THE FOREIGN INVESTMENT REGULATION REVIEW

SEVENTH EDITION

Editors
Calvin S Goldman QC and Michael Koch

THE LAWREVIEWS

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Editors
Calvin S Goldman QC and Michael Koch

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PREFACE

This seventh 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.

Foreign investment continues to garner a great deal of attention. This trend is expected to continue as the global economy further integrates, the number of cross-border and international transactions keeps increasing, and national governments continue to regulate foreign investment in their jurisdictions to an unprecedented degree. Reviews of cross-border mergers have, in some instances, been characterised recently by a rising tension between normative competition and antitrust considerations on the one hand, and national and public-interest considerations on the other; the latter sometimes weighing heavily against the former. As a result, more large, cross-border mergers are being scrutinised, delayed or thwarted by reviews that are progressively broad in scope.

Many factors are driving these emerging trends – the rise in populist political movements has increased the focus on national interest considerations such as protectionism; there are concerns over the export of jobs and industrial policy; heightened concerns over cybersecurity have led to enhanced national security protection measures; and an increased focus in some jurisdictions on the stream of capital flowing from state-owned enterprises has driven greater scrutiny of proposed investments, particularly those in economic sectors such as information technology and natural resources. Where, historically, national security concerns were limited to businesses involved in manufacturing or supplying military equipment and to infrastructure industries critical to national sovereignty, the scope of transactions reviewed on the basis of national security has broadened significantly. Transactions in sectors such as banking and finance, media, telecommunications, and other facets of the digital economy, as well as transportation industries and even real estate, may be potential focal points for foreign investment review.

Efforts to overhaul the regulatory landscape have been seen in the United States with the expansion of the review authority of the Committee of Foreign Investment in the United States (CFIUS), including a broadening of transactions under CFIUS's scrutiny. In turn, France is trying to generate support to revise the European Union's competition reviews to, among other things, more closely scrutinise mergers in the technology sector. Other major jurisdictions in Europe, including Germany and the United Kingdom, have shown greater interest in increased regulatory authority in regard to foreign investment reviews.

Differences in foreign investment regimes (including in the timing, procedure, thresholds for and substance of reviews) and the mandates of multiple agencies (often overlapping and sometimes conflicting) are contributing to the relatively uncertain and 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 may be 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.

The American Bar Association Antitrust Law Section (ABA ALS) Task Force on National Interest and Competition Law has built on the work of the ABA ALS previous Task Force on Foreign Investment Review. It has looked more closely at the potential implications of national interest considerations and evolving breadth of national security reviews, including, in some cases, as they may relate to, or interface with, normative competition reviews. In so doing, the Task Force has examined a number of cases in selected jurisdictions where these issues have been brought to the forefront. In August 2019, the report of the Task Force was considered and approved by the Council of the ABA ALS.

These emerging trends and the evolving issues in the interface of foreign investment and competition reviews were the subject of panel discussions at the Annual Conference of the International Bar Association in Rome in October 2018 and the ABA ALS Global Seminar Series in Düsseldorf, Germany in May 2018, among others in recent years. The evolving issues have also attracted attention in recent years in international fora of public authorities, such as the International Competition Network and the Organisation for Economic Co-operation and Development's Competition Committee.

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 17 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.

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

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

Calvin S Goldman QC and Michael Koch
Goodmans LLP
Toronto
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Chapter 7

GERMANY

Oliver Schröder[1]

I INTRODUCTION

Rules on foreign investment have been the subject of considerable discussion and public interest in the recent past in Germany. With the background of current trade and political tensions and ongoing uncertainty surrounding Brexit, industrial policy and the creation of European (or German, or both) champions is back on the agenda. The discussions surrounding the *Siemens/Alstom* merger that was ultimately blocked by the EU Commission[2] as well as the perceived role of the German government in the aborted *Deutsche Bank/Commerzbank* merger are vivid recent examples of such development. The German Federal Minister for Economic Affairs and Energy has recently announced a 'National Industrial Strategy 2030'[3] to promote the creation of European and German champions and political debate is in full swing regarding its implementation.

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

1 Oliver Schröder is a partner at Cleary Gottlieb Steen & Hamilton LLP.

2 *Bloomberg*, 'Siemens-Alstom's European Champion Deal Blocked by EU' (6 February 2019), available at www.bloomberg.com/news/articles/2019-02-06/siemens-alstom-deal-derailed-by-eu-on-competition-concerns.

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

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

to German state-owned bank KfW.[5] 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.[6]

Particularly considering the 50Hertz transaction, German rules on foreign investment have been tightened again effective late-2018[7] and now already apply when 10 per cent of voting rights in enterprises active in critical infrastructures are acquired directly or indirectly. In this connection, certain media companies were added to the list of critical infrastructures. Outside of critical infrastructures, the applicable general threshold for foreign investment review remains at 25 per cent of voting rights.

Factually, the approach taken by the authorities has seemingly become more cautious as well, and exercise of prolonged review periods is a realistic risk where investments in certain sensitive areas are concerned, with the resulting impact on overall transaction timeline and transaction certainty.

II FOREIGN INVESTMENT REGIME

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

i Sector-specific regime

There are specific rules that apply to the acquisition of companies that operate in areas that are relevant to national defence or other similarly sensitive security areas (the sector-specific control regime). In particular, if a company is to be acquired that produces certain goods that are listed in the war weapons control list, specially constructed engines or gears for tanks or military tracked armored vehicles, products with IT security features that are used to process classified government information or certain goods with a specific military use listed in the export list, a notification of such investment pursuant to Section 60, Paragraph 2 of the Foreign Trade and Payments Ordinance (AWV) must be submitted by any non-German investor. The relevant threshold of ownership that triggers such notification obligation is 10 per cent of the voting rights of the company (or the acquisition of a business through an asset deal by a company in which an investor holds at least 10 per cent of the voting rights). Prior to clearance by the Federal Ministry for Economic Affairs and Energy (BMWi) the underlying contracts are invalid and the transaction is therefore provisionally suspended. In its review, the BMWi considers whether the respective acquisition poses a threat to essential security interest of the Federal Republic of Germany. Similar rules also apply to the acquisition of a

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.

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

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

company operating certain high-grade earth-remote sensing systems (Section 10 of the Act of Satellite Data Security). The sector-specific investment review is not covered in this chapter in further detail, as it is rare in practice because of the narrow focus on military-use technology.

ii Cross-sectoral regime

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

iii Type of investors concerned

Under the cross-sectoral investment regime, acquisitions by any investor outside the EU or the European Free Trade Association (EFTA), or both, are covered. It is irrelevant in this context whether the investor is a private investor or state owned, and whether the investor actually is already operating within the EU or EFTA (e.g., through a branch). For the determination of whether an investor qualifies for the cross-sectoral investment review, its place of incorporation or factual place of management outside the EU or EFTA is decisive.[8]

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

The AWV contains a further rule, pursuant to which even acquisitions by EU or EFTA-incorporated investors may be subject to review of 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.[9] Because of the broad definition of 'indirect acquisitions', further discussed below, it is unclear in which context these anti-circumvention rules will still be relevant in future, outside a scenario where an acquisition vehicle is held in trust.[10]

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

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

9 Section 55(2) AWV.

10 Pursuant to some commentators, the circumvention rule should also apply if a domestic entity is the direct acquiror and such entity is held by a non-EU or EFTA investor – this would have the consequence that indirect acquisitions of non-EU or EFTA acquirors with a direct domestic acquiror would only be subject to scrutiny in a circumvention case. Particularly before the background 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.

a German company above the applicable threshold is subject to review, regardless of whether such shares are acquired through a share deal, through a capital increase, through a merger transaction or through a swap transaction. As the law links the acquisition of a participation in a company to certain voting rights thresholds (depending on the business sector concerned, either 10 per cent or 25 per cent, see subsection v, below) that are so acquired, the mere acquisition of non-voting shares or option or preemptive rights to acquire shares in future is, however, not subject to foreign investment review prior to the exercise of such rights.

In addition to the acquisition of voting shares through a share deal or similar transaction, the law also covers the acquisition of an enterprise through an asset deal. As long as the acquisition relates to an enterprise (i.e., a group of assets comprising a business undertaking that are used for a commercial purpose rather than individual assets that do not form an enterprise),[11] any acquisition of such 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.[12]

v Applicable voting rights thresholds

Acquisition of voting shares or of a business through an asset deal are only subject to review if certain thresholds of voting rights are reached or surpassed. By contrast, the value of shares or assets acquired is irrelevant for the purposes of foreign investment review.[13]

General rule

First, there is a general threshold of 25 per cent of voting rights covering acquisition of any domestic enterprise irrespective of the business segment it operates in. The review will be triggered at the time the investor 'reaches or surpasses' this threshold of 25 per cent of voting rights.[14]

Critical infrastructures

In contrast, the relevant control threshold is significantly lowered if the enterprise in question operates in certain specific business sectors of particular relevance to security within the meaning of Section 55(1), Sentence 2, Nos 1–6 of the AWV. If businesses active in these areas are concerned, an acquisition of 10 per cent of voting rights already suffices to trigger

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

12 Ibid.

13 Id., Question 3.

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

the foreign investment review process (and, as will be explained below, in case of acquisitions of companies active in these business segments, a mandatory notification obligation applies). At the same time, the law stipulates that in case of acquisitions in these sectors, a threat to public order or security may be considered particularly likely.[15]

The critical infrastructures concerned that are subject to the lower 10 per cent control threshold are the following business areas:

German companies that:

a operate critical infrastructures within the meaning of the Act on the Federal Office for Information Security[16] (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 software[17] for the operation of critical infrastructures within the meaning of the Act on the Federal Office for Information Security (e.g., software for (1) power plant or network control technology in the energy sector, (2) control and automation technology in the water sector, (3) cash supply, card-based payments or security transactions, (4) hospital information systems or the marketing of prescription drugs, (5) air, rail or road transport of passengers and goods, and (6) food supply);

c are entrusted with the operation of telecommunications surveillance measures according to the Telecommunication Act or manufacture technical equipment therefor;

d provide certain cloud computing services;

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

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

vi Attribution of voting rights

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

According to Section 56(2), No. 1 AWV, voting rights of third parties in which the acquirer holds a participation corresponding to the relevant threshold applying to the direct acquisition are fully attributed to the investor. Therefore, if, for example, a non-EU or EFTA

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

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

17 Section 55(1), Sentence 3 AWV sets forth certain further details on the definition of 'sector-specific software'; pursuant 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 purpose (but may be used within critical infrastructures), is not covered by contrast, cf. BMWi, FAQ re investment control under foreign trade laws of May 2019, p. 2, Section I, Question 7.

entity holds 10 per cent of an intermediary entity holding 6 per cent of the shares of a domestic German company operating a critical infrastructure business and the non-EU or EFTA entity acquires 4 per cent of the shares of such German company, this transaction triggers a potential review by the BMWi. Pursuant to Section 56(2), No. 2 AWV, shareholdings of a third party are also attributed if the acquirer and the third party have concluded an agreement on the joint exercise of voting rights (acting in concert).

Moreover, these attribution rules apply through the chain in the case of indirect acquisition.[18] As a consequence, if, for example, a German company acquires a 10 per cent shareholding in a critical infrastructure business, such German company is majority held (or least 10 per cent thereof are held) by an EU company and such EU HoldCo in turn is held with a shareholding quota of at least 10 per cent by a non-EU 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 definition under antitrust law, transaction structures will have to be closely scrutinised. As it may be sufficient for one entity within the chain that is not located in the EU or EFTA to acquire, in the context of the transaction, a shareholding of at least 10 per cent or 25 per cent (indirectly) in a German entity, the full transaction structure must be assessed on a case-by-case basis to determine whether notification obligations (in case of critical infrastructures) or review rights (in case of acquisitions not concerning critical infrastructures) apply.

vii Intra-group restructurings

It is debatable whether the attribution of voting rights (and the resulting need to subject an acquisition to foreign investment review) is warranted in 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 preexisting ultimate parent US HoldCo, such transaction will, applying the wording of the AWV, be subject to review, although there is no change of control on the level of the ultimate parent. As the competent authority in our experience is not taking a clear position in these cases, the parties should consider an application for a certificate of non-objection at least in cases where it is questionable whether the subsidiary concerned may operate in a critical infrastructure or public order or security may otherwise be affected.

viii Notification obligation and application for certificate of non-objection

Where the acquisition of a business active in critical infrastructures (as described in Section II.v) is concerned, the law requires a mandatory notification of the BMWi by the acquirer.[19] The notification obligation is triggered by the conclusion of the contract obliging the parties to transact (regularly: the sale contract), not just at the time of transfer *in rem* or closing. The law only stipulates that the notification is to be made in writing, but does not contain further formal or substantive requirements for the notification as such. Regularly,

18 Section 56(3) AWV.

19 Section 55(4), (1) AWV. Both a notification with regard to the acquisition of critical infrastructure as well as a certificate of non-objection (see Sections IV.iii and IV.iv) will need to be made in the German language pursuant to applicable general administrative law (Section 23 of the German Federal Administrative Procedure Act).

it will be sufficient to describe the transaction and parties (in particular the investor and the applicable control structure through the corporate chain) and to provide a high-level description of the target's and the investor's business (explaining, in particular, why and to what extent the transaction relates to critical infrastructures). Upon such notification, the BMWi will decide upon the commencement of a formal review procedure (see Section II.vi).

Outside the acquisition of critical infrastructures, there is no obligation to notify. However, to avoid uncertainty with regard to a potential *ex officio* review, an investor may apply for a certificate of non-objection.[20]

A certificate of non-objection confirms that the acquisition does not raise any concerns related to public order or security. To apply, the investor should submit basic information on the planned acquisition, the domestic enterprise that is the subject of the acquisition and the respective fields of business of the investor and the enterprise to be acquired to the BMWi. The BMWi will then decide within a time 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 II.vi).

While it is not mandatory to apply for a certificate of non-objection, in practice, it will in many cases be recommendable to do so. As will be explained below, an *ex officio* review by the BMWi will only be triggered by the BMWi obtaining positive knowledge of a transaction, with a statutory longstop date of only five years from conclusion of the sale contract. Absent an application for a certificate of non-objection, the investor will not be in a position to demonstrate that the BMWi obtained such positive knowledge, so that there will be a prolonged period of uncertainty and a possibility that the BMWi will retroactively seek to unwind the transaction. Therefore, if there is the possibility that the transaction may raise concerns with respect to public order or security, it will be recommendable 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) are relatively rare.

III TYPICAL TRANSACTIONAL STRUCTURES

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

In a typical share deal, the seller and purchaser will agree on a sale of certain identified shares, but will not immediately consummate such sale. Rather, closing will be conditioned upon obtaining regulatory approvals. Where public order or safety are implied (either because of the acquisition of shares in a company operating critical infrastructures or because of general considerations) and the relevant voting right threshold is reached or surpassed, the parties will regularly 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 (while the review process outside of the sector-specific control regime is non-suspensory) a transaction may have to be unwound in case of an adverse decision by BMWi.

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

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 pursuant to a court sanctioned scheme. Similar to a share purchase transaction, the investment agreement will regularly foresee foreign investment clearance as a condition precedent to proceeding with execution of the relevant corporate acts.

In a public takeover scenario, a separate and well-defined legal regime applies and any decision by a bidder to acquire shares in an entity that is domiciled in Germany[21] 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,[22] various minimum prizing 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 respective condition precedent to settlement of the offer in its offer document. While the law stipulates[23] that the *ex officio* review period is triggered by the BMWi obtaining knowledge of the publication of the bidder's intention to launch an offer (and not just with the launch of the offer as such), this should be irrelevant in most cases, as a bidder will regularly notify the transaction (or apply for a certificate of non-objection) in a public takeover scenario.

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

IV REVIEW PROCEDURE

i Review process and timelines

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.

In all of these cases, from a technical legal perspective, the review procedure has no suspensory effect (so it will be possible to consummate the transaction in theory – while in case of an adverse decision by the BMWi, it will potentially have to be unwound).

ii *Ex officio* review

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

Such *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 three months of obtaining knowledge of the conclusion of the relevant acquisition documentation. Any such notification by the BMWi must be in writing; for the purposes of determining whether the deadline for initiating an in-depth investigation

21 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.

22 The German Takeover Act defines 'control' as the acquisition of at least 30 per cent of voting rights. An acquisition of such 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.

23 Section 55(3) AWV.

has been met, service of the notice to the domestic company affected by the acquisition is decisive. In addition, a statutory longstop date of five years from conclusion of the acquisition documentation applies irrespective of the knowledge of the BMWi.

Given that the standard review deadline of three months is only triggered by positive knowledge of the BMWi, it will in practice be very difficult to determine when such period has lapsed if the acquirer does not apply for a certificate of non-objection or files a formal notification pursuant to Section 55(4) AWV in case of the acquisition of critical infrastructure businesses.

iii Review upon notification

Where the acquisition of critical infrastructure businesses is concerned, such acquisition[24] has to be notified to the BMWi in writing. Through such notification, which can be submitted by the acquirer or the target, the BMWi will obtain positive knowledge of the transaction and the review deadline of three months to determine whether an in-depth investigation will be launched applies, as discussed in the preceding paragraph.[25]

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

iv Review upon application for certificate of non-objection

An acquirer may apply[26] to the BMWi in writing for the issuance of a certificate of non-objection. As explained in Section II.viii, such application will regularly be prudent if there are at least initial concerns that public order or security may be threatened by the transaction. If an application is made, the BMWi has to decide whether it intends to open an in-depth investigation within two months from receipt of the application. In case it does not notify the applicant about its intention to open an in-depth investigation in writing within such two-month period, the certificate of non-objection is deemed to have been issued (and such deemed issuance can regularly not be revoked or withdrawn by the Ministry anymore other than in exceptional cases, such as where the information made available by the applicant was wrong).[27] Applying for a certificate on non-objection does not trigger administrative fees or costs (other than the own costs of the applicant and its advisers).

v In-depth investigation

In case 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.[28] The BMWi may request all entities directly or indirectly involved in the acquisition to submit additional documentation as needed for carrying out the investigation.

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

25 The BMWi will regularly not inform the notifying parties that no in-depth investigation is launched except in case a certificate of non-objection is being applied for.

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

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

28 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

For the in-depth investigation, a deadline of four months after the receipt of complete documents applies. Within such four months period, the BMWi may prohibit the direct acquirer from making the acquisition, or, in the alternative, it may issue instructions to safeguard the public order and security of the Federal Republic of Germany. If it intends to issue such prohibitions or instructions, 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 which 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 time period of negotiations.[29]

If the BMWi intends to prohibit a transaction, it may in particular prohibit or restrict the exercise of voting rights in the acquired company which 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 a completed acquisition at the expense of the acquirer.

vi Substantive scope of review, prohibitions and orders

In its review, the BMWi assesses whether an investment may impose a risk to public order or security in Germany that is actually threatening and sufficiently important so that it may affect fundamental public interests.[30] The term public order or security refers to Article 36, Sections 52(1) and 65(1) of the TFEU 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. However, the political discussion of the recent past clearly indicates that authorities may apply a broader understanding of public order and security in future and the BMWi has considerable discretion in determining whether public order or security are at risk.

Therefore, and owing to the fact that if a prohibition decision is issued the transaction will likely have to be abandoned irrespective of whether the decision is potentially upheld or not in subsequent litigation against the BMWi, in practice the authority has significant leverage to negotiate public law agreements containing certain security related conditions or commitments with investors (see Section IV.v). In the preceding years, the German government has concluded several such agreements with purchasers.[31]

financing of the acquisition as well as a copy of the acquisition agreement; see a complete list of required information in BMWi, General Ruling of 22 March 2019 on the required documentation under Section 57 of the AWV, BAnz AT 11 April 2019 B2.

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

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

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

vii Legal protection against decisions by the BMWi

If the BMWi opens a review procedure, prohibits an acquisition or imposes restrictions, such decisions may be challenged pursuant to general principles of administrative law. Such legal challenges may exclusively be brought by the acquirer or by the seller, but not by the relevant target.[32] 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 opposition proceedings according 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 the deal uncertainty for the prolonged time period of a legal proceeding.

V FOREIGN INVESTOR PROTECTION

Germany has entered into more than 130 bilateral investment treaties (BITs) and is the country with the most BITs worldwide. Many of the German BITs have been concluded based on a model agreement and customarily contain protection against expropriation without adequate compensation, principles of fair and equitable treatment, principles of full protection and security, most favoured nation treatment, protection against discrimination and provisions on the unrestricted transfer of capital and profits. While several of these BITs have been concluded a long time ago and older BITs do not always contain state-investor dispute settlement clauses, investor-state dispute settlement by way of arbitration has been provided for in German BITs since the 1980s. In particular, Germany is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the ICSID convention) which it signed in 1966 with ratification and entry into force in 1969.[33]

Cases where a dispute settlement mechanism under BIT against Germany was initiated are very rare. As of June 2019, only one dispute was pending and two cases were settled or discontinued (while there were 25 pending cases by German investors against foreign states and a significant number of decided cases).[34]

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

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

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

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

VI CURRENT DEVELOPMENTS

On 14 February 2019, the European Parliament approved an EU Regulation[35] on foreign direct investment screening, it will apply from October 2020.

Pursuant to this new Regulation, although individual Member States retain their authority to screen foreign investments, numerous procedures and criteria will be established for cooperation among Member States and with the European Commission. Specifically, an EU-wide framework will be established that grants competence to the European Commission to intervene with an official opinion on the grounds of public order or security and a forum for Member States will be provided to weigh in and potentially affect the course of foreign investment activities across the European Union.

In practice, the most significant impact on German foreign investment controls will be the additional potential delays caused by such cooperation and intervention, while the substantive parts of the Regulation (e.g., the definition of strategic sectors and critical infrastructures) should already be mirrored in principle by the current German legislation in force.

Pursuant to the Regulation, Member States will be required to notify the European Commission and all other Member States of an ongoing foreign investment screening[36] and provide certain information on the transaction set forth in the Regulation.[37] Upon such notification, other Member States may provide comments to the Member State conducting the screening, where they consider that the foreign investment undergoing the screening is likely to affect their public order or security. Equally, the European Commission may issue an opinion where it considers that the foreign investment undergoing the screening is likely to affect public order or security in more than one Member State.

Upon a notification of an ongoing screening and provision of the required information, the European Commission and other Member States have 35 calendar days to provide comments and the European Commission should issue its opinion within that 35-day time frame as well (but is allowed an additional five days if Member States provide comments). If the information provided by the Member State conducting the screening is deemed insufficient, the European Commission and other Members States may also request to be provided with further information within 15 calendar days of the initial notification, and thereupon have 20 calendar days to provide comments or an opinion.

Although the European Commission's power to issue opinions is discretionary, if at least one-third of Member States consider the foreign investment likely to affect their public order or security, the European Commission must set out its views on the transaction and while the opinion does technically not have binding force, Member States are required to take account of it and provide an explanation if the opinion is not followed. Factually, therefore, the views of the European Commission will have significant relevance and investors will not only need to analyse potential impact in Germany, but also consider impact beyond the borders of the actual transaction based on the very broad concept of public order and security.

35 Regulation EU 2019/452 (the Regulation).

36 Article 6 of the Regulation; there is also a separate mechanism for the Member States and the European Commission to provide comments or an opinion on transactions not undergoing a screening process yet in Article 7 of the Regulation.

37 Article 9(2) of the Regulation.

Appendix 1

ABOUT THE AUTHORS

OLIVER SCHRÖDER

Cleary Gottlieb Steen & Hamilton LLP

Oliver Schröder advises domestic and international clients on M&A, private equity, public takeovers, corporate law and reorganisations, as well as related commercial law matters. His work extends to a broad range of industries and clients, including the financial institutions, automotive retail, consumer, construction and energy sectors.

Oliver regularly publishes on corporate and M&A topics. *Chambers Global*, *The Legal 500* and *JUVE* recommend Oliver as one of the leading M&A lawyers in Germany.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt
Germany
Tel: +49 69 97 10 30
Fax: +49 69 97 10 3199
oschroeder@cgsh.com
www.cgsh.com

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