks - Requirements and test methods; German version EN 14683:2019+AC:2019", edition of October 2019,

9. **[Medicinal Products]** develops, manufactures or markets medicinal products within the meaning of Section 2 subsection 1 of the Medicines Act (*Arzneimittelgesetz*) which are essential for ensuring the provision of health care for the population, including their starting materials and active ingredients, or holds a corresponding authorisation under medicinal products legislation,

10. **[Medical Devices]** develops or manufactures medical devices within the meaning of the German medical devices legislation which are intended for the diagnosis, prevention, monitoring, prediction, prognosis, treatment or alleviation of life-threatening and highly contagious infectious diseases,

11. **[In Vitro Diagnostics]** develops or manufactures in vitro diagnostic devices within the meaning of the German medical devices legislation which serve to

provide information on physiological or pathological processes or conditions or to determine or monitor therapeutic measures in connection with life-threatening and highly contagious infectious diseases,

12. **[Satellites]** is an operator of a high-grade earth remote sensing system within the meaning of Section 2 subsection 1 number 4 of the Act to Safeguard the Security Interests of the Federal Republic of Germany from Endangerment by the Distribution of High-Grade Earth Remote Sensing Data (*Satelliten-datensicherheitsgesetz*),

13. **[Artificial Intelligence]** develops or manufactures items which, by means of artificial intelligence procedures, solve specific application problems and are capable of autonomously optimising their algorithms and can be used, in an automated manner, to

a) conduct cyber-attacks,

b) imitate individuals in order to spread targeted disinformation,

c) be used as a means to analyse voice communications or for remote biometric identification of individuals for the purpose of surveillance which from an objective point of view is also suitable for internal repression, or

d) analyze movement, location, traffic or event data relating to individuals for the purpose of surveillance which from an objective point of view is also suitable for internal repression,

14. **[Automated and Autonomous Driving]** develops or manufactures motor vehicles or unmanned aerial vehicles which possess the technical equipment to control automated or autonomous driving or navigation functions, or develops or produces the essential components necessary to control such driving or navigation functions or any software required for this purpose,

15. **[Robotics]** is a developer or manufacturer of robots, including automated or autonomously mobile forms, with the following characteristics:

a) especially constructed for handling highly explosive substances,

b) especially constructed or designed as radiation-hardened in order to be able to withstand a radiation dose of more than  $5 \times 10^3$  Gy (silicon) without loss in functionality,

c) especially constructed for operability in altitudes of more than 30,000 metres, or

d) especially constructed for operability in water depths of 200 metres and more,

16. [Semiconductors] is a developer, manufacturer or refiner of

a) micro- or nano-electronic non-optical circuits (integrated circuits) on a substrate or discrete semiconductors,

b) micro- or nano-structured optical circuits on a substrate or discrete optical components, or

c) manufacturing or processing tools, including in particular crystal growth, photolithography, mask production, fibre drawing or coating facilities, and grinding, etching, doping or sawing equipment or cleanroom transport equipment, testing tools and masks, for items within the meaning of paragraphs (a) or (b),

17. [IT Security] develops or produces IT products or essential components of such products with the aim of selling them to third parties which, as the essential functional characteristic, serve

a) the protection of the availability, integrity, authenticity or confidentiality of information technology systems, components or processes,

b) the defence against attacks on IT systems, including the associated damage analysis and restoration of affected IT systems, or

c) the investigation of criminal offences by means of information technology and the protection of evidence by criminal prosecution authorities,

18. [Airlines] operates an air carrier with an operating licence within the meaning of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ L

293, 31.10.2008, p. 3) or develops or manufactures items of sub-categories 7A, 7B, 7D, 7E, 9A, 9B, 9D or 9E of Annex I of Regulation (EC) No 428/2009 or items or technologies intended for aerospace use or for use in aerospace infrastructure systems,

19. [Dual-use Products] develops, manufactures, modifies or uses items of category 0 or list items 1B225, 1B226, 1B228, 1B231, 1B232, 1B233 or 1B235 of Annex I of Regulation (EC) No 428/2009,

20. [Quantum Technology] is a developer or manufacturer of items and essential components of

a) quantum information science, in particular quantum computers and quantum simulation,

b) quantum communication, in particular quantum cryptography, or

c) quantum-based measurement technology, in particular quantum sensors and items of quantum metrology,

21. [Additive Manufacturing] is a developer or manufacturer of

a) items used to manufacture components made of metallic or ceramic materials for industrial applications by means of additive manufacturing techniques, in particular powder-based manufacturing techniques involving a protective gas atmosphere and using a laser or electron beam as energy source,

b) essential components of the items specified in paragraph (a), or

c) powder materials processed by the manufacturing techniques specified in paragraph (a),

22. [Wireless Networks] develops or manufactures items specifically serving the operation of wireless or wired data networks, in particular wire or light wave based transmission techniques, network connection components, signal amplifiers, and network monitoring, management and control products for this purpose,

23. [Smart Metering] is a manufacturer of a

a) smart meter gateway within the meaning of Section 2 sentence 1 number 19 of the Measuring Station Operations Act (*Messstellenbetriebsgesetz*) which has been certified by the Federal Office for Information Security (*Bundesamt für Sicherheit in der Informationstechnik*) in accordance with Section 19 subsection 3 in conjunction with Section 24 of the Measuring Station Operations Act or is subject to an ongoing certification process, or

b) security module for smart meter gateways which has been certified by the Federal Office for Information Security for the purpose of evidencing the security technology requirements under Section 22 subsections 1 and 2 of the Measuring Station Operations Act or is subject to an ongoing certification process,

24. **[Security Clearances]** employs persons who work in vitally important agencies as set out in Sections 5a, 5b or Section 9a of the Security Clearance Determination Ordinance (*Sicherheitsüberprüfungs-feststellungsverordnung*) in security-critical units within the meaning of Section 1 subsection 5 sentence 3 of the Security Clearance Act (*Sicherheitsüberprüfungsgesetz*),

25. **[Raw Materials]** extracts, processes or refines raw materials or their ores specified in the form of a list of critical raw materials in the Annex to a Communication from the European Commission as part of the Raw Materials Initiative of the European Commission and which were published in the Federal Gazette by the Federal Ministry for Economic Affairs and Energy,

26. **[Secret Patents]** develops or manufactures items protected by a patent ordered to be kept secret pursuant to Section 50 of the Patent Act (*Patentgesetz*) or a utility model ordered to be kept secret pursuant to Section 9 of the Utility Model Act (*Gebrauchsmustergesetz*), or

27. **[Agriculture]** directly or indirectly cultivates an agricultural area of more than 10,000 hectares.

#### **Category 4** – catch-all category pursuant to Sec. 55 (1) AWW

The substantive test that the German government applies when assessing whether a transaction shall be subjected to remedies or might even be prohibited is whether the acquisition in question may potentially have an adverse effect on the public order or security of the Federal Republic of Germany or other EU Member States and/or an adverse effect on projects initiated and funded by the EU.

This is a rather broad and vague concept. In practice, we experience that the German government usually focuses on the following topics (which may vary from business sector to business sector):

- Prevention of uncontrolled know-how drain (unique selling points, employment and location guarantees, key enabling technologies).
- Market shares and substitutability with products/services of competitors.
- Government customers and relevance for supply chains relating to critical goods and services.
- Company received state aids (e.g. subsidies, low-interest loans, state guarantees).
- Origin of the investor (“country related risk profiles”) meaning that, according to our experience, US investors, for example, are scrutinized intensively in relation to data privacy issues.
- Current political, economic and social framework (e.g. impacts of the Covid-19 crisis).

In 2020, the German government clarified that they consider particularly whether the purchaser is indirectly or directly controlled by the government of a third country.



## Key points/15 seconds read/Summary

The latest amendments of the German FDI regime provide for a mixed picture: The German government reserves the right to screen and to clear acquisitions in newly defined sectors. However, these sectors have already been basically caught by the rules set so that the latest amendments rather provide for more clarity than increasing the burden to file on investors in Germany. This is also true with regard to the new provisions relating to add-on acquisitions and internal restructurings by which the German government provides for some more flexibility in practice.

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