A&O SHEARMAN

# Navigating German FDI Rules

## KEY CONSIDERATIONS AND PRACTICAL INSIGHTS FOR VENTURE CAPITAL INVESTORS

Germany's foreign direct investment (FDI) regime has been expanded considerably in recent years, mirroring a global trend towards increased scrutiny of cross-border investments, and particularly targeting evolving sectors, such as Artificial Intelligence (AI), quantum computing, robotics and semiconductors. For venture capital (VC) investors that are often involved in early-stage investments in both High Tech and Deep Tech start-ups focusing on such advanced and pioneering technologies, navigating these rules is crucial to ensure smooth transactions and avoid regulatory pitfalls.

This overview outlines the key issues, practical considerations, and anticipated developments that VC investors and start-ups should bear in mind.

# 1. The German FDI regime at a glance

The German FDI regime provides for a long list of rather detailed descriptions of businesses of German companies. Depending on the nationality of the investor and the stake to be acquired, these may trigger a mandatory filing requirement, meaning that (direct or indirect) investments in such companies must not be completed prior to having obtained clearance from the Federal Ministry for Economy and Energy (MoE). In addition, the MoE is principally entitled to call-in acquisitions of 25% or more of the voting rights in any German company by a non-EU/EFTA investor within a period of up to five years after signing.

Basically, the German FDI rules differentiate between four types of investments falling under the scope of the screening mechanism that can be summarized as follows:

| CATEGORY | | |
|---|---|---|
| **1. DEFENSE & ENCRYPTION** | • **Non-German investors**<br>• Mandatory clearance at **10** – 20 – 25 – 40 – 50 – 75%<br>• Stand-still obligation | • German Export List<br>• Secret patents<br>• Encryption/BSI<br>• Etc. |
| **2. CRITICAL INFRASTRUCTURE** | • Non-EU/EFTA investors<br>• Mandatory clearance at **10** – 20 – 25 – 40 – 50 – 75%<br>• Stand-still obligation | • Data Centers<br>• Relevant software<br>• TK networks and inception<br>• Cloud Computing<br>• Etc. |
| **3. NEW SENSITIVE SECTORS** | • Non-EU/EFTA investors<br>• Mandatory clearance at **20** – 25 – 40 – 50 – 75%<br>• Stand-still obligation | • Semiconductors<br>• AI<br>• Robotics<br>• IT-Security<br>• Etc. |
| **4. CATCH-ALL CATEGORY** | • Non-EU/EFTA investors<br>• Right to review at **25** – 40 – 50 – 75%<br>• **No stand-still obligation** | • Suppliers of German State<br>• R&D strong companies<br>• Political sensitive activities<br>• Etc.<br>• Case-by-case assessment strongly required |

# 2. Key aspects that VC investors need to be aware of

- **Broad sector coverage**: Within the past few years, the list of relevant businesses caught by the German FDI rules was extended from previously 11 to now 31. The German FDI regime now covers several of the most promising emerging and transformative Deep Tech, High Tech, and Green Tech sectors including defense, aerospace, (clean) energy, life sciences, biotechnology, artificial intelligence, robotics, semiconductors, and quantum technology.

- **Broad personal scope**: The German FDI regime typically captures acquisitions by non-EU/EFTA investors. In the defense sector, filing requirements may even apply to non-German acquirers. It is particularly noteworthy that the MoE applies a "look-through" approach, examining the entire chain of ownership up to the ultimate beneficial owner. Consequently, the mere fact that the direct acquirer or the ultimate investor and/or the UBO might be a German or an EU/EFTA based entity does not exclude a filing requirement in any case. Given that the German FDI regulations differ from the common rules on the attribution of voting rights and do not provide for a "dilution" of voting rights, a 10% shareholding of a foreign entity at a higher level of the investor's acquisition structure may trigger the need for a filing (even if this is just a holding company).

- **Low thresholds**: Compared to most other FDI regimes across the globe, the German FDI screening rules provide for very low voting rights thresholds that trigger a filing requirement. In particular, the German FDI rules are triggered not only when an investor acquires control over a domestic company. Depending on the business of the German target, the acquisition of 20%, or even just 10%, of the voting rights may be subject to prior clearance from the MoE. VC seed and Series A funding may often reach or exceed such thresholds even if the investment volume is not very high.

- **No enterprise value or turnover thresholds**: The German FDI rules do not provide for any *de-minimis* exemptions with regard to the turnover generated by the target company and/or with respect to the enterprise value or the funding amount. Hence, even low investments in a start-up that does not yet generate any turnover may trigger a filing and clearance requirement.

- **Stand-still obligation and gun jumping**: Transactions that require a mandatory notification are principally subject to a stand-still obligation and a suspensory effect, i.e., the parties are not allowed to complete such a transaction until approval from the MoE. A ban on (i) sharing sensitive information with the acquirer and (ii) exercising voting rights by the acquirer prior to clearance ("gun jumping") applies. As long as such clearance has not been issued by the MoE, the transaction is temporarily invalid under civil laws.

- **Multiple clearance requirements/successive funding rounds**: Even if an initial investment was cleared by the MoE, subsequent increases in shareholding in later funding rounds (e.g., Series B, C) may trigger new filing obligations if relevant voting rights thresholds are crossed (20%, 25%, 40%, 50%, 75%).

- **Far reaching *ex officio* powers of the MoE**: All acquisitions of 25% or more of the voting rights by a non-EU/EFTA investor may be called-in by the MoE for a period of up to five years. Parties may therefore carefully consider to file on a voluntary basis in the interest of deal certainty. The advisability of voluntary filing depends on the specific circumstances, including target and investor characteristics and the political climate.

# 3. Be aware, but don’t be concerned *FDI filings are no deal-breakers*

- **Most of the transactions are cleared without conditions**

Official data published by the MoE show that the overwhelming majority of notified transactions is cleared without any remedies. In 2024, the MoE imposed restrictive measures only in 3% of the transactions it had reviewed. As far as publicly known, only one transaction was blocked in 2024. Whilst these figures have been quite stable in Germany over the past few years, the global FDI landscape paints a mixed picture with an increased number of interventions in some of the key jurisdictions including, in particular, France where 44% of the transactions were subject to remedies, the US (19%) and Italy (13%).

If the MoE stipulates conditions or requests certain commitments from the parties, such remedies are typically tailor-made and address specific concerns. They regularly comprise of, *inter alia*, (i) limitations on shareholder influence, (ii) requirements with regard to the management composition, and (iii) the obligation to keep running the German business and to continuously supply critical German customers. The allocation of such execution risks and commitments in the transaction documentation is therefore crucial.

Based on our experience, the MoE is usually open to negotiate the content of the remedies with the parties. Contrary to merger control decisions, any such remedies are not made public by the MoE.

**DEVELOPMENT OF RESTRICTIVE MEASURES BY YEAR OF FILING***

| YEAR | TOTAL NUMBER OF CASES | CASES WITH RESTRICTING MEASURES** |
|---|---|---|
| 2024 | 261 | 8 (3%)*** |
| 2023 | 257 | 12 (5%)*** |
| 2022 | 306 | 13 (4%) |
| 2021 | 306 | 14 (4,5%) |
| 2020 | 160 | 12 (7,5%) |
| 2019 | 106 | 12 (11%) |

* This slide refers only to the national (German) FDI screening cases.

** This encompasses prohibitions, side-conditions, public-law contracts and administrative orders.

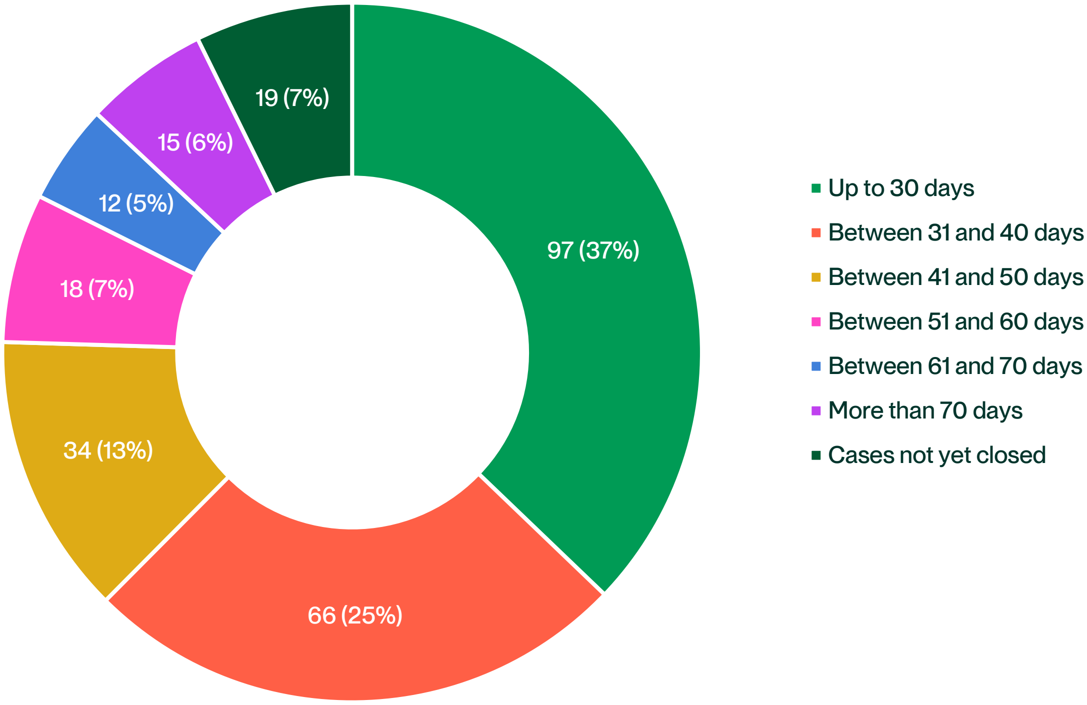
*** Numbers as of 31 January 2025. As of that date there are 19 cases filed in 2024 and one case filed in 2023 that are not yet closed. Therefore, it is likely that these numbers will still change.

- **Most of the transactions are cleared within 2 months**

  Most filings are cleared swiftly: In 2024, over 80% of all transactions reviewed by the MoE were cleared within the statutory two-months Phase 1 review period. More than one third of the filings was even cleared within 30 days.

  If, however, the MoE considers a Phase 2 review to be necessary, the clearance procedure may likely take more than 5-6 months. Parties would therefore be well advised to thoroughly assess the risk of a Phase 2 review and, if necessary, reflect such risk in an appropriate Long Stop Date under the transaction documentation.

**DEVELOPMENT OF RESTRICTIVE MEASURES IN GERMAN FDI SCREENING CASES**




*source: BMWK, Investment Screening in Germany: Facts & Figures

# 4. Outlook – Toward increased scrutiny within the EU

In the EU, 25 out of 27 EU Member States now have national FDI screening mechanisms in place that significantly differ from each other in terms of both the sectoral and the personal scope. Going forward, FDI screening will play an increasingly significant role at the EU level. The European Parliament recently endorsed a revised EU Screening Regulation that may make the regulatory landscape for foreign investors even more complex: Among others, it is envisaged that FDI screening will be mandatory in numerous sensitive sectors in all EU Member States and the EU Commission will likely have the power to intervene on its own initiative. In parallel, the new German government emphasized their intention to enact revised FDI rules designed to strengthen Germany's resilience in a changing geopolitical landscape and to prevent foreign investments in critical infrastructure and strategic sectors that conflict with the national interests. Beyond the core FDI framework, sector-specific legislation in Germany is increasingly introducing foreign investment restrictions that may apply to non-EU/EFTA-owned entities seeking to operate in sensitive areas such as energy, defense, or critical infrastructure. These rules can impose additional barriers to market access or participation in public tenders, even where the entity is established within the EU. This trend underscores the importance of identifying and assessing such regulatory risks early in the investment process, particularly for VC investors targeting strategic sectors. At the same time—and that is the good news—the coalition agreement also pledges to promote and support start-ups as well as to simplify and expedite FDI screening procedures.

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