The Foreign Investment Regulation Review

Eighth Edition

Editors
Calvin S Goldman QC and Michael Koch

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Calvin S Goldman QC and Michael Koch

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CONTENTS

PREFACE.. v
Calvin S Goldman QC and Michael Koch

Chapter 1 BULGARIA... 1
Nikolay Kolev and Trayan Targov

Chapter 2 CANADA... 13
David Rosner and Justine Johnston

Chapter 3 CHINA.. 30
Jianwen Huang

Chapter 4 EU OVERVIEW.. 44
Lourdes Catrain and Eleni Theodoropoulou

Chapter 5 FRANCE.. 57
Didier Théophile, Olivia Chriqui-Guiot and Guillaume Griffart

Chapter 6 GERMANY... 68
Oliver Schröder and Stephanie Birmanns

Chapter 7 IRELAND... 84
Pat English and Grace Murray

Chapter 8 ITALY.. 102
Giuseppe Scassellati-Sforzolini, Francesco Iodice and Simone Marcon

Chapter 9 MEXICO 144
Juan Francisco Torres-Landa Ruffo, Federico De Noriega Olea and Pablo Corcuera Bain

Chapter 10 PORTUGAL... 155
Tânia Luísa Faria, Miguel Stokes, Margot Lopes Martins and Inês Drago

Chapter 11 RUSSIA 171

Vassily Rudomino, Ksenia Tarkhova, Ruslana Karimova, Roman Vedernikov and Anastasia Kayukova

Chapter 12 SOUTH AFRICA 191

Deon Govender

Chapter 13 SPAIN 198

Edurne Navarro, Alfonso Ventoso and David López Velázquez

Chapter 14 UNITED KINGDOM 210

Alex Potter

Chapter 15 UNITED STATES 239

Aimen Mir, Christine Laciak and Meredith Mommers

Chapter 16 VIETNAM 260

Nguyen Truc Hien and Nguyen Anh Hao

Appendix 1 ABOUT THE AUTHORS 275

Appendix 2 CONTRIBUTORS' CONTACT DETAILS 291

PREFACE

This eighth edition of *The Foreign Investment Regulation Review* provides a comprehensive guide to laws, regulations, policies and practices governing foreign investment in key international jurisdictions. It includes contributions from leading experts around the world from some of the most widely recognised law firms in their respective jurisdictions.

Unprecedented challenges have arisen in 2020 not only to the health and well-being of persons around the globe, but also to globalisation itself and, with it, the flow of capital. Whereas foreign investment has for a number of years been attracting increased attention, in the past year this trend has accelerated. Prior to the covid-19 pandemic, the global economy was continuing on its trend towards further integration, even with indications of emerging protectionism, and the number of cross-border and international transactions were increasing, while national governments continued to intervene in foreign investment based on a broadening set of criteria. Foreign investment reviews of cross-border mergers could not help but be affected by shifts in economic relations between countries, which in turn were driven by evolving geopolitical considerations. These included structural developments such as Brexit, as well as increased tensions over trade and related policies, as we have seen between the United States and China. These increased tensions have heightened concerns over national interest considerations such as the export of jobs and industrial policies, as well as heightened national security concerns over cybersecurity, new technologies, communications and other strategic areas. As previously pointed out, these developments have led, in the case of certain merger reviews, to increased tensions between normative competition and antitrust considerations on the one hand and national and public-interest considerations on the other, the latter sometimes weighing heavily against the former. As a result, more large cross-border mergers have been scrutinised, delayed or thwarted by reviews that are progressively broad in scope.

Since the pandemic has taken hold, the underlying considerations that had been driving trends in the review of foreign investment moved to the front of national agendas, with the result that these trends have been both accelerating and increasing in scope. Concerns about the benefits of globalisation have been on the rise in an environment where nations find themselves competing for supplies of critical medicines, equipment and personal protective equipment necessary to meet the public health emergency. This has led to a broadening of the types of businesses the takeover of which might be viewed as raising strategic, public interest or national security considerations. The increased focus on the stream of capital flowing from state-owned enterprises that had already driven greater scrutiny of proposed investments took on heightened importance, particularly in economic sectors viewed as being critical to the pandemic response, such as public health and supply chains. As the impacts of the worldwide economic shutdown on the valuation of domestic businesses began to be felt, concerns around opportunistic hollowing out of domestic sectors rose to the forefront of considerations of such matters as lowering financial thresholds triggering foreign investment reviews.

This has all taken place in the context of efforts to overhaul the regulatory landscape that were already under way in the United States and Europe. In the United States, the foreign investment review process has recently seen a significant expansion of the review authority of the Committee on Foreign Investment in the United States (CFIUS) following the enactment of the Foreign Investment Risk Review Modernization Act (known as FIRRMA) in August 2018. This included a broadening of transactions under CFIUS's scrutiny, most notably in connection with transactions involving critical technology, critical infrastructure and sensitive personal data. The exceptional coverage and commentary recently on the CFIUS review pertaining to TikTok is a reflection of the heightened interest in this area in the United States. In turn, there is greater focus on foreign investment in Europe, where a regulation gives the European Commission a new central advisory role in coordinating increased scrutiny by Member States, which have themselves strengthened their existing foreign investment laws (e.g., Germany). In the EU, there will now be greater focus on proposed acquisitions by foreign state-owned enterprises (SOEs) that may be acquiring European firms whose value has been reduced by the pandemic, in order to prevent the use of unfair subsidies. Recent additional regulatory steps directed towards broadening the scope of foreign investment reviews are being considered in the United Kingdom, as well as in other jurisdictions, and have also been taken in Australia where review thresholds have been dropped and national security reviews will be broadened. In addition, in Canada, timelines for national security reviews have been significantly extended and investments by SOEs, as well as investments in Canadian businesses related to public health or the supply of critical goods and services, will be subject to heightened scrutiny in response to the pandemic.

In addition to these significant developments, differences in foreign investment regimes (including in the timing, procedure and thresholds for and substance of reviews) and the mandates of multiple agencies (often overlapping and sometimes conflicting) continue to contribute to the relatively uncertain and at times unpredictable foreign investment environment. This gives rise to greater risk of inconsistent decisions in multi-jurisdictional cases, with the potential for a significant 'chilling' effect on investment decisions and economic activity. Foreign investment regimes are increasingly challenged by the need to strike the right balance between maintaining the flexibility required to reach an appropriate decision in any given case and creating rules that are sufficiently clear and predictable to ensure that the home jurisdiction offers the benefits of an attractive investment climate notwithstanding extraordinary circumstances.

The recently increasing breadth, scope and timelines for proposed acquisitions by SOEs and other proposed acquisitions giving rise to national security considerations have raised a potentially challenging issue in the context of proposed acquisitions of failing firms. There is a widely held view that, as a result of the disruptive economic effects of the covid-19 pandemic, there will be a sizeable number of distressed industries and failing firms in sectors that have been most significantly impacted by the pandemic. The number of failing firm cases is likely to increase the longer the pandemic continues to substantially affect economies in jurisdictions across the globe. The evolving view in various jurisdictions over the past couple of months or so is that the timeline for economic recovery from the effects of the pandemic is likely to be considerably longer than earlier forecasts suggested, and especially in sectors impacted the hardest; the *OECD Economic Outlook* issued by the Organisation for Economic Co-operation and Development (OECD) in June 2020 also reflects a longer timeline for economic recovery than the OECD originally estimated in March 2020.

In this exceptional environment there may be failing firm cases where the proposed acquirer is an SOE, which in some foreign direct investment reviews includes a corporation that may be influenced directly or indirectly by a foreign government. There may also be proposed acquisitions of failing entities in the public health or supply chain markets, which may be regarded as more sensitive transactions in the context of the pandemic. If these types of proposed acquisitions are subjected to increased scrutiny and longer timelines in foreign investment reviews where the acquiree is a failing firm, and to the extent that there may be a parallel competition review conducted on a considerably more expeditious basis, the proposed acquisition risks not being completed if the acquiree cannot be sustained during that period. That may lead to a competitively less preferable acquirer with existing operations in the same jurisdiction becoming the only purchaser in a position to complete the proposed acquisition, thereby avoiding liquidation of the assets and loss of jobs. The same result may follow even where the proposed acquirer is not an SOE or the failing firm is not in an apparently sensitive business, because the increasing scope and timelines for foreign investment reviews, coupled with continuing geopolitical tensions, may raise sufficient uncertainty to dissuade a foreign entity from making a proposed acquisition. These developments could have a significant impact on domestic market concentrations going forward.

With respect to the interface of national interest and public interest considerations and the evolving breadth of national security reviews, including, in some cases, as they may relate to or interface with, normative competition reviews, the American Bar Association Antitrust Law Section (ABA ALS) Task Force on National Interest and Competition Law prepared a report that was considered and approved by the Council of the ABA ALS in August 2019. In that report, the Task Force examined a number of cases in selected jurisdictions where these issues have been brought to the forefront.

In the context of these significant developments, we hope this publication will prove to be a valuable guide for parties considering a transaction that may trigger a foreign investment review, which often occurs in parallel with competition reviews. It provides relevant information on, and insights into, the framework of laws and regulations governing foreign investment in each of the 16 featured jurisdictions, including the timing and mechanics of any required foreign investment approvals, and other jurisdiction-specific practices. The focus is on practical and strategic considerations, including the key steps for foreign investors planning a major acquisition, or otherwise seeking to do business in a particular jurisdiction. The recent trends and emerging issues described above and their implications are also examined in this publication. Parties would be well advised to thoroughly understand these issues and to engage with regulatory counsel early in the planning process so that deal risk can be properly assessed and managed. Having regard to the changing regulatory environment pertaining to foreign investment reviews and the evolving protectionism as well as geopolitical considerations across a number of jurisdictions, regulatory counsel may recommend approaching the relevant government authorities at a comparatively early stage in order to engage in constructive discussions and to obtain an initial view from government officials of the proposed transaction.

We are thankful to each of the chapter authors and their firms for the time and expertise they have contributed to this publication, and also thank Law Business Research for its ongoing support in advancing such an important and relevant initiative.

Please note that the views expressed in this book are those of the authors and not those of their firms, any specific clients or the editors or publisher.

Calvin S Goldman QC and Michael Koch
Goodmans LLP
Toronto
August 2020

Chapter 6

GERMANY

Oliver Schröder and Stephanie Birmanns[1]

I INTRODUCTION

Rules on foreign investment have long been the subject of considerable discussion and public interest in Germany. The *Siemens/Alstom* merger, which was ultimately blocked by the European Commission,[2] and the perceived role of the German government in the aborted *Deutsche Bank/Commerzbank* merger are vivid recent examples of this development. The German Federal Minister for Economic Affairs and Energy has announced a 'National Industrial Strategy 2030'[3] to promote the creation of European and German champions and there continues to be active political debate regarding its implementation.

In this context, the traditional market-liberal approach to foreign investment control in Germany has been gradually changing. Following the acquisition of German robotics company Kuka by Chinese Midea in 2016, there was widespread political concern and scepticism about the adequacy of existing rules, which did not allow the German government to block the transaction. This led to a first revision of foreign investment rules in 2017, whereby 'critical infrastructure' businesses were explicitly addressed and made subject to a notification obligation, and timelines for review were significantly expanded.[4] When State Grid Corporation of China in 2018 tried to purchase a minority stake of 20 per cent in 50Hertz, the electricity transmission system operator, co-shareholder Elia, the Belgian utility, exercised a right of first refusal. Subsequently, a second 20 per cent stake came to market. As foreign investment rules at that time only applied at a threshold of 25 per cent of voting rights, the government had no legal tools at hand to block the acquisition, but negotiated with Elia a renewed exercise of the right of first refusal, with a pre-wired sale of the stake to German state-owned bank KfW.[5] In August 2018, the German government authorised

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2 European Commission, decision of 6 February 2019 in case M.8677 – *Siemens/Alstom*, preliminary public version available at https://ec.europa.eu/competition/mergers/cases/decisions/m8677_9376_3.pdf.

3 BMWi, National Industrial Strategy 2030, Strategic guidelines for a German and European industrial policy, available at www.bmwi.de/Redaktion/EN/Publikationen/Industry/national-industry-strategy-2030.html.

4 BMWi, Ninth Amendment to the Foreign Trade and Payments Ordinance, BAnz AT 17 July 2017 V1; Circular Order 5/2017 of 14 July 2017, BAnz AT 17 July 2017 B1 (an English translation of the Ordinance is available at www.gesetze-im-internet.de/englisch_awv/); cf. also *Becker/Sachs*, NZG 2017, 1336; *Boewe/Johnen*, NZG 2017, 1095.

5 Reuters, 'Germany moves to protect key companies from Chinese investors' (27 July 2018), available at www.reuters.com/article/us-50hertz-m-a-kfw/germany-moves-to-protect-key-companies-from-chinese-investors-idUSKBN1KH0RB.

the prohibition of a transaction for the first time, when Chinese Yantai Taihai Corporation attempted to acquire Leifeld Metal Spinning, as the target produced high-tech materials relevant for the nuclear sector.[6]

In light of the 50Hertz transaction, German rules on foreign investment were tightened a second time in late 2018[7] and since then the rules have applied when 10 per cent of voting rights in enterprises active in critical infrastructures are acquired directly or indirectly. In addition, certain media companies were added to the critical infrastructure list. Apart from critical infrastructures, the applicable general threshold for foreign investment review remains at 25 per cent of voting rights.

Following these earlier changes in 2017 and 2018 and with the adoption of a legislative bill amending the German Foreign Trade Act (AWG) shortly before the parliamentary summer break in 2020,[8] the level of scrutiny has been increased yet again. Formally on the basis of the EU Screening Regulation,[9] but clearly also influenced by the current covid-19 crisis, the new rules (the 2020 Revisions) have substantially tightened several core provisions of German foreign investment control, introducing, inter alia, a suspensory effect and a much relaxed substantive review standard; health-related industries have also been included in the definition of critical infrastructures.[10]

It is to be expected that, on top of these revisions to the AWG, the planned adoption of a 16th amendment to the Foreign Trade and Payments Ordinance (AWV), containing several key implementation rules, will further expand the scope of government review as the list of critical infrastructure businesses (and corresponding review and prohibition rights) will be greatly expanded to include, in particular, critical technologies, such as cybersecurity, nanotechnology and artificial intelligence.

In practice, the approach taken by the authorities also seems to have become more cautious, and the exercise of prolonged review periods is a realistic risk where investments in certain sensitive areas are concerned, with a resulting impact on overall transaction timelines and transaction certainty.

II FOREIGN INVESTMENT REGIME

The foreign investment regime in Germany is bifurcated into a 'sector-specific' and a 'cross-sectoral' control regime.

6 BBC, 'Chinese takeover of German firm Leifeld collapses' (1 August 2018) available at www.bbc.com/news/world-europe-45030537.

7 BMWi, Twelfth Amendment to the Foreign Trade and Payments Ordinance, BAnz AT 28 December 2018 V1; Circular Order 3/2018 of 19 December 2018, BAnz AT 28 December 2018 B1; cf. *Annweiler*, NZG 2019, 528; *Slobodenjuk*, BB 2019, 202; *Dammann de Chapto/Brüggemann*, NZKart 2019, 93.

8 First Amendment to the Foreign Trade Act and other Acts of 10 July 2020, BGBl. Part I 16 July 2020, p. 1637 et seq.

9 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.

10 BMWi, Fifteenth Amendment to the Foreign Trade and Payments Ordinance, BAnz AT 2 July 2020 V1.

i Sector-specific regime

There are specific rules that apply to the acquisition of businesses operating in areas relevant to national defence or other similarly sensitive security areas (the sector-specific control regime). In particular, if a company is to be acquired that produces certain goods listed in the war weapons control list, specially constructed engines or gears for tanks or military tracked armoured vehicles, products with IT security features used to process classified government information or certain goods with a specific military use listed in the export list, a notification of the investment must be submitted by any non-German investor pursuant to Section 60, Paragraph 2 of the AWV. The relevant threshold of ownership that triggers this notification obligation is 10 per cent of the voting rights of the company (or the acquisition of a business through an asset deal by a company in which an investor holds at least 10 per cent of the voting rights). Prior to clearance by the Federal Ministry for Economic Affairs and Energy (BMWi), the underlying contracts are invalid and the transaction is therefore provisionally suspended. In its review, the BMWi considers whether the acquisition poses a threat to essential security interest of the Federal Republic of Germany. Similar rules also apply to the acquisition of a company operating certain high-grade earth-remote sensing systems (Section 10 of the Act of Satellite Data Security). The sector-specific investment review is not covered in this chapter in further detail, as it is rare in practice because of the narrow focus on military-use technology.

ii Cross-sectoral regime

Outside the sector-specific review, a cross-sectoral review system applies pursuant to Section 55 et seq. of the AWV. This cross-sectoral review applies to businesses of all sectors regardless of the size of the company involved in the acquisition. However, within the cross-sectoral review scheme, a distinction is made between the acquisition of entities or businesses active in critical infrastructures and other companies.

iii Type of investors concerned

Under the cross-sectoral investment regime, acquisitions by any investor outside the EU or the European Free Trade Association (EFTA) are covered. It is irrelevant in principle whether the investor is a private investor or state owned, and whether the investor is actually already operating within the EU or EFTA (e.g., through a branch). For the determination of whether an investor qualifies as a foreign investor, its place of incorporation or factual place of management outside the EU or EFTA is decisive.[11]

As will be discussed below, the cross-sectoral investment review also covers indirect acquisitions of voting rights and businesses. As a consequence, it is sufficient in principle if one entity within a corporate chain is incorporated in or managed from outside the EU or EFTA to trigger a foreign investment review. In particular, under the provisions of the AWV, it will generally not be relevant whether the direct acquisition occurs through a German or EU entity, if and as long as the entity is controlled (for purposes of the foreign investment regime) by non-EU or non-EFTA entities.

The AWV contains a further rule, pursuant to which even acquisitions by EU or EFTA-incorporated investors may be subject to review by the BMWi if there are reasons to

11 See the definition 'EU Resident' and 'Non-EU Resident' in Section 2(18) and (19) of the AWG; cf. also *Böhm*, ZBB/JBB 2019, 115, 118.

believe that the use of the local entity is (at least in part) based on a scheme to circumvent the application of foreign investment rules, particularly because of the acquiring vehicle not having operative business or a local presence in the form of offices, personnel or production assets.[12] Because of the broad definition of 'indirect acquisitions', discussed further below, it is unclear in which context these anti-circumvention rules may still be relevant outside a scenario where an acquisition vehicle is held in trust.[13]

iv Type of investment

The AWV covers acquisitions of an existing 'domestic enterprise' or of a 'direct or indirect participation' in an existing domestic enterprise. Consequently, any acquisition of shares in a German company above the applicable threshold is subject to review, regardless of whether the shares are acquired through a share deal, through a capital increase, through a merger or through a swap transaction. However, as the law requires the acquirer to reach a certain voting rights threshold (see Section II.v), the mere acquisition of non-voting shares or option or preemptive rights to acquire shares in future is not subject to foreign investment review prior to the exercise of those rights.

In addition to the acquisition of voting shares through a share deal or similar transaction, the law also covers the acquisition of an enterprise through an asset deal. As long as the acquisition relates to an enterprise (i.e., a group of assets comprising a business undertaking that are used for a commercial purpose, rather than individual assets that do not form an enterprise),[14] any acquisition of such an enterprise by an entity in which an investor holds voting rights above the applicable threshold will trigger the foreign investment review.[15]

Contrary to the acquisition of existing enterprises, establishing a new company (greenfield investments) or the creation of commercial joint ventures (i.e., where there is no corporate participation in an existing German entity) will not be subject to restrictions under the foreign investment control regime.[16]

v Applicable voting rights thresholds

Acquisitions of voting shares or of a business through an asset deal are only subject to review if certain thresholds of voting rights are reached or surpassed. By contrast, the value of shares or assets acquired is irrelevant for the purposes of foreign investment review.[17]

12 Section 55(2) AWV.

13 According to some commentators, the circumvention rule should also apply if a domestic entity is the direct acquirer and the entity is held by a non-EU or non-EFTA investor; this would have the consequence that indirect acquisitions of non-EU or non-EFTA acquirers with a direct domestic acquirer would only be subject to scrutiny in a circumvention case. Particularly in view of the recent revisions to the AWV, this position seems inconsistent with the wording of the law and in our experience is also not in line with the interpretation applied by the BMWi.

14 BMWi, FAQ re investment control under foreign trade laws of May 2019, p. 1, Section I Question 2.

15 See Section 55(1a) AWV.

16 ibid.

17 id., Question 3.

General rule

First, there is a general threshold of 25 per cent of voting rights covering acquisitions of any domestic enterprise irrespective of the business segment it operates in. The review will be triggered at the time the investor 'reaches or surpasses' this threshold of 25 per cent of voting rights.[18]

Critical infrastructures

In contrast, the relevant control threshold is significantly lower (and the review standard significantly stricter) if the enterprise in question operates in certain specific business sectors of particular relevance to public order or security. These sectors, listed in Section 55(1), Sentence 2, Nos. 1–11 of the AWV, were recently broadened through the 2020 Revisions and against the background of the covid-19 crisis to include health-specific industries. Where businesses active in these sectors are concerned, an acquisition of 10 per cent of voting rights already suffices to trigger the foreign investment review process. In cases of above-threshold acquisitions of companies active in these business sectors, a mandatory notification obligation applies and the closing of any transaction is mandatorily suspended until clearance is granted. Further, the law stipulates that in the case of acquisitions in the sectors subject to review, a threat to public order or security may be considered to be particularly likely.[19]

The critical infrastructures subject to the lower 10 per cent control threshold are comprised of the following business areas.

German companies that:

a operate critical infrastructures within the meaning of the Act on the Federal Office for Information Security[20] (e.g., facilities that (1) belong to the energy, information technology and telecommunications, transport, healthcare, water, food, finance or insurance sector, and (2) are vital to the functioning of the community);

18 It is debatable whether the review will be triggered again once an investor acquires additional voting rights above the applicable threshold. The wording of the relevant provisions in Section 56(1) AWV does not suggest this conclusion. For this view, see *Becker/Sachs*, NZG 2017, 1336, 1338; Pottmeyer, in: *Wolffgang/Simonsen/Rogmann*, AWR-Kommentar, Sections 55 to 59 of the AWV, Paragraph 22; *Hasselbrink*, GmbHR 2010, 512, 515; *Krause*, BB 2009, 1082, 1083; *Traugott/Strümpell*, AG 2009, 186, 191; cf. also for the legislator's intention reflected in BT-Drs. 16/10730, p. 13. However, certain authors hold that the acquisition of higher or majority rights will justify a renewed review, in particular if the shareholder acquires a relative or absolute voting majority: *Hensel/Pohl*, AG 2013, 849, 854; *Besen/Slobodenjuk*, BB 2012, 2390; *Söhner*, RIW 2011, 454, 459; *Stork*, EWS 2009, 454, 457.

19 It is unclear whether the wording of the law constitutes a presumption, or just mandates a particularly thorough screening of acquisitions in these sectors; in our view the latter interpretation is warranted, as the burden of proof lies with the public authorities pursuant to applicable general administrative law (Section 24 of the German Federal Administrative Procedure Act) and this principle would otherwise be jeopardised. In any event, the list of critical infrastructures provided by the law is conclusive only for the purposes of the notification obligation, but merely illustrative for the purposes of determining a threat of public order or security, so that prohibitions may also be issued based on public order or security outside these sectors (and with a relevant threshold of 25 per cent applying), cf. BMWi, FAQ re investment control under foreign trade laws of May 2019, p. 3, Section II, Question 2.

20 See also the pertinent Ordinance regarding the Determination of Critical Infrastructures (BSI-KritisV) issued by the Federal Office for Information Security.

b develop or modify certain sector-specific software[21] for the operation of critical infrastructures within the meaning of the Act on the Federal Office for Information Security (e.g., software for (1) power plant or network control technology in the energy sector, (2) control and automation technology in the water sector, (3) cash supply, card-based payments or security transactions, (4) hospital information systems or the marketing of prescription drugs, (5) air, rail or road transport of passengers and goods, and (6) food supply);

c are entrusted with the operation of telecommunications surveillance measures according to the Telecommunications Act or manufacture technical equipment for such measures;

d provide certain cloud computing services;

e have an authorisation for components or services related to the telematics infrastructure according to Volume V of the Social Insurance Code;

f are active in the media sector and, with particular topicality and broad impact, contribute to forming public opinion via broadcasting, 'telemedia' or print media;

g provide services needed to ensure the trouble-free operation and functioning of state communication infrastructures within the meaning of Section 2 Subsection 1 Sentences 1 and 2 of the Act establishing the Federal Institute for Digital Radio of Authorities and Organisations with Security Responsibilities;

h develop or manufacture personal protective equipment within the meaning of Article 3(1) of Regulation (EU) 2016/425 of the European Parliament and of the Council of 9 March 2016 on personal protective equipment;

i develop, manufacture or market essential medicines, including their precursors and active ingredients, within the meaning of Section 2 Subsection 1 of the Medicinal Products Act to ensure the provision of healthcare to the population, or possess a corresponding licence under pharmaceuticals law;

j develop or manufacture medicinal products within the meaning of medicinal product law intended for diagnosis, prevention, monitoring, predicting, forecasting, treating or alleviating life-threatening and highly infectious diseases; or

k develop or manufacture in vitro diagnostics within the meaning of medicinal product law that serve to supply information about physiological or pathological processes or conditions or to stipulate or monitor therapeutic measures relating to life-threatening and highly infectious diseases.

vi Attribution of voting rights

The AWV contains far-reaching rules on the attribution of voting rights to an investor.

Pursuant to Section 56(2), No. 1 AWV, voting rights held by third parties in which the acquirer holds a participation corresponding to the relevant threshold applying to a direct acquisition are fully attributed to the investor. Therefore, if, for example, a non-EU entity holds 10 per cent of an intermediary entity holding 6 per cent of the shares of a domestic German company operating a critical infrastructure business and the non-EU or non-EFTA entity acquires 4 per cent of the shares of the German company, this transaction triggers

21 Section 55(1), Sentence 3 AWV sets out certain further details on the definition of sector-specific software; according to guidance given by the BMWi, such software must have been developed or modified with the specific purpose of use for critical infrastructures; a software that is not primarily aimed at such a purpose (but may be used within critical infrastructures), is not covered; in contrast, cf. BMWi, FAQ re investment control under foreign trade laws of May 2019, p. 2, Section I, Question 7.

a potential review by the BMWi. Pursuant to Section 56(2), No. 2 AWV, shareholdings of a third party are also attributed if the acquirer and the third party have concluded an agreement on the joint exercise of voting rights (acting in concert).

Moreover, these attribution rules apply throughout the chain in the case of indirect acquisition.[22] If, for example, a German company acquires a 10 per cent shareholding in a critical infrastructure business, the German company is majority held (or least 10 per cent thereof is held) by an EU holding company (or HoldCo) and the EU HoldCo is in turn held with a shareholding quota of at least 10 per cent by a non-EU or non-EFTA investor, the investment will be subject to review.

As a consequence of these far-reaching attribution rules, which are not linked, in particular, to corporate control thresholds or the relevant control definitions under antitrust law, transaction structures will have to be closely scrutinised. As it may be sufficient for one entity within the chain that is not located in the EU or EFTA to acquire, in the context of the transaction, a shareholding of at least 10 per cent (or 25 per cent, as the case may be) (indirectly) in a German entity, the full transaction structure must be assessed on a case-by-case basis to determine whether notification obligations (in the case of critical infrastructures) or review rights (in the case of acquisitions not concerning critical infrastructures) apply.

vii Intra-group restructurings

It is debatable whether the attribution of voting rights (and the resulting need to subject an acquisition to foreign investment review) is warranted in the case of merely restructuring an existing investment within a corporate group. For example, if a German entity that was indirectly held by a US HoldCo is moved within the corporate structure and thereby becomes the subsidiary of a Chinese interim HoldCo that itself is held by the pre-existing ultimate parent US HoldCo, the transaction will, applying the wording of the AWV, be subject to review, although there is no change of control on the level of the ultimate parent. As the competent authority in our experience is not taking a clear position in these cases, the parties should consider an application for a certificate of non-objection at least in cases where it is questionable whether the subsidiary concerned may operate in a critical infrastructure or public order or security may otherwise be affected.

viii Notification obligation and application for certificate of non-objection

Where the acquisition of a business active in critical infrastructures (as described in Section II.v) is concerned, the law requires a mandatory notification to the BMWi by the acquirer.[23] The notification obligation is triggered by the conclusion of the contract obliging the parties to transact (generally, the sale contract), not just at the time of transfer *in rem* or closing. The law only stipulates that the notification is to be made in writing but does not contain further formal or substantive requirements. Normally, it will be sufficient to describe the transaction and parties (in particular the investor and the applicable control structure through the corporate chain) and to provide a high-level description of the target's and the

22 Section 56(3) AWV.

23 Section 55(4), (1) AWV. A notification with regard to the acquisition of critical infrastructure and a certificate of non-objection (see Sections IV.iv and IV.v) would both need to be executed in the German language pursuant to applicable general administrative law (Section 23 of the German Federal Administrative Procedure Act).

investor's business (explaining, in particular, why and to what extent the transaction relates to critical infrastructures). Upon receipt of the notification, the BMWi will decide upon the commencement of a formal review procedure (see Section IV.vi).

Outside the acquisition of critical infrastructures, there is no obligation to notify. However, to avoid uncertainty with regard to a potential *ex officio* review, an investor may apply for a certificate of non-objection.[24]

A certificate of non-objection confirms that the acquisition does not raise any concerns related to public order or security. To apply, the investor should submit basic information on the planned acquisition, the domestic enterprise that is the subject of the acquisition and the respective fields of business of the investor and the enterprise to be acquired to the BMWi. The BMWi will then decide within a period of two months whether it will enter into a formal review process, failing which the certificate shall be deemed to have been issued (see Section IV.vi).

While it is not mandatory to apply for a certificate of non-objection, in practice, it will in many cases be recommendable to do so. As will be explained below, an *ex officio* review by the BMWi will only be triggered by the BMWi obtaining positive knowledge of a transaction, with a statutory longstop date of only five years from conclusion of the acquisition contract. In the absence of an application for a certificate of non-objection, the investor will not be in a position to demonstrate that the BMWi obtained this positive knowledge, so there will be a prolonged period of uncertainty and a possibility that the BMWi will retroactively seek to unwind the transaction. Therefore, if there is the possibility that the transaction may raise concerns with respect to public order or security, it would be recommended to apply for a certificate of non-objection. Experience shows that such applications are handled in a pragmatic and time-efficient way in most cases where concerns regarding public order or security can easily be ruled out, and instances where the BMWi proceeds to a more comprehensive review (e.g., by requesting additional documents) have been relatively rare so far. Whether this continues to be the case after the 2020 Revisions, remains to be seen.

III TYPICAL TRANSACTIONAL STRUCTURES

As explained, the foreign investment regime in Germany covers both share and asset acquisitions of an existing German enterprise.

In a typical share deal, the seller and purchaser will agree on a sale of certain identified shares but will not immediately consummate the sale. Rather, closing will be conditioned upon obtaining regulatory approvals. Where public order or safety are implied (either because of the acquisition of shares in a company operating critical infrastructures or because of general considerations) and the relevant voting right threshold is reached or surpassed, the parties will generally include the lapse of the applicable review period or obtaining a certificate of non-objection as a condition precedent for closing. This is to mitigate the risk that a transaction may have to be unwound in the event of an adverse decision by the BMWi. It is important to note in this context that formerly the review process outside the

24 Such an application is also permissible in conjunction with a notification pursuant to Section 55(4) AWV – with the effect of shortening the applicable review period from three to two months (see Section II.vi). An application for a certificate of non-objection is deemed to include the required notification (if any) but not vice versa, so that it should always be made clear that a certificate of non-objection is being applied for.

sector-specific control regime was non-suspensory, but the 2020 Revisions have introduced a suspensory effect and strict anti-gun-jumping prohibitions for acquisitions of critical infrastructure businesses (see Section IV.i).

Where share acquisitions through merger or capital increase transactions are concerned, this will be commonly based on an investment agreement and technical implementation of the share acquisition will then occur according to a court-sanctioned scheme. Similarly to a share purchase transaction, the investment agreement will generally stipulate foreign investment clearance as a condition precedent to proceeding with execution of the relevant corporate acts.

In a public takeover scenario, a separate and well-defined legal regime applies and any decision by a bidder to acquire shares in an entity that is domiciled in Germany[25] and listed on an EU organised market will need to be notified to the financial regulator (BaFin), relevant stock exchanges and the public immediately. Thereupon, a strict timeline is triggered, which eventually leads to the publication of an offer document with prescribed acceptance and settlement periods (depending on whether the bidder seeks to obtain control over the target,[26] various minimum pricing and most favoured treatment rules may apply as well). For the purposes of foreign investment review, it is generally permissible to make public offers subject to obtaining required regulatory clearances, and the bidder will include a corresponding condition precedent to settlement of the offer in its offer document. While the law stipulates[27] that the *ex officio* review period is triggered by the BMWi obtaining knowledge of the publication of the bidder's intention to launch an offer (and not just with the launch of the offer as such), this should be irrelevant in most cases, as a bidder will generally notify the transaction (or apply for a certificate of non-objection) in a public takeover scenario.

Finally, in the case of an asset deal, a consideration similar to that in a share purchase will apply.

IV REVIEW PROCEDURE

i Suspensory effect and anti-gun-jumping provisions for critical infrastructure acquisitions

Formerly, the review procedure (for both critical infrastructure business acquisitions and other, non-critical infrastructure, acquisitions) had no suspensory effect, therefore it was possible to consummate a transaction, although in the event of an adverse decision by the BMWi the transaction had to be unwound.

This has changed with the 2020 Revisions. Now, in cases where a notification to the BMWi is required (i.e., in all cases of acquisitions of critical infrastructure businesses), any agreement or arrangement between the seller and the acquirer aimed at consummating the transaction remains provisionally void until clearance has been granted (or is deemed to have been granted following the expiry of the relevant review period). Therefore, in contrast to the

25 Certain exceptions apply where a company is domiciled in the EU but has a (sole or primary) listing in Germany, see Section 1(3) Takeover Act.

26 The German Takeover Act defines control as the acquisition of at least 30 per cent of voting rights. An acquisition of this percentage of voting rights outside a public offer (also based on various attribution rules or acting in concert) triggers an obligation to launch a mandatory offer at a prescribed minimum price.

27 Section 55(3) AWV.

previous situation a transaction cannot be closed while the review is pending. In particular, the acquirer is prohibited from exercising any voting rights directly or indirectly, and may not conclude voting agreements or give voting instructions. The acquirer may not receive any dividend payments nor equivalent economic rights prior to clearance.

Further, under newly imposed information sharing restrictions, it is also impermissible to make available to a critical infrastructure acquirer, prior to foreign investment clearance, enterprise-specific company information as far as this relates to business areas or business objects relevant for the classification of the enterprise as a critical infrastructure or otherwise to be considered specifically in the context of the review for their impact on public order or security. In addition, neither may the acquirer receive company-specific information designated as relevant by the BMWi upon notification of the proposed acquisition. Any voluntary breach of these restrictions will be subject to criminal liability and penalised by imprisonment of up to five years. In cases of negligent behaviour, an administrative fine will apply.

While the legislative materials state that these information sharing restrictions shall only cover information whose disclosure must be prevented because of the particular impact its premature disclosure would have on public order or security and a related critical infrastructure, it will be very difficult in practice to segregate critical information in this sense from information that can be disclosed (e.g., commercial, legal or accounting information or other company information that is irrelevant for the purposes of the foreign investment review).

A key aspect of an acquirer's due diligence is the operational and commercial review of the target entity and the validation of its business model. This will in all likelihood require the disclosure of sensitive business data (including data that may be relevant for foreign investment review purposes) to an acquirer to evaluate the feasibility of a transaction prior to signing, and thus prior to a formal notification of the transaction to the BMWi. It remains unclear how such a pre-signing due diligence could be facilitated in light of the broad prohibition on information sharing upon notification of the transaction. One solution to consider could be the disclosure of such information to clean teams, an approach that is familiar under antitrust restrictions, so that the acquirer and economic beneficiary would not be provided with critical information directly but relevant advisers (only) could assess the viability of the transaction. In practice, it is likely that any such approach and the classification of relevant data would have to be arranged with the BMWi beforehand, to avoid the application of sanctions.

ii Review procedure

With respect to the applicable process and timelines for cross-sectoral review, an *ex officio* review has to be distinguished from a review upon a notification of the transaction or a review process triggered by the application for a certificate of non-objection.

iii Ex officio review

To the extent that the investor is not obliged to notify the acquisition of voting rights (i.e., where no acquisition of a critical infrastructure business is concerned) and does not notify, or apply for a certificate of non-objection voluntarily, the BMWi may review transactions *ex officio*.

Such an *ex officio* review can be commenced by the BMWi if it notifies the direct acquirer and the domestic company affected by the acquisition about the opening of an in-depth investigation procedure within two months of obtaining knowledge of the conclusion of the relevant acquisition documentation.[28] Any such notification by the BMWi must be in writing; for the purposes of determining whether the deadline for initiating an in-depth investigation has been met, service of the notice to the domestic company affected by the acquisition is decisive. In addition, a statutory longstop date of five years from conclusion of the acquisition documentation applies irrespective of the knowledge of the BMWi.

Given that the standard review deadline is only triggered by positive knowledge on the part of the BMWi, it will be very difficult in practice to determine when this period has lapsed if the acquirer does not apply for a certificate of non-objection or does not file a formal notification pursuant to Section 55(4) AWV.

iv Review upon notification

Where the acquisition of critical infrastructure businesses is concerned, the acquisition[29] has to be notified to the BMWi in writing. Through this notification, which has to be submitted by the acquirer without delay after signing, the BMWi will obtain positive knowledge of the transaction, launching the two-month deadline for a review to determine whether an in-depth investigation is required (as discussed in Section IV.iii).[30]

Where an acquirer chooses to apply for a certificate of non-objection, a shortened review period of two months applies (see Section IV.v).

v Review upon application for certificate of non-objection

An acquirer may apply[31] to the BMWi in writing for the issuance of a certificate of non-objection. Such an application would generally be prudent if there are at least initial concerns that the transaction may present a threat to public order or security. If an application is made, the BMWi has to decide whether it intends to open an in-depth investigation within two months of receipt of the application. If it does not notify the applicant of its intention to open an in-depth investigation in writing within this two-month period, the certificate of non-objection is deemed to have been issued (and this deemed issuance can generally not be revoked or withdrawn by the Ministry any more other than in exceptional cases, such as where the information made available by the applicant was incorrect).[32] Applying for a certificate of non-objection does not trigger administrative fees or costs (other than the applicant and its advisers' own costs) .

28 Section 14a(1) AWG; Section 55 (3) AWV.

29 The notification obligation is already triggered by the conclusion of a purchase contract, not just at the time of the *in rem* acquisition.

30 The BMWi will generally not inform the notifying parties that no in-depth investigation is launched unless a certificate of non-objection is being applied for.

31 Such an application can be submitted as soon as the applicant is in possession of the relevant documents and in any case prior to signing on the basis of sufficiently progressed transaction documentation.

32 In particular, Sections 48 and 49 of the German Federal Administrative Procedure Act.

vi In-depth investigation

If the BMWi decides to initiate an in-depth investigation, the direct acquirer is required to submit documentation to the BMWi as determined by the Ministry by way of the general instruction published in the Federal Gazette.[33] The BMWi may request all entities directly or indirectly involved in the acquisition to submit additional documentation as needed for carrying out the investigation.

For the in-depth investigation, a deadline of four months after the receipt of complete documents applies. Within this four-month period, the BMWi may prohibit the direct acquirer from making the acquisition or alternatively it may issue instructions to safeguard the public order and security of the Federal Republic of Germany. If it intends to issue such instructions or prohibitions, it must obtain the approval of the German federal government.

In addition, the BMWi may negotiate and enter into public law contractual agreements with the acquirer that are aimed at guaranteeing public order and security in the Federal Republic of Germany. The four-month deadline for the issuance of prohibitions or instructions is suspended for the duration of negotiations.[34]

If the BMWi intends to prohibit a transaction, it may in particular prohibit or restrict the exercise of voting rights in the acquired company that belong to a non-EU or non-EFTA acquirer or are attributed to him or her, or appoint a trustee to bring about the unwinding of the completed acquisition at the expense of the acquirer.

vii Substantive scope of review, new 'likely to affect' standard, and prohibitions and orders

Prior to the 2020 Revisions, the BMWi in its substantive review assessed whether an investment presented a risk to public order or security in Germany that was 'actually threatening' and sufficiently important potentially to affect fundamental public interests.[35] The term 'public order or security' refers to Article 36, Sections 52(1) and 65(1) of the Treaty on the Functioning of the European Union and has to be interpreted pursuant to EU law.

Under these provisions, grounds of public order and security may justify restrictions of the free movement of goods, capital and payments and the freedom of establishment. Historically, the European Court of Justice has applied these criteria very restrictively and ruled that abstract concerns about investments in undertakings in strategic sectors do not constitute a valid justification based on public order or security.

Under the 2020 Revisions, this conservative approach is likely to change quite dramatically. Pursuant to Article 4 of the EU Screening Regulation, a Member State, in determining whether public order or security are affected, may take into account whether the foreign investor is directly or indirectly controlled by government, including state bodies

33 The documentation must cover, inter alia, detailed information about the purchaser, the target and its business, shareholdings before and after the acquisition, business contacts to public bodies and the financing of the acquisition as well as a copy of the acquisition agreement; see a complete list of required information in BMWi, General Ruling of 22 March 2019 on the required documentation under Section 57 of the AWV, BAnz AT 11 April 2019 B2.

34 There is no maximum duration foreseen for these negotiations and the ensuing suspension; however, the acquirer may declare the negotiations failed at any time and thereupon the deadline will continue to run. In practice, however, this will lead to a prohibition and will usually not be practicable.

35 Bast, in: *Hocke/Friedrich*, Außenwirtschaftsrecht, Section 7 AWG, Paragraph 10b; *Lechler/Germelmann*, Zugangsbeschränkungen für Investitionen, p. 34 et seq.

or armed forces of a third country, has already been involved in activities affecting security or public order in a Member State or whether there is a serious risk that the foreign investor engages in illegal or criminal activities. This review standard is mirrored in the new provisions of Sections 55(1b) AWV. Therefore, authorities may apply a broader understanding of public order and security in future and the BMWi has considerable discretion in determining whether public order or security are at risk.

There are two additional specific aspects to consider. First, in evaluating whether a transaction should be prohibited, in future the BMWi will not only consider German public order or security, but also (in line with the EU Screening Regulation) take into account concerns regarding the public order or security of other EU Member States or effects on certain EU-wide projects. This will clearly make the required analysis more complex, costly and time-consuming.

Second, the level of scrutiny has been significantly tightened by the 2020 Revisions with the introduction of a 'likely to affect'[36] standard of review. This means that it is no longer necessary for the BMWi to show an 'actual and serious threat' to public order or security as an effect of the transaction, but merely sufficient to establish that the foreign direct investment is likely to affect public order or security.

On the one hand, the degree of prognostic certainty of the BMWi's decision is thereby reduced, as a potential future effect on public order or security (rather than an actual impact) is sufficient. Unfortunately, it remains unclear what degree of certainty will be required and we are concerned that the law will enable a broad exercise of discretion in this regard.

On the other hand, the necessary substantive impact is reduced from a threat to a status of being affected, which clearly is a less stringent requirement and also affords the BMWi broad discretion.

It remains to be seen how the BMWi and eventually the courts will interpret these open-ended definitions, but it is already clear that the new standard's vagueness will reduce deal certainty for any transaction subject to foreign investment review.

If a prohibition decision is issued, the transaction will probably have to be abandoned irrespective of whether the decision might be upheld in subsequent litigation against the BMWi, therefore in practice the authority has significant leverage to negotiate public law agreements with investors, containing certain security-related conditions or commitments (see Section IV.vi). In previous years, the German government has concluded several such agreements with purchasers.[37]

viii Legal protection against decisions by the BMWi

If the BMWi opens a review procedure, prohibits an acquisition or imposes restrictions, these decisions may be challenged according to general principles of administrative law. Such legal challenges may be brought exclusively by the acquirer or by the seller, but not by the relevant target.[38] There is no need to carry out previous opposition proceedings as the decisions by the BMWi are issued by a higher federal authority and are thus not open to such proceedings pursuant to Section 68(1), No. 1 of the German Code of Administrative Court Procedure.

36 *Voraussichtliche Beeinträchtigung.*

37 BT-Drs. 19/1103, p. 8.

38 *Krause*, BB 2009, 1082, 1087; *Müller/Hempel*, NJW 2009, 1638, 1641; *Seibt/Wollenschläger*, ZIP 2009, 833, 844; *Voland*, EuZW 2010, 132, 135.

Because the foreign investment regime shall only protect public order and security and not the interests of third parties, third parties will not be in a position to challenge a clearance or deemed clearance (or any other decisions by the BMWi) in court.

In practice, these legal protections are not particularly relevant. Even if legal action against a prohibition or instruction by the BMWi can be brought in theory, the timeline and publicity of a transaction will generally not permit sustaining deal uncertainty for the prolonged duration of a legal proceeding.

V FOREIGN INVESTOR PROTECTION

Germany has entered into more than 130 bilateral investment treaties (BITs) and is the country with the most BITs worldwide. Many of the German BITs have been concluded based on a model agreement and customarily contain protection against expropriation without adequate compensation, principles of fair and equitable treatment, principles of full protection and security, most favoured nation treatment, protection against discrimination and provisions on the unrestricted transfer of capital and profits. While several of these BITs have been concluded a long time ago and older BITs do not always contain state-investor dispute settlement clauses, German BITs have provided for dispute settlement by way of arbitration since the 1980s. In particular, Germany is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, which it signed in 1966 with ratification and entry into force in 1969.[39]

Cases where a dispute settlement mechanism under a BIT has been initiated against Germany are very rare. As at August 2020, only one dispute is pending against Germany and two cases have been settled or discontinued (whereas there are 25 cases by German investors against foreign states pending and a significant number of decided cases).[40]

In 2009, competence for foreign investor protection was transferred to the EU with the entry into force of the Lisbon treaty. As a result, EU Member States can no longer negotiate BITs without the involvement of the European Commission and no new German BITs have entered into force since 2009. Existing BITs are grandfathered, however, as long as the EU has not concluded investment treaties replacing the respective bilateral BITs. Since 2009, the EU has tried to negotiate free trade agreements with a number of countries and concluded negotiations in particular with regard to Canada, Singapore and Vietnam (the latter two agreements recently entered into force and the agreement with Canada is pending full ratification).

VI CURRENT DEVELOPMENTS

i European coordination

Although individual Member States retain their authority to screen foreign investments pursuant to the EU Screening Regulation, numerous procedures and criteria will become applicable in October 2020 for cooperation between Member States and with the European Commission. An EU-wide framework will be established granting competence to the

39 BGBl. II 1969, No. 12, p. 369.

40 For further information, see the statistical data on www.german-investment-treaty-disputes.de.

European Commission to intervene with an official opinion on grounds of public order or security, and a forum for Member States will be provided to weigh in and potentially affect the course of foreign investment activities across the EU.

Pursuant to the EU Screening Regulation, Member States will be required to notify the European Commission and all other Member States of an ongoing foreign investment screening and provide certain information on the transaction. Upon such notification, other Member States may provide comments to the Member State conducting the screening where they consider that the foreign investment undergoing the screening is likely to affect their public order or security.

Equally, the European Commission may issue an opinion where it considers that the foreign investment undergoing the screening is likely to affect public order or security in more than one Member State or certain EU-wide projects or programmes such as the Trans-European Networks for Energy or the Trans-European Transport Network.

Although the European Commission's power to issue opinions is discretionary, if at least one third of Member States consider the foreign investment likely to affect their public order or security, the European Commission must set out its views on the transaction and although technically the opinion does not have binding force, Member States are required to take account of it and provide an explanation if the opinion is not followed.

In practice, therefore, the views of the European Commission and of other Member States will carry significant weight and investors will need to analyse not only the potential impact in Germany, but also the impact beyond the borders of the actual transaction, with reference to the very broad concept of public order and security.

The precise impact of this process on the timelines for German foreign investment reviews is currently unclear, as the implementing rules in the AWV have not yet been published. However, significant delays are to be expected. Under the EU Screening Regulation, upon notification of an ongoing screening and provision of the required information, the other Member States have 35 calendar days to provide comments and the European Commission should also issue its opinion within that 35-day time frame (but it is allowed an additional five days if Member States provide comments). If the information provided by the Member State conducting the screening is deemed insufficient, the European Commission and other Member States may also request to be provided with further information within 15 calendar days of the initial notification and thereupon have 20 calendar days to provide comments or an opinion.

ii White Paper on foreign subsidies

In June 2020, the European Commission adopted a White Paper addressing distortions in the European market caused by foreign subsidies.[41] The White Paper, which triggers a public consultation process preparing future legislation, proposes new regulatory tools aimed at closing perceived enforcement gaps when it comes to financial support granted by non-EU governments.

One of these tools specifically addresses potential distortions caused by foreign subsidies facilitating the acquisition of (stakes in) EU companies. It aims at preventing recipients of foreign subsidies from enjoying unfair benefits when acquiring EU companies. To this end, the White Paper suggests the introduction of an additional notification requirement for

41 Available at https://ec.europa.eu/competition/international/overview/foreign_subsidies_white_paper.pdf.

transactions by investors benefiting from financial support of a non-EU government. The notification would need to be made to the European Commission and would have suspensory effect (i.e., the transaction could not close pending the authority's review). According to the White Paper, the relevant standard for prohibiting a transaction (or for requiring commitments that effectively remedy the authority's concerns) would be facilitation of the acquisition by a foreign subsidy and its distortion of the single market.

In addition to adding to the burden for the parties involved, the proposals contained in the White Paper raise a number of issues concerning practicability and legal certainty. Against this background, it seems far from certain that the White Paper will result in EU legislation as soon as 2021, which is the time frame currently envisaged by the European Commission.

Appendix 1

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