

# Foreign Investment Review 2021

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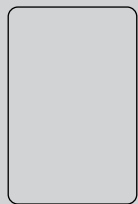
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# Foreign Investment Review 2021

**Contributing editor**

**Oliver Borgers**  
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Lexology Getting The Deal Through is delighted to publish the tenth edition of *Foreign Investment Review*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on the European Union, France, Italy, Pakistan, Spain, Sri Lanka and Uzbekistan.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Oliver Borgers of McCarthy Tétrault LLP, for his continued assistance with this volume.



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## LAW AND POLICY

### Policies and practices

- 1 | What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

The German approach to foreign investment control has been liberal to date. Germany is among the states attempting to defend and even to extend the free trade of goods and capital. Currency or exchange restrictions are neither imposed on EU residents nor on non-EU residents. However, some investments from non-EU states, in particular acquisitions in sensitive and high-technology industries by Chinese investors, have led to a slight rethinking of the liberal approach to foreign investment control. This development has resulted in amendments of the applicable law in 2017 and 2019. A further tightening of investment controls came with amendments adopted in 2020, implementing the EU Screening Regulation 2019/452. Under the current law, the Federal Ministry for Economic Affairs and Energy (BMWi) must be notified of any planned non-EU investment in critical infrastructure whereby the investor directly or indirectly acquires 10 per cent or more of the company's voting rights (including in particular the infrastructures needed to maintain the permanent functioning of the public health system, a particular public policy focus since the outbreak of the covid-19 pandemic). The same applies to any non-German investment in security-related technologies. If the following review procedure reveals that the investment is likely to affect security or public order, the BMWi may prohibit the investment or issue approval conditions.

The German government has justified this approach by referring to article XIV GATS, which allows for the adoption of measures to maintain the public order. In the context of the investment review procedure, the BMWi enjoys a broad margin of discretion in taking into account the background of acquirers and persons acting on their behalf, in particular their previous – or future – misconduct, such as illegal or criminal activities, or the influence of foreign states (as also set out in article 4 paragraph 2 EU Screening Regulation). To ensure the effectiveness of the investment screening, the contractual obligations of the M&A transaction may not be executed before the investment review has been carried out (gun-jumping provisions). Therefore, measures aiming to close acquisitions through legal or factual execution are pending invalid until the review procedures are completed.

With regard to the announced broadening of the legislation to also cover critical technologies, it is to be expected that the BMWi will further specify which precise technologies will be covered. The critical technologies focused upon are expected to include several fields listed in article 4 paragraph 1 (b) of the EU Screening Regulation, in particular artificial intelligence, robotics, semiconductors, biotechnology and quantum technology. Furthermore, acquisitions in sectors such as data processing may fall under the broadened scope (article 4 paragraph 1 (a) of the EU Screening Regulation).

In conclusion, lower thresholds and longer review periods lead towards a stricter approach to foreign investment control. The lack of unequivocal definitions and procedural regulations causes increasing legal uncertainty. We expect the government to examine the cases in more depth than it has done in the past. An example of the recent, more interventionist strategy is the prohibition of Chinese Yantai Taihai Corporation's attempted acquisition of the German company Leifeld in 2018.

### Main laws

- 2 | What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals and investors on the basis of the national interest?

The Foreign Trade and Payments Act (AWG) and the Foreign Trade and Payments Ordinance (AWV) provide the legal basis for the control of foreign investments in Germany. The latest amendment of the AWG was on 17 July 2020, the latest update of the AWV was issued on 26 October 2020.

The Administrative Procedure Act governs the investment review procedure. The Code of Administrative Court Procedure contains the remedies for administrative investment control measures.

### Scope of application

- 3 | Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

The relevant industry sector is decisive as to the level of scrutiny applied in the review. The sector-specific review sets out a strict review procedure for the acquisition of companies that operate in sensitive security areas such as defence and crypto-technology. This includes manufacturers and developers of war weaponry, ammunition, military equipment such as tank motors and gears, and any technology used for processing classified government information. The acquisition of companies that modify or use these goods also falls under the scope of sector-specific review since the 2020 AWG amendments. Furthermore, past activities might suffice to include companies under this definition, if the company or any of its employees retain relevant knowledge or access to relevant technology, documents or data storage of any kind.

Under the cross-sectoral review, in line with the EU Screening Regulation, the BMWi may examine whether the respective acquisition 'is likely to affect security or public order' – a significantly lower risk threshold than the previously required 'threat' to the security or public order of Germany. Acquisitions may in particular constitute such prospective impairments if the target:

- operates critical infrastructure such as energy, water, information technology and telecommunications, and infrastructure used for finance or insurance, healthcare, transport or food;
- develops and modifies software that is used for operating this critical infrastructure;
- has been authorised to carry out organisational measures in the telecommunications sector or produces the technical equipment used for implementing statutory measures to monitor telecommunications and has knowledge about this technology;
- provides cloud computing services if certain thresholds are reached;
- holds a licence for providing telematics infrastructure components or services;
- is a company of the media industry that contributes to the formation of public opinion via broadcasting, teledmedia or printed products and is characterised by particular topicality and breadth of impact;
- provides services ensuring the functioning of communication infrastructures between public authorities;
- develops or produces personal protective equipment;
- develops, produces, markets or holds licences of pharmaceuticals essential for the provision of healthcare;
- develops or produces medicinal products to diagnose, prevent, predict, cure or mitigate highly contagious or life-threatening infectious diseases; or
- develops or produces in-vitro diagnostic products delivering information on physiological or pathological reactions to contagious or life-threatening infectious diseases.

For the sector-specific review, a threshold of 10 percent of the target's voting rights applies to all acquisitions of German companies. The same is true for acquisitions within the scope of the cross-sectoral review if the target falls into one of the above-mentioned categories of sensitive areas set out in section 55 paragraph 1 sentence 2 AWW. It has been announced that the number of areas falling under increased scrutiny will be increased on the basis of article 4 paragraph 1 (a) EU Screening Regulation, although details are not yet known. According to the announcement, these categories will include, among others, activities regarding artificial intelligence, robotics, semiconductors, biotechnology and quantum technology. Unequivocally defining and delimiting these categories will be crucial to adequately shape the scope of investment review.

Furthermore, the BMWi is entitled to review all acquisitions of German companies whereby investors acquire ownership of at least 25 per cent of the company's voting rights.

The review applies to asset deals and share deals, including both direct and indirect shares, and – in principle – irrespective of the relevant industry sector and of both the nature and origin of the investor. The target must be 'domestic', meaning:

- legal persons and partnerships based or headquartered in Germany;
- branches of foreign legal persons or partnerships headquartered in Germany; or
- permanent establishments of foreign legal persons or partnerships in Germany.

## Definitions

- 4 | How is a foreign investor or foreign investment defined in the applicable law?

German legislation applies the cross-sectoral review to any non-EU or non-EFTA-based investor. In addition, investors located within EU and EFTA territories may be subject to foreign investment control where it seems necessary to prevent abuse or circumvention of the foreign investment control rules. This might be the case where an investor does not pursue any significant independent economic activity or does not maintain a permanent establishment within the European Union in the form

of business premises, personnel or equipment. The BMWi tends to read the term 'circumvention' very broadly and thus substantially widens its review authority.

The sector-specific review applies to any non-German (ie, also EU-based) investor. German investors may also be subject to foreign investment control where this seems necessary to prevent abuse or circumvention of the foreign investment control rules.

## Special rules for SOEs and SWFs

- 5 | Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

German legislation does not contain specific provisions for SOEs or SWFs, although the control exerted by foreign governments or armed forces over the acquirer is now explicitly a factor to be considered in the context of the investment review (section 55 paragraph 1b AWW). The recent developments towards stricter foreign investment control were in part a reaction to the economic activity of foreign SOEs and SWFs in Germany. Thus, a foreign investor's affiliation with the public sector may play a role for the BMWi's assessment of whether the public order or security of Germany is endangered.

## Relevant authorities

- 6 | Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

The BMWi is the authority responsible for conducting the review of mergers or acquisitions on national interest grounds. Within the Ministry, the Department for Foreign Trade Policy (department V) conducts the review. The BMWi regularly consults other federal ministries or agencies, such as the Federal Ministry of Foreign Affairs or the Federal Ministry of Defence.

The BMWi may only prohibit an acquisition with the approval of the German federal government. Conversely, the German federal government is not entitled to prohibit an acquisition if the BMWi has not issued a negative assessment.

- 7 | Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

German legislation affords the BMWi a high degree of discretion in regard to both the decision of whether to intervene at all, the scrutiny and weighing of the acquirer's background, and potential measures (ranging from conditional approval to prohibition). The AWW lists possible impairments to the German public order or security to support the BMWi in exercising its discretion. EU and German fundamental rights, including the principles of equality and proportionality limit the BMWi's discretion. The BMWi must take into account the interests of both the acquirer and the seller, and is obliged to state its reasons as well as the standard of review applied in each case. In practice, the BMWi has a very broad margin of discretion, which is hardly ever challenged in court.

## PROCEDURE

### Jurisdictional thresholds

- 8 | What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

The Federal Ministry for Economic Affairs and Energy (BMWi) is entitled to review all acquisitions of German companies where the investors acquire ownership of at least 25 per cent of the voting rights. A threshold

of 10 per cent applies to acquisitions that are subject to sector-specific review and to acquisitions within the scope of the cross-sectoral review if the target falls into one of the categories set out in section 55 paragraph 1 sentence 2 of the Foreign Trade and Payments Ordinance (AWV). The type of review depends on the sector concerned.

Notification of an acquisition to the BMWi is mandatory if:

- an investment is subject to the sector-specific review; or
- an investment is subject to cross-sector review and falls within the category of a threat to the German public order or security (laid out in section 55 paragraph 1 sentence 2 AWV).

In contrast to merger control, other elements such as turnover, purchase price or enterprise value do not trigger a notification or filing obligation. In addition, there is no de minimis exception limiting the FDI procedure to targets of a certain size.

Investors who are not subject to a notification obligation are nevertheless advised to either notify the BMWi of the acquisition or to apply for a certificate of non-objection in cases where it is conceivable that the BMWi could see a threat to Germany's or any other EU member state's public order or security.

### National interest clearance

#### 9 | What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees? Is filing mandatory?

German legislation provides for three ways to start a review procedure:

- the investor applies for a certificate of non-objection;
- the investor applies for clearance; or
- the BMWi initiates a review procedure.

Notification of an acquisition to the BMWi is mandatory if:

- an investment is subject to the sector-specific review; or
- an investment is subject to cross-sector review and the target falls into one of the categories set out in section 55 paragraph 1 sentence 2 AWV.

For investments that are subject to the cross-sectoral review, the investor may apply for a certificate of non-objection. The certificate provides legal certainty that the transaction does not pose a threat to German public order or security (section 58 AWV).

For investments that are subject to sector-specific review, the investor must apply for clearance (sections 60 and 61 AWV) and initiate the review procedure by notifying the BMWi of the planned acquisition (section 60 paragraph 3 sentence 1 AWV). The BMWi will issue clearance where the review procedure reveals no threat to essential security interests (section 61 AWV).

In addition to the foregoing, the BMWi may initiate the review procedure in regard to any investment it learns of and that raises concerns with regard to public security and order. The authorisation to initiate review procedures expires five years after the acquisition has been agreed (section 14a paragraph 3 sentence 2 of the German Foreign Trade and Payments Act (AWG)). If review procedures are taken up, the BMWi will officially inform the parties involved and require further statements and data (section 55 paragraph 3 AWV).

The review procedure consists of two stages: a preliminary examination and an examination in detail, including an investigation. In most cases, the review procedure is concluded within the first phase. The BMWi will only enter into the second stage, a formal investigation, if the preliminary examination gives rise to concerns about the transaction's compliance with investment control rules.

There are no standard application forms. Pursuant to a decree dating from 22 March 2019, the application should include the following information:

- the name and place of business of investor and target;
- the investor's share of voting rights before and after the transaction;
- an explanation of the business of investor and target;
- the shareholder structure of investor and target;
- all shares of investor and target in third-party companies;
- an explanation of the target's critical infrastructure activities;
- any obligation of the target to protect government classified information;
- business contacts with public sector and defence customers of the past five years;
- the acquisition agreement and financing of the acquisition;
- any consortium agreement regarding the target;
- information on the short-, medium- and long-term strategy post-completion; and
- power of attorney for the investor.

This list is non-exhaustive, and the BMWi may (and often does) request any further documents it deems necessary to reach a decision. The documents must be in German. The annexes of the sale and purchase agreement do not necessarily need to be translated. In consultation with the case handler a translation of the headings of the annexes can suffice.

The application must be submitted to the BMWi. The BMWi does not charge any fees or expenses, the applicants must bear their own expenses.

#### 10 | Which party is responsible for securing approval?

Both investor and target are legally obliged to comply with the foreign investment rules. However, the notification obligations are among the exclusive duties of the investor: for both investments subject to the sector-specific review (section 60 paragraph 3 AWV) and cross-sectoral review (section 55 paragraph 4 AWV), it is the investor who must apply for clearance.

### Review process

#### 11 | How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

Since the 2020 amendments to the AWG, both sector-specific and cross-sector investment audits are subject to consolidated deadline provisions, intended to accelerate reviews – in particular in straightforward cases – and increase the foreseeability of the duration of proceedings.

With these goals in mind, the preliminary review undertaken by the BMWi may now last two months (previously three months) since the BMWi was notified about the acquisition or acquired knowledge of the conclusion of the investment contract. Equally, in the event of an application for a certificate of non-objection, the certificate will be deemed issued if the BMWi did not formally initiate an examination procedure within two months of the application being filed. A review procedure is legally precluded if more than five years have passed since the conclusion of the investment contract.

After the preliminary review period, the BMWi may, if necessary, perform an in-depth examination and prohibit an investment or impose conditions on the investment within the first four months of the investor providing complete information on the transaction. Under the 2020 amendment, the BMWi can no longer extend the review period by requesting documents. However, the practical effects of this amendment is expected to be limited, as a subsequent request, though not extending the review period, still suspends it until the complete documentation



is provided. Thereby, the conclusion of review procedures will in fact be delayed in a very similar way as under the old law. Furthermore, ongoing negotiations between the BMWi and the investor suspend the limitation period. The law does not limit the duration of these negotiation periods. The only eventuality allowing for the extension of the review period are examination procedures characterised by particular complexity of a factual or legal nature (extension by three months). An additional extension by one further month is possible if German defence interests are affected to a particular extent. The BMWi determines on a case-by-case basis, consulting other authorities involved but ultimately at its own discretion, whether the conditions for extending the review period are fulfilled.

The authorities do not publish data regarding the duration of the procedure. Experience indicates that clearance for cross-sectoral investments takes two to three months. The preliminary assessment of sector-specific investments usually takes one to three months. The process may be lengthened considerably where the BMWi launches the second stage of the review procedure (in-depth examination). Although the consolidated audit deadlines contained in the 2020 amendments aim at accelerating foreign investment reviews, doubts persist whether these regulations will actually speed up proceedings in practice. In particular, with regard to politically sensitive investments, the necessity to provide additional information subject to review will result in potentially considerable durations of proceedings.

Regardless of the legal time limits, the investor may try to accelerate the procedure by fully cooperating with the authorities and by providing the necessary information as early as possible.

**12 | Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?**

In non-sensitive matters, nothing prevents the parties from closing the transaction before obtaining the approval of the BMWi. However, the validity of both the transaction and the underlying transaction contract may be affected by the BMWi's decision. In addition, under the 2020 amendment, gun-jumping regulations have been put in place, intended to prevent both legal and factual execution before clearance in sensitive matters.

Since the 2020 amendments, the same rules apply to sector-specific and reportable cross-sector acquisitions, while previously only the acquisition of companies operating in the sector-specific area were declared pending invalid. Under the new law, both in the context of sector-specific and reportable cross-sector acquisitions, the underlying contractual obligations are valid but subject to dissolution if the BMWi issues a prohibition to conclude the transaction. In contrast, for example, information and technology are transferred without prior review and approval, and, therefore, the material transfer agreements executing the contractual transaction are pending invalid. If the BMWi refuses to clear the acquisition, the transaction is *ex tunc* invalid and, therefore, considered as never having had any legal effect. Not issuing a prohibition within the review periods stipulated under the amended AWG is considered equivalent to the transaction's approval (either actually expressed or deemed to be granted).

To prevent the *de facto* implementation of foreign investments, the provisions of the amended AWG bans specific particularly serious enforcement actions, including the exercise of voting rights by the acquirer, the granting of claims to payment of profits and the disclosure of company-related, security-relevant information. These regulations are comparable to gun-jumping rules in merger control proceedings. Violating these bans can be punished as deliberately or negligently committed offences under criminal and administrative

law, and constitute a (prospective) impairment of security and public order, undermining the whole transaction. Consequently, the parties are advised to obtain clearance before executing the transaction.

**Involvement of authorities**

**13 | Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?**

The BMWi is open to discuss with the investor the possible hurdles and concerns involving the acquisition contemplated. Where the investor is able to provide comprehensive information on the planned acquisition, these discussions might facilitate the subsequent investigation and examination procedures. However, the transaction needs to be rather advanced. In some cases, meetings with the BMWi are possible – for example, to explain the business activity or the business strategy of the target. However, whether these meetings take place is at the discretion of the BMWi.

**14 | When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?**

German legislation governs the two-stage foreign investment review procedure. These two stages are: a preliminary examination and an examination in detail, including an investigation. In most cases, the review procedure is concluded within the first phase. The BMWi will only enter into the second stage, a formal investigation, if the preliminary examination gives rise to concerns about the transaction's compliance with investment control rules.

However, investors are free to rely on the assistance of public relations and political advisers before and throughout the review procedure. This is especially useful in difficult cases, such as investments in the defence sector or of SOEs in critical infrastructure.

**15 | What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to pre-merger review?**

In cases where voluntary notification applies and the investor has abstained from making that notification, the BMWi is authorised to initiate a review procedure within five years of the transaction. This review might result in a retroactive conditional approval or prohibition of the foreign investment. Review procedures are precluded if the BMWi has not initiated procedures within two months of having acquired knowledge of the conclusion of the contractual obligation. In cases of notifications of acquisitions or clearance requests, review procedures are equally precluded if not taken up within two months.

Therefore, investors are strongly advised to notify the BMWi of a planned investment in the case of the slightest doubt. It is the fastest way to obtain legal certainty as to the admissibility of the planned investment and minimises the risk of the BMWi's retroactive interference with the transaction.

Where the BMWi blocks an investment, it is authorised to prohibit the exercise of the voting rights of the target or to appoint a trustee assigned to rescind the investment. In addition, the BMWi may take further measures to execute the prohibition.



**SUBSTANTIVE ASSESSMENT****Substantive test****16 | What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?**

The substantive test for clearance depends on the applicable type of review. The cross-sectoral review requires an examination as to whether the investment is likely to impair the 'public order or security' of Germany or of any other EU member state. Under the sector-specific review, the Federal Ministry for Economic Affairs and Energy (BMWi) assesses whether the investment will potentially endanger 'essential security interests' of Germany. Both terms are subject to interpretation. As they stem from EU law, the case law of the Court of Justice of the European Union has served as a primary source for interpretation.

**Cross-sectoral review: prospective impairment of the 'public order and security'**

In line with the guidelines set by the EU Screening Regulation, the 'public order and security' test balances the imperatives of maintaining an attractive investment climate and protecting targets of strategic importance to the member states. A prospective impairment (instead of the 'threat' required before the 2020 amendments) of the public order and security may arise where the existence or functioning of the state, of government institutions or public services is affected. In accordance with this lowered substantive test, avoiding potential future harm is a sufficient goal allowing performing forward-looking investment reviews. The public order and security test also encompasses the maintenance of foreign relations, national military interests and the survival of the population. The BMWi's case practice shows that a danger (as required by the old law) to public order or security was primarily seen in the possible access of non-EU companies to German security-relevant technologies and infrastructures as well as security-relevant technology transfer to foreign countries. Negative impacts on economic or financial interests or on the labour market did not constitute a threat to the public order and security. Thus, an investment could not be blocked to preserve jobs in Germany.

Under the new law, the focus of investment reviews has changed, allowing considerations beyond (national) security, public supply and critical infrastructures to play a role. It cannot be excluded that even political priorities in economic, financial, labour and social policy might today impact decision-making with regard to potential restrictions in the context of acquisitions.

Finally, the expanded focus of investment review is illustrated by section 55 paragraph 1b of the Foreign Trade and Payments Ordinance (AWV). This provision contains aspects that shall be considered in the evaluation of prospective impairments of the security or public order in Germany or any other EU member state. These factors revolve around the background of the investor, including (significant risks of) past and present misconduct, such as illegal or criminal activities, or the influence of foreign governments and armed forces, in particular through ownership structures or funding.

The (non-exhaustive) list of strategic industries and sectors (section 55 paragraph 1 sentence 2 AWV) indicate a threat to the public order and security. The list serves as a guideline for the BMWi's assessment.

**Sector-specific review: threat to 'essential security interests'**

The 'essential security interests' test aims at protecting the key industries and technologies related to military defence. For example, essential security interests would be endangered where the investment compromises the core capability of the German defence industry. In the sector of crypto-technology, essential security interests might be

threatened where the reliability of such technology used by the government is in doubt. The provision also intends to secure the existence of German firms supplying the government with crypto-technology and other defence equipment. The assessment requires the consideration of future foreign, security and economic policy that might conflict with the foreign investment.

Although concerns have been raised that aspects such as net benefit or reciprocity should be considered in the substantive test, they have not yet been incorporated in the AWV.

In principle, the onus for showing the transaction does or does not satisfy the test is on the BMWi. However, the applicant is obliged to actively participate in the review procedure, in particular by providing sufficient information on the planned transaction. Because of the authorities' wide margin of discretion, in practice the onus lies more on the applicant's side.

**17 | To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?**

The BMWi has typically not widely consulted or cooperated with officials in other countries during the substantive foreign investment assessment. Reviews regarding national security interests have by nature been limited to the respective state. Given that such review procedures often concern companies in possession of sensitive technology and know-how, authorities are reluctant to share information cross-border.

However, in light of the new EU-wide cooperation mechanism under the EU Screening Regulation, it is expected that the cooperation and exchange of information on investments between the European Commission and member states will be enhanced significantly. Member states are likely to increasingly take into account EU-wide interests while reviewing foreign direct investments.

**Other relevant parties****18 | What other parties may become involved in the review process? What rights and standing do complainants have?**

Although the Foreign Trade and Payments Act (AWG) and the AWV do not provide for the formal involvement of third parties in the investment control procedure, third parties may voice their concerns with respect to a particular transaction. It might be of strategic advantage for competitors to provide the BMWi with additional information on the investment.

Where the BMWi is unable to decide an investment case based on the currently available information, it consults other federal ministries or agencies. The BMWi regularly relies on the expertise of the Federal Ministry of Foreign Affairs, the Federal Ministry of Defence, the Federal Ministry of Finance, the Federal Ministry of the Interior and the Federal Office for Export Control.

**Prohibition and objections to transaction****19 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?**

Where an investment subject to cross-sectoral review is likely to affect Germany's or any other EU member state's public order or security, the BMWi may either issue a prohibition or conditions for approval. The same applies to investments subject to sector-specific review where these investments endanger Germany's essential security interests. In addition, any investment falling under the sector-specific review is subject to clearance by the BMWi.

**20** | Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings or agreeing to other mitigation arrangements?

Investors have two options where the BMWi concludes that the investment might affect the public order or security or essential security interests.

First, the investor may negotiate approval conditions with the BMWi. The BMWi is authorised to either prohibit a transaction or attach its approval to certain conditions. In light of the principle of proportionality, the BMWi is obliged to apply the least restrictive measures possible while protecting the German public order and security interests. If possible, it will debate approval conditions with the investor before prohibiting a transaction. It may, for example, require that the merger excludes a certain, critical division or component of the target. To this end, the investor may submit a statement guaranteeing its compliance with the conditions to the BMWi.

Second, the investor and the BMWi may negotiate an agreement under public law that includes statements of commitment from both sides (as well as the target). Such an agreement allows the parties to find a workable solution, such as approval conditions. However, the agreement must respect the limits set by the AWW, in particular the substantive tests for clearance set out in sections 55 and 60.

### Challenge and appeal

**21** | Can a negative decision be challenged or appealed?

The BMWi's decision can be appealed before the Administrative Court of Berlin. The foreign investment rules do not provide for a review procedure within the BMWi.

In practice, judicial review of the BMWi's decisions is limited. The BMWi is granted considerable discretion in the assessment of investments. Therefore, judicial review mainly examines whether the BMWi has correctly applied the procedural rules, and whether it has taken into consideration all of the information provided for by the investor.

As a negative decision affects both investor and target, both parties may bring an action against the BMWi.

### Confidential information

**22** | What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

The BMWi is obliged to treat the information received as strictly confidential and does so. Any breach of confidentiality may result in disciplinary measures as well as in criminal liability. Information on a transaction submitted to the BMWi is exempted from the right to access official information granted by the Freedom of Information Act. In principle, this Act entitles anyone to access official information from the authorities of the federal government. However, section 3 No. 1 letter (f) provides for an exception where the disclosure of the information may have detrimental effects on measures to prevent illicit foreign trade. Pursuant to this provision, any transaction in violation of the AWW or AWF is considered 'illicit'.

However, information will be exchanged under the EU Screening Regulation with both the European Commission and other member states. The confidentiality of the information collected under the Regulation will be ensured in accordance with EU law and the law of the member state concerned.

## RECENT CASES

### Relevant recent case law

**23** | Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

#### Aixtron

In May 2016, the Chinese company Fujian Grand Chip Investment (GCI) announced its intention to invest in the German electronics manufacturer Aixtron. Thereby, GCI would have acquired 50.1 per cent of the company's voting rights. The Chinese investor had already successfully applied for a certificate of non-objection. Subsequently, the Federal Ministry for Economic Affairs and Energy (BMWi) revoked the certificate in October 2016 and announced the resumption of the review procedure. The revocation was based on concerns raised by the United States regarding its national security interests. The acquisition subsequently failed owing to an American veto, so that the BMWi did not have to resume the review procedure.

#### Kuka

In 2016, the Chinese Midea Group announced investment negotiations with the German company Kuka. Kuka develops and produces robots for various industries, such as automotives, electronics, energy or healthcare. The announcement triggered a public debate on the influence of foreign investors on German firms and on a potential transfer of technical know-how from Germany to China. However, the BMWi issued a certificate of non-objection after a preliminary examination, without even entering into the second stage of the review procedure. Subsequently, Midea took over 95 per cent of the voting rights of Kuka. This case – together with Aixtron and some other cases – led to the 2017 Foreign Trade and Payments Ordinance (AWV) reform introducing stricter rules on foreign investment control.

#### Leifeld

In August 2018, the Leifeld case came to be known as the first formal prohibition of a foreign investment by the German government based on the 2017 AWW reform. The Chinese investor Yantai Taihai Corporation had aimed at taking over the German company Leifeld Metal Spinning. The target mainly produces sophisticated, seamless pipe-formed metal parts that are used in the aerospace, but also in the nuclear sector. Therefore, the investment qualified as subject to cross-sectoral review, on the basis that it 'operates critical infrastructure'. The BMWi – with the approval of the other federal ministries – concluded that the takeover would endanger the German public order and security. This decision can be seen as a harbinger for a stricter review of foreign investments in the future in general and of Chinese investments in particular.

#### IMST

At the beginning of December 2020, the German federal government prohibited the acquisition of IMST GmbH by Addisino, a subsidiary of the Chinese state-owned defence group Casic. IMST, a small enterprise with a turnover of €14 million, has particular expertise in the field of satellite and radar communication and 5G millimetre-wave technology. IMST has developed a key component for the earth observation satellite TerraSAR-X. The Federal Ministry of Defence had purchased its data for calculating a 3D elevation model, which is used, for example, in reconnaissance, command and control, simulation and weapon systems for military purposes. In addition, the 5G technology plays an important role, and IMST's mobile radio systems are used by police forces. The German government was not willing to permit the outflow of this special know-how to a Chinese SOE and prohibited it.

**UPDATES AND TRENDS****Key developments of the past year**

- 24 | Are there any developments, emerging trends or hot topics in foreign investment review regulation in your jurisdiction? Are there any current proposed changes in the law or policy that will have an impact on foreign investment and national interest review?

In general, we observe a trend towards a stricter approach in German foreign investment review. The extended review periods and lower voting rights thresholds illustrate this development. In addition, Federal Minister of Economy Peter Altmaier presented the final version of his National Industrial Strategy 2030 on 25 November 2019. His strategic guidelines stipulate, inter alia, that in very important cases, the federal government should consider intervening as an acquirer through a national equity facility for a limited period of time to stop a foreign investment. This has, for instance, led to an acquisition of a substantial stake in 50Hertz by the public bank KfW.

At the European level, the EU adopted the new Regulation (EU) 2019/452 on 19 March 2019 to support reciprocity between member states' screening mechanisms. It establishes a common framework for the screening of foreign direct investments into the EU on grounds of public security or order. The Regulation lays down requirements that national rules have to comply with and introduces a new EU-wide cooperation mechanism for the exchange of information between member states. Member states are likely to increasingly take into account EU-wide interests while reviewing foreign direct investments. It entered into force fully on 11 October 2020.

Furthermore, the Regulation (EU) 2019/452 contains a list of 'critical technologies' that will be included in the list of particularly security-relevant companies. The range of critical technologies subject to investment review will be further expanded, including in particular companies in the fields of artificial intelligence, robotics, semiconductors, biotechnology and quantum technology. For these sectors, the review threshold of 10 per cent of the voting rights shall apply. The 17th amendment of the Foreign Trade and Payments Ordinance will implement these new critical areas. Owing to an intense discussion within the German government the release is constantly being postponed. At the moment, the release is aimed for the first quarter of 2021.

The political sensitivity to foreign investments in critical health infrastructures in the context of the covid-19 pandemic further illustrates the general trend towards a growing readiness to expand the scope of foreign investment screening and intervene decidedly if it is deemed necessary.

**Coronavirus**

- 25 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

In line with EU Commission's recent guidance for the protection of European critical assets and technologies in the context of covid-19, German authorities increased their efforts to prevent a 'sell-out' of companies and technologies crucial to the health sector. The issues arising with regard to investment control in the health sector and the covid-19 pandemic emerged prominently in connection to CureVac, a Tübingen-based biotech company, which allegedly was to be acquired by the US government. Under the 2020 amendments, the catalogue of companies subject to the Federal Ministry for Economic Affairs and

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Energy's investment reviews has been extended to include a considerable number of activities in the health sector, covering in particular the development and production of medical equipment and pharmaceuticals needed to contrast infectious diseases (section 55 paragraph 1 sentence 2 Nos. 8 to 11 of the German Foreign Trade and Payments Ordinance). In general, investors aspiring to acquire companies in the health sector should be prepared for more intense scrutiny than before the covid-19 pandemic.

Although measures to protect the health of the population are considered to reflect overriding public interests, a complete ban of an investment may, however, only be proportionate as a last resort. Eventually, sufficient and appropriate restrictions consist in the issuing of orders, such as the imposition of delivery obligations, to avoid supply disruptions.

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