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© 2021 Law Business Research Ltd
This ninth 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. This year, in keeping with the considerable increase in prominence of foreign investment review, we are delighted to include new chapters on Austria, Belgium, India, Israel, Japan and the Netherlands, along with several new contributors for countries covered in previous editions. We have also revised the format to focus on the aspects of foreign investment rules that are most critical for dealmakers.

Unprecedented challenges have arisen in 2020–2021 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, this trend has accelerated throughout the past 18 months. Prior to the covid-19 pandemic, the global economy was continuing its trend towards further integration, even with indications of emerging protectionism, and the number of cross-border and international transactions was 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, now in its early post-implementation stages, 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, essential supply chains and industrial policies, as well as heightened national security concerns over cybersecurity, new technologies, communications and other strategic areas.

These and other developments discussed below 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 hand, the latter sometimes weighing heavily against the former. An example of the kind of differing regulatory decisions between the competition authorities and the Ministerial decision making in relation to concurrent foreign investment reviews occurred when BHP Billiton, the global leader in mining based in Australia, which has already engaged in previous significant mining investments in Canada, proposed to acquire the Potash Corporation of Saskatchewan, at an amount of approximately US$40 billion. Both Australia and Canada are members of the Five Eyes with respect to national security matters. That regulatory review process became a highly publicised matter of public interest through much of 2010. In the end, while the Canadian
Competition Bureau cleared the proposed merger, the federal Minister of Industry, following his review under the Investment Canada Act and consultation with his Cabinet colleagues, issued an interim negative decision, in November 2010, on national interest grounds that were never really articulated. Rather than trying to then make further submissions, BHPB decided to withdraw the proposed acquisition. Some commentators at that time suggested that the reasons for the Ministerial position had more to do with the pending elections at the provincial level in Saskatchewan and at the federal level than any significant national interest issue (Potash Corp had a long standing perception among people in Saskatchewan as a historical corporate leader in that province).

A similar split in such regulatory decision making subsequently occurred in November 2013 in relation to the proposed acquisition of Grain Corp of Australia by Archer Daniels Midland Company of the United States. That also was cleared by the competition authority (the Australian Competition and Consumer Commission) following its competition review; however, following subsequent concerns raised by the Foreign Investment Review Board, the Treasurer of Australia, one of the most senior Cabinet members, decided to block the proposed acquisition. Farmer concerns and distribution networks were apparently factors in that decision. Again, some commentators suggested real-world political considerations had some bearing on that negative decision.

As a result of cases such as these and other evolving considerations discussed below, more cross-border mergers have been scrutinised more intensely, with the process delayed or in some cases thwarted, by foreign investment reviews that are increasingly broader 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 both been accelerating and increasing in scope. Concerns about the benefits of globalisation have been on the rise in an environment where nations have found 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 (SOEs) 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 that trigger 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, which saw the introduction of a mandatory notification regime and 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, greater resources are now being allocated to monitoring and enforcement activities. This is making the voluntary filing calculus even more complex as there is no statute of limitations on CFIUS’s jurisdiction if it has not cleared a transaction. As the policy focus has shifted to supply chain security across the globe, CFIUS is being used in conjunction with other US government authorities to wean critical US supply chains off their reliance on Chinese inputs; for example, by either blocking or subjecting to review even ordinary
course transactions with blacklisted Chinese companies. Heightened CFIUS interest and commentary pertaining to certain China-related transactions, such as occurred in relation to TikTok, is a reflection of some of these evolving developments.

In turn, there is greater focus on foreign investment in Europe, where the European Union’s foreign investment screening regulation, which became fully operational in October 2020, gives the European Commission a new central advisory role in coordinating increased scrutiny by Member States and obliges Member States to notify other Member States and the European Commission of foreign investments that they are screening under their national regimes. Furthermore, Member States have themselves introduced new foreign investment regimes (e.g., the Czech Republic and Denmark), are planning to do so (e.g., the Netherlands and Slovakia) or have further updated or tightened their existing foreign investment laws (e.g., Germany by introducing a variety of new sectors that it considers to be sensitive such as artificial intelligence, robotics and nanotechnology). Currently, 18 EU countries have an FDI screening mechanism in place and a senior EU trade official has confirmed that dozens of foreign-investment vetting requests have been notified to the European Commission through the new EU screening mechanism since it came into force.

The United Kingdom has now aligned itself more closely with other countries by significantly strengthening its powers to intervene in deals that may threaten national security. The National Security and Investment Act 2021 marks a step change in the UK government’s power to screen, impose conditions on and block deals that pose unacceptable risks. Once the new regime comes into force on 4 January 2022, it will require mandatory notification of investments in 17 strategically sensitive sectors that cross certain share or voting rights thresholds – a significant change in light of the UK’s (continuing) voluntary merger filing regime. Transactions in all other sectors will be susceptible to ‘call in’ by the government should there be concerns.

The United States and Europe are not alone in elevating concerns over foreign investment during the pandemic and in response to increasing concerns over China’s global influence. In Canada, during 2020–2021, timelines for national security reviews were temporarily extended and investments by SOEs as well as in Canadian businesses related to public health or the supply of critical goods and services were subjected to heightened scrutiny in response to the pandemic. The Canadian government has issued more detailed guidelines for the review of foreign investments, among other things, to include national security concerns relating to the potential of the investment to enable access to sensitive personal data that could be leveraged to harm Canadian national security through its exploitation, including personal data concerning government officials, such as members of the military or intelligence community. In Australia, on 1 January 2021, the Foreign Investment Reform Act came into effect, ushering in sweeping changes to that country’s foreign investment review law. The temporary A$0 monetary screening thresholds for all investments that had been introduced in response to covid-19 were removed; however, this threshold was continued through provisions for the mandatory review of investments in sensitive national security businesses. New Australian regulations list businesses in critical infrastructure, telecommunications, military goods or defence or intelligence technology, the provision of service to defence or intelligence forces, the storage or access to classified security information and the storage, collection, or maintenance of personal information of defence and intelligence personnel. The symmetry between the Canadian guidelines and the Australian regulations should not be considered coincidental. Both countries are members of the Five Eyes together with the United States, the United Kingdom and New Zealand. The
Australian Treasurer has also been given new, stronger enforcement and review powers under the legislation, including a new ‘last resort’ power, under which the Treasurer may review previously approved transactions where national security risks have emerged after approval by the Foreign Investment Review Board.

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 may 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 the timeline for economic recovery from the effects of the pandemic.

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 an anticompetitive 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 addition, the ABA ALS Task Force on
the Future of Competition Law Standards has delivered a further report in early August 2021 to the Council of the ABA ALS that, among other subjects, has considered recent developments pertaining to national interests and national champions in competition reviews. These evolving considerations in competition reviews cannot be viewed in isolation from the increasing scope of national interest factors in foreign investment reviews.

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 21 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 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.

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Chapter 8

GERMANY

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I OVERVIEW

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, 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 Ministry for Economic Affairs and Energy (BMWi) has announced a ‘National Industrial Strategy 2030’ 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 business sectors of particular relevance to public order or security (Sensitive Business Sectors) were explicitly addressed and made subject to a notification obligation, and timelines for review were significantly expanded. When State Grid Corporation of China in 2018 twice tried to purchase a minority stake of 20 per cent in 50Hertz, the electricity transmission system operator, the government had no legal tools at hand to block the acquisition as foreign investment rules at that time only applied at a threshold of 25 per cent of voting rights. The German government found a workaround via Elia, the Belgian utility and co-shareholder in 50Hertz. For both tranches, Elia exercised a right of first refusal with a pre-wired sale of the second 20 per cent stake to German state-owned bank KfW. Interestingly, the German

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1 Olivier Schröder is a partner and Stephanie Birmanns is a counsel at SZA Schilling, Zutt & Anschütz Rechtsanwaltsgesellschaft mbH.
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.
government also used an acquisition by KfW of a 23 per cent stake in the German biotech company CureVac to prevent a takeover by a foreign investor, even though the concern that a vaccine against covid-19 developed by CureVac would not be made available to Germany and the EU following such a takeover could have been addressed in the framework of an FDI review.\textsuperscript{6}

In August 2018, the German government authorised 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.\textsuperscript{7}

In light of the 50Hertz transaction, German rules on foreign investment were tightened a second time in late 2018.\textsuperscript{8} The trend to more regulation and a tighter government review culminated in 2020 and 2021, which saw a series of amendments significantly expanding the scope of German FDI rules. The most recent changes, which are described in more detail under Section II below, resulted in an unprecedented increase not only in the number of notifiable transactions but also in cautionary applications for a certificate of non-objection. It is to be expected that this trend will continue – at least until there is a more robust experience with the new rules in general and the definition of the Sensitive Business Sectors in particular.

In practice, the approach taken by the authorities remains 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.

\section*{II YEAR IN REVIEW}

Between June 2020 and June 2021 the Foreign Trade Act (AWG)\textsuperscript{9} and the Foreign Trade Ordinance (AWV) underwent two and three important revisions, respectively. Formally on the basis of the EU Screening Regulation,\textsuperscript{10} but clearly also influenced by the covid-19 pandemic, the new rules introduced in 2020 have substantially tightened several core provisions of German foreign investment control, introducing, inter alia, a suspensory effect and a much

\begin{footnotes}
\item[6] BT-Drucksache 19/20076, see also Bendlin Spür, COVuR 2020, 516, 522 et seq.
\item[8] BMWi, Twelfth Amendment to the Foreign Trade and Payments Ordinance, BAnn AT 28 December 2018 V1; Circular Order 3/2018 of 19 December 2018, BAnn AT 28 December 2018 B1; see Anweiler, NZG 2019, 528; Slabodensjuk, BB 2019, 202; Dammann de Chapto/Brüggemann, NZKart 2019, 93; Schladebach/Becker, NVwZ 2019, 1076.
\end{footnotes}
relaxed substantive review standard.\textsuperscript{11} In addition, health-related industries were added to the list of Sensitive Business Sectors\textsuperscript{12} and procedural rules adapted to the requirements of the EU Screening Regulation.\textsuperscript{13}

The latest amendment to the AWV significantly expands the scope of the mandatory notification requirements and government review.\textsuperscript{14} Its most important changes are as follows:

\textbf{a} an expansion of the list of Sensitive Business Sectors subject to cross-sectoral review (and of the respective review and prohibition rights);

\textbf{b} an extension of the sector-specific review to, inter alia, all weapons and military items on part I section A of the export control list;

\textbf{c} an adaptation of the review standard in the sector-specific regime from ‘actual threat’ to ‘likely to affect’;

\textbf{d} an extension of the rules on the attribution of shareholdings for the purposes of determining the relevant thresholds;

\textbf{e} the introduction of a provision clarifying that subsequent acquisitions of voting rights are subject to a renewed clearance if certain thresholds are crossed; and

\textbf{f} the introduction of the possibility for the BMWi to prohibit transactions in situations of atypical control - where voting rights thresholds are not met but factual influence vests with an investor (e.g., through board seats or information rights).

\section*{III FOREIGN INVESTMENT REGIME}

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

\textbf{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). The sector-specific regime was expanded by the 17th Amendment to the AWV and covers companies developing, producing, modifying or possessing goods listed in part I section A of the export control list or defence technology protected by classified IP rights. This also applies to companies that had such activities in the past and ‘still dispose of knowledge or other access to the technology on which such goods are based’.\textsuperscript{15} In addition, it applies to companies producing certain products with IT security features used to process classified government information or targets qualifying as a defence-important facility within the meaning of the Security Clearance Act.

\begin{itemize}
\item \textsuperscript{11} See Enders, RIW 2020, 652; Niestedt/Kunigk, NJW 2020, 2504.
\item \textsuperscript{12} BMWi, Fifteenth Amendment to the Foreign Trade and Payments Ordinance, BAnz AT 2 June 2020 B2; see also Louca/Kopf, MedR 2020, 1003; Jungkind/Bormann, NZG 2020, 619; Bendlin Spür, COVuR 2020, 516, 520 et seq.
\item \textsuperscript{13} BMWi, Sixteenth Amendment to the Foreign Trade and Payments Ordinance, BAnz AT 28 October 2020 B2.
\item \textsuperscript{14} BMWi, Seventeenth Amendment to the Foreign Trade and Payments Ordinance, BAnz AT 30 April 2021 V1 (the 17th Amendment to the AWV); the latest amendments discussed here will apply to transactions signed after 1 May 2021.
\item \textsuperscript{15} Annweiler, NZG 2021, 241, 243 rightly raises the question of how a target may prove in practice that it lost access to critical knowledge or technologies.
\end{itemize}
If a company that is active in one of the sectors listed in Section 60(1) AWV is to be acquired, a notification of the investment must be submitted by any non-German investor.\(^\text{16}\) 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 BMWi, the underlying contracts are invalid and the transaction is therefore provisionally suspended. In its review, the BMWi considers whether the acquisition is likely to impair essential security interests of the Federal Republic of Germany.\(^\text{17}\) The 17th Amendment to the AWV relaxed the substantive review standard under the sector-specific regime to ‘likely to affect’. This approach goes back to the EU Screening Regulation and was previously introduced in the cross-sectoral review (see Section V.vii).

The recent expansion of the scope of both the sector-specific and the cross-sectoral review resulted in potential overlaps. In a number of cases, the applicable regime could only be established well into the review. Against this background, the BMWi now has the possibility to switch from one type of review to another even after initiation of an in-depth investigation.\(^\text{18}\) Such a switch, of which the BMWi has to inform the parties, does not affect the review periods. The sector-specific investment review is not covered in this chapter in further detail because it is much narrower in scope than the cross-sectoral regime. However, many procedural rules, in particular the attribution of voting rights, follow the same rules as under the cross-sectoral regime described below.

ii  Cross-sectoral regime
Outside the sector-specific review, Section 55 et seq. of the AWV provide for a cross-sectoral review system. This cross-sectoral regime applies to businesses of all sectors regardless of the size of the company involved in the acquisition. However, within the cross-sectoral review scheme, it is important to distinguish between the acquisition of entities active in ‘sensitive business sectors’ as opposed to other businesses. The business sector ultimately determines whether a transaction will be subject to a mandatory notification requirement and to which voting rights threshold the cross-sectoral review applies (see Section III.v).

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.\(^\text{19}\)

As will be discussed below, the cross-sectoral review (as well as the sector-specific regime) 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, it will

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16 Section 60(3) AWV.
17 Section 60(1) AWV.
18 Section 62a AWV.
19 See the definition ‘EU Resident’ and ‘Non-EU Resident’ in Section 2(18) and (19) AWG; see also Böhm, ZBB/JBB 2019, 115, 118.
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 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. 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.

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 III.v), the mere acquisition of non-voting shares or options or preemptive rights to acquire shares in the 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 covers the acquisition of an enterprise through an asset deal, a lending of securities or a transfer of ownership of shares as collateral for a loan. 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), 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.

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.

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20 Section 55(2) AWV; § 60(2) AWV contains a corresponding provision for the sector-specific regime.
21 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.
22 BMWi, FAQ re investment control under foreign trade laws, Question A.4.
23 See Section 55(1a) AWV; see Section 60(1a) for the sector-specific regime.
24 BMWi, FAQ re investment control under foreign trade laws, Question A.4.
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 the foreign investment review.25

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 exceeds’ this threshold of 25 per cent of voting rights.26

Sectors of particular relevance to public order or security (Sensitive Business Sectors)

In contrast, the relevant control threshold is significantly lower if the enterprise in question operates in Sensitive Business Sectors. The number of these sectors, listed in Section 55a(1) AWV, was expanded from six to 27 since June 2020. The latest additions go back to the sectors mentioned in the EU Screening Regulation but are defined more narrowly, so that investors have a significantly higher degree of comfort when assessing filing requirements for businesses operating in Sensitive Business Sectors than in other Member States that simply took over the broad sectors mentioned in the EU Screening Regulation.

In addition, the 17th Amendment to the AWV introduced a two-tiered voting rights threshold for these sensitive business sectors: where businesses active in the sectors listed in Section 55a(1) Nos. 1–7 AWV are concerned, an acquisition of 10 per cent of voting rights already suffices to trigger the foreign investment review process.27

The lower 10 per cent control threshold applies to German companies that:

a operate critical infrastructures within the meaning of the Act on the Federal Office for Information Security28 (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);

b develop or modify certain sector-specific software29 for the operation of critical infrastructures;

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 certain telematics infrastructure;

25 BMWi, FAQ re investment control under foreign trade laws, Question A.6.
26 Section 56(1) No. 3 AWV.
27 Section 56(1), No. 1 AWV.
28 See also the pertinent Ordinance regarding the Determination of Critical Infrastructures (BSI-KritisV) issued by the Federal Office for Information Security; see also the Second Act on Increasing the Security of Information Technology Systems of 18 May 2021, BGBl. Part I, 27 May 2021, p. 1122 et seq.
29 Section 55a(2) AWV sets out 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, see BMWi, FAQ re investment control under foreign trade laws, Question C.2.
are active in the media sector and, with particular topicality and broad impact, contribute to forming public opinion; or

provide services needed to ensure the trouble-free operation and functioning of state communication infrastructures.

For the sectors that are described in Section 55a(1) Nos. 8–27 AWV, the relevant threshold is 20 per cent.\(^{30}\) They comprise German companies that:

- develop or manufacture personal protective equipment;
- develop, manufacture or market essential medicines;
- develop or manufacture medicinal products intended for diagnosis, prevention, monitoring, predicting, forecasting, treating or alleviating life-threatening and highly infectious diseases;
- develop or manufacture in vitro diagnostics that serve to supply information about physiological or pathological processes relating to life-threatening and highly infectious diseases;
- operate a sophisticated earth remote sensing system;
- develop or manufacture goods using artificial intelligence processes that can be used for certain defined applications;
- develop or manufacture autonomous motor vehicles or unmanned aircraft;
- develop or manufacture industrial robots designed for certain security-sensitive applications;
- develop, manufacture or process certain discrete semiconductors;
- develop or manufacture cybersecurity products;
- operate an aviation company with an EU operating licence or develop or manufacture certain goods or technologies intended for use in space or for deployment in space infrastructure systems air transport;
- develop, manufacture, modify or use dual-use items in the nuclear, aviation and space industry;
- develop or manufacture goods and essential components for quantum mechanics;
- develop or manufacture additive manufacturing processes using metallic or ceramic materials (i.e., three-dimensional printing);
- develop or manufacture products for the operation of wireless or wireline data networks;
- manufacture smart-meter gateways and related security modules;
- employ personnel working in security-sensitive positions at vital facilities pursuant to the Security Clearance Act;
- extract, process or refine critical raw materials;
- develop or manufacture goods falling under classified patents; or
- cultivate an agricultural area of more than 10,000 hectares.

In cases of above-threshold acquisitions of companies active in the 27 Sensitive Business Sectors listed above, a mandatory notification obligation applies and the closing of any transaction is mandatorily suspended until clearance is granted.

\(^{30}\) Section 56(1), No. 2 AWV.
Staggered acquisitions

With the introduction of Section 56(2) AWV, the 17th Amendment to the AWV ended the scholarly debate whether a review will be triggered again once an investor acquires additional voting rights above the applicable threshold.31 Already under the old rules’ controversial wording, the BMWi had considered itself competent to examine any additional acquisition above the relevant threshold.32 While the first draft of the 17th Amendment to the AWV foresaw a codification of this position, it met strong opposition arguing for the need to introduce a de minimis threshold in order not to make extreme cases such as the acquisition of one additional share subject to a new review. Section 56(2) AWV now establishes the need for an additional review by the BMWi if an already existing participation is increased and certain voting rights thresholds are exceeded. These thresholds are set at 20, 25, 40, 50, and 75 per cent and apply once the original threshold, namely, 10, 20, or 25 per cent was already exceeded.

vi Attribution of voting rights

The AWV contains far-reaching rules on the attribution of voting rights to an investor. Pursuant to Section 56(4) No. 1 AWV, voting rights that are 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 in a Sensitive Business Sector listed in Section 55a(1) Nos. 1–7 AWV and the non-EU or non-EFTA entity acquires 4 per cent of the shares of the German company, this transaction triggers a potential review by the BMWi. Pursuant to Section 56(4) 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) or if other circumstances lead to the assumption that voting rights will be jointly exercised. For state-owned investors, Section 56(4) third sentence AWV introduces a rebuttable presumption for the attribution of voting rights: in case of several entities (indirectly) controlled by the same third country, a joint exercise of voting rights is assumed.33

Moreover, these attribution rules apply throughout the chain in the case of indirect acquisitions.34 If, for example, a German company acquires a 10 per cent shareholding in a critical infrastructure business pursuant to Section 55(1) No. 1 AWV, 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

31 Against this interpretation, see Becker/Sachs, NZG 2017, 1336, 1338; Pottmeyer, in: Wolfgang/Simonsen/ Rogmann, AWR-Kommentar, Sections 55–59 of the AWV, Paragraph 22; Haselbrink, GmbHR 2010, 512, 515; Krause, BB 2009, 1082, 1083; Traugott/Strümpell, AG 2009, 186, 191; see also for the legislator’s intention reflected in BT-Drs. 16/10730, p. 13.
33 See also Barth/Käser, NZG 2021, 813, 818.
34 Section 56(5) AWV.
of the transaction, a shareholding of at least 10 per cent (or 20 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 Sensitive Business Sectors) or review rights (in the case of other sectors) apply.

vii Acquisition of atypical control

The newly introduced Section 56(3) AWV allows the BMWi to review transactions that remain below the relevant voting rights thresholds of 10, 20, or 25 per cent but by which the investor obtains influence beyond its share of voting rights (known as atypical control). Atypical control is assumed if an acquisition of voting rights below the relevant thresholds is combined with certain ‘plus factors’ such as:

- the assurance of additional seats or majorities in supervisory bodies or in the management;
- the granting of veto rights in strategic business or personnel decisions; or
- the granting of rights over information within the meaning of Section 15(4) No. 3 AWG.

Plus factors are usually contractually agreed upon shareholder rights that go beyond the usual (statutory) protections of minority shareholders. When considered as a whole, these additional rights, together with the share of voting rights held by the investor, must lead to a ‘participation intensity’ that is comparable to the relevant threshold.35

Importantly, the acquisition of atypical control does not trigger a notification requirement but the BMWi can review such transactions ex officio. For reasons of transaction security, investors will have to carefully consider whether an application for a certificate of non-objection may be advisable.

viii 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. Pursuant to the newly introduced Section 55(1b) AWV, a transaction will not be notifiable under the cross-sectoral regime if the ultimate parent company remains the same, only the chain of ownership changes and no shareholders from a previously non-participating legal group join.36 In all other cases, the BMWi considers the FDI regime applicable.

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35 BMWi, FAQ re investment control under foreign trade laws, Question B.4.
36 BMWi, FAQ re investment control under foreign trade laws, Question A.8.
Notification obligation and application for certificate of non-objection

Where the acquisition of a business active in Sensitive Business Sectors (as described in Section III.v) is concerned, the law requires a mandatory notification to the BMWi by the acquirer. 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. For public offers within the meaning of the Securities Acquisition and Takeover Act, the triggering event is the publication of the decision to submit the offer. The law stipulates that notifications have to be made in writing or electronically (i.e., by email). Upon receipt of the notification, the BMWi will decide upon the commencement of a formal review procedure (see Section V.vi).

General instructions on the information to be provided in a notification or application for a certificate of non-objection can be found in the Federal Gazette. In June 2021, the BMWi introduced a template in excel format accompanied by guidance on its use. The template covers numerous data points and should be used for all types of submissions, including formal notifications, applications for certificate of non-objection, and informal submissions. In addition to the completed template, the BMWi will accept a memo describing the relevant details of the transaction in more detail. Notifications, applications, or submissions under the FDI regime do not trigger administrative fees or costs (other than the applicant’s and its advisers’ own costs).

Outside the Sensitive Business Sectors listed in Section 55a(1) AWV, there is no obligation to notify under the cross-sectoral regime. However, to avoid uncertainty with regard to a potential ex officio review, an investor may apply for a certificate of non-objection. 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 the information requested in the excel template 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 V.v).

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 or in informal submission informing the BMWi about the transaction, 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

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37 Section 55a(4) AWV. Such a notification and a certificate of non-objection (see Sections V.iv and V.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).

38 Section 55a(4) second sentence AWV.

39 BMWi, General Ruling of 27 May 2021 on the required documentation under Section 14a AWG and Sections 55a, 58 and 60 AWV, BAnz AT 11 June 2021 B2.

40 Available at https://www.bmwi.de/Redaktion/DE/Artikel/Aussenwirtschaft/investitionspruefung.html.

41 For transactions subject to a notification obligation or deals undergoing an ex officio review, an application for a certificate of non-objection is not available (Section 58(3) AWV). However, in cases where the notification requirement is not clear, the notification can be combined with a subsidiary application for a certificate of non-objection.
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.

IV 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 in a Sensitive Business Sector listed in Section 55a(1) AWV 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 the 2020 revisions have introduced a suspensory effect and strict anti-gun-jumping prohibitions for acquisitions of businesses active in Sensitive Business Sectors (see Section V.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 Germany42 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,43 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.

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

42 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.

43 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.
V REVIEW PROCEDURE

i Suspensory effect and anti-gun-jumping provisions for notifiable acquisitions

Formerly, the review procedure had no suspensory effect, and 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 recent revisions. Now, in cases where a notification to the BMWi is required (i.e., in all cases concerning Sensitive Business Sectors listed in Section 55a(1) AWV, 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, 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 or equivalent economic rights prior to clearance.

Furthermore, under information-sharing restrictions introduced in 2020, it is in cases subject to a notification requirement impermissible to make available to an 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 Sensitive Business Sector 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 can be 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 Sensitive Business Sector, 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 signing of the transaction.44 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.

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44 For general guidance see BMWi, FAQ re investment control under foreign trade laws, Questions H.4 and H.5.
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 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.\(^\text{45}\) 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 signing 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, does not file a formal notification pursuant to Section 55a(4) AWV, or does not inform the BMWi by informal submission.

iv  Review upon notification
Where the acquisition of businesses active in Sensitive Business Sectors is concerned, the acquisition\(^\text{46}\) 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.\(^\text{47}\)

v  Review upon application for certificate of non-objection
An acquirer may apply\(^\text{48}\) 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 concern a Sensitive Business Sector or otherwise 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

\(^\text{45}\) Section 14a(1) AWG; Section 55 (3) AWV.

\(^\text{46}\) The notification obligation is already triggered by the conclusion of a purchase contract, not just at the time of the *in rem* acquisition.

\(^\text{47}\) 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.

\(^\text{48}\) 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 based on sufficiently progressed transaction documentation.
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).\footnote{In particular, Sections 48 and 49 of the German Federal Administrative Procedure Act.}

\textbf{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.\footnote{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 27 May 2021 on the required documentation under Section 14a AWG and Sections 55a, 58 and 60 AWV, BAnz AT 11 June 2021 B2.} 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.\footnote{Section 14a(1) No. 2 AWG. In individual cases comprising particular factual or legal difficulties, the BMWi may prolong the review period for up to three months (Section 14a(4) AWG).} 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.\footnote{Section 14a(6) No. 2 AWG. There is no maximum duration foreseen for these negotiations and the ensuing suspension; however, the acquirer or the BMWi may declare the negotiations failed at any time and thereupon the deadline will continue to run; see BMWi, FAQ re investment control under foreign trade laws, Question F.5. In practice, however, this will lead to a prohibition.}

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.

\textbf{vii Substantive scope of review, new 'likely to affect' standard, and prohibitions and orders}

Prior to 2020, 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.\footnote{Bast in: Hocke/Sachs/Pelz, Außenwirtschaftsrecht, 2nd Edition, 2020, Section 7 AWG, Paragraph 10b; Lechler/Germelmann, Zugangsbeschränkungen für Investitionen, p. 34 et seq.} 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.

This conservative approach changed 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 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(1) AWV. Therefore, authorities may apply a broader understanding of public order and security and the BMWi has considerable discretion in determining whether public order or security is at risk.

There are two additional specific aspects to consider. First, in evaluating whether a transaction should be prohibited, 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 likely make the required analysis more complex, costly and time-consuming.

Second, the level of scrutiny has been significantly tightened with the introduction of a ‘likely to affect’ 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.

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. In addition, 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.

To date, there does not seem to be a dramatic change in the BMWi’s decisional practice but it remains to be seen how the BMWi and, eventually, the courts will interpret these open-ended definitions in the long term. In any case, 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 V.vi). In previous years, the German government has concluded several such agreements with purchasers.
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. 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.

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.

VI OUTLOOK

The importance of FDI review for M&A transactions in Germany is ever more increasing. While the 17th Amendment to the AWV clarified some open questions, it has also added complexity and legal uncertainty to the overall review system. It therefore remains indispensable for foreign investors to deal with FDI requirements at an early stage of the M&A process. This is particularly true for a time until there will be more experience and additional guidance on the BMWi’s enforcement of the new rules in practice.

In addition, the recent amendments to the AWG and AWV are due for evaluation by July 2022, so that further adjustments to investment control in Germany can be expected by then at the latest. It remains to be seen whether the new German government will attempt to address the complexity of the current regime by giving the German FDI regime a fundamental overhaul.

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