

GERMANY



Arnecke Sibeth Dabelstein <https://asd-law.com/>

<b>1.</b>	<b>Relevant legislation (foreign investment legislation in force)</b>
<p>Foreign Trade and Payments Act (Außenwirtschaftsgesetz; “<b>AWG</b>”) and Foreign Trade and Payments Ordinance (Außenwirtschaftsverordnung; “<b>AWV</b>”).</p> <p>Both laws can be accessed via:</p> <ul style="list-style-type: none"> <li>• <a href="https://www.gesetze-im-internet.de/englisch_awg/englisch_awg.pdf">https://www.gesetze-im-internet.de/englisch_awg/englisch_awg.pdf</a></li> <li>• <a href="https://www.gesetze-im-internet.de/englisch_awv/englisch_awv.html">https://www.gesetze-im-internet.de/englisch_awv/englisch_awv.html</a></li> </ul>	
<b>2.</b>	<b>Relevant authority (foreign investment regulator)</b>
<p>The Federal Ministry for Economic Affairs and Climate Action (Bundesministerium für Wirtschaft und Klimaschutz)</p>	
<b>3.</b>	<b>Specific sectors covered (foreign investment regime involving specific sectors of the economy / business activities).</b>
<p>Companies in the area of critical infrastructures, which include energy, transport, water, health, communications, media and data processing, are particularly sensitive. Here, a shareholding of 10 % or more of the voting rights already falls within the scope of the investment review.</p> <p>Companies in the health sector, such as manufacturers or developers of personal protective equipment, of medicines essential for the supply of the population or of certain medical devices, also fall under the stricter scrutiny, but now from a shareholding of 20 percent of the voting rights. This threshold also applies to a large number of other economic sectors and technologies that were not previously covered separately (e.g. artificial intelligence, robotics, semiconductors, cyber security, aerospace, quantum and nuclear technology, automated or autonomous driving or flying, optoelectronics).</p>	
<b>4.</b>	<b>Types of transactions caught and notification thresholds (definition of a foreign investor / activities / turnover / assets subject to foreign investment assessment / investment threshold - e.g. % of votes in the target triggering the notification)</b>
<p>In principle, the cross-sectoral review covers all acquisition transactions through which a non-EU citizen directly or indirectly acquires control of at least 25% the voting rights in a domestic company.</p> <p>If the domestic company belongs to a particularly security-sensitive sectors (e.g. operator of critical infrastructures), the threshold is 10% of the voting rights. Intra-EU acquisitions are only covered to the extent that they serve to circumvent the investment test.</p>	

<p>The sector-specific review, on the other hand, only covers acquisition transactions through which a foreigner directly or indirectly acquires control over at least 10% of the voting rights in a domestic enterprise that produces certain goods listed exhaustively in Section 60 AWV.</p> <p>According to Section 2 AWG an export consignment shall embrace the material goods which an exporter exports simultaneously via the same customs office at the point of exit to the same country of destination. Foreigners shall mean all persons and partnerships with legal personality which are not residents. Foreign assets shall mean:</p> <ul style="list-style-type: none"> <li>• assets abroad,</li> <li>• claims in euro against foreigners and</li> <li>• instruments of payment denominated in currencies other than the euro, claims and securities.</li> </ul>	
<b>5.</b>	<b>Parties to be included in the foreign investment assessment (notifying parties and protected entities)</b>
<p>All companies / persons involved in the acquisition are to be included in the foreign investment assessment. In the case of the cross-sectoral and sector-specific tests, the reporting obligation lies solely with the purchaser.</p>	
<b>6.</b>	<b>Exceptions</b>
<p>No subject areas are exempt from investment control. Every business activity may be covered by investment control.</p>	
<b>7.</b>	<b>Notification / review type (e.g. mandatory, pre-closing, suspensory)</b>
<p>In the case of an atypical acquisition of control, there is no obligation to notify, but the BMWK has the right to review. The relevant thresholds are not those for voting rights, but the acquisition of control and management rights (investor or shareholder agreements). If a notification is required a filing is suspensory (please also see point 10 below).</p>	
<b>8.</b>	<b>Possibility for third parties to be involved in the review process (requirements, procedural rights etc.)</b>
<p>Third parties are not involved in the assessment procedures. However, according to the Freedom of Information Act (IFG), third parties have the possibility to request insight into the administrative act.</p>	
<b>9.</b>	<b>Filing fee</b>
<p>Neither fees nor attachments are charged.</p>	
<b>10.</b>	<b>Submission deadline / stand-still obligation</b>
<p>The acquisition must be reported to the BMWK in writing or electronically without delay after the conclusion of the contract governed by the law of obligations. In the case of an offer within the meaning of the German Securities Acquisition and Takeover Act (Wertpapiererwerbs- und Übernahmegesetz), the notification must be made immediately after publication of the decision to make the offer.</p> <p>If notification is required, execution is prohibited; voting rights may not be exercised and no company-related information may be disclosed to the acquirer until the notification has been released.</p>	

If there is no obligation to notify, the transaction may be completed, but there is a risk of reversal in the event of a prohibition.	
<b>11.</b>	<b>Availability of pre-notification / informal consultation</b>
For informal consultation, the Federal Ministry of Economics and Technology can be contacted at <a href="mailto:investitionspruefung@bmwk.bund.de">investitionspruefung@bmwk.bund.de</a> . There is no formal pre-notification.	
<b>12.</b>	<b>Scope of information / documents required for filing</b>
<p>In case of an application for a certificate of non-objection, a cross-sectoral as well as sector-specific review, the acquisition, the acquirer, the domestic company to be acquired and the shareholding structures in the acquirer must be stated. Furthermore, the business areas of the acquirer and the domestic company to be acquired must be described in outline as well as the power of representation.</p> <p>More detailed requirements are set out in the general ruling on the information and documents to be submitted pursuant to Section 14a AWG and Sections 55a, 58 and 60 AWW.</p>	
<b>13.</b>	<b>Proceedings timetable (timing for review)</b>
<p>In the case of the cross-sectoral assessment, the BMWK decides at the preliminary assessment stage within two months of becoming aware of the conclusion of the contract under the law of obligations whether to open an assessment procedure. This then lasts up to four months after receipt of the complete.</p> <p>In the event of particular actual or legal difficulties, the procedure may be extended by three months. In addition, it is possible to extend the procedure by a further month if the acquisition particularly affects the defence interests of the Federal Republic of Germany.</p> <p>The same applies to the sector-specific review and the certificate of non-objection.</p>	
<b>14.</b>	<b>Outcome of the review process (clearance, conditional authorisation, possible commitments etc.)</b>
<p>The acquisition inspected within the scope of the cross-sectoral assessment is deemed to be released if no assessment procedure is initiated. The BMWK releases the acquisition if there are no concerns with regard to the public order or security of the Federal Republic of Germany or another EU member state and the issue of a clearance certificate is excluded. The release may be subject to the requirement that the BMWK must be notified of the acquisition of further voting rights, even below the thresholds. The acquisition may be prohibited if there are concerns for security and public order. Alternatively, orders may be issued against the companies involved in the acquisition in order to ensure public security and order.</p> <p>The acquisition inspected as part of the sector-specific review is deemed to be released if no inspection proceedings are initiated within two months. Likewise, it is released if there are no concerns with regard to essential security interests of the Federal Republic of Germany. In order to ensure these security interests, the acquisition may be prohibited or orders may be issued against the parties involved in the acquisition.</p>	

<p>The certificate of non-objection is deemed to have been issued if no examination procedure has been opened after two months. The clearance is also certified if there are no concerns with regard to public security or order.</p>	
<b>15.</b>	<b>Publicity of the decision and confidentiality of the information provided</b>
<p>The final decision is not published. However, under the Freedom of Information Act (IFG), third parties have the option of requesting to inspect the administrative act.</p> <p>If the decision is to be published on the basis of an application under the IFG, the parties concerned must be informed of this.</p> <p>In this case, all confidential information concerning shall be redacted in the decision in consultation with the parties concerned.</p>	
<b>16.</b>	<b>Can a decision be challenged or appealed (by whom, on what basis, in which timeframe)</b>
<p>As an administrative act, the decision may be challenged by means of the appeals provided for in the Administrative Court Order (VwGO). The addressed parties may contest the decision within one month.</p>	
<b>17.</b>	<b>Sanctions for failure to notify (administrative fines or other administrative sanctions, criminal sanctions, civil law consequences)</b>
<p>Fines of up to EUR 30,000 may be imposed. The prerequisite for this is that, contrary to Section 64 (1), Section 65 (1), Section 66 (1) or (4) Sentence 1, Section 67 (1) (in conjunction with Section 68 (1), Section 69 or Section 70 AWW), a report is not made, is not made correctly, is not made completely or is not made on time, either intentionally or negligently.</p> <p>In addition, if, contrary to Section 68 (2) AWW, a report is not made, is not made correctly, is not made completely or is not made in time, either intentionally or through negligence.</p> <p>In addition, fine proceedings may be initiated against the persons responsible for the company on account of a possible breach of supervisory duties. The maximum fine in this case is also EUR 30,000.</p> <p>In the case of negligent reporting errors, it may be possible to make a voluntary declaration, which may exempt the company from punishment.</p>	
<b>18.</b>	<b>Other national security review distinct from FDI rules</b>
<p>Apart from investment control, there are no other domestic security checks relating to investments of companies in Germany.</p>	
<b>19.</b>	<b>Significant legislative/regulatory developments in the past year and possible proposals for reform</b>
<p>The AWW was last amended in 2021. In the process, the voting thresholds were supplemented, and the investment review was expanded. The 20th amendment to the AWW is planned and is currently being prepared by the BMWK.</p> <p>Violations of EU sanctions, including bans on Russia, will be subject to fines unless they are already punishable under the AWW. These include investment restrictions in the mining sector, the extension of the ban on taking over management positions in Russian state-</p>	

owned enterprises and the ban on Russian nationals holding management positions in EU critical infrastructure facilities.

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**Helpful links**

- <https://www.bmwk.de/Redaktion/DE/Artikel/Aussenwirtschaft/investitionspruefung.html>
- [https://www.bmwk.de/Redaktion/DE/Downloads/A/allgemeinverf%C3%BCgung-au%C3%9Fenwirtschaftsgesetz-270521.pdf?\\_\\_blob=publicationFile&v=1](https://www.bmwk.de/Redaktion/DE/Downloads/A/allgemeinverf%C3%BCgung-au%C3%9Fenwirtschaftsgesetz-270521.pdf?__blob=publicationFile&v=1)
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