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FDI Screening Regulation

One screening fits all?

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Introduction: One screening fits all?

FDI Screening Regulation and its impact on foreign investments

(Editorial status: July 2023)

This article is part of a series on the FDI Screening Regulation, its implementation in the EU Member States and its influence on M&A transactions.

Dr. Milena Charnitzky, RITTERSHAUS & Friederike Henke, BUREN

1. Introduction

The desire for more control over foreign direct investment has increasingly come into political focus in recent years. The German investment verification regime is just one of many in Europe that has become much stricter in recent years. The most recent catalyst for change at the European level was and is the Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the verification of foreign direct investment within the Union („FDI Screening Regulation“).

Since the introduction of the FDI Screening Regulation, according to the EU Commission[1], 24 of the 27 EU Member States had in 2021 either:

(a) introduced a new national FDI screening mechanism,

(b) adapted an existing mechanism; or

(c) initiated a consultation or legislative process that is intended to lead to (i) the adoption of a new mechanism or (ii) the amendment of an existing one, e.g.:

(a)	Czech Republic, Malta, Denmark, Slovenia, Slovak Republic
(b)	Austria, France, Germany, Finland, Hungary, Italy, Latvia, Lithuania, Poland, Romania, Spain
(c) (i)	Netherlands, Portugal
(c) (ii)	Belgium, Estonia, Greece, Ireland, Luxembourg, Sweden

No Initiative:
Bulgaria, Croatia, Cyprus

The above overview is based on a report from the European Commission that was published in November 2021. These numbers have meanwhile changed with the recent introduction of screening mechanisms in inter alia The Netherlands, Belgium and Luxembourg.

This article is the first in a series of articles that aims to compare the impact of the FDI Screening Regulation in various European countries and Switzerland as an EFTA state. The investment screening regimes of six countries are introduced; Switzerland as an EFTA. In the order of publication: Germany, the Netherlands, Austria, Poland, France, Switzerland. The comparison between the countries will show that there are more similarities than one would initially expect, but that the approaches to the practical challenges are sometimes quite different, so that a look across the border can be very insightful.

2. Background and objectives of the FDI Screening Regulation

The regulation is the result of various requests to the European Commission. In February 2017, the economy ministers of France, Italy and Germany Sapin, Calenda and Zypries sent a letter to EU Trade Commissioner Malmström[2] calling on the EU Commission to develop proposals for an EU-wide framework for national investment screenings. A similar request can be found in a proposal by ten members of the European Parliament

1 First Annual Report on the screening of foreign direct investments into the Union, 23.11.2021, COM (2021) 714 final, p. 8 f.

2 See the letter of the Ministers of Economy of Italy, France and Germany to Cecilia Malmström, February 2017, available under www.bmwi.de/Redaktion/DE/Downloads/S-T/schreiben-de-fr-it-an-malmstroem.html, last accessed on on 28 July 2023.

from March 2017.[3] Both requests argue that freedom of investment in the EU must be subject to restrictions in order to protect the Union, that it requires a certain degree of reciprocity when investing in other non-EU states, and that it must be possible to intervene in favor of national security interests, especially when investments are subsidized by state aid.[4]

The central objective of the FDI Screening Regulation is the protection of security and public order and to standardize the investment screening regimes within the EU. Thus, „in individual cases, foreign investors may seek [...] to acquire control of or influence in European undertakings whose activities have repercussions on critical technologies, infrastructure, inputs, or sensitive information".[5] Such acquisitions could allow that „these assets [are used] to the detriment not only of the EU's technological edge, but also its security and public order".[6]

3. Essential contents of the regulations

3.1 No obligation for FDI control

The FDI Screening Regulation does not oblige Member States to introduce an investment screening regime. Member States shall still be able to take into account their respective situations and national circumstances.[7]

The regulation also does not give any specifications in regard to the type of investments that are controlled and the sectors that are deemed to be sensitive. However, it designates various high and future technologies as security-relevant and supports the intervention powers of the Member States in the case of foreign direct investments in European key or critical technology companies. These include foremost AI companies (artificial intelligence), robotics (in certain areas), semiconductor or quantum technology.

FDI screening and any restrictions on the foreign investor may still only be carried out for reasons of security and public order (Art. 3 and 4). The FDI Screening Regulation also lays down certain minimum requirements for the procedure, which increases the transparency of the screening process[8], non-discrimination, judicial recourse[9] and timeframes[10].

3.2 No appraisal threshold

Unlike many Member States that already have an investment appraisal procedure, the Regulation does not specify an appraisal threshold; the concept of investment in Art. 2 (1) is also broader and in particular also covers „greenfield investments" (i.e. investments related to the incorporation of a first subsidiary in the Member State concerned) as well as investments in individual assets such as land or real estate that are essential for the use of critical infrastructure.[11] In Poland, France, Austria and Germany, neither greenfield investments nor investments in individual assets such as real estate are currently covered.

3.3 Cooperation mechanism

The focus of the regulation is to liaise the FDI review of Member States through a cooperation mechanism in order to enable mutual exchange of information and opinions, and thus implement a sort of „neighbourhood watch".

The exchange of information between the Member States is to take place via contact points to be set up in each Member State. The contact point for Germany is the Federal Ministry of Economics and Climate Protection (BMWK).

The FDI Screening Regulation nevertheless explicitly grants the Member States the final right to decide whether - and if so, how - to screen a foreign direct investment within the framework of the FDI Screening Regulation.[12] Neither the Commission nor other Member States however can in the end prevent an investment in a (different) Member State; they can only communicate their concerns in the form of comments (Member States) or opinions (Commission).[13] These must be given „due consideration"[14] by the Member State concerned and it shall provide an explanation if the opinion is not followed („comply or explain").[15] The Member States will nevertheless have the possibility in the future to examine and, if necessary, prohibit an acquisition or to have it examined and prohibited if the investment is likely to affect the public order or security of another Member State. The comments and opinions of Member States and Commission shall primarily have an advisory function. However, there is a uniform obligation to provide information.[16] The latest OECD report on the FDI Screening Regulation published in November 2022[17]

3 Proposal for a Union act on the Screening of Foreign Investment in Stra-tegic Sectors, 20 March 2017, B [8-0000/2017] by Weber, Caspary, Saifi, I. Winkler, Cicu, Proust, Quisthoudt-Rowohl, Reding, Schwab and Szejn-feld, last accessed 11 April 2022.
4 See B. and para. 1 in Proposal for a Union act on the Screening of For-eign Investment in Strategic Sectors, 20 March 2017, B [8-0000/2017], last accessed 11 April 2022.
5 European Commission, Communication: Welcoming foreign direct in-vestment while protecting Essential interests, 13.9.2017, COM(2017) 494 final, p. 5.
6 European Commission, Communication: Welcoming foreign direct in-vestment while protecting Essential interests, 13.9.2017, COM(2017) 494 final, p. 56.
7 European Commission, Proposal for a Regulation of the European Par-liament and of the Council establishing a framework for the verification of foreign direct investments into the European Union, COM(2017) 487 final {SWD(2017) 297 final}, p. 10; Krenzler/Herrmann/Niestedt/Voland, 18th EL October 2021, EU_VO_2019_452 before Art. 1 para. 11.
8 Art. 3(2).
9 Art. 3 (5).
10 Art. 3 (3).

11 Art. 4 (1) a.
12 Art. 1(3); on the sometimes difficult allocation of legal bases and compe-tence bases for the FDI Screening Regulation see in detail: Klamert/Bucher EuZW 2021, 335, 337 et seq.
13 Art. 6 (2) and (3), Art. 7 (2) and (3).
14 Art. 6(9), Art. 7(7).
15 Art. 8(2) c.
16 Art, 5.
17 OECD Report: Framework for Screening Foreign Direct Investment into the EU - Assessing effectiveness and efficiency, https://www.oecd.org/investment/investment-policy/oecd-eu-fdi-screening-assessment.pdf, last accessed on 28 July 2023.

(the ”OECD Report”) gives a schematic overview of the obligation to provide information from the perspective of a Member State possessing information on the one hand[18] and from the perspective of a Member State seeking information on the other hand[19].

It is not unproblematic that, in the case of transactions that have not been screened, comments or opinions can still be submitted up to 15 months after the completion of the foreign direct investment.[20] This deadline is apparently only shorter if information is requested from the Member State.[21] This rigid deadline stands in contradiction to Art. 3 (3) of the FDI Screening Regulation, according to which the Member States may set their own time frame for their respective screening regime and allow comments and opinions to be taken into account.

This observation is also supported by the OECD Report which served to assess the effectiveness of the FDI Screening Regulation as an intermediate step to an evaluation by the European Commission in October 2023. The OECD Report states that participants (i.e. parties to an acquisition that falls under the scope of the FDI Screening Regulation) observed shortcomings that resulted in delays, inefficient procedures, duplication of work, or tight timelines that strain resources and lead to unsatisfactory national screening decisions.[22]

3.4 No to the reciprocity test

The regulation does not include a reciprocity test. Instead, the FDI Screening Regulation has set a regulatory framework that raises the overall hurdles for investments in the EU.

4. Aim of the series of articles

As the FDI Screening Regulation leaves a lot of “wiggle room”, the complaint is sometimes raised that the regulation stops short and leaves behind “patchwork“.[23] Instead, the comparison of the countries examined here – Germany, the Netherlands, Poland, Austria, France and Switzerland – will show that there are more similarities than one would assume. In all the countries examined, more or less the same questions and challenges arise; the catalogues of critical sectors are mainly the same. Differences occasionally exist in the screening thresholds or the mechanism of the screening regime. The biggest difference, however, is the importance that the respective countries attach to investment screening – possibly also for political reasons. Overall, there is growing sympathy for stronger powers of the authorities to intervene – especially in countries that have had corresponding laws for a very long time, such as in France and in Germany. For the Netherlands, a recently introduced cross-sectoral investment control is new. While the country had already implemented the cooperation mechanism in 2020, shaping the requirements for an investment screening has proven to be a tough legislative endeavour, which led to the implementation of the Security Test Act on 1 June 2023[24].

Switzerland does not have cross-sectoral investment control. In contrast to Germany, however, companies in critical sectors in Switzerland are generally still fully or at least majority state-owned (national or cantonal) and thus protected from a takeover from abroad (for example, the federal railway, the postal service, aviation, etc.) Poland and Austria, like Switzerland, also largely rely on an open investment policy. In particular, Poland and Austria also provide for „de minimis“ exemptions for acquisitions of target companies that do not exceed a certain employee and/or turnover threshold. Please find More details on the FDI Screening Regulation and its effects in the neighboring countries in the next article in this publishing series.

18 OECD Report, page 29.
19 OECD Report, page 30.
20 Art. 7(8).
21 Art. 7(6).
22 OECD Report, page 7.
23 This was the criticism from Italy in particular, and the reason why Italy, as a co-sponsor of the regulation alongside France and Germany, abstained from the vote at the end; see Italy's statement in Council of the EU, Pro-cedure file2017/0224 (COD), 6551/19 - ADD2, I/A item note, 22 February 2019.

24 Investments, Mergers and Acquisitions Security Test Act (Wet Veiligheidstoets investeringen, fusies en overnames)


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FDI Screening Regulation and the Regulations in Germany

(Editorial status: July 2023)

Dr. Milena Charnitzky, RITTERSHAUS

I. Introduction

The latest amendments through the 1st Amendment to the Foreign Trade and Payments Act (AWG) and the amendments to the Foreign Trade and Payments Ordinance (AWV) in 2020 and 2021 were both reactions to the lessons learned from the Covid pandemic and to Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the verification of foreign direct investment within the Union („FDI Screening Regulation"). Unlike Poland and France, for example, Germany has opted for indefinite (rather than temporary) tightening of the investment screening regime, particularly in light of the Covid pandemic (see chart 1)[1].

Due to the tightening in Germany and on the EU level by the FDI Screening Regulation, the Federal Ministry for Economic Affairs and Climate Protection (formerly: Federal Ministry for Economic Affairs and Energy) allegedly expected an increased case volume of at least 500 new reportable acquisitions per year. From the numbers shown above (status: 9 January 2023 according to the report of the BMWK), one can see that this number has not quite been reached. The increase from 2019 to 2021 (the latter the first full year of the new screening mechanism) is however palpable – the number of FDI screening reviews in Germany alone has tripled, if you count also the EU notifications of transactions which German may review and comment on, the number has more than quintupled. Most of the transactions to be reviewed are according to the BMWK numbers non-sector specific and most of the investors involved come from the United States, followed by UK and only then China.

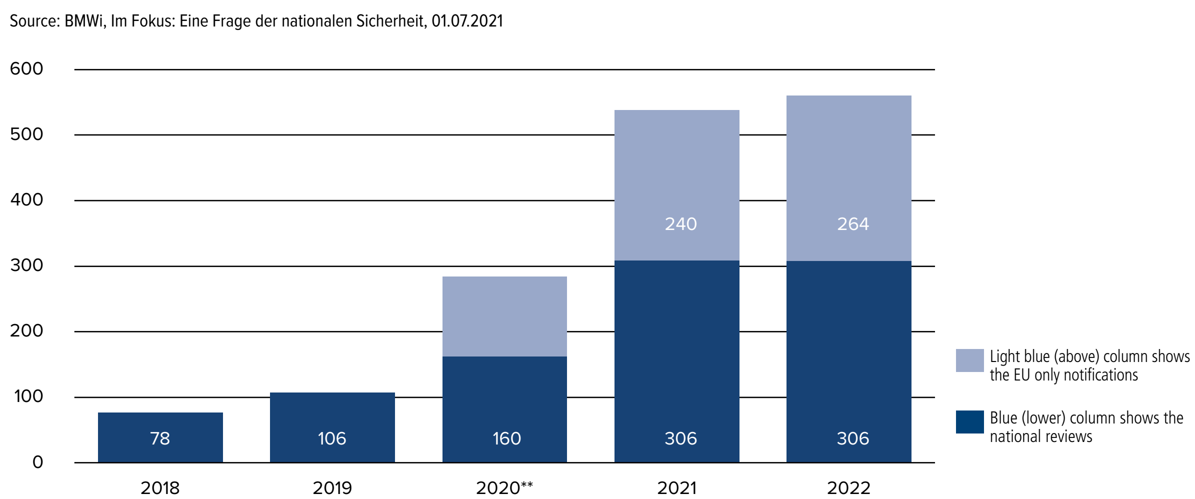
II. German FDI screening regime and changes resulting from the FDI Screening Regulation

In Germany, the legal basis for the screening of foreign acquisitions of shareholdings is the AWG[2] , the AWV and the general decree issued by the Federal Ministry

1 Table BMWK, Investitionsprüfung in Deutschland : Zahlen und Fakten, Stand : 9.1.2023, https://www.bmwk.de/Redaktion/DE/Publikationen/Aussenwirtschaft/investitionsprufung-in-deutschland-zahlen-und-fakten.pdf?__blob=publicationFile&v=1, consulted on 30 July 2023.** EU cooperation mechanism was implemented in October 2020

2 The other regulations in the AWG and AWV - the export control of goods and commodities (Sections 4, 5 AWG; Sections 8 to 54 AWV) as well as the notification and disclosure requirements in capital and payment transactions (Sections 4, 5 AWG; Sections 63 to 73 AWV) - are not the subject of this review.

Chart 1 • Number of procedures



of Economics and Climate Protection (BMWK).[3] The BMWK also acts as the contact point to be installed for the cross-member state cooperation mechanism under the FDI Screening Regulation.

1. Which deals are subject to review and/or notification obligations?

The first thing to understand about the German FDI screening regulations is that the German FDI regime distinguishes – abridged – between

(i) acquisitions that *may* be reviewed (and thus transactions that the BMWK may or may not be notified of) and
(ii) acquisitions that *must* be reviewed (and thus acquisitions the BMWK must be notified of)

as well as between a cross-sectoral audit (in this article referred to as deals of Category A – see details under III.) and the more stringent sector-specific audit (in this article referred to as deals of Category B – see details under IV.). The latter concerns in particular defense-sector related acquisitions.

Which acquisition falls under which category depends first of all on the industry sector of the target. Depending on a Category A or B deal, different prerequisites trigger a FDI review. For example, if the deal potentially falls under Category B, investments of *foreign* purchasers are subject to review (therefore also acquisitions by purchasers from EU member states, whereas for the Category A, only investments by non-EU member purchasers trigger the FDI review). Further, the threshold (percentage of shares / voting rights acquired) for opening up the transaction to an FDI review is different for Category B than for Category A.

The requirements and definitions for Category A and Category B transactions mainly overlap but are overall tighter for Category B, for which also the scrutiny depth is stricter. Since most of the concerned deals will fall under the cross-sectoral audit in Category A, the focus of this articles lies on this constellation.

2. Timelines and review periods

In terms of time, the FDI screening review is in general divided into two phases that set deadlines in motion: (i) in the first phase (Phase I), the BMWK decides whether to open the review process at all, the screening is therefore a sort of preliminary examination; (ii) in a second phase (if the BMWK decides to open the review process – Phase II), the BMWK notifies the parties that the transaction will be reviewed and usually requests further, more detailed documentation. The first phase is initiated by the notification of the transaction, either proactively by the authority or proactively by the acquiring party by applying for a so-called clearance certificate. The starting point for the review and the beginning of the time frame for the fulfillment of any notification obligation is the conclusion of the purchase contract / investment agreement (Signing).

Positive to mention is that the review periods for both review procedures in Category A and B have through the changes in the last years been standardized and clarified. The preliminary examination in Phase I, within which the BMWK must decide whether to officially open the examination procedure or not, has been shortened to two months; the decision deadline for Phase II has been shortened to four months as of receipt of the required documents (Section 57 AWV). Furthermore, according to the new regulation, the request for further documents no longer leads to a new start of the time period, but only suspends it. A new start of the time period is only foreseen in special cases, such as if the clearance or the clearance certificate is withdrawn, revoked or amended.[4] In the case of complex review procedures, the review period can be extended twice, once by up to three months, once by up to one month. The opening of the review procedure is further excluded if more than five years have lapsed as of the date of knowledge of the conclusion of the contract (signing) – to trigger this time period, a precautionary notification can in some cases be sensible.

3. Asset deals; exemptions

It has now been clarified that asset deals are also covered (as was previously practiced).[5] However, as in France, certain intra-group acquisitions are exempt from the reporting requirement if all parties involved (subsidiary A as acquirer, subsidiary B as seller and parent company C as controlling company) are domiciled in the same third country and one of the subsidiaries sells a domestic company to the other subsidiary.

III. Cross-sectoral audit, §§ 55 ff. AWV

Acquisitions that fall under the scope of the FDI screening regime of the cross-sectoral audit and which may in general all be reviewed by the German authorities are according to Sec. 55 para. 1 AWV:

- (i) direct or indirect acquisitions exceeding the minimum thresholds
- of (ii) domestic companies or interests therein
- by (iii) non-EU purchasers/investors,
- regardless of the industry sector

(together hereinafter the “Acquisitions” or “Acquisition”).

3 General decree of the BMWi of 27 May 2021, BAnz AT of 11.06.2021. The latter regulates details of the documents to be submitted to the BMWi in the event of a notification under the Foreign Trade and Payments Act and the Foreign Trade and Payments Ordinance.

4 Cf. in detail Nestedt/Kunigk NJW 2020, 2504, 2506 f.; Sattler/Engels EuZW 2021, 485, 487.

5 Circular No. 3/2020 on the 15th amendment to the Foreign Trade and Payments Ordinance of 25 May 2020, BAnz AT 2 June 2020, B. to No. 1 letter b). The purchase of individual assets, on the other hand, is not recorded as an acquisition (of an interest), but may be subject to licensing requirements under export control regulations, depending on the goods involved and where their final destination is to be.

Practical note: Indirect acquisition by a Non-EU member purchaser means that the above conditions under (i) and (iii) are also fulfilled if the direct purchaser is a EU-member company (e.g. from Spain) and its shareholder or ultimate parent company resides outside of the EU (e.g. USA or Asia). To establish an European SPV (special purpose vehicle) to acquire the target and forego the German screening measures does therefore not “do the trick” (this assumption is not uncommon).

Apart from this general screening rule in Sec. 55 AWV, the AWV lists in a catalogue in Sec. 55a AWV acquisitions and investments in specific industry sectors (a catalogue which has been significantly broadened in the last three years, among others due to lessons learned under Covid) of which the authorities must be notified (Sec. 55a para. 1, 4 AWV). If the authorities are not notified of such deal, this is considered a breach of the law (for consequences please see below under V.).

Practical note: The general possibility for authorities to screen a deal means that the parties may choose to notify the authorities of any such deal as a precaution and apply for a so-called clearance certificate (Unbedenklichkeitsbescheinigung) which is then usually a condition precedent for closing. Such a way forward can be advisable in certain “grey areas” (i.e. doubts whether the target falls in certain industry sectors listed in Sec. 55a para. 1 AWV) where it is usually better to notify the authorities early on themselves and provide them with all relevant information rather than have the risk of the deal being opened for review after the deal has been signed and/or closed.

This path is nowadays advisable even if the parties believe that the transaction is going to be cleared. The reason for this caution is that the German authorities are much more vigilant and tend to ask for more notifications than before due to a wider interpretation of critical sectors in general. Therefore, if it is not evident that critical sectors are not touched, the notification is advisable. This recommendation is especially to be made for all tech sector transactions.

2. Definitions

According to the AWV, *acquisition* means the acquisition of „voting shares“ (Section 56 AWV, Section 60a AWV), i.e. of corresponding capital shares conferring voting rights.

Since the changes made by the 16th and 17th AWV amendments (in 2021), a notifiable acquisition can now also be made in „other ways“, for example due to control resulting from the allocation of additional seats or majorities in supervisory bodies or in the management, by granting veto rights in strategic business or personnel decisions or rights to access company-related information (so-called „atypical acquisition of control“). The background to this regulation was the observation of acquisitions of control intended to deliberately circumvent the thresholds;[6] the new regulation aims to counteract such circumvention.[7]

Purchaser from a non-EU member state means a purchaser residing in countries that are not part of the European Union – as a result of the Brexit, this now also includes Great Britain.[8] The countries of the European Free Trade Association (EFTA), i.e. Iceland, Norway, Liechtenstein and Switzerland (Section 5 (2) of the Foreign Trade and Payments Act) are considered to be EU residents.[9] Even though Switzerland has a special status because it has acceded to the EEA Agreement but has not ratified it, it is considered a state with comparable protection status because of various bilateral agreements.[10] The target company must be *domestic*. This is determined by the place of management (administrative headquarters). A company with its registered office in another EU country but its administrative headquarters in Germany is therefore also considered domestic.

The minimum thresholds for acquisitions to be notified and/ or potentially subject for review depend on whether the acquisition would fall under a cross-sectoral audit or the more stringent sector-specific audit.

3. Minimum thresholds for review

Shareholdings are only subject to review above a certain percentage threshold – how high this threshold is depends on the industry concerned. The legislator differentiates here between a catalogue of particularly critical industries and the remaining acquisitions. Previously, a review threshold of 10% applied to all critical sectors, and 25% to the others.[11] The catalogue of the new critical sector now comprises no fewer than 27 constellations (55a AWV).

Following the implementation of the FDI Screening Regulation, three screening thresholds now apply according to the German AWV (Sec. 56):

- a shareholding of 10% or more (for the case groups in § 55a nos. 1 to 7)
- a shareholding of 20% or more (for case groups § 55a nos. 8 to 27);
- a shareholding of 25% or more (for all other acquisitions with the exception of the sector-specific audit in Sec. 60 AWV – see details below in this article).

6 Sattler/Engels EuZW 2021, 485, 489; Lippert BB 2021, 1289, 1292.
7 It should be noted that transactions under transformation law can also be acquisitions within the meaning of the AWV, such as the merger of a domestic target company with a legal entity controlled by a non-EU party, see Mausch-Liotta/Sattler Hocke/Sachs/Pelz, AWR, 2020, Section 55 para. 84.
8 (Domestic) permanent establishments and branches of non-EU acquirers are also not deemed to be EU residents (Sections 55 (2), 60 (2) AWV).
9 The background to the inclusion of the EFTA States is the protection of fundamental freedoms, which is effective throughout the EEA area and may only be restricted in very few cases to protect national security (Article 346 (1) (b) TFEU).
10 Mausch-Liotta/Sattler Hocke/Sachs/Pelz, AWR, 2020, § 55 marginal no. 74.
11 The critical sectors included first and foremost operators of critical infrastructures in accordance with the BSI Criticality Regulation, telecommunications services and similar „basic service providers“.

Practical note: When calculating the above percentage thresholds, it is important not to forget the voting rights that may be attributable to the acquirer after the acquisition via third parties who hold an audit-relevant interest in the target company or with whom voting agreements exist.

Acquisitions of shareholdings after certain thresholds have been reached, trigger a (re-newed) review.[12] These thresholds take in particular into account de facto majorities based on the usual participation quota at shareholders' meetings or annual general meetings.[13]

4. Obligation to notify, obliged party, time of reporting

If the thresholds under above 3. are exceeded, the authorities must be notified of the transaction immediately upon conclusion of the contract (signing). As a rule, the immediate acquirer is obliged to report the transaction, even if the acquirer is a resident of the European Union. However, the notification is often made in consultation with the seller and is also often recommended to be filed sooner than the signing itself (once the intention to acquire is sufficiently established.) Changes to the notification (if not material) can usually be made without further complications (i.e. changes to the purchase price that also needs to be inserted in the respective forms).

5. Clearance certificate vs. release procedure

Before the changes in Sec. 55a AWV through the amendments in the years 2020 and 2021, an application for a clearance certificate pursuant to Section 58 AWV was usually filed in order to set the preliminary examination period in motion, after the fruitless expiry of which the acquisition was deemed to be unobjectionable.

According to the new regulations, the precautionary application for a clearance certificate is no longer possible for certain acquisitions (arg e Section 55a (4) AWV).[14] Instead, the clearance procedure pursuant to Section 58a AWV applies here, whose time limit for the clearance fiction is only set in motion by the notification of the transaction. The clearance procedure is linked to the notification requirement and thus, in principle, to a later point in time, which has a significant effect on the timeline and planning of a transaction. According to the explanatory memorandum, the clearance certificate and the clearance procedure will be mutually exclusive in the future[15], but the explanatory memorandum leaves the option of combining the two as a precautionary measure.

6. Loosened review criteria „security“ and „public order”

Until the changes made by the 1st Amendment to the German AWG, the starting point for the examination of FDI was a threat to the public order or security of the Federal Republic of Germany. Now, it is sufficient if an acquisition of an equity interest is likely to *affect* the public order or security. Thus, the relevant impact on security interests was not only lowered in terms of content, but also softened in terms of time due to the future-oriented component. The territorial reference point has also been expanded: the decisive factor is no longer solely the security or public order of the Federal Republic of Germany; the security or public order of another EU member state or a probable impairment of projects or programs of Union interest must also be taken into account.[16] This extension builds a bridge to the second major change introduced by the FDI Screening Regulation, the EU-wide cooperation mechanism.

Investor-related factors are also to play a role in the assessment, in particular whether the acquirer is directly or indirectly controlled by a foreign government[17] or has been involved in security-endangering activities in the past. With regard to the FDI Screening Regulation, control recently also means financial provision by the investor's state.[18]

IV. Sector-specific audit, §§ 60 ff. AWV

In deviation from the cross-sectoral audit, deals of Category A, the sector-specific audit is much stricter and includes only specific, usually defense-sector and military-related target industries. In these sectors, all acquisitions and holdings by foreigners are subject to the sector-specific audit, i.e. acquisitions by EU and EFTA nationals are also covered. In specific cases, also investments by nationals can be subject to review, i.e. if the structure is intended to circumvent the sector-specific audit.

The review threshold of 10% shareholding has remained the same as before the FDI Screening regulation and is the same under Category A deals in the sensitive sectors listed in catalogue Sec. 55a para. 1 nos. 1 to 7 AWV. However, due to the FDI Screening Regulation, the scope of application has been expanded also in Category B deals. Whereas previously only target companies that develop and manufacture certain goods

12 This was also in line with the previous inspection practice of the BMWi. In the cases of the case groups § 55a Nos. 1-7 AWV, this applies from the percentage thresholds of 20, 25, 40, 50 or 75.
13 Sattler/Engels EuZW 2021, 485, 489.
14 It remains applicable to the remaining acquisitions above a participation threshold of 25%, which are likely to make up a smaller proportion. Also: Lippert, 1292; Annweiler GWR 2021, 241, 243.
15 Explanatory Memorandum, BR-Drs. 343/21, p. 43.
16 Article 8(3) of the FDI ScreeningRegulation refers to its Annex, which contains an exhaustive list of programs.
17 This clarification was already called for in the key issues paper of the economics ministers of France, Italy and Germany in 2017, see Proposals for ensuring an improved level playing field in trade and investment, February 2017, point (4), available at https://www.bmwk.en/SiteGlobals/BMWI/Forms/Search/EN/Servicesuche_Form.html?resourceId=180050&input_=180004&pageLocale=en&selectSort=score+desc&templateQueryStringListen=proposals-for-ensuring-an-improved-level-playing-field-in-trade-and-investment-last accessed 04/24/2022.
18 For details, see also Mausch-Liotta Hocke/Sachs/Pelz, AWR, 2020, paras. 49, 50; These factors have already been taken into account in the BMWi's audit earlier, which is why only a clarification and not a change in audit practice has been made here, see also Sattler/Engels EuZW 2021, 485, 490.

from the Export List were included, *all* military equipment from Part I Section A (arms, munitions and armaments) of the Export List[19] is now covered. Furthermore, modification and actual force - both present and past - are also harmful, so that companies that do not manufacture the listed goods[20] but store or transport them are also affected.[21]

The above made statements regarding obligations to notify under III. 4. and review criteria under III. 5. are in basics applicable to the sector-specific audit as well.

V. Consequences of breaching FDI screening and notification obligations

For all transactions for which an approval is required and not given, the transaction is legally invalid. Therefore, for transactions which fall under sensitive industry sectors in Sec. 55a AWV or Sec. 60 AWV, the risk of not notifying the authorities and requiring approval, is that the authorities can post-closing reopen the deal and either prohibit the deal or impose restrictions on it (in addition to probably imposing fines). This right of the authorities only expires after five years after getting note of the respective transaction.

For all transactions for which an approval is required and an approval/ review process is pending, the transaction is (pending) legally invalid.

For all transactions which are subject to potential review (i.e. also all transactions falling under Sec. 55 AWV), the validity of the transaction stands under the resolving condition that the approval is not denied, i.e. the transaction is valid until it is denied.

Breaches against the stipulations of AWV and AWG are mainly regulatory offenses but with in part sensitively high fines. Some are however considered criminal offenses (see below VI.).

VI. Prohibition of enforcement and exceptions; criminal offense

An important new aspect to know when looking at foreign investments in German targets is the closing prohibition on all investments subject to FDI screening notification. Any acquisition subject to notification requirements, with the exception of legal transactions involving securities (Sec. 59a AWV), is suspended for the duration of the investment review and may not be closed / excecuted. In order to prevent cases of „de facto consummation", the seller is prohibited, among other things, in addition to an actual closing,

- to enable the acquirer to exercise voting rights,
- to grant the acquirer the use of profit participation rights
- disclose to the acquirer company-related, audit-triggering or safety-relevant information to be considered in the audit.

Under Section 59a AWV, exceptions to the prohibition of enforcement apply to the enforcement of shareholdings acquired by means of legal transactions with securities via a stock exchange.[22] The provision is modeled on the antitrust provision of Section 41 (1a) GWB, which aims to eliminate the legal uncertainty caused by the pending invalidity of the legal transactions and establishes the parallelism with the exemption provision in Art. 7 FKVO[23]. Unlike Section 41 (1a) GWB, the wording of Section 59a AWV does not cover public takeover bids under the WpüG[24], so that a privileged treatment for these is probably ruled out, even if it would have been desirable from a practical point of view.

Anyone who violates an enforcement prohibition or an enforceable order of the BMWK in the future is liable to prosecution[25]. The negligent commission of these acts constitutes an administrative offense punishable by a fine of up to EUR 500,000.00.[26] A breach of the prohibition of closing is now a criminal offense (Sec. 18 para. 1 b. AWG).

Practical note: The above prohibitions may make it advisable to foresee according stipulations also in investment agreements – which generally precede the respective purchase agreement in a more extensive transaction – and place not only execution measures (takeover / subscription of shares / registration of the capital increase with the commercial register), but also the respective upstream obligations, e.g. the resolution on the capital increase for the issuance of new shares itself, under corresponding conditions precedent. In that regard, it will be advisable to align the wording of such clauses to closing conditions for merger control in order to cover all eventualities.

VII. Conclusio: Implications for M&A Practice in Germany

One of the first topics in discussions around transactions is usually the expected risks and time delays due to investment controls. Companies have to deal with the provisions of the AWG and AWV much more often and much more intensely than before in order to „set up" the transaction process correctly at an early stage. The practice of the BMWK, also in dealing with the recent cases of Chinese investments, shows that the antennas of the authority have become much more sen-

19 The export list lists all goods that are subject to export control law and for which an export license is required under Section 8 AWV.
20 Barth/Käser NZG 2021, 813, 817; Sattler/ Engels EuZW 2021, 485, 490.
21 Barth/Käser NZG 2021, 813, 817; Sattler/ Engels EuZW 2021, 485, 490.

22 Covered are securities as well as instruments convertible into other securities admitted to trading on a stock ex-change or similar market (e.g. convertible bonds and bonds with warrants).
23 (EC) No. 139/2004 of January 20, 2004 (EC Merger Regulation).
24 Securities Acquisition Takeover Act.
25 Sections 80 (2) AWV, 18 (1b) No. 3 AWG.
26 Section 19 (1), (3) AWG.

sitive and that many terms in the catalogue of the AWV are understood by the BMWK much more broadly than the wording of the regulations would suggest. The punitive nature of violations of the enforcement prohibition has made things worse. With the explicit inclusion of investor-related factors, the parties involved must also be aware that in future more documents than before will be relevant for examination by the authorities (including, for example, investment and shareholder agreements) in order to be able to clarify interrelationships and opportunities for control. Particularly in the case of sector-specific audits, stakeholders must be prepared for the fact that, under the general decree of the BMWK, details of the place of birth, place of residence, passport numbers etc. of the management bodies will be requested from all (including indirect) acquirers.

The elimination of the clearance certificate for all 27 case groups of Section 55a AWV also deprives the parties involved of a previously important opportunity to proactively influence the timeline of the FDI screening process. Overall, the parties involved will have to take into account longer transaction times and an early degree of specification in contracts in order to cover and „price in“ all eventualities. It will also be more important than before to contact the BMWK at an early stage in order to clarify any obligation to notify and the necessary documents in the context of a notification.

At the end of the article on the Netherlands by mr. Friederike Henke, which follows this article, there is a brief legal comparison with the Dutch regulations as well as additional advice for (international) M&A practice that applies to both legal systems.

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FDI Screening Regulation and the Regulations in the Netherlands

(Editorial status: July 2023)

Friederike Henke, BUREN

I. The Netherlands as an open economy

The Dutch economy is strongly influenced by international trade and direct investment. The OECD's Foreign Direct Investment Regulatory Restrictiveness Index ranks the Netherlands (as well as Switzerland) as one of the countries with the lowest FDI restrictions in the world and categorises the Dutch economy as an open economy. Hence, there are currently hardly any restrictions on investment from (non-EU) foreign countries.

The Netherlands has therefore been struggling with the introduction of controls and it is initially surprising that - although the FDI Screening Regulation does not oblige it to do so - various draft laws have been introduced to create a cross-sectoral investment screening regime. Parliamentary documents on the drafting process of the FDI Screening Regulation show that the Netherlands would have preferred to regulate through much more non-binding guidelines instead of an EU regulation, but it was not able to prevail with this. Another important point for the Netherlands was that the powers of the Member States should not be overly restricted, especially with regard to the definition of the terms of „(national) security“ and „public order“. It was important to the Netherlands that each Member State can define its own standard for screenings will be. On this point, the final regulation has considered the concerns of the Netherlands (and other states).

2. Existing sector-specific restrictions on foreign direct investment (FDI)

2.1 Reporting obligation for gas, electricity and telecommunications

With a view to security of supply, the gas, electricity and telecommunications sectors, among others, are subject to a notification requirement. The Gas Supply Act (Gaswet) and the Electricity Supply Act (Elektriciteitswet) have regulated the first two sectors since the late 1990s. Since October 2020, a restriction on foreign investment also applies to the telecommunications sector, regulated by the Telecommunications Act (Telecommunicatiewet), which has been amended accordingly.

Companies in these sectors are required to notify the Dutch Ministry of Economic Affairs if a change of control in a company active in these sectors is imminent.

Based on the Telecommunications Act, the change of control is about the definition of „controlling interest“ (overwegende zeggenschap) over a company[1]. The concept of 'controling interest' covers cases where the acquirer, after the transaction:

- alone or together with persons acting jointly, directly or indirectly holds at least 30% of the votes in the general meeting of a legal entity;

1 Article 14a.3 Telecommunicatiewet.

- may, alone or together with persons acting jointly, appoint or remove more than half of the members of the board of directors or the supervisory board of a legal person, even if all persons entitled to vote participate therein; or
- one or more person(s) holds shares vested with a special statutory right of control.

The Gas Act[2] and the Electricity Supply Act[3], on the other hand, link the definition of change of control to the provision of antitrust law, according to which „control“ is understood as „the possibility of exercising a decisive influence on the activities of an undertaking due to factual or legal circumstances“.

The notification must take place at least four months before the change of control (closing) for transactions in the gas and electricity sector and at least eight weeks before the change of control (closing) for transactions in the telecommunications sector. Failure to comply with these reporting requirements will result in the entire transaction being voidable.

2.2 Ban on privatisation for vital (critical) infrastructure

In addition, many „vital“ (comparable to the term „critical“ in Germany) infrastructures, such as drinking water companies, are subject to the legal requirement that they must be controlled by Dutch legal entities under public law (i.e. the Dutch state). This ban on privatisation makes it impossible to transfer control to foreign investors.

3. Changes in investment control as a result of the FDI Screening Regulation

3.1 NL Implementation Act

The FDI Screening Regulation was implemented in the Netherlands by means of the FDI Screening Regulation Implementation Act (Uitvoeringswet screeningsverordening buitenlandse directe investeringen) of 18 November 2020, which entered into force on 4 December 2020 (NL Implementation Act).

The NL Implementation Act on the one hand, implemented the elements required for the FDI Screening Regulation to be effective in the Netherlands and, on the other hand, the NL Implementation Act served to fulfil the obligations that rest on the Member States. Although regulations are in principle directly applicable, by way of exception, implementation was carried out by a separate act of legislation as the regulation only makes minimal obligatory specifications, leaving, in this respect, the Member States room for specification. Many Member States that already had an investment screening regime (especially Germany) have also made use of this room.

The NL Implementation Act essentially regulates only three aspects:

- Establishment of a contact point within the meaning of Art. 11 (1) of the FDI Screening Regulation; this is the Ministry of Economic Affairs and within the Ministry the Bureau for Verification of Investment (Bureau Toetsing Investering (BTI));
- The ministry responsible for the cooperation mechanism according to Art. 6 to 8 of the FDI Screening Regulation is determined by the respective screening mechanism - where no screening mechanism prevails in the Netherlands, the Minister of Economic Affairs - in coordination with the Minister of Justice and the Minister of Foreign Affairs - is responsible for the control;
- The ministers who are to be responsible for fulfilling the obligations to process information rights under Art. 9 of the FDI Screening Regulation.

The NL Implementation Act applies to screening mechanisms that existed at the time of entry into force (December 2020) and to future ones.

3.2 Act on Security Test for Investments, Mergers and Acquisitions (Vifo Act)

The introduction of a generally applicable cross-sectoral screening mechanism in the Netherlands, in addition to the existing sector-specific screening mechanisms, was controversial. The first attempt in 2020 to introduce such a mechanism was immediately rejected following critical statements by the Dutch Council of State (Raad van State) in February 2021[4]. In particular, the Council of State had criticised that the principles of legality, diligence, legal certainty and proportionality were not taken into account by the first draft act.

(1) Overview Vifo Act

The second attempt for general legislation followed in July 2021, when the first draft of the Act on Security Test for Investments, Mergers and Acquisitions (Wet veiligheidstoets investeringen, fusies en overnames) (Vifo Act) was presented. It was approved by the senate (Eerste Kamer) in May 2022 and entered into force a year later, on 1 June 2023.

The Vifo Act affects all companies that have their registered office in the Netherlands. The decisive factor for the determination whether a company is resident in the Netherlands, is the location of the company‘s activities and management, not its registered office.

In the event of a change of control within a company in an affected industry, the company and investor (or ac-

2 Article 66e Gaswet.
3 Article 86f Elektriciteitswet.

4 Kamerstukken II 2020/21, 35880, nr. 4, www.raadvanstate.nl/@123818/w18-20-0499-iv/

quirer of control) must report the transaction to the BTI. The investor‘s country of origin has no influence on the reporting obligation; this is a decisive difference to the German regulation. The notification of a transaction is done via forms that are available on the BTI website[5] and have been illustrated with an illustrative infographic.

The BTI screens whether the investor‘s acquisition of the company would pose a threat to national security. Such screening takes into account factors such as the transparency and ownership structure of the investing party, as well as its financial stability and motivations for the transaction itself. The screening also considers whether the investing party has a criminal record, whether it is subject to state control and from which state the investment originates. If the investment concerns a sensitive technology or a highly sensitive technology (see point (3), the BTI also examines the investor‘s past performance in the area of information security.

Non-compliance with this reporting obligation by the investor and the target company can lead to a suspension of all of the investor’s voting rights. In addition, the BTI can impose a fine of a maximum of 10% of the company‘s turnover - it is unclear whether this is the worldwide turnover or (only) the turnover generated in the Netherlands. If the transaction is completed without the BTI‘s approval, the entire acquisition is void.

(2) Vital infrastructures

The control mechanism will apply to companies that are „vital providers“ (vitale aanbieders) or are involved in sensitive technologies. In this context, the draft legislation provides for crucial differences between the category of „vital providers“ on the one hand and that of „sensitive technologies“ on the other. The term „vital suppliers“ is defined by law, the term „sensitive technology“ in separate orders in council or decrees, Amvbs (algemene maatregelen van bestuur). The background for this difference is that the category of ‚sensitive technology‘ will be subject to more changes than the category of vital providers, which is why the more flexible option of the Amvbs was chosen for sensitive technologies.

The term „vital providers“ was formulated together with the National Coordinator for Counter-Terrorism and Security (NCTV), who maintains a list of vital infrastructures[6]. These include, among others, the internet, gas storage and air transport sectors, as well as (nuclear) energy and banking – healthcare is not (yet) included. In formulating the concept of „vital providers“, the list of the Dutch Act on the Security of Networks and Information Systems[7], which transposed the EU‘s NIS Directive[8] in the Netherlands, was used as a basis. The legal definition of a „vital provider“ is: „a company that operates, manages or provides a service whose continuity is vital to Dutch society“. Specifically, Amsterdam Schiphol Airport, the Port of Rotterdam and the Dutch Central Bank are named as vital infrastructure providers.

(3) Sensitive technologies

A technology is “sensitive” if it meets one or more of the following criteria:

The term „sensitive technologies“ primarily comprises military products and dual-use goods, which are defined, among others, in the Wassenaar Arrangement[9] and the EU Dual-Use Regulation[10]. Some of these technologies can be exempted from control by the decrees (Amvbs) already mentioned. Other technologies can be added as „sensitive“ on the basis of Article 8(3) of the Vifo Act, provided that:

a) the technology is essential for the purposes of defense, investigation, intelligence and security services;

b) the availability and presence of the technology are nationally essential in order to avoid the risks of losing essential products or facilities; or

c) the technology is broadly applicable to various vital processes or processes affecting the national security.

On the basis of the Decree on the Scope of Application of Sensitive Technology[11] dated 4 May 2023, the following technology is considered “sensitive”:

a) Quantum technology - makes it possible to calculate, communicate and measure in new ways. Quantum technologies enable computers to perform many processes simultaneously. This category of technology also includes quantum computing, quantum communication and quantum sensing;

b) Photonics technology - the generation, transport and detection of light waves and light particles. The technology is used in many “high tech” products and in specific military products including night-vision goggles;

5 www.bureautoetsinginvesteringen.nl/het-stelsel-van-toetsen/melding-doen, last accessed 25.07.2023.
6 https://www.nctv.nl/onderwerpen/vitale-infrastructuur/overzicht-vitale-processen, last accessed 25.07.2023.

7 Wet beveiliging netwerk- en informatiesystemen (Network and Information Systems Security Act)
8 Directive (EU) 2016/1148 - Cyber security of network and information systems
9 The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies
10 Regulation (EC) 428/2009 - Dual-use Regulation
11 Besluit van 4 mei 2023 tot het nader bepalen van het toepassingsbereik van de Wet veiligheidstoets investeringen, fusies en overnames op het gebied van sensitieve technologie (Besluit toepassingsbereik sensitieve technologie), https://zoek.officielebekendmakingen.nl/stb-2023-172.html, last accessed on 25.07.2023

c) Semiconductor technology - develops and manufactures integrated circuits, microchips and/or computer chips. Semiconductor technology includes companies with specific expertise in manufacture, industrial machinery and design software in relation to chips;

d) High Assurance technology - security products to protect the confidentiality, integrity and availability of sensitive information of the Dutch government. High Assurance products focus on information protection following the highest security standards in order to resist attacks from third states and other advanced persistent threats (APTs).

The Decree further introduces the term "highly sensitive" (zeer sensitief). For such type of technology, the risks to national security are considered significantly higher than for „ordinary" sensitive technology. The Decree explains which criteria are relevant to determine if sensitive technology shall be considered as "highly sensitive":

- to what extent the entire technology industry depends on the sensitive technology;
- how unique the sensitive technology is and how difficult it is to reproduce the sensitive technology;
- the extent for which the sensitive technology is directly applicable to military or security purposes;
- the existence of international standards with respect to protection of the sensitive technology;
- to what extent the technology is secured.

The four above mentioned technology's are on the basis of these criteria considered "highly sensitive". In addition, cryptanalytic systems (hacking), velocity interferometers (laser reflection) and nuclear technology are named.

Unlike vital suppliers, companies active in the field of sensitive technologies are also subject to screening when a change of significant influence (significante invloed) on the company is pending or if the right to appoint or remove a board member changes. Cases in which „significant influence" change are those in which a minority stake of at least 10%, 20% or 25% is acquired, depending on the classification of the sensitive technology in different categories, which in turn is to be effectuated by Amvbs. The Decree described above stipulates that the threshold is 10% for companies active in the highly sensitive technology.

In this respect, the reduced review thresholds which apply to investments in companies with sensitive technologies are similar to those for sector-specific control respectively in sectors identified in Section 55a AWV in Germany which are considered particularly relevant for the German population.

(4) Indirect participations
If a company is not directly involved in vital infrastructure or sensitive technologies, the screening mechanism applies if the company being sold or bought has control or significant influence over a Dutch company active in one of these sectors (indirect control).

(5) Retroactive application of the Vifo Act as of 8 September 2020

Where the expectation initially was that all transactions would be subjected to the retroactive application of the Vifo Act as of 8 September 2020, with the introduction of the Vifo Act this retroactive effect was limited, which is beneficial to M&A transactions that have been completed in the intermediate period between 8 September 2020 and 1 June 2023.

The retroactive effect does not apply to investments made in operators of corporate campuses and certain categories of sensitive technology as designated in the Decree on the Scope of Application of Sensitive Technology.

For other transactions, the Dutch Minister of Economic Affairs and Climate will make a request if there are reasonable grounds that the M&A transaction could pose a risk to the security regime of The Netherlands. The Minister has the authority to do so until February 2024. In this respect, it should also be noted that the Dutch government fell in July 2023 and new elections will only take place in November 2023.

(6) Defence industry

Apart from the Vifo Act (draft), a separate investment control for the defence industry is currently envisaged (Wetsvoorstel investeringstoets voor de defensie-industrie). Since a discussion of this draft law is beyond the scope of this article, this is only mentioned for the sake of completeness.

4. Impact on M&A practice - the Netherlands

The BTI's latest annual report[12] of November 2022 shows that in 2021, the first year after its establishment, a total of 14 transactions from the telecommunications sector and one from the electricity sector were reported to and controlled by the BTI. In the first nine months of 2022 (until 30 September 2022), two transactions from the telecommunications sector and three from the electricity sector were reported and controlled.

None of the 15 inspections resulted in prohibitions or other measures regarding the transaction they were related to.

Over the past five years, a total of 23 transactions were subjected to investment controls. In 15 transactions, i.e. more than 50%, the investor originated from Europe, followed by North Africa, from which regions 6 investors originated.

In addition, the BTI mentions that the turnaround times of investment controls varied widely depending on the complexity of the investigation, but the average over the past years spans 77 days. In only two cases, the BTI had to prolong the statutory deadline. On this basis it can be assumed that the legal deadlines will in most cases actually be met - as long as the parties involved submit all the required documents.

5. Comparison of Laws and Implications for M&A Practice - Germany & The Netherlands

Looking back at Dr Milena Charnitzky's contribution on the German regulations, this article concludes with a brief legal comparison. Against the background that the German foreign trade regulations have existed for a very long time, a comparison with the Netherlands can only be made to a limited extent.

It is striking that unlike Germany, the Netherlands opted to subject all investors under the Vifo Act to screening, regardless of their origin, if and when the relevant sectors are affected. In contrast, the German regulations (and the recitals of the FDI Screening Regulation) are primarily aimed at investors from outside the EU.

It cannot be ruled out that the Dutch regulation will be further specified or successively expanded by government implementing regulations (the aforementioned Amvbs), similar to the AWV amendments in Germany.

The time limit rules currently seem to be shorter in the Dutch procedure than in the German procedure, and the Dutch procedure seems to be more user-friendly than the German one by providing forms (similar to the French one). How the deadlines and the procedure in the cross-sectoral control mechanism will play out in practice will be seen in the coming years when the BTI will have to review more transactions than over the past five.

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The author would like to thank Mr Martin Stumpf for valuable comments.

12 https://www.tweedekamer.nl/downloads/document?id=2022D45081, last accessed 25.07.2023.

FDI Screening Regulation and the Implementation in Austria

(Editorial status: July 2023)

Christopher Jünger, Wolf Theiss Rechtsanwälte

1. Introduction

Prompted by harmonization efforts at the European level through Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (FDI Screening Regulation) and accelerated by the Covid-19 pandemic (keyword: security of supply), the Austrian legislator enacted the Investment Control Act (InvKG)[1] on 24 July 2020. Compared to the predecessor provisions, the control of foreign direct investments in Austrian companies has thereby become decisively more important for transaction practice in many respects.

2. Predecessor provisions in the Foreign Trade Act

Certain types of foreign direct investments were already subject to approval under the Austrian Foreign Trade Act before the InvKG came into force. However, the scope of application was much narrower.[2]

This is currently leading to a far greater volume of applications for approval than was previously the case.[3] In total, there were only 25 procedures in eight years under the review mechanism of § 25a Foreign Trade Act, whereas there were 70 procedures in the first year after the InvKG came into force alone.[4]

3. Investment Control Act

3.1 Scope of Application

The core provision of the investment control approval requirement is § 2 InvKG, which refers in large part to the definition in § 1 InvKG. In summary, an approval requirement exists if (i) a relevant direct investment is made by at least one foreign person, (ii) the target company is active in one of the areas listed in the annex to the InvKG, (iii) Union and international law provisions do not conflict with an approval requirement and (iv) there is no exemption from the approval requirement.

(1) Direct Investment

The term direct investment is comprehensive and includes the following groups of cases according to § 1 no. 3 InvKG: (i) the direct or indirect acquisition of an Austrian undertaking or material assets of an Austrian undertaking (asset deals/reorganizations); (ii) the direct or indirect acquisition of voting shares[5] in an Austrian undertaking (share deals); and (iii) the direct or indirect acquisition of a controlling influence over an Austrian

1 Bundesgesetz über die Kontrolle von ausländischen Direktinvestitionen (Investitionskontrollgesetz – InvKG), BGBl. I Nr. 87/2020.
2 Cf. the description in Barbist/Kröll/Khol, Das neue Investitionskontrollrecht - Einführung und Kurzkommentar zum InvKG 3.
3 Barbist/Kröll, Die Kontrolle ausländischer Direktinvestitionen in Österreich - Strenger geht nicht mehr? EuZW 2021, 355, and Mayer/Weber, Zur Reichweite der Genehmigungspflicht nach dem Investitionskontrollgesetz, ÖJZ 2021, 874.
4 Investment control activity report for the period 25 July 2020 to 24 July 2021.
5 On the relevance thresholds for share deals, see below under 3.1.e).

undertaking (asset deals, share deals, reorganizations, syndicate agreements, joint ventures/VC models, etc). In summary, a controlling influence is said to exist if the acquiring person (whether through acquired assets, rights or contractual obligations) can exert a determining influence on the activities of the Austrian target company. In particular, the criteria of the EU Merger Regulation[6] can be used for the assessment.[7]

It is the view of the competent authority that under certain conditions, intra-group restructurings may also be covered by the authorization requirement.[8] In the opinion of the authority, this is to be assessed on a case-by-case basis. If an intra-group restructuring does not result in any relevant changes in the control relationships, it can be assumed based on the current practice of the authorities that no approval is required. However, a relevant change in control should already occur if a new (intermediate) holding company is added to the shareholder chain and this company is in a position to independently exercise control over the Austrian target company – even if the ultimate beneficial owners do not change.

(2) Direct and Indirect Acquisitions

The InvKG covers not only direct but also indirect investments in Austrian companies. An indirect investment is characterized by the fact that the Austrian target company is not the direct object of the transaction, but that it indirectly affects the control over the Austrian target company. The object of the transaction is usually another affiliated company at a higher level (e.g. direct acquisition of all shares in a German company that has established an Austrian subsidiary).

(3) Foreign Person as Acquirer

For a direct or indirect investment to fall within the scope of the InvKG, it must be made by a person attributable to a third country (not EU, EEA or Switzerland). Otherwise, it is not a foreign direct investment and there is no authorization requirement. In the case of natural persons, the decisive factor is their nationality; in the case of legal entities, it is their registered office and – alternatively – the place of their main administration.

(4) Activity of the Target Company in a relevant Sector

A further prerequisite for the approval requirement is that the Austrian target company is active in one of the sectors defined by means of an annex to the InvKG. Part 1 of the annex contains an exhaustive list of particularly sensitive areas (e.g. operation of critical energy infrastructure, research and development in the medical field). Part 2 of the annex contains a non-exhaustive list of other critical sectors in which there may be a threat to security or public order (e.g. information technology, traffic and transport, food or raw materials supply). According to the legal definition of the InvKG, areas are considered „critical“ if they are of essential importance for the maintenance of important societal functions because their disruption, destruction, failure or loss would have serious consequences for the health, safety or economic and social well-being of the population or the effective functioning of state institutions.

Since the legislator has described the sectors in the annex in a very sweeping manner, this leads to great difficulties of interpretation in practice. According to the current very broad interpretation practice of the competent authority, all sectors listed in the annex are „critical“ per se, without the need for any further assessment. This means that, for example, every software company („information technology“) or every catering business („food“) basically falls within the scope of the InvKG (for the de-minimis exception, see below).[9] Guidelines to assist in the interpretation of the law are reportedly currently in the works.

(5) Relevance Thresholds for Share Deals

Not every foreign direct investment is automatically subject to approval. The InvKG contains certain relevance thresholds, especially with regard to share deals: According to § 2 para 1 no. 3 InvKG, a certain minimum share of voting rights in the Austrian target company must be acquired. The amount of this minimum share depends on the sector in which the target company is active: If the target company is active in one of the particularly sensitive sectors listed in Part 1 of the annex, an acquisition of 10% is relevant. If the investor already holds more than 10% of the voting rights in the Austrian company prior to the transaction, the subsequent thresholds of 25% and 50% respectively apply. If the target company is active in an area covered by Part 2 of the annex, the first stage does not apply; the relevance thresholds here are 25% or (if the investor already holds more than 25%) 50%. § 5 InvKG contains rules on the aggregation of voting rights of several investors in certain constellations (e.g. in the case of an agreement between two or more foreign persons participating in the target company on the joint exercise of voting rights).

(6) De-minimis Exception

Foreign direct investments in which the Austrian target company is a micro-enterprise, including start-ups, with

6 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.
7 § 1 no. 7 InvKG.
8 For a differentiated view see Rastegar/Jünger, Die Genehmigungspflicht nach dem InvKG (Teil 2), RdW 2022, 15.

9 Rastegar/Jünger, Die Genehmigungspflicht nach dem InvKG (Teil 2), RdW 2022, 16.

fewer than ten employees and an annual turnover or annual balance sheet total of less than EUR 2 million are excluded from the scope of the InvKG (§ 2 para 2 InvKG). With this de-minimis exception, the legislator intended to exempt immaterial acquisitions from the approval requirement from the outset.

3.2 Procedure

(1) Approval Procedure and application for a Non-objection Ruling

The InvKG provides for two different procedures: If the transaction is a foreign direct investment subject to approval, the direct acquirer is obliged to submit an application for approval immediately after conclusion of the transaction documentation (Signing) or, in the case of a public offer, immediately after announcement of the intention to make an offer. In practice, the application is usually coordinated with the seller.

The Federal Minister of Labour and Economy is responsible for the approval procedure. The content of the approval application is defined by law (cf. § 6 para 4 InvKG) and also includes, for example, a precise description of the business activities of the acquirer and the target company, information on the beneficial owners of the acquirer or the other EU Member States in which the acquirer and the target company carry out significant business activities. Due to the necessary information, it is recommended to consider the preparation of the application at an early stage in the transaction planning.

The authority may also initiate an approval procedure ex officio by becoming aware of a transaction (in particular by reviewing deal news and by exchanging information with the antitrust authorities) and request the acquirer to submit an application within three business days (§ 8 InvKG).

If an acquirer would like to obtain legal certainty as to whether approval under the InvKG is required even before the transaction documentation is signed, it is possible to apply for a non-objection ruling in accordance with § 9 InvKG. Since the application must contain almost the identical information as an application for approval, practice has shown that applying for a non-objection ruling often only makes sense once the transaction structure has become clear. If the facts underlying the application change (e.g. different acquisition vehicle), a new procedure is necessary. The authority has to issue a non-objection ruling within two months if it is established that the direct investment is not subject to an authorization requirement. Alternatively, the application is treated as an application for approval and the regular procedure is initiated.

(2) Test Standard: Public Order and Safety

When assessing whether a foreign direct investment may lead to a threat to security or public order, including crisis management and services of general interest within the meaning of Art. 52 and Art. 65 TFEU, its effects in the areas listed in the annex to the InvKG must be examined. In practice, the competent authority obtains opinions on this from potentially affected bodies and institutions, such as ministries, federal states, municipalities or other legal entities under public law.

Investor-related factors should also play a role in the assessment, in particular whether the acquirer is directly or indirectly controlled by a foreign government, has been involved in the past in activities that have or had an impact on security or public order in another EU Member State, or there is a significant risk of involvement in illegal or criminal activities (§ 3 para. 2 InvKG).

(3) Mandatory Initiation of the EU Cooperation Mechanism

If an application for approval under the InvKG is submitted (or if an application for the issuance of a non-objection ruling is treated as an application for approval), it is mandatory for the authority to initiate the cooperation mechanism at EU level. In the interest of time efficiency, it is recommended that the completed form for the EU cooperation mechanism be submitted together with the application for approval for this purpose.[10] Under the EU cooperation mechanism, the European Commission and other Member States have the possibility to request further information.

(4) Duration of the Approval Procedure

The Austrian authority initiates the EU cooperation mechanism after submission of a complete request for approval. Its completion takes up to six weeks - assuming that neither the EU Commission nor other Member States submit additional requests for information. Only after completion of the EU cooperation mechanism does the one-month review period of the Austrian authority begin. If the authority concludes that an in-depth review is necessary, it must notify the initiation of the phase 2 review within this period, for which a maximum of two months is available.

At the end of the approval process, the transaction can be approved, approved subject to conditions or prohibited. In the period from 25 July 2020 to 24 July 2021, most approvals were already granted in phase 1 (i.e. without an in-depth review), two approvals were granted without conditions after completion of a phase 2 review, and two approvals were granted with conditions after completion of a phase 2 review. In the first year after the InvKG came into force, there were no prohibitions.[11]

10 Available at https://www.bmdw.gv.at/Themen/Investitionskontrolle.html.
11 Investment control activity report for the period 25.07.2020 to 24.07.2021.

3.3 Legal consequences in the event of omission

(1) Standstill obligation

A transaction for which approval is required under the InvKG is deemed by law to have been concluded subject to the condition precedent that approval is granted. Without approval, the legal transaction is therefore null and void.

(2) Fines and Imprisonment

In addition to administrative penalties for failure to notify, the InvKG also provides for fines and imprisonment (up to one year, under special circumstances up to three years) if a transaction subject to approval is carried out without approval. Comparable to the prohibition of implementation under antitrust law (gun jumping), the influence of the acquirer on the Austrian target company between signing and closing of a transaction (e.g. through certain contractual reservations of consent) prior to approval can also be problematic in this respect.

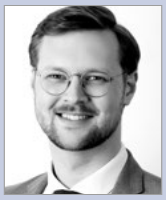
4. Implications for M&A Practice/ Practical Advice

The InvKG has greatly increased the importance of investment control in Austrian transaction advice. It can be assumed that in certain areas (e.g. medical technology, energy supply) phase 2 procedures will be initiated more frequently and that approval will only be granted subject to conditions (e.g. supply commitments or waivers of termination for a certain period of time).

Practice shows that the competent authority initiates proceedings ex officio if it becomes aware of a transaction through publicly available information or through the automatic exchange of information with the antitrust authorities.

Due to the general description of the relevant sectors in the InvKG and the broad interpretation of the Federal Minister of Labour and Economy, it is recommended to clarify an approval requirement with the authority in case of doubt (be it by informally contacting the authority or by applying for a non-objection ruling) and, if necessary, to submit an application for approval as a precautionary measure.

Against the background of the effort required to prepare the application and the potential duration of the approval process, the process should be considered early in the transaction planning.



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The FDI Screening Regulation and Polish Regulations

Anna Wojciechowska, WKB Wierciński Kwieciński Baehr sp.k.

1. Previous legal situation - Act of 24 July 2015 on the Control of Certain Investments

A foreign direct investment control regime was in effect in Poland long before the enactment of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening for foreign direct investment in the EU ("FDI Screening Regulation"). This regime was based on the Act of 24 July 2015 on the Control of Certain Investments,[1] which applied to a limited, enumerated list of specific strategic sectors of the economy, such as energy, explosives manufacturing, the chemical industry, and telecommunications.

The companies protected under this regime are identified by name in appropriate implementing regulation, i.e., a regulation of the Council of Ministers, which is subject to review and updated on a regular basis. This mechanism was established in 2015, and continues to be in effect. 15 companies are currently listed in the regulation adopted by the Council of Ministers.[2] Note that inclusion on the list is not limited solely to state-owned enterprises, and so private sector companies are also present. The relevant state authority indicated on the list, usually the Minister of State Property or the Minister of Defence, as the case may be, may object to investments that would lead, among others, to the acquisition of 20% or more of the protected company's share capital. Unlike the mechanism provided for in the FDI Screening Regulation, such control applies to all investors, regardless of a given investor's nationality. Furthermore, the President of the Office of Competition and Consumer Protection[3] is not responsible for conducting such control procedures, but rather they are the sole responsibility of the respective state authorities identified in the Regulation of the Council of Ministers.

Under these regulations, an investor must give the competent state authority notice of the planned investment in a prescribed form. The authority is then entitled to object to the investment within 90 days of receiving notice. An objection may only be raised where permitted by law, in particular with the aim of ensuring public order or safety. A transaction which was not duly notified or executed contrary to the objection of the appropriate authority is null and void.

2. New FDI screening rules in effect since 24 July 2020

As part of the, so-called, "Anti-Crisis Shield 4.0",[4] the Act on the Control of Certain Investments was significantly

1 Act of 24 July 2015 on the control of certain investments, Journal of Laws of 2015, item 1272, consolidated text of 27 January 2023, Journal of Laws of 2023, item 415.
2 Regulation of the Council of Ministers of 16 December 2022 concerning the list of entities subject to protection and their respective appropriate controlling authorities, Journal of Laws of 2022, item 2838. This Regulation entered into force on 1 January 2023 and is valid until 31 December 2023.
3 Polish: „Urząd Ochrony Konkurencji i Konsumentów", abbreviation: „UOKiK".
4 Act of 19 June 2020 on subsidies to interest on bank loans granted to entrepreneurs affected by the effects of COVID-19 and on simplified procedures for approving a settlement in connection with COVID19 (Journal of Laws of 2020, item 1086), as amended by, among others, the Act of 12 May 2022 on amendments to the Act on Goods and Services Tax and certain other acts (Journal of Laws of 2022, item 1137), consolidated text of 2 September 2022, Journal of Laws of 2022, item 2141.

expanded in respect of foreign direct investment controls. The relevant amendments entered into force on 24 July 2020 and were given a limited term of validity, currently 60 months from their effective date.[5] The amendments introduced an additional mechanism to control M&A transactions in certain strategic sectors of the economy. Compared to the previous law, a separate list of strategic sectors was identified. It is important to emphasise that these regulations do not replace the control mechanism introduced in 2015, but rather introduces another investment control regime operating in parallel to that already in existence.

According to the guidelines published by the Office of Competition and Consumer Protection regarding the new regulations,[6] their aim is to protect Polish industry from "hostile takeovers" by investors from beyond the European Union, European Economic Area (EEA), and Organisation for Economic Cooperation and Development (OECD). Note that the exemption of investors from OECD member states was added in the final phase of the legislative process and significantly mitigates the impact made by the new rules, since this means that investors based in OECD member states, such as the USA, Canada, Australia, Israel, and Japan, among others can also benefit from the exemption enjoyed by investors from countries within the EU and EEA.

Past practice shows that Poland's Office of Competition and Consumer Protection has rarely taken action following the new regulations' entry into force and has examined very few cases. In 2020 alone the Office received only four applications,[7] two of which failed to result in the initiation of any proceedings since a preliminary examination showed that the notified transaction was not actually subject to these controls. In one case, a positive decision was received, i.e., no objection was raised in respect of the transaction. In the last case, proceedings were initiated and continued until the following year. For comparison, in 2021 proceedings were initiated in a total of eight cases, three of which received positive decision and one of which was discontinued.[8]

For this reason, the new Polish FDI screening regime has met with strong criticism.[9] The legislature has been criticised for exaggerating fears that local companies weakened by the Covid-19 pandemic would become easy targets for "hostile takeovers". Therefore, in light of the low level of activity of the Office of Competition and Consumer Protection in the field of investment control, it is unclear whether the application of the new Polish FDI screening regime will be extended in time or will be allowed to expire. Without an extension, these provisions will expire on 24 July 2025.

2.1 Scope – affected economic sectors and low materiality threshold

The new regulations have a significant effect on M&A transactions since the scope of the law's application is very broad, covering many companies based in Poland, and it has a low materiality threshold.

First and foremost, all listed companies, regardless of the sector they operate in, are protected under the new regulations. Moreover, all companies that own, so-called, critical infrastructure as defined in the relevant legislation also fall under the aegis of these regulations. According to the Act of 26 April 2007 on Crisis Management,[10] critical infrastructure includes all structures, equipment, facilities and services essential for the security of the State and its citizens and to ensure the proper functioning of public administration, institutions, and entrepreneurs.

Furthermore, all companies active in certain identified economic sectors fall under the protection of the new regime. These sectors include, among others, producers of software for certain sectors, electricity producers and distributors (regardless of whether conventional or renewable), companies engaging in fuel transport and storage, telecommunications, heat production, transportation and distribution, and the processing of meat, dairy, cereal, fruit, and vegetables, as well as those within the medical and pharmaceutical industries (specifically the production of medical equipment, instruments, and apparatus, as well as drugs and other pharmaceutical products, etc.).

However, only an investment in a company based in Poland which has generated sales of more than EUR 10 million within the territory of Poland in at least one of the two immediately preceding financial years will be subject to notification.

The new regulations do not apply to investments in smaller companies, i.e., target entities which do not exceed the turnover threshold referred to above. Additionally, the law authorises the Council of Ministers to adopt supplemental regulations on further exemptions from the control mechanism, which should be ad-

5 The amendments shall expire on 24 July 2025, unless their term is extended.
6 "Investment Control - procedural explanations concerning the submission of notices to the President of the UOKiK and the conduct of proceedings falling within the scope of the Act on investment control" ("Kontrola Inwestycji – Wyjaśnienia proceduralne w sprawie składania Prezesowi UOKiK zawiadomień oraz prowadzenia postępowań objętych zakresem ustawy o kontroli inwestycji") Office of Competition and Consumer Protection, published 22 July 2020, available at: https://uokik.gov.pl/wyjasnienia_i_wytyczne.php.
7 Publication of the Office of Competition and Consumer Protection: https://uokik.gov.pl/aktualnosci. php?news_id=18278.
8 Report on the activities of the Office of Competition and Consumer Protection for the year 2020, available at: https://uokik.gov.pl/download.php?plik=25581.
9 Press articles, including: https://businessinsider.com.pl/gospodarka/przepisy/ustawa-okontroli- inwestycji-uokik-od-roku-nie-skorzystal-z-tej-mozliwosci/rjcjven.

10 consolidated text of 1 December 2022, Journal of Laws of 2023, item 122.

opted taking the circumstances resulting from the Covid-19 pandemic and the new regulations' general objectives into account.

2.2 Transactions subject to control

Investments made by investors from outside EU, EEA, and OECD member states, which may lead to the acquisition or achievement of a controlling position over or significant participation in a protected company, as such concepts are defined by the new regulations, are subject to control. In principle, the concept of a "controlling position" under the new regulations corresponds to the concept of control as defined by the respective law on merger controls.

In contrast to the above, the acquisition or achievement of significant participation is defined as: (i) acquiring or taking up at least 20% of the company's shares; (ii) achieving 20% of the total number of votes in the company's decision-making body or such share of the company's profits; (iii) crossing 40% of the total number of votes in the company's decision-making body or such share of the company's profits; and (iv) acquiring or leasing the protected company's entire enterprise, or organised part thereof.

Thus, in addition to, so-called, 'share deal' transactions, 'asset deal' transactions may also be subject to FDI controls in certain circumstances. Similarly, acquiring a significant share of the profits of a protected company can be classified as a transaction subject to FDI control.

Furthermore, in addition to the direct acquisition of shares in a protected company, the law expressly provides that transactions involving the indirect acquisition of such shares through a subsidiary, transactions on assets, and all other indirect means of achieving control or exerting influence over a protected company (e.g., mergers, demergers, amendments to the articles of association, share redemptions, as well as all other transactions or actions which lead to the indirect acquisition or achievement of a significant equity interest or a controlling position, including under foreign transactions subject to foreign law) are also subject to the control regime.

When compared to the Act on Competition and Consumer Protection, which applies to merger control the new FDI control regulations do not expressly exclude intra-group reorganisations, leading to uncertainty regarding whether such transactions are subject to the notification duty discussed above.

Note that the President of the Office of Competition and Consumer Protection is vested with the authority to review transactions if they are structured to circumvent the notification duty, which they can perform ex officio. In order for the President of the Office of Competition and Consumer Protections to initiate such ex officio controls, circumstances indicating an abuse or circumvention of the law, including the intent to avoid the notification duty, must exist. If an investor does not in fact carry our any business activities in their own name, or they do not possess a permanent establishment, office, or staff in any EU, EEA, or OECD member state, such circumstances shall be deemed indications of an abuse of rights or a circumvention of the law.

2.3 Procedure

The President of the Office of Competition and Consumer Protection is responsible for the control of foreign investments under the new Polish FDI screening regime, i.e., the same authority responsible for merger control under the provisions of the Act on Competition and Consumer Protection.

In principle, notice of a transaction must be given to the President of the Office of Competition and Consumer Protection prior to its performance and settlement. The law specifies that the relevant notification must be made prior to the conclusion of "any contract giving rise to an acquisition obligation", while in the case of listed companies, it must be made prior to the publication of any public tender offer regarding the sale or exchange of shares.

A transaction may not be completed before the investor receives the authority's consent or the expiry of the statutory period during which the authority must issue a decision in the case.

The President of the Office of Competition and Consumer Protection may object to a given transaction if they finds that the transaction could, at least potentially, result in a threat to public order, public safety, or public health in the Republic of Poland. Therefore, the authority's assessment of the transaction will be based on very general consideration which, consequently, grants the President of the Office of Competition and Consumer Protection broad discretion. The authority may also refuse consent if the applicant fails to provide it with all necessary information and, where the entity intending to acquire or achieve a controlling position or significant participation is based in an EU, EEA, or OECD member state, it is not possible to establish whether the investor satisfies the mandatory residency requirements to benefit from the exemption enjoyed by entities based in those jurisdictions (i.e., being a resident in those jurisdictions for at least two years prior to the submission date of the notification). A decision stating that the transaction does not raise concerns, or confirming that the transaction is not subject to control, should be issued within 30 business days of the notice's submission.

Where control proceedings are initiated on the grounds of public safety or public order, a decision shall be issued within 120 calendar days (if the President of the Office of Competition and Consumer Protection requests additional documents or raises questions regarding the application, this period is suspended from running until such questions or requests are answered). Similar to the merger control regime, the President of the Office of Competition and Consumer Protection is entitled to initiate proceedings ex officio if a foreign investor fails to notify a transaction, however, no proceedings may be initiated if five years have passed since the date of the transaction.

Appeals against a decision issued by the President of the Office of Competition and Consumer Protection regarding investment control proceedings are admissible to the competent administrative court.

2.4 Sanctions

Transactions subject to notification will be null and void if they are performed without giving notice thereof to the President of the Office of Competition and Consumer Protection or in contravention of the authority's objection. Additionally, the President of the Office of Competition and Consumer Protection is entitled to challenge resolutions of the shareholders' meeting adopted in violation of investment control regulations. Further, the law provides for very strict penalties for violations of the new regulations, in the form of both financial penalties, such as fines of up to PLN 50,000,000 (approx. EUR 10,000,000), and criminal penalties (up to five years' imprisonment). Such penalties can be imposed on both the investor and natural persons acting on its behalf.

3. Impact on M&A transactions

Due to the potentially far reaching control obligation regarding foreign investments, the new regulations have a significant impact on M&A transactions. The law grants protection to numerous companies from across many sectors of the economy as identified by the Act. The preparatory stages and time line of international transactions are likely to be severely affected by the broad scope of the new regulations. At the same time, many very different transaction structures are now subject to mandatory controls, for example, indirect acquisitions of control over protected companies or foreign transactions made under foreign law. The classification of intra-group reorganisations remains unclear due to the lack of an express exemption of such transactions. In such cases, it would be worth considering an application for a decision stating that there are no grounds to initiate control procedures on account of the fact that the authority has already issued such decisions.

The competent authority, i.e., the President of the Office of Competition and Consumer Protection, has been granted far-reaching powers. Approval for a given transaction can also be refused if there is even the potential for it to result in a threat to public order, public safety, or public health, which results in legal uncertainty, as the authority's decisions are thus made difficult to foresee. The decision-making practice and the positive results of investment controls thus far are encouraging, but are insufficient as yet to say that a stable and predictable practice has emerged.

Additionally, by equipping the President of the Office of Competition and Consumer Protection with new powers, companies will often face the situation that a transaction will, in practice, require two separate approvals from the same public authority, albeit granted on different legal grounds, i.e., merger control regulations on the one hand and foreign direct investment control regulations on the other.

At the time that this article is being written, it is not yet known whether a further extension of the new FDI screening regime's term of validity will be enacted. Without such an extension, the new regulations will expire on 24 July 2025 and investment control would revert to being performed solely on the basis of the "older" provisions of the Act on the Control of Certain Investments from 2015.

4. Legal Comparison – Austria & Poland

Looking back to Christopher Jünger's contribution on the Austrian regulations, this article concludes with a brief comparison of those with the Polish regulations. In both countries, regulations on the control of foreign investments were already in place before the FDI Screening Regulation was enacted. However, their scope of application was much narrower.

In Poland, there are currently two parallel control mechanisms, existing independently of each other, one under the regulations which previously applied (and continue to apply), and the other introduced by amendments to the Act on the Control of Certain Investments, which came into force on 24 July 2020. In Austria, on the other hand, there exists a uniform control procedure under the current Investment Control Act, enacted on 24 July 2020.

A unique feature of the Polish transposition regulations is their limited period of validity. At present, the new regulations will only continue to be in effect until 24 July 2025 and their potential extension remains uncertain. The solution was itself conditioned on the Covid 19 pandemic and an uncertain international situation which could potentially have negative impacts on the markets and competition. Unlike in Austria, the Polish legislature decided to exclude not only investors from EU and EEA Member States and Switzerland from the scope of the screening regime, but also investors from OECD member states. Against the background of significant foreign investment in Poland, especially from the USA, this should be seen as a significant difference.

In practice, it is important that in Austria an EU cooperation mechanism is initiated for every approval procedure, so that other Member States learn of a transaction as soon as approval is required in Austria. Since the target company's subsidiaries and branches in other Member States must be identified in the form submitted for the EU cooperation mechanism, it cannot be ruled out that other Member States will then themselves initiate domestic control proceedings. Cases such as this have already arisen in Austria. However, in Poland, there are no known cases in which the competent authority initiated proceedings ex officio.

Both legal systems are highly similar regarding the scope of application of their FDI screening regimes, including a variety of transaction structures, such as share deals and asset deals, as well as both direct and indirect acquisitions, although, unfortunately, neither provides for an express exemption for intra-group restructurings. Further, in both countries, the duration of proceedings before the respective competent authorities and the severity of penalties (for example, terms of imprisonment of up to five years in Poland and up to three years, under certain circumstances, in Austria) are also similar.

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The FDI Screening Regulation and the Regulations in France

Christian Sauer, Bryan Cave Leighton Paisner

In recent years, France has become increasingly attractive for foreign investors (both from Europe and from outside Europe): in 2022, a new record was set with 1,725 foreign investments made in France, of which 16% were made by investors from the United States, ahead of Germany (16%) and the United Kingdom (10%)[1]; in this context 325 applications for approval under investment control rules were filed,[2] an equivalent number to 2021 (328 applications)[3].

France generally perceives foreign investment as an opportunity, as shown by President Emmanuel Macron's Choose France program, which aims to bring foreign investment to France[4].

However, from a French perspective, opening up to foreign capital comes with the risk that assets strategic to France will be controlled by foreign third parties. To protect key industries and assets, France introduced investment controls already in 2005, subjecting certain investments to prior approval by the Minister of Economy (Ministre de l'Economie et des Finances). Political by nature and geared toward protectionism, the French investment control system has proven adaptable since then. The Law of May 22, 2019 "Concerning the Growth and Transformation of Enterprises" (Loi du 22 mai 2019 relative à la croissance et à la transformation des entreprises - „Loi PACTE" / „PACTE Law") and the implementing decree of December 31, 2019 (the „Decree")[5] have made far-reaching changes to the foreign investment control rules, in particular significantly expanding the scope of the approval requirement and modifying the approval process. The PACTE Law and the Decree have been incorporated into the French Code monétaire et financier („CMF").

True to its early protectionist orientation, France was then actively involved since 2017 with other member states and the European Commission in the drafting of regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investment in the Union (FDI Screening Regulation). The approval procedure as amended by the Loi PACTE 2019 is already fully compatible with the requirements of the FDI Screening Regulation and thus no far-reaching changes to the regulatory framework were necessary when the FDI Screening Regulation came into force and only limited provisions of the FDI Screening Regulation have thus found their way into the Code monétaire et financier.

In the context of the Covid-19 pandemic, France has followed the recommendations of the European Commission and has expanded the sectors covered by its control system par decree[6], in order to prevent foreign investors from taking control of strategic French companies that have fallen into financial distress as a result of the Covid-19 crisis[7].

1 Ministère de l'économie, communiqué de presse „En 2022, la France maintient son haut niveau d'attractivité dans un environnement international complex" February 27, 2023
2 Direction général du Trésor „ Contrôle des investissements étrangers en France – Rapport annuel 2023".
3 Direction général du Trésor „ Le contrôle des investissements étrangers en France en 2021 „ March 2022.
4 https://www.elysee.fr/emmanuel-macron/choose-france#beginning https://www.elysee.fr/emmanuel-macron/choose-france#beginning

5 Arrêté of 31 December 2019 relatif aux investissements étrangers en France.
6 Arrêté of 27 April 2020
7 Les Échos, „Coronavirus : la France va renforcer le contrôle des investissements étrangers," April 29, 2020.

1. Scope

In summary, an approval is required if (i) „investors" within the meaning of the CMF (ii) engage in a transaction that qualifies as an „investment" within the meaning of the CMF and (iii) do so in one of the sectors deemed „critical" (sensitive).

1.1 „investor" and „investment"

Since the entry into force of the Decree, „investors" for the purposes of the CMF include (i) individuals with foreign nationality, (ii) individuals who do not have their principal residence in France, (iii) foreign (i.e. non-French) legal entities, and (iv) French legal entities controlled by a foreign individual or legal entity.

For the assessment of „control", the standard French definition of Article L.233-3 of the Code de commerce is applicable for this purpose, or otherwise the definition on the possibility of having a „decisive influence" as defined in Article L.430-1 III of the Code de commerce regarding the antitrust rules on mergers.

According to article L.233-3 of the Code de commerce, the control of a company is held by a person who:

a) directly or indirectly holds the majority of voting rights;

b) according to an agreement with other shareholders, holds alone the majority of voting rights;

c) actually determines the decisions of the shareholders' meeting through its voting rights;

d) has the right to appoint or remove the majority of the members of the administrative, management or supervisory bodies;

Furthermore, whoever directly or indirectly holds more than 40% of the voting rights and to the extent that no other shareholder directly or indirectly holds a larger percentage, is considered by the Code de commerce to be „controlling".

Finally, is considered as „controlling" when two or more persons actually determine the decisions of the shareholders' meeting through concerted action.

The Decree also clarified that all persons (whether individuals or legal entities) that are directly or indirectly controlled by a foreign investor as per (iii) or (iv) of the definition in paragraph 1 above (defined as a chain of control) are also considered investors for the purposes of the CMF[8].

According to Article R.151-2 of the CMF, the term „investment" is defined as (i) the acquisition of control as defined above, (ii) the partial or total acquisition of a branch or business unit (branche d'activité) or (iii) exceeding the threshold of 25% of the voting rights of a French entity (the threshold was set at 33% before the 2019 reform). However, exceeding the threshold of voting rights under (iii) is not considered an investment for the purposes of the CMF for investors from member states of the European Union or countries of the European Free Trade Association that have entered into a cooperation agreement with France to prevent tax evasion or, in the case of a chain of control, if all members of the chain of control are resident in and have citizenship of these countries.

Greenfield investments or the purchase of isolated assets are therefore not considered investments within the meaning of the French regulation.

As a result of the Covid-19 crisis, France lowered the threshold under (iii) from 25% to 10% for listed companies on July 22, 2020, with reference to the applicable German and Spanish regulations, in order to protect listed companies with a large ownership structure from possible influence by minority interests.

The reduction was originally set to expire on December 31, 2020, but has since been repeatedly renewed and has currently been extended until December 31, 2023.

1.2 Critical sectors

The 2019 Decree has unified the list of sectors considered critical for all investors, whereas before the reform, different sector lists applied depending on the type of investor (non-EU, EU investor or French).

Furthermore, the Decree has expanded the list to include the following sectors: print media, food production and safety, transformation or distribution of agricultural products, as well as research activities in the field of key technologies (including cybersecurity, artificial intelligence, robotics, semiconductor and quantum technology). The areas of print media and food production and safety were added as part of the implementation of the FDI Screening Regulation.

The standard of review for the respective economic sector is a possible violation of national defense interests, a possible involvement in activities related to the exercise of public authority by the state or the preservation of public order, or a possible violation of public security.

8 Art. R.151-1 CMF.

The list of sectors in the CMF regarding which an investment may constitute one of the above threats to public order and safety can be summarized as follows:

i. Sectors of Article R.151-3, I of the CMF that are considered „critical“ or „sensitive“ by nature (especially in the fields of weapons, ammunition, explosives, cryptology or in the context of secret defense activities);

ii. Activities relating to infrastructures, goods or services essential for the protection of national interests in the fields of: energy, drinking water, transportation, space, electronic communications, law enforcement, operation of facilities of „vital interest“ within the meaning of the Code de la défense, health care, food safety, and the press (Article R151-3, II of the CMF);

iii. Research and development in the areas of (i) key technologies and (ii) dual-use (civil and military) goods and technologies, each for applications in one of the critical sectors (CMF Article R151-3, III).

“Biotechnologies” was added to the list of key technologies, by decree (arrêté) of April 27, 2020, in the context of the Covis-19 crisis; and research and development activities in the field of renewable energies by arrêté of September 10, 2021.

In contrast to merger control, economic data of the target company or the investor, such as annual turnover or market share, are not decisive for investment control according to the CMF. However, economic data on the target company to be provided to the Ministry as part of an application will be included in the evaluation of an investment by the Minister of Economy.

1.3 Exceptions

According to Article R.151-7 of the CMF, no approval is required (i) for intra-group investments if all legal entities of the group are more than 50% directly or indirectly controlled by the same shareholder, (ii) for exceeding the threshold of 25% of the voting rights if the investor had already previously acquired control and been granted approval, (iii) for the acquisition of control if the investor had previously acquired 25% of the voting rights and been granted approval. In the latter case, the investor must notify the Minister of Economy of the planned acquisition of control prior to its realisation. If the Minister of Economy does not object within 30 days, the notified acquisition of control shall be deemed approved.

However, the above exceptions will not apply if the investment aims to move a critical business branch or unit abroad.

2. Approval process

2.1 Process

The Loi PACTE has made the investment control process more transparent and structured it into two phases, similar to the merger control process. In addition, the possibility of a preliminary inquiry has been extended.

(1) Preliminary inquiry

Pursuant to Article R.151-4 of the CMF, the investor, but more recently also the target company, may submit a preliminary inquiry to the Ministry of Economy to determine whether part or all of the target company‘s (or businesses’) activities qualify as „critical“ within the meaning of the CMF. The Ministry of Economy will respond to such a request within two months. However, it remains to be seen to what extent this possibility will be used in practice, since in the event of a positive response from the Ministry (i.e. the company is considered active in one of the critical areas), the entire approval process must then still be completed.

In 2022, according to the Ministry of Economy, 42 preliminary inquiries were filed of which 81% were classified as non-critical.[9]

(2) Approval process

The approval process starts with the filing of the application to the Direction Général du Trésor and is then divided into two phases (Article R.151-6 of the CMF) :

(i) The Minister of Economy must decide within 30 working days from receipt of the application (i) to reject the application, considering the investment not to be subject to approval, (ii) to accept the application and grant approval without conditions, or (iii) to order a further review. As part of a further review, the Ministry may request additional information on the investment, the target company and/or the investor.

(ii) If further review is ordered, the Ministry has 45 business days to deny or grant approval, possibly subject to conditions (see B.2 below).

Before the Loi PACTE came into force, the process was structure in a single phase with a deadline of two months. However, this period did not start until the Ministry confirmed the completeness of the application, which in practice regularly allowed it to delay the start of the period.

With regard to projects to exceed the 10% threshold for listed companies, which was newly regulated in the

9 See fn. 2.

context of the Covid-19 pandemic, a simplified fast-track procedure was introduced in which the Ministry of Economy must decide within ten days to approve the transaction or subject it to further review.

In the case of a planned investment by one or more members of a chain of control, the application may be submitted by any member of the chain of control on behalf of all investors involved[10].

The CMF contains the list of documents and information to be submitted with the application[11]. In particular, the investor must disclose its capital links or financial support received from a third country or a public entity outside the European Union during the last five years.

In September 2022, the Ministry has published guidelines to clarify the interpretation of the legal rules (such as, e.g., the notions of chain of control or joint control) and explain the approval process and possible obligations for investors.

Since January 1, 2022, the list of required information to be filed has been expanded to include information on the implementation of the European FDI Screening Regulation, in particular an English-language template in which, among other things, the target company's activities in the European Union and the investor's strategy in the EU must be outlined.[12] The form is available on the Ministry's website.

Finally, the 2019 reform has clarified that the silence of the Ministry or a lack of response within the above deadlines is considered a refusal at any stage of the process or a preliminary inquiry, the only exception to this being the fast-track procedure when the 10% threshold is exceeded for listed companies.

The Loi PACTE requires the French government to publish statistical data on investment control regime annually and to report to the French parliament.

However, in contrast to merger control rules, the individual decisions of the Minister of Economy on investment control applications are not published and thus, in practice, cannot serve as a precedent.

According to the annual report of the Ministry of Economy, in 2022, 131 of the 325 applications submitted (including requests for preliminary inquiry) were approved, 70 of them subject to conditions[13] - these numbers are stable in comparison to 2021.[14] However, the annual report for 2022 nor the previous report for 2021 do not specify the status of the remaining applications submitted and whether these applications were rejected, are still under review, or whether applications have been withdrawn by the investors.

2.2 Possible conditions

The Loi PACTE has now enshrined in law the existing practice of subjecting approval for an investment to conditions, in order to ensure that the project, especially in its implementation, does not violate protected national interests in the field of national security, public order or defense (Article L.151-3 of the CMF).

According to the CMF (Article R. 151-8), the possible conditions are aimed at guaranteeing the continuity and security of critical activities (in particular with regard to possible subjection to foreign law), ensuring the maintenance of specific knowledge and know-how in France, adapting the internal organization of the target company (including the exercise of acquired rights) or determining the information to be provided by the investor to the authority in charge of supervising the investment.

In particular, the Minister may impose that part of the acquired shares or business of the target company be sold to a third party approved by the Ministry[15]. If the possibility of such a requirement by the Ministry becomes apparent during an approval process or in the course of the preliminary analysis of the transaction, the search for a suitable third party buyer should be started at an early stage.

In practice, the conditions are generally set by unilateral commitments of the investor to the French State. In its subsequent approval decision, the Minister then refers to the commitments made by the investor.

However, it is extremely rare for the Minister to formally deny an approval (and it would in any event not be made public, as explained), as investors usually prefer to withdraw from their project if the requested conditions become too extensive.

In the M&A practice, the share purchase agreements regularly specify the risk allocation for the investment control process among seller and purchaser and determine the level of conditions that the investor must accept in order for this condition precedent to be considered fulfilled, similar to the practice regarding merger control.

10 Art. R.151-5 CMF.
11 Art. R. 151-16 du CMF and Art. 1 of the Arrêté of December 31, 2019 relatif aux investissements étrangers.
12 Arrêté of 10 September 2021
13 See fn. 2.
14 See fn. 3.
15 Art. R.151-8 CMF.

3. Sanctions and execution control

The Loi PACTE has significantly expanded the list of sanctions that may be imposed by the Ministry of Economy, and investors thus expose themselves to significant risks, including fines, should they fail to comply with their obligations.

(1) If an investment requiring approval is made without approval, the Minister may :

- order the investor not to proceed with the transaction, to modify it or to restore the target to its previous state, and order that an application be made for approval of the investment[16] ;
- impose a daily penalty of a maximum of € 50,000 per day until compliance with the regulation[17] ;
- order important protective measures[18], such as suspending the investor‘s acquired voting rights, prohibiting the payment of dividends or distributions for the acquired stakes, or temporarily suspending the disposition of assets;

(2) In the event that an approved investment fails to comply with the requirements or conditions, the Minister of Economy may revoke the approval, order the investor to comply with its obligations, impose a penalty if necessary, or impose other requirements, including the restoration of the previous state of the target or the disposal of assets of the critical sectors.

In both cases, the Minister of Economy may also impose fines[19], of no more than the higher of the following amounts : (i) twice the investment amount of the transaction, (ii) 10% of the target company‘s annual worldwide turnover before tax, or (iii) €5 million for investors who are legal entities and €1 million for those who are individuals.

In addition, according to Article L.151-4 of the CMF, any agreement to carry out a transaction requiring prior authorization without approval is null and void.

4. Implications for M&A practice

The reform of 2019 has rendered the French investment control regime more transparent in terms of approval process, deadlines and documentation to be submitted, and incorporated in the CMF the previous practice of subjecting approvals to conditions.

16 Art. L.151-3-1 CMF.
17 Art. R.151-14 CMF.
18 Art. L.151-3-1 CMF.
19 Art. L.151-3-2 CMF.

In the preparation for a M&A transaction, it remains however regularly difficult to determine whether a given company is active in one of the critical sectors, as the sectors are openly defined and, unlike in merger control, decisions are not published. As explained, in France foreign investment control is deliberately designed as a protectionist instrument of French economic policy.

In practice, the question of whether a transaction is subject to approval should be included in the analysis and planning of a transaction at an early stage and, if necessary, an informal exchange with the Ministry of Economy should be sought. In the case of transactions potentially requiring approval, the investor should also consider the extent of possible conditions that would acceptable to it and include these in its assessment of the investment opportunity.

Investors should prepare for the fact that the Ministry has repeatedly proven to be quite creative and will try to protect French national interests in the areas of national security, public order or defense in different ways, even beyond the realisation of a transaction. For example, the Ministry regularly requires the investor to report annually on the performance of its investment and the target company. During the approval process, the requested conditions may, to a certain extent, be negotiated and fine-tuned in the discussions with the Ministry.

5. The European cooperation system - an additional hurdle?

In the first twelve months following the entry into force of the FDI Screening Regulation, 265 transactions were reported to the Member States and the European Commission within the framework of the European cooperation system, 108 of which were reported by France[20]. For France, this cooperation system is of strategic interest and the Ministry of Economy has been very active in the bodies created for the exchange of information. According to the Ministry of Economy, the exchange of information has made it possible to identify transactions that were subject to French investment control. The exchange has also allowed the Ministry to refine its risk analysis, especially when the target company operated in several countries of the European Union.[21]

According to the Ministry of Economy, France will assist the parties in the framework of the European information exchange and help ensure that the implementation of the FDI Screening Regulation does not create any additional, disproportionate burden or hurdle for

20 See fn. 3.
21 See fn. 3.

investors. It remains to be seen how this intent will be actually implemented in the long run.

Given the progressive expansion of French foreign investment control regime over the last years, the additional requirements under the European cooperation system and the current practice for applications, investors, including from EU countries, should anticipate the issue of investment control in France at an early stage in order to avoid delays in the process or possible sanctions.

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The FDI Screening Regulation and FDI control mechanisms in Switzerland

Alexander Göbel, Niederer Kraft Frey

1. Introduction

Centrally located in continental Europe, Switzerland is an attractive destination not only for tourists but also for investors. Currently, Swiss capital investments worth approximately EUR 735 billion are held by investors from abroad.[1] It is estimated that about 450'000 jobs depend on these investments; considering the total number of employed persons in Switzerland of about 5.1 million, this is not an insignificant number. Although there has been a corona-induced reduction in new foreign direct investment in Switzerland over the last three to four years[2], several large transactions have, nevertheless, attracted attention[3] from across the border over the last few years: In 2016, the Basel-based Syngenta Group was acquired by Chinese state-owned chemical company ChemChina for USD 43 billion, the most expensive Chinese acquisition to date.[4] The same year also saw the acquisition of the Kloten-based in-flight catering company Gategroup by the Chinese HNA Group for CHF 1.4 billion.[5]

Without skipping ahead, these impressive figures make it clear that Switzerland is open to foreign investment. Switzerland currently does not have a classic, cross-sectoral investment control regime that could impede or restrict foreign direct investments. Only with regard to a few industrial sectors there are restrictions (see section 2.2 below). In addition, there are some flanking measures (cf. section 2.3 below), which can make foreign investment in Switzerland somewhat more cumbersome under certain circumstances, but which generally represent manageable obstacles.

2. Investment control mechanisms in Switzerland

2.1 No classical investment control mechanisms

Neither does Swiss national law provide for investment control nor does European law on investment control apply in Switzerland:

a. With the exception of the sector-specific regulations outlined in the following section, Swiss law does not have any investment control mechanisms. There are no general notification or approval requirements for the acquisition of (or participation in) Swiss companies by foreign investors.

b. Switzerland is not a member of the European Union („EU"). The Bilateral Agreements, which regulate, for example, the free movement of persons and goods between the EU and Switzerland, are limited to a few areas of regulation. Even in the areas covered by the Bilateral Treaties, there is no automatic adoption of new EU law or EU case law. Accordingly, the Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union („EU FDI Screening Regulation") does not apply in Switzerland. There are also no plans to implement the EU FDI Screening Regulation in national law.

1 State Secretariat for Economic Affairs SECO, Volkswirtschaftliche Bedeutung von Auslandinvestitionen für die Schweiz, www.seco.admin.ch/seco/de/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Internationale_Investitionen/Auslandsinvestitionen/Volkswirtschaftliche_Bedeutung_Auslandinvestitionen_Schweiz.html, last accessed 16 February 2023.
2 Swiss National Bank, Direct Investment 2020, p. 4.
3 Particularly in view of the fact that the two transactions described below are widely regarded in the press as rather unsuccessful: ChemChina is aiming for an IPO for Syngenta, while Gategroup has already been sold to the next investor.
4 Fortune, China is unloading its biggest ever foreign acquisition, www.fortune.com/2021/07/01/china-acquisition-chemchina-syngenta/, last accessed 16 February 2023.
5 Neue Zürcher Zeitung, Chinese want to sell majority stake in Gategroup, www.nzz.ch/wirtschaft/gategroup-hat-an-flughoehe-gewonnen-ld.1363158, last accessed 16 February 2023.

The reason for a lack of investment control mechanisms is, in the view of the Swiss Federal Council, that Switzerland's openness to foreign investors strengthens Switzerland as a business location and the advantages of openness outweigh any disadvantages.[6] Moreover, critical sectors, such as those protected by the EU FDI Screening Regulation, are in Switzerland frequently still fully or at least majority state-owned (national or cantonal) and thus protected from foreign acquisition.[7]

2.2 Sector-specific regulations

Only in a few industries, specific regulations for foreign investors apply as part of the process of obtaining concessions:

(1) Banks and savings banks
The permit to establish a bank which is under controlling foreign influence and which is to be organized under Swiss law may be made subject by the authorities to certain additional requirements (e.g. the use of a name which does not indicate or imply that the bank is of Swiss character) pursuant to art. 3bis Bank Act. Pursuant to art. 3ter Bank Act, this also applies in the event of a subsequent change in the ownership structure.

In contrast to the two industries outlined below (aviation as well as radio and TV), there is a comparatively large number of precedent cases in the banking sector that can be used to interpret the provisions in the event of acquisitions (or participation) of Swiss banks by foreign investors.

(2) Aviation
Pursuant to art. 27 of the Swiss Aviation Act in conjunction with art. 103 of the Swiss Aviation Ordinance, a company with registered office in Switzerland will only be granted an operating license for the commercial carriage of passengers if the company is under actual control and majority owned by Swiss citizens. Furthermore, if the company is a stock corporation, more than half of the share capital must be registered shares[8] and the majority of these registered shares must be owned by Swiss citizens or Swiss-controlled entities. An exception to art. 27 of the Swiss Aviation Act is possible on the basis of intergovernmental agreements.

6 State Secretariat for Economic Affairs SECO, Volkswirtschaftliche Bedeutung von Ausland-Investitionen für die Schweiz, www.seco.admin.ch/seco/de/home/Aussenwirtschaftspolitik_Wirtschaftli-che_Zusammenarbeit/Wirtschaftsbeziehungen/Internationale_Investitionen/Auslandsinvestitionen/Volkswirtschaftliche_Bedeutung_Auslandinvestitionen_Schweiz.html, last accessed 16 February 2023.

7 Some examples: Railroads - Swiss Federal Railways SBB; post - Swiss Post; telecommunications - Swisscom; production, distribution and sale of electricity - Axpo; air traffic control - Skyguide. It is, of course, still possible for private providers to compete in these sectors with the state-owned companies after obtaining a concession.

8 In view of the extensive abolition of bearer shares in 2019 (bearer shares are only permissible for listed companies and if bearer shares have been issued in the form of intermediated securities), the requirement that more than 50% of the shares must be issued as registered shares regularly no longer poses a challenge in practice.

(3) Radio and TV
Pursuant to art. 44 para. 2 of the Federal Law on Radio and Television, a foreign-controlled legal entity or a domestic legal entity with foreign participation may be denied a license for the broadcasting of radio and TV programs if the corresponding foreign state does not grant counter-rights to a similar extent.

However, comparable to the regulations in aviation, exceptions are also possible here, especially if „international obligations" prevent the enforcement of this provision.

(4) Reciprocity requirement: telecommunications and nuclear energy
Further restrictions are provided for by the Telecommunications Act (cf. art. 23 para. 2 Telecommunications Act) and the Nuclear Energy Act (cf. art. 13 para. 2 Nuclear Energy Act): Companies domiciled in Switzerland can, even if a foreign company is involved, obtain the license required for the respective operation. If, however, an emigration merger with the foreign-based parent company is considered after the acquisition of the company, it should be noted that licenses in the telecommunications sector and in connection with nuclear energy (as well as in the aviation sector, but there are also the restrictions already described in section 2.2 (2) above) are only granted to foreign companies if a Swiss company could also obtain a license in the corresponding country. This is not a restriction that would prevent the acquisition of a company in the aforementioned industries, but these rules could make restructuring measures after the acquisition more difficult or even impossible.

(5) Other industries with licensing requirements
In principle, there is economic freedom in Switzerland. Nevertheless, there are some industries that require a concession or permit. These include, inter alia[9], (i) the financial sector (see above under section 2.2 (1) already regarding banks and savings banks), (ii) the gambling sector including casinos, (iii) the postal sector, (iv) commercial shipping and (v) long-distance transport. In these industries, participation/ownership by foreign investors is not per se a factor to deny the concession or permit. However, under certain circumstances, foreign participation could be taken into account in the granting of a concession or permit within the scope of the generally available discretion by the authorities.

2.3 Accompanying measures

Not investment control measures per se, but both Swiss corporate and real estate law provide for certain restrictions that must be taken into account (at an early stage) in the context of transactions:

9 ICLG, Foreign Direct Investment Regimes 2020, p. 120.

(1) Company law - residence requirement
In practice, the residency requirement for the board of directors will usually not be an obstacle to the acquisition of a Swiss company: A large number of service providers domiciled in Switzerland have specialized in acting as board members or directors on a fee basis. However, it is advisable to make contact at an early stage so that the KYC process, which may be necessary, can be completed by the time of closing (and the replacement of the existing board of directors with new board members of the purchaser that regularly accompanies this).

(2) Real estate law - „Lex Koller"
In Switzerland, the acquisition of real estate by persons abroad is restricted and requires a permit from the competent cantonal authority. Exempt from this, however, are properties that serve „as a permanent establishment of a trade, factory or other business conducted in a commercial manner, of a craft enterprise or of a liberal profession".

Generally, the Lex Koller provisions will usually not pose an unmanageable problem in the context of the acquisition of a Swiss company. However, during the due diligence process, attention should be paid to ensuring that no properties are in scope which might not meet the aforementioned requirements.

3. Outlook

While, as described above, the view has largely been held in Switzerland that an open policy on foreign investment is of central importance for the attractiveness of Switzerland as a business location, the tightening of investment controls in neighboring countries has led to a new political discussion.[10] Since 2018, there has been a political push to create a legal basis for investment controls in Switzerland. The idea is that a two-step procedure will be used to examine whether an acquisition by a foreign investor endangers or threatens public order or security, among other things. In the first stage of the procedure, which should be of short duration, the State Secretariat for Economic Affairs SECO is to examine whether an in-depth approval procedure is required. If such a procedure is not deemed necessary, the acquisition can be completed directly; otherwise, an in-depth examination will follow during a second phase.[11]

It cannot yet be predicted to what extent this political initiative[12] will have a chance of success. Although the National Council and the Council of States have spoken out positively in favor of the introduction of investment control and have called on the Swiss Federal Council to prepare a preliminary draft, which has now been available since mid-May 2022, the legislative process is still ongoing and long. The consultation procedure will be followed by the actual parliamentary legislative phase and, if necessary, a referendum. Therefore, the extent to which investment controls will be introduced in Switzerland in the future cannot be predicted at this point in time.

12 According to an additional political proposal, the Lex Koller provisions (cf. section 2.3 (2)) should also be applied to electricity grids, hydropower and gas grids. This will not be discussed here further, as the deadline for dealing with this motion in the National Council was extended by another two years and, compared to the motion described, possible implementation is even further in the future.

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10 Motion Rieder, Schutz der Schweizer Wirtschaft durch Investitionskontrollen, www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20183021, last accessed 16 February 2023.
11 Federal Council, Federal Council Sets Out the Cornerstones of a Swiss Investment Control, www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-84838.html, last accessed 16 February 2023.

Foreign Direct Investment Control in Europe - A Summary of the Legal Situations in Germany, France, the Netherlands, Austria, Poland and Switzerland

This article shall conclude the series of articles on foreign direct investment control mechanisms in Germany, France, the Netherlands, Austria, Poland and Switzerland with a summary of the key findings (see also figure 1 for a presentation of the most important similarities and differ-ences in table form). To conclude the article, a list of important questions regarding foreign in-vestment control mechanisms and their relevance in due diligences will be presented.

Alexander Göbel, Niederer Kraft Frey

1. Summary of the national regulations

1.1 Outliers

While most of the countries presented in the previous articles have a similar implementation of the FDI Screening Regulation, there are two noticeable exceptions: Switzerland does not have comparable foreign direct investment control mechanisms and the Netherlands only recently implemented them.

(1) Switzerland

Switzerland does not have an investment control program in the true sense of the word. The corresponding EU law is not applicable in Switzerland, and there are no plans to implement the FDI Screening Regulation. General reporting or licensing requirements do not have to be ob-served when foreign investors acquire (or invest in) Swiss companies. Switzerland is open to foreign investors and has only a few sector-specific restrictions, which limit investments in aviation, banks and savings banks, radio and TV, telecommunications and nuclear energy, among others. These restrictions do not make foreign investment significantly more difficult. A legislative procedure to introduce investment control measures is currently pending.

(2) The Netherlands

The Netherlands is considered one of the countries with the fewest restrictions on FDI in the world. It is characterized by international trade and direct investment; there are few restrictions on foreign investment. For companies in the gas, electricity and telecommunications sectors, there is only a four-month notification requirement prior to any change of control. Failure to comply with this requirement would result in the transaction being voidable. In addition, a few critical infrastructures must be held by Dutch legal entities under public law and are, therefore, practically inaccessible to foreign investors.

The Netherlands has struggled with the introduction of additional controls and initially only minimally implemented the FDI Screening Regulation. The legislation process for the introduction of screening mechanisms then took three years and led to the entry into force of the “Vifo Act” as per 1 June 2023.

In the first approximately two years after the minimum implementation of the FDI Screening Regulation, a total of 20 transactions were screened. None of these resulted in a ban or other restrictive measures, and the statutory deadlines for review were mostly met without delay.

1.2 Germany, France, Austria and Poland

Similar investment control regimes apply in Germany, France, Austria and Poland, and now also in The Netherlands. Their commonalities and relevant differences are highlighted below. Given that this special edition is based on an earlier series of articles and The Netherlands only recently introduced the Vifo Act, we have not included The Netherlands in the comparison. Particularities on the Dutch regime can be found in the article on The Netherlands.

(1) France
In France, foreign investments are promoted with the „Choose France“ program. Nevertheless, France is aware of the danger of unregulated foreign direct investments and has had investment controls in place since 2005 to protect important industries and assets. These regulations were already compatible with the FDI Screening Regulation and, therefore, only needed to be adapted to a limited extent.

(2) Poland
Poland has had controls on certain investments in strategic sectors since 2015. Originally, the protected companies were listed exhaustively and with company names. In July 2020, an additional FDI screening regulation has entered into force, which is much more far-reaching.

(3) Germany
In Germany, trade with foreign countries was basically unregulated. However, German foreign trade law, especially investment control, has been tightened considerably in the last five years. These tightening were triggered primarily by the numerous acquisitions of German technology companies by Chinese investors, the lessons learned from the COVID-pandemic and the required implementation of the FDI Screening Regulation.

(4) Austria
In Austria, too, in addition to the FDI Screening Regulation, security of supply, which had become more important again due to the COVID-pandemic, was the decisive factor for a new investment control law, which was enacted in 2020.

(5) Commonalities
The investment control regimes of France, Germany, Austria and Poland are based on similar motives. This can be seen in particular in the highlighted tightening, which took place in all four countries during the course of the COVID-pandemic. At that time, the need to protect the critical infrastructure in one‘s own country from „foreign influences“ became „en vogue“. Nations wanted to be able to provide security of supply more autonomously again, especially with regard to energy, food, communications and other areas that are central to the functioning of a society. Furthermore, there was an aim to have less dependence on other nations. Therefore, potentially undesirable direct or indirect influence by foreign investors or governments (which do not belong to the EU, the EEA or the EFTA states) is subject to a stricter screening mechanism. With the FDI Screening Regulation of relevance in these countries, the FDI control mechanisms are similar in many key aspects. This is illustrated in the following sections.

a) Transactions concerned

Target company

In all four countries, there are both cross-sectoral and sector-specific control measures that determine which acquisitions are subject to investment control and at which thresholds. The catalogs of target company sectors that are exempt from a reporting obligation have become smaller overall. Instead, the sectors subject to scrutiny have been significantly expanded. These catalogs differ only minimally from country to country.

Sectors such as the defense industry, telecommunications, the energy industry and transportation - i.e. defense and security of supply in the broadest sense - have long been subject to a stricter scrutiny regime. Yet, the catalogue of acquisitions, which need to be reported have in-creased even more in recent years. More and more industries are covered, in particular medical (product)-related and technical sectors (robotics, sensor technology, cyber security, semicon-ductors etc.) have been added. The naming of specific industries allows an – in relative terms - easy assessment of whether a transaction may be affected by the investment control measures.

It is important to bear in mind the structure that generally prevails: a fundamental distinction must be made between acquisitions of shareholdings for which there is a reporting obligation and those for which there is no reporting obligation, but for which the authorities can perform reviews (even after the transaction has been completed). This applies to all investments that could potentially pose a threat to the public order, national security interests or the security of supply. In this context, the relevant authorities are regularly granted far-reaching powers, which can lead to considerable uncertainties. This problem is particularly accentuated in France and Germany, where official decisions are not published - it is therefore not possible to conduct a case study. In Poland, it is mainly the wording „potential danger“ that leads to uncertainties due to the wide scope for interpretation. In addition, all listed companies are protected, regardless of their field of activity. In

Germany, in a worst-case scenario, even a due diligence may already lead to uncertainty/ trouble, because the disclosure of company-related, security-relevant information is prohibited for the duration of the investment review. It cannot be ruled out, that the due diligence disclosures may include such information. In addition, the preliminary examination of (i) whether a transaction must be reported, (ii) or whether it merely should be reported, and/or (iii) a proactive clearance with the authorities for precautionary measures is advisable, requires great care and an in-depth discussion with both the target company and the acquirers.

Domestic and foreign investors

In all countries, an investment by a resident and, with the exception of France, a legal entity or natural person of an EU or EFTA state, is unproblematic and does not require any further examination, unless there are additional circumstances. Poland is another exception: All investments in named protected companies are subject to official control.

b) Proceedings

The procedures are similar in all four countries and have become much more transparent since the implementation of the FDI Screening Regulation. Depending on the legislation, a notification must be made to the responsible authority immediately before or after the signing, in case a reporting obligation exists. This authority must decide within a few weeks whether the transaction can be approved directly or whether it must be examined in greater depth (in Germany: whether the examination procedure is to be opened as the „main procedure" at all). The latter triggers a new deadline of several months. An extension of this period is possible under certain circumstances. Once the in-depth examination has been completed, either the approval is granted, which may be subject to conditions, or the acquisition is prohibited.

c) Sanctions and Consequences

The threats of sanctions to prevent unauthorized but reportable transactions are also very similar. Anyone who violates or attempts to circumvent an enforcement ban can face substantial fines: In Germany, the individuals involved can receive a fine of up to EUR 500‘000. In Austria, they face up to three years in prison. To enforce an order in France, a penalty of up to EUR 50‘000 per day can be imposed and access to profits or the exercise of voting rights can be prevented. In the event of non-compliance, a fine may also be imposed depending on the transaction volume. The penalties in Poland are also extremely rigid, with up to five years‘ imprisonment and a maximum fine of EUR 12.5 million.

(6) Differences

a) Preliminary settlement

In France, it is possible for an investor or the target company to clarify in advance whether the target company‘s activities fall within one of the sectors covered by investment control. Such inquiries are answered by the French Ministry of Economy within two months. In Austria, too, it is possible to achieve a certain degree of certainty even before signing: A clearance certificate can be obtained before an agreement is signed. However, due to the high requirements, this is only done in practice when the transaction structure is final and clear. Here, too, the authorities have two months to comment. In Germany, since the last revision of the Foreign Trade and Payments Ordinance, this possibility only exists for companies subject to the cross-sectoral review if they do not fall into the catalog of reportable acquisitions (i.e. the catalog of art. 55a AWV). A corresponding release procedure can only be launched after the transaction has been reported, because it is linked to the reporting obligation. In Poland, such a transaction must already be reported before the conclusion of a contract containing an obligation to purchase.

b) Intra-group transactions

Intragroup transactions are also handled differently. In France, intragroup investments are exempt from investment control if all legal entities of the group are more than 50% directly or indirectly controlled by the same shareholder. This does not apply if the investment is intended to move a critical line of business abroad. In Germany, the notification requirement does not apply if both the selling company and the acquiring company as well as their common parent company have their registered office in the same third country. Austria does not provide for any general exemptions for intragroup transactions. In the view of the authorities there, all internal restructurings may in principle be subject to approval. The situation is similar in Poland. There, too, there is no exemption for intragroup transactions.

c) Thresholds

Similar in principle, but not identical, are the thresholds above which an investment is covered by investment control. In France, the acquisition of control or of a branch of business is decisive. This also includes a shareholding of more than 25% of the voting rights. In the course of the COVID-pandemic, this threshold was temporarily reduced to 10% for listed companies. In Ger-many, a threshold of 10% applies for particularly critical sectors, a threshold of 20% for industries outside the actual basic supply, and for all other (non-reportable) industries a threshold of 25% is applicable. In Austria, too, investments in particularly sensitive sectors are subject to approval starting at a stake of 10%. If this threshold is already exceeded before the transaction, a subsequent threshold of 25% applies, or

Abb. 1 • Commonalities and differences

Source: Own presentation

	France	Poland	Germany	Austria	Netherlands	Switzerland
General approval requirement in critical sectors	available	available	available	available	limited available	not available
Intra-group transactions exempted	yes	no	yes, partially	no	no	–
Thresholds	from 10%	from 20%	depending on sector	depending on sector	depending on sector, starting from 10%	–
Exceptions for EU/EEA/EFTA	No, except in the case of the lower threshold of 10% or 25%.	Yes, except for named specified Companies	In principle yes	yes	no	–

50% if the latter is also already exceeded. The first threshold does not apply to less sensitive but still protected sectors. Poland also makes the acquisition of control in certain sectors subject to authorization. This already includes the acquisi-tion of a dominant position. This is the case starting at an acquisition of 20% of the shares in a company or the same share of the votes in the decision-making body, or from a 40% share in the profits. In addition, the leasing of the entire business of a protected enterprise is also affected. However, investments in companies, which achieved a turnover of less than EUR 10 million in one of the two preceding years, are excluded a similar regulation exists in Austria. There, micro-enterprises and start-ups are also exempt.

d) Summary

The above statements are not intended to be a conclusive summary of the individual investment control measures of the countries mentioned. Rather, the aim is to show that the countries, at least in part, implement similar investment control measures. For further details, please refer to the articles on the individual countries.

2. Effects on M&A practice

As described above, a country-independent assessment, i.e. whether a transaction will not be affected at all by investment control measures, is not possible due to the manifold regulations. The following shall guide the thinking process about whether additional, in-depth investment control clarifications are advisable.

1. Is the target company part of an industry affected by investment control? Protected industries are often: the defense industry, telecommunications, the energy sector, transport, medical devices, new technologies (robotics, optics, radar, sensor technology etc.) and semiconductors.

2. Is a participation threshold exceeded or is sufficient influence on the enterprise achieved? The participation thresholds vary widely, but are often „round“ numbers between 10 and 50%.

3. Where is the acquirer domiciled? Is the registered office outside the EU or the EFTA area?

4. Based on the questions and answers to nr. 1 to 3 above, is the transaction at hand (i) with certainty reportable (i.e. do I have to do something), (ii) are there doubts (i.e. should I report as a precaution, if necessary) or (iii) can I exclude a reporting obligation and is there only the risk that an authority will make use of its (nevertheless existing) powers to examine the transaction at a later stage?

5. Could the transaction be qualified as a threat to public security, security of supply, defense interests or the like?

6. Is the (direct or indirect) acquirer directly or indirectly controlled by a third country? Has the acquirer received significant government grants in recent years?

7. Is there an intention to withdraw significant parts of the business from the country of origin after the transaction?

8. What is the acquirer's purpose for the transaction?

In any case, a careful case-by-case assessment, in particular involving experts from the individual jurisdictions concerned, remains of central importance. Furthermore, it is indispensable that full attention is paid to the issue right from the beginning of a transaction in order to take the right course of action. Furthermore, in order to cover all eventualities, the contracts must be drafted with sufficient precision to deal with potential adverse actions by authorities. As a rule, it is not sufficient to deal with investment control only after signing, as it may be beneficial to apply for preclearance settlement at a relatively early stage (if possible in the relevant jurisdiction) - even if the contracts have not yet been finally negotiated.

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