

Foreign Investment Matters

Key Facts & Figures on Foreign Direct Investment Control in Germany

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Germany is an attractive destination for investment. The German Federal Ministry of Economic Affairs and Climate Action (**BMWK**) describes Germany as “one of the most open economies in the world.”¹ Nevertheless, in recent years, the German legislator has tightened the screening rules for foreign direct investment (**FDI**) to assess whether deals will affect national and EU security interests. The number of economic sectors covered by the German FDI screening rules was significantly increased and filing thresholds were lowered.² This alert summarizes the regime and key facts and figures of the BMWK’s recent enforcement practice.

Relevance of the Target’s Business

German FDI screening rules become relevant when foreign, i.e., non-German, investors acquire targets (with a subsidiary or independent branch) in Germany. There are two prongs, depending on the business activity and product portfolio of the domestic company:

- If the German company is active in export-listed military and defense products or in IT for processing classified government information, the German FDI screening rules cover investments by any foreign investor including from other EU/EFTA Member States (so-called sector-specific review).
- For many other business activities, the German FDI screening rules apply only in case of acquisitions by non-EU/EFTA investors. This so-called cross-sectoral review covers, *inter alia*, critical infrastructure (including certain areas of the energy, IT and telecommunications, transportation and traffic, health, water, food, and the finance and insurance industries) as well as pharma, biotech, telematics, robotics, fine mechanics, artificial intelligence, and

¹ BMWK, *Foreign Trade and Investment Law*, available [here](#).

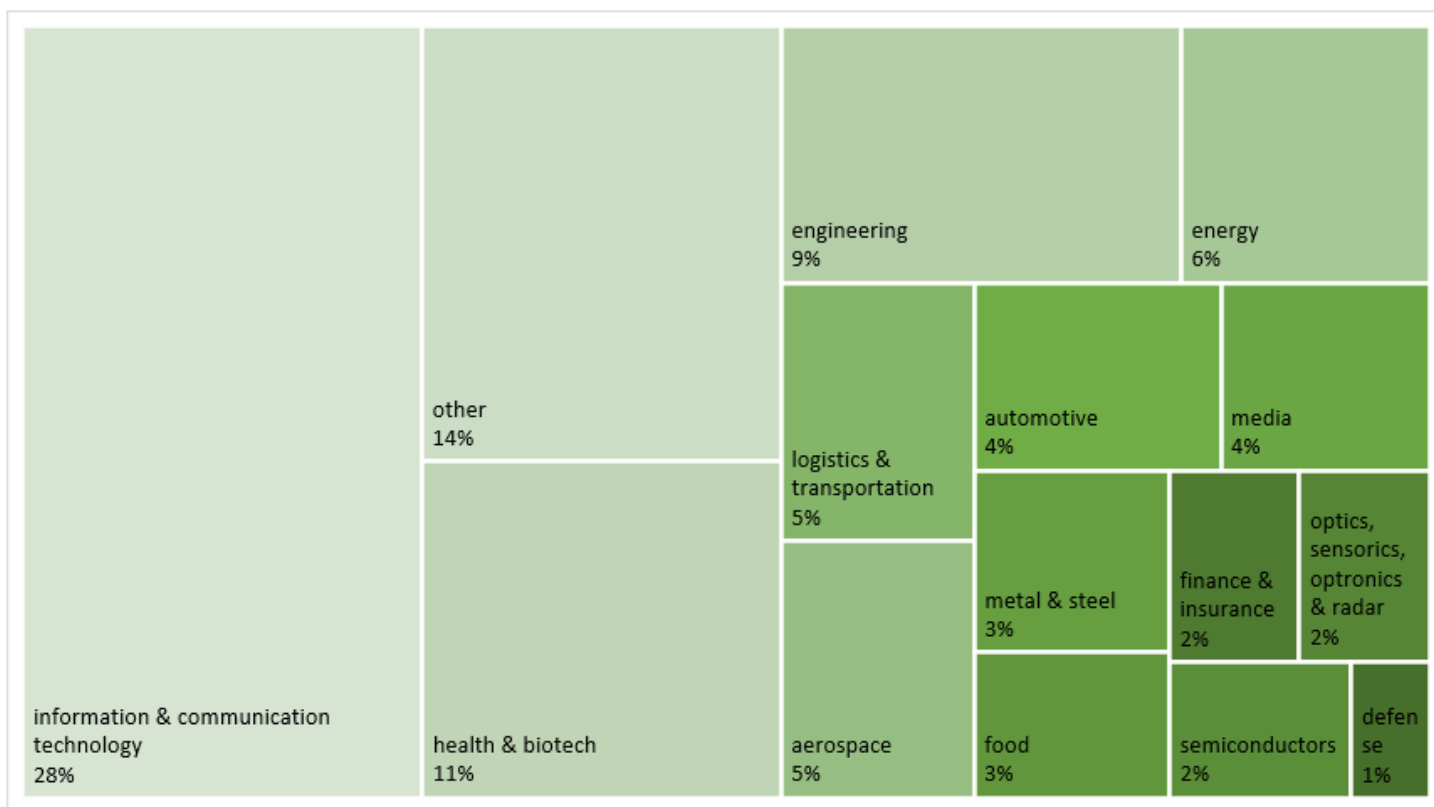
² See Willkie’s client alert of May 18, 2021, available [here](#).

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other high-tech sectors. The vast majority of the German FDI screening cases notified in 2022 (86%) were subject to a cross-sectoral review.³

The following chart shows that almost one third of the German FDI screening cases of 2022 related to targets active in the information & communication technology sector, followed by health & biotech, and engineering. The remaining cases related to targets mostly active in the energy, logistics & transportation, aerospace, automotive, media, metal & steel, food, finance & insurance, optics, sensorics, optronics, radar, semiconductors, and defense industries.

Sectors of target companies in German FDI screening cases filed in 2022⁴



Voting Rights Thresholds to Trigger a Filing Requirement

Depending on the sector in which the target is active, the notification requirement is triggered by the direct or indirect initial acquisition of at least 10% or 20% of the target's voting rights. Subsequent filing requirements are triggered every time the

³ BMWK, *Investment Screening in Germany: Facts & Figures*, p. 4, available [here](#).

⁴ BMWK, *Investment Screening in Germany: Facts & Figures*, p. 6.

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foreign investor increases its voting rights above certain additional thresholds.⁵ Voting rights can be cumulated, especially in cases where investors are controlled by a foreign state.

Deals can also be subject to review if the acquirer does not reach the voting rights threshold but where a corresponding influence is conveyed in another way, for example through influence on supervisory board mandates or on the appointment of management, or veto rights relating to strategic business decisions. The BMWK can also pick up any acquisition of at least 25% of a German target's voting rights and conduct an *ex officio* review.

Investor-related Factors and Origin of Investors

In cross-sectoral screening procedures, the BMWK examines whether the deal has a likely effect on the public order or security of the Federal Republic of Germany, another Member State of the European Union, or on Union interests. The test in sector-specific investment control focuses on “essential security interests” of the Federal Republic of Germany (however, the BMWK can switch between the two types of procedure). Ultimately, the assessment depends on the industry affected and the type of investor, including the country of origin. German FDI screening rules are not designed to discriminate against investors from certain countries. However, practice has shown that the BMWK tends to apply a more critical review for investors from certain countries, such as China. For investments in critical assets in the EU by Russian or Belarusian governments, the European Commission called upon Member States to systematically use their FDI screening mechanisms to assess and prevent threats to public order or security in the Member States.⁶ However, depending on the sensitivity of the industry sector, the BMWK has also opened in-depth reviews and demanded remedies for acquisitions by investors from other countries.

Given the broad scope of industry sectors captured, the number of German FDI screening cases has nearly quadrupled from 78 cases in 2018 to 306 in 2022.⁷ As the following chart shows, the top three countries of investors' origin are the U.S.,⁸ followed by the UK⁹ and China.¹⁰

⁵ If the acquirer's share of voting rights as a result of the further acquisition reaches or exceeds 20%, 25%, 40%, 50%, or 75% (depending on the sector).

⁶ European Commission's Communication – Guidance to the Member States concerning foreign direct investment from Russia and Belarus in view of the military aggression against Ukraine and the restrictive measures laid down in recent Council Regulations on sanctions (2022/C 151 I/01).

⁷ BMWK, *Investment Screening in Germany: Facts & Figures*, pp. 9, 11.

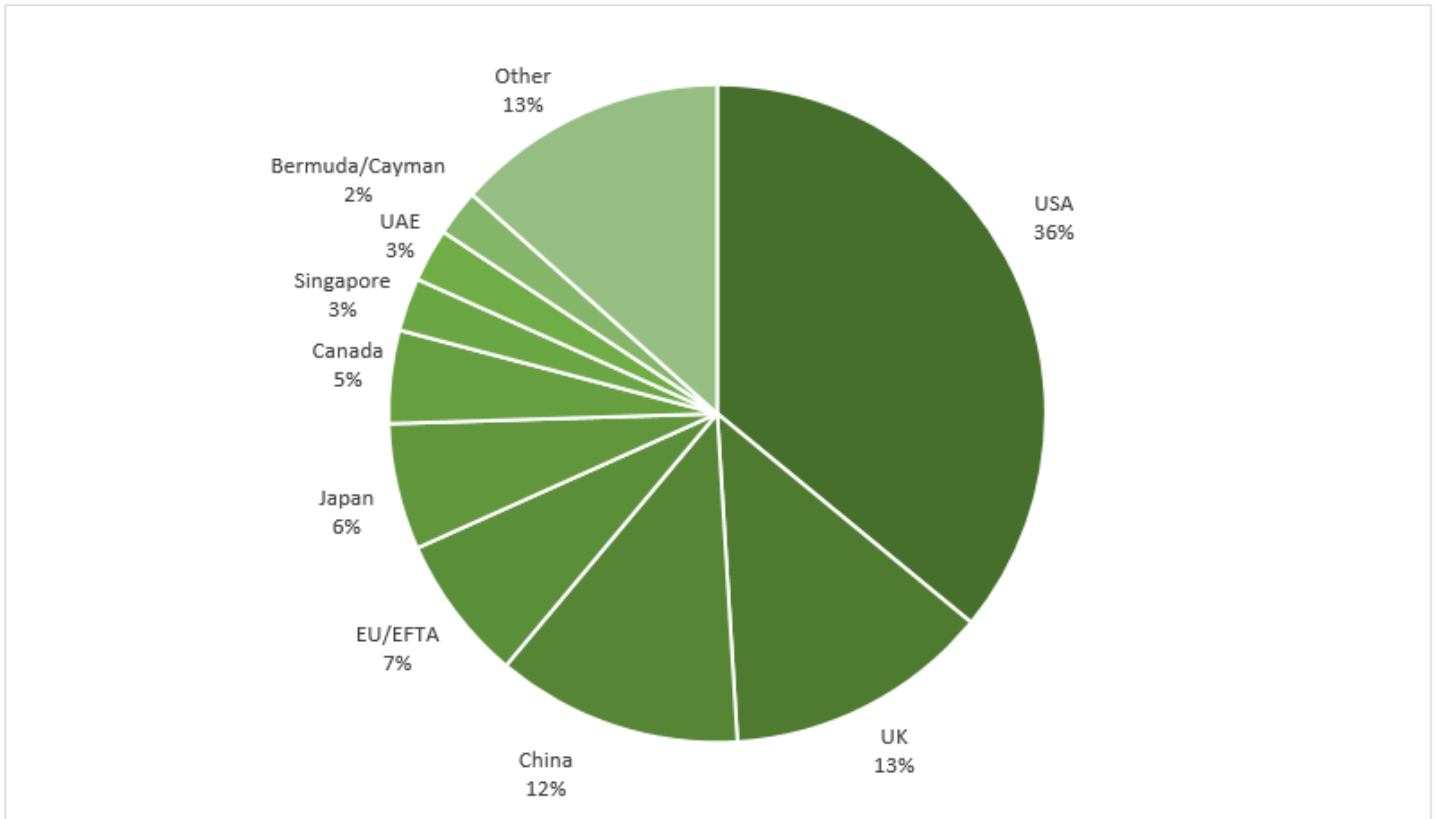
⁸ The number of cases for foreign investment from U.S. investors has more than quadrupled in the last five years (from 27 filings in 2018 to 110 filings in 2022).

⁹ Including Channel Islands here and throughout. For foreign investment originating from the UK, the number of German FDI filings has increased tenfold in the last four years, due to the fact that, until the end of the Brexit transition period, acquisitions by UK investors were only subject to the sector-specific, but not the cross-sectoral screening process.

¹⁰ German FDI screening cases involving Chinese investors have increased by 37% in the past five years (from 27 filings in 2018 to 37 filings in 2022).

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Origin of investors in German FDI screening cases filed in 2022¹¹



Impact on Deal Process and Timeline

A notifiable transaction must not be consummated prior to approval by the BMWK (standstill obligation). During the review, security-sensitive actions such as the transmission of certain information or the exercise of voting rights are prohibited and can constitute a criminal offence. Depending on the complexity of the case, the FDI screening procedure can have a significant impact on the timing of the deal.

The BMWK's pre-review phase (Phase I) is up to two months.¹² An in-depth investigation (Phase II) can take up to four months. The review periods in Phase I and II do not begin until all necessary information and documents have been submitted. In Phase II proceedings, the parties may have to submit extensive information and documents. In cases of particularly complex issues, the BMWK can extend the review period by an additional three to four months.

¹¹ BMWK, *Investment Screening in Germany: Facts & Figures*, p. 5.

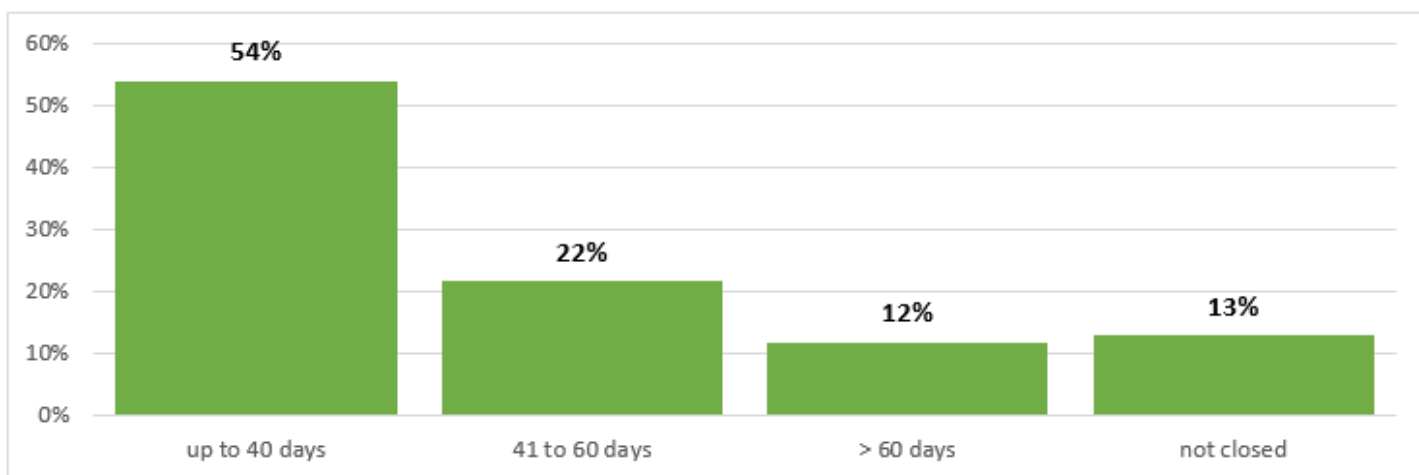
¹² Beginning when the BMWK obtains knowledge of the acquisition, usually upon receipt of a notification or application for a certificate of non-objection.

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The BMWK may, within a period of up to five years from signing, investigate *ex officio* an acquisition of at least 25% of the voting rights in a German target or the acquisition of decisive influence in another way. To obtain legal certainty, parties to a transaction can apply for a certificate of non-objection. This process will trigger the same review periods of Phase I and II, including potential extensions.

The majority of cases notified to the BMWK in 2022 were cleared within 40 days. Only about 8% of the cases were subject to Phase II investigations.¹³

Duration of proceedings in German FDI screening cases filed in 2022¹⁴



The BMWK cleared most of the cases notified in 2022 unconditionally. Only 2% of the cases were cleared subject to remedies or prohibited.¹⁵ Remedies are usually implemented through conditions or in public law contracts between the parties and the Federal Republic of Germany to address security concerns, such as reporting obligations to the BMWK, supplier guarantees for the benefit of certain security-relevant facilities, or specific requirements for the transfer of information and data security. So far, the BMWK has only prohibited a few deals.¹⁶

¹³ BMWK, *Investment Screening in Germany: Facts & Figures*, pp. 7, 12.

¹⁴ Ibid.

¹⁵ BMWK, *Investment Screening in Germany: Facts & Figures*, p. 13.

¹⁶ Between 2004 and July 2021, the BMWK only issued two prohibition decisions. See BMWK, *Im Fokus: Eine Frage der nationalen Sicherheit*, available [here](#). Another transaction was blocked in November 2022.

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Recent Decisions of the BMWK

A recent example of a partial prohibition is the participation of a Chinese state-owned shipping company in a container terminal in Hamburg. Despite considerable concerns from numerous government branches, the BMWK ultimately allowed a minority shareholding secured against atypical influence.

Another recent case shows that the FDI review can conflict with the timeline of a deal. In 2022, the envisaged acquisition of a German semiconductor manufacturer by a Taiwanese manufacturer failed because the longstop date expired during the BMWK's review.

Most recently, in November 2022, the BMWK prohibited the envisaged acquisition of a semiconductor chip manufacturing plant in Germany by a Chinese investor via its Swedish subsidiary. Robert Habeck, Federal Minister of Economic Affairs and Climate Action, explained that it was particularly important that Germany and Europe maintain economic and technological sovereignty in the semiconductor industry.¹⁷

Summary and Outlook

Germany remains open to foreign investment. Nonetheless, tightened regulation and stronger enforcement can be expected in light of global economic and security developments. We are closely following discussions on further amendments to German FDI rules and will provide updates on key developments in the [Foreign Investment Matters series](#).¹⁸

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¹⁷ BMWK press release of November 9, 2022, *Foreign Trade and Investment Law*, available [here](#).

¹⁸ See Willkie's client alert of February 24, 2023, available [here](#).

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