

# GERMAN GOVERNMENT INTRODUCES SIGNIFICANT AMENDMENT OF FDI RULES

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Legal Briefings

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Germany is continuing to tighten and develop its FDI regime: After various legislative actions in the course of 2020, the German Federal Government agreed on significant amendments of the existing FDI rules which will enter into force with its publication in the Federal Gazette (*Bundesanzeiger*).

During the last year, the German legislator has lowered the thresholds for starting an FDI examination process, introduced an overall standstill obligation for each acquisition being subject to a filing obligation and extended the FDI filing case groups. This has primarily been triggered by the [COVID-19-pandemic as well as the EU-Screening-Regulation \(EU\) 2019/452](#). With the new FDI amendment, these rules are subject to a massive amendment.

The most relevant changes of the current amendment of the German Foreign Trade Ordinance (AWV) can be summarized as:

- New filing obligations are introduced with a specific focus on high-tech enterprises;
- The relevant thresholds for a filing obligation for case groups, save for critical infrastructures and defence have been raised from 10% to 20%;
- The acquisition of additional shares in a company might also trigger a filing obligation, however only if specific thresholds are exceeded;
- A certificate of non-objection can in the future only be applied for in cases where no filing obligation exists.

In the light of these new amendments, acquirers should conduct a comprehensive examination of any intended transaction or investment with regard to German businesses in order to avoid adverse effects including penalties based on the tightened FDI regime.

## **NEW FILING CASE GROUP**

The amended AWW introduces new sector specific (i.e. related to defence and security) and cross-sectoral case groups triggering a filing obligation.

In particular, the main newly implemented case groups cover:

- Companies developing or manufacturing goods via procedures of artificial intelligence, being used for automatically conducting cyber-attacks or imitating persons in order to actively spread disinformation, analysing of voice communication or biometric identification, analysing data for surveillance;
- Companies developing or manufacturing vehicles or unmanned aircrafts which dispose of technical equipment for the control of automated or autonomous driving or navigation functions or essential components for the control of such driving or navigation functions or the relevant software;
- Companies developing or manufacturing IT products or essential components for the protection or defence of attacks on IT systems or for the IT-based investigation of crimes;
- Companies operating specific satellite systems;
- Companies developing or manufacturing robots, developed for handling explosives or being designed to function in space, deep sea or under radiation exposure;
- Companies developing, manufacturing or finishing (inter alia) specific nanoelectronic components;
- Companies producing specific smart meter gateways;
- Companies employing people working for specific state organizations in security-related functions;
- Companies being active in specific raw material extraction;
- Companies developing or manufacturing goods which are subject to patent or protected design under state security protection;
- Companies developing or manufacturing goods which specifically serve for the operation of wireless or wired data networks;

- Airlines and companies developing or manufacturing specific components for aerospace;
- Companies developing or manufacturing goods or components related to quantum IT, quantum communication or quantum measuring technologies and other specific high-tech products and components;
- Companies farming (directly or indirectly) an area of at least 10,000 hectares;
- Companies developing, manufacturing, modifying or keeping all armaments being listed in part I, section A of the export list (up to now, only specific parts of this list were covered).

By introducing these new case groups, the legislator brings the German FDI system in line with the European regime and introduces filing obligations especially for new, future-oriented technologies.

### **RELEVANT THRESHOLDS FOR THE CROSS-SECTORAL EXAMINATION**

The relevant thresholds for triggering a filing obligation or for giving the Federal Ministry of the Economics (BMWi) as the competent authority the power to initiate ex officio investigations in a specific case (related to the cross-sectoral case groups) have been modified.

Now, a filing obligation exists

- a. with respect to critical infrastructures and the defence sector if the acquirer directly or indirectly holds **10 %** of the shares of the relevant company after the acquisition;
- b. with respect to the other filing case groups (such as the newly implemented) if the acquirer directly or indirectly holds **20 %** of the shares of the relevant company after the acquisition (*up to now 10%*);

The BMWi is entitled to initiate FDI investigations

- c. with respect to **other companies** if the acquirer directly or indirectly holds **25 %** of the shares of the relevant company after the acquisition.

Furthermore, the AWW now states that this shall also apply in the event of an acquisition of further shares by the acquirer. However, this is limited to the case that the acquirer already holds, as a minimum, shares in the above mentioned amount of the company and if the amount of shares would be/exceed

- **20, 25, 40, 50 or 75 %** in the cases of 2. (a);

- **25, 40, 50 or 75 %** in the cases of 2. (b);

- **40, 50 or 75 %** with respect to 2. (c);

in total after the relevant acquisition.

Besides, the AWW now includes various stipulations, further clarifying atypical forms of acquisition (especially, where the amount of shares does not correspond with the effective influence).

### **CERTIFICATE OF NON-OBJECTION (*UNBEDENKLICHKEITSBESCHEINIGUNG*)**

The amended AWW still provides the possibility for the acquirer to apply for a so-called certificate of non-objection (*Unbedenklichkeitsbescheinigung*). Up to now, this instrument could be used in both cases where a filing obligation existed – or not.

As of now, such certificate of non-objection can no longer be applied for if a filing obligation actually exists or if an ex officio examination procedure has already been initiated. According to the legislative reasoning, cases of doubt will remain if a specific acquisition must be filed or not. Therefore, in such cases of doubt the acquirer can combine the filing with an alternative application for a certificate of non-objection.

### **FURTHER PROCEDURAL CHANGES**

The new AWW includes various other stipulations which are intended to reflect and adjust the regime in the light of the changes made in the course of 2020 and 2021. For instance, the BMWi can combine the approval of an acquisition with the requirement that the future acquisition of further shares must also be notified to the BMWi. Furthermore, the BMWi is entitled to switch between the examination procedures from cross-sectoral to sector-specific examination procedure if requested. Finally, it is stipulated that the new rules shall apply for acquisitions which have been signed on or after the new regime came into force.

All in all, this new AWW amendment further tightens the German FDI regime and introduces more filing obligations for acquirers. However, it also includes some important clarifications and even facilitations for the involved parties. In any case, this new amendment will lead again to a substantial raise of filings and ex officio procedures which must be considered in the context of each transaction involving German companies.





## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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