Developments

A Practical Approach to the New German Foreign Investment Regime – Lessons to be Learned from Merger Control

*By Florian Stork**

Abstract

The author presents in this paper the new German foreign investment regime entered into force in the spring of 2009. He sets out the basic principles of the regime as well as its enforcement in practice. According to the new German foreign investment regime, the German Federal Ministry of Economics and Technology (BMWi) may examine and prohibit purchases of German companies by foreign investors if they pose a severe threat to public policy or security. Certain transactions, however, fall within the "safe harbour" or are otherwise exempted so that the BMWi has no right of interference. The author presents several exemptions from the scope of application of the regime, which can be either identified from the wording of the law by reverse argument or derived from the spirit and purpose of the new foreign investment regime. Furthermore, by presenting the concept of so called "critical infrastructures", the paper gives valuable guidance to practitioners on what the German administration might consider relevant for public policy or security. The last part of the paper summarizes the filing and the review process. The parties may, in order to receive clearance for their transaction, notify their transactions to the BMWi and receive a certificate of non-objection. While, this notification is wholly voluntary, parties who do not apply for clearance bear the risk that their transactions are blocked or unwound if the BMWi decides to investigate the transaction within three months from signing *ex officio.*

A. Introduction

In the spring of 2009, a new German foreign investment regime entered into force, governing the acquisition of German companies by investors located outside the European Union[1] (EU) or the European Free Trade Association[2] (EFTA). Except for some pre-existing

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[1] The EU comprises Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

provisions on the sale and purchase of German companies manufacturing military products,[3] the law in this area has no precedents in Germany. However, on a worldwide level similar provisions for the examination of foreign investments in many other countries exist, including Australia, Canada, China, France, India, Japan, Russia, the United Arab Emirates, the United Kingdom and the United States of America.[4]

According to the amended version of the German Foreign Trade Act (*Außenwirtschaftsgesetz,* AWG) and the German Foreign Trade Regulation (*Außenwirtschaftsverordnung,* AWV),[5] the German Federal Ministry of Economics and Technology (*Bundesministerium für Wirtschaft und Technologie*, BMWi) may examine and prohibit purchases of German companies by foreign investors if they pose a severe threat to public policy or security. Notifications to the BMWi remain wholly voluntary. Parties who do not apply for clearance via a so called "certificate of non-objection", however, bear the risk that their transactions are blocked or unwound if the BMWi decides to investigate the transaction within three months from signing *ex officio*.[6] For a transaction in the form

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[2] The EFTA comprises Iceland, Liechtenstein, Norway and Switzerland.

[3] See, Rudiger Theiselmann, *Aussenwirtschaftsrecht and Corporate Investments in Germany - New Hurdles for Foreign Investors*, 10 GERMAN LAW JOURNAL No. 11 1495 (2009).

[4] *BMWi*, Frequently asked questions about the legislation concerning the acquisition of German enterprises by foreign investors (Amendment of the German Foreign Trade and Payments Act and the implementing regulation), Question 15, available at: http://www.bmwi.de/BMWi/Redaktion/PDF/Gesetz/faqs-13-gesetz-zur-awg-englisch,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf, last accessed 27 January 2010.

[5] The amendments are published in Federal Law Gazette I 2009, 23 April 2009, p. 770.

[6] The English translation of Section 53 AWV reads:

"(1) The BMWi may, within a period of three months following the conclusion of the contract governed by the law of obligations on the acquisition of voting rights, examine the purchase of a resident company or a direct or indirect acquisition of shares of such a company by a non-EU resident in order to determine whether the purchase will jeopardise the public policy or public security of Germany; in cases involving a public offer, the period begins with the publication of the decision to make the offer or with the publication of the fact that control of the company has been attained. This shall not apply if the direct or indirect share of voting rights held by the non-EU purchaser in the company in question after the purchase is less than 25%. When the share of voting rights held by the non-EU purchaser is being calculated, any voting rights held by other companies in the company to be purchased shall be allocated to the non-EU purchaser where the non-EU purchaser holds 25% or more of the voting rights of the other company. The voting rights of third parties with which the non-EU purchaser has concluded an agreement on the joint exercise of voting rights shall also be accorded to the purchaser. Branches and permanent establishments belonging to the purchaser shall not be considered as EU resident. The BMWi may under the preconditions of sentences 1 and 2 also examine the purchase of a EU resident company or a direct or indirect participation in such a company by a EU resident company in which a non-EU resident holds at least 25% of the voting rights if there are indications that an abusive arrangement or circumvention transaction has taken place in order to circumvent an examination pursuant to sentences 1 and 2. Non-EU purchasers from Member States of the EFTA shall be afforded the same treatment as EU resident purchasers. The BMWi shall notify the purchaser of its decision to examine an acquisition pursuant to the first sentence.

of a share deal to be definitely exempt, the foreign investor must hold a stake of less than 25% of the voting rights after the purchase ("safe harbour"). In all other cases, it must be decided on an individual basis if an acquisition should be notified to the BMWi. In practice, however, the seller may leave interested non-EU purchasers no choice and demand the BMWi's approval to obtain transaction certainty. EU residents may have to declare that none of their shareholders, holding a stake of 25% or more, is an individual or a company not located in the EU.

B. Personal Scope: Who Does the Law Apply To?

The new German foreign investment regime principally only applies to investors from outside the EU or EFTA (Non-EU investors) who seek to acquire a German company (the Target). Under certain circumstances, the acquisition by an investor situated in the EU or EFTA (EU resident investor) may also be subject to the BMWi's scrutiny (circumvention/abusive arrangements). The law is general and comprehensive, i.e., applicable to all sectors and all companies.

I. The Target: A German Resident Company

The German administration may only examine and possibly prohibit purchases that target a German company. Note, that German branches (*Zweigniederlassungen*) and permanent establishments (*Betriebsstätten*) of foreign companies are also targets that are protected by the new foreign investment regime. Companies are defined by Section 4(1) no. 5 of the AWG as residents if their registered office or seat of management is in Germany. German

(2) If the BMWi has informed the purchaser of its decision to examine an acquisition in accordance with the first sentence of Section 53(1), the purchaser shall be required to communicate to the BMWi all documents relating to the purchase pursuant to sentence 2. The documents to be communicated shall be determined by the BMWi by means of an announcement in the Federal Gazette. The BMWi shall inform the Federal Government of the results of the examination. The BMWi may, within a period of two months following receipt of the complete documents, prohibit or issue orders where necessary in order to safeguard the public policy or public security of the Federal Republic of Germany. Prior consent has to be obtained from the Federal Government before a purchase is prohibited or orders are issued.

(3) At the written request of a purchaser, in which the outlines of the planned purchase, the purchaser and his field of business must be presented, the BMWi shall issue a certificate stating that there is no objection to the acquisition (certificate of non-objection), if the purchase raises no concerns concerning the public policy or public security of the Federal Republic of Germany. The certificate of non-objection shall be deemed to have been issued if the BMWi does not open an examination procedure pursuant to Section 53(1) sentence 1 within one month of receipt of the application.

(4) In order to implement a prohibition the BMWi may take the necessary measures. In particular it may: 1. prohibit or limit the exercise of voting rights in the purchased company where they belong to or are to be allocated to a non-EU purchaser, or 2. appoint a trustee to reverse a purchase that has already taken place."

branches of foreign companies are considered to be residents if they have domestic management and accounting functions. Permanent establishments maintained in Germany by foreign companies are considered to be residents if they have domestic management.

II. The Purchaser

1. Non-EU Investor

Principally, a right of examination and refusal by the BMWi only exists with regard to investors located outside the EU or the EFTA (investors from the EFTA are treated like investors from the EU), as these investors are not EU residents. By reference to an EU regulation,[7] EU residents are defined as natural persons who have their residence in the EU, as well as legal persons or groups of persons whose registered office, head office or permanent branch is in the EU. For example, the Channel Islands are part of the customs territory of the EU and thus are part of the Union.[8] Investors who are located elsewhere in the world are not within the EU and thus are "non-EU investors" by reverse argument. This holds true even if they have branch offices (*Zweigniederlassungen*) and/or permanent establishments (*Betriebsstätten*) in the EU.[9] German based investors or other EU resident purchasers, including European subsidiaries of non-EU investors, are only subject to the BMWi's scrutiny if they are used as a vehicle to circumvent the German foreign investment regime, as discussed below.

2. EU Resident Investor

EU resident investors are principally not subject to the German foreign investment regime because they are either German or must – for the purposes of EU law – be treated like German investors and may thus not be discriminated against. Only if a non-EU investor owns at least 25% of the voting rights in the EU resident investor and if there are indications that an abusive arrangement or a bypass transaction is undertaken to avoid scrutiny,[10] the BMWi may examine such transactions according to Section 53(1) of the AWV.

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[7] Council Regulation (EEC) No 2913/92, 12 October 1992 established the Community Customs Code.

[8] Rainer Traugott and Philipp Strümpell, *Die Aktiengesellschaft*, 186, 190 (2009); Harmut Krause, *Betriebs-Berater*, 1082, 1086 (2009); Oliver von Rosenberg, Juliane Hilf, and Martin Kleppe, *Der Betrieb*, Section 831, 832 (2009); Christoph H. Seibt and Bernward Wollenschläger, *Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis*, 833, 835 (2009); Thomas Voland, *Europäische Zeitschrift für Wirtschaftsrecht*, 519, 520 (2009). This has significant practical relevance because many private equity funds have their registered seat on the Channel Islands.

[9] See, Section 53(1) of the AWV (otherwise all large, globally active companies were EU residents).

[10] *E.g*. the formation of a EU resident letterbox company, see Explanatory Memorandum, BT-Drs. 16/11898, 12.

Even though the Purchaser must prove the commercial justification of what may look a purely artificial structure,[11] the BMWi is first required to come up with conclusive indications that the parties intend to circumvent the investment regime. A commercial justification is likely to be recognized if the transaction was structured and optimized in a certain way for tax purposes.[12]

C. Material Scope: Which Acquisitions May Trigger Administrative Intervention?

The BMWi has the right to examine and – with the consent of the Federal Government – to block and unwind transactions. BMWi can also issue formal directives if the Purchaser acquires a German company entirely, either by way of share or asset deal,[13] or if he purchases at least 25% of the voting rights in that company or part of a company's assets[14] relevant to public policy or security. Certain transactions fall within the "safe harbour" or are otherwise exempted so that the BMWi has no right of interference.

I. Purchase of at Least 25% of the Voting Rights

The BMWi cannot examine and prohibit acquisitions of shares if the direct or indirect share of the voting rights of the Purchaser does not reach 25% ("safe harbour"). Note that an acquisition of less than 25% may still trigger a filing obligation to the German Federal Cartel Office if the turnover thresholds are met[15] and if the acquisition results in a competitively significant influence on the Target.

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[11] Explanatory Memorandum, BT-Drs. 16/11898, 12.

[12] Rainer Traugott and Philipp Strümpell, *Die Aktiengesellschaft,* 186, 191 (2009); Harmut Krause, *Betriebs-Berater,* 1082, 1086 (2009).

[13] Oliver von Rosenberg, Juliane Hilf and Martin Kleppe, *Der Betrieb*, 831, 833 (2009); Christoph H. Seibt and Bernward Wollenschläger, *Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis*, 833, 836 (2009); Georg-Pottmeyer in Hans-Michael Wolffgang/Olaf Simonsen, AWR, Section 52, para 22; Friedrich in Ernst Hocke/Siegfried Berwald/Heinz D. Maurer/Friedrich, AWR, Section 52, para 23 (the latter two with regard to the similarly structured Section 52 AWV); dissenting Thomas Voland, *Europäische Zeitschrift für Wirtschaftsrecht*, 519, 520 (2009): only share deals.

[14] Georg-Pottmeyer in Hans-Michael Wolffgang and Olaf Simonsen, AWR, Section 52, para 22; Friedrich in Ernst Hocke, Siegfried Berwald, Heinz D. Maurer, Friedrich, AWR, Section 52, para 23 (both with regard to the similarly structured Sec. 52 AWV); dissenting Christoph H. Seibt and Bernward Wollenschläger, *Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis*, 833, 836 (2009).

[15] In Germany, there exists a pre-merger notification requirement if there is a concentration as defined by the Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB) and if the participating enterprises had a combined worldwide turnover of more than € 500 million in the last financial year, and one participating enterprise had a domestic turnover of more than € 25 million in the last financial year, and another participating enterprise reached a domestic turnover of more than € 5 million in the last financial year and if no *de-minimis* exemptions apply.

1. Not "in Sync" with Merger Control

The legislator chose not to use notions such as "control" or "competitively significant influence" and thus connect the German foreign investment regime to (German) merger control. Compared to European merger control, which exclusively uses the term "control", the new regime is thus wider, whereas compared to German merger control, the scope of application is more limited and foreseeable (thus rendering greater legal certainty on whether administrative intervention rights exist).

2. Calculation and Attribution of Another Company's Voting Rights in the Target

The 25% threshold in the German foreign investment regime is to be calculated on a purely technical basis. When determining whether or not the Purchaser holds at least 25% of the voting rights, the burden of proof lies with the Purchaser if the facts are unclear and he argues that he does not hold the alleged amount of voting rights in the Target.[16]

Other companies' voting rights in the Target company will be attributed to the non-EU investor according to Section 53(1) of the AWV if (a) he holds 25% or more of the voting rights in such a third company or (b) if the Purchaser and the third party have concluded a legally binding agreement about the joint exercise of voting rights. The joint exercise of voting rights on a purely *de facto* basis does not result in the attribution of voting rights. Voting rights resulting from an agreement with another company must be fully considered when determining the Purchaser's influence over the Target. Whether the attribution of voting rights of another company, in which the Purchaser holds at least 25% of the voting rights, should be calculated on an absolute or a relative basis is disputed.[17] The BMWi seems to prefer an absolute attribution. This would be too strict, however, and not reflect the Purchaser's real influence over the Target. For example, if a non-EU investor acquires an interest of 25% in a third company that holds, in turn, 25% in the ultimate (German) Target which is relevant to public security, he cannot exercise any important minority rights in the Target but is restrained to a 6.25% influence.

[16] See, wording of Section 53(1): "This [right to examine a transaction] shall not apply if…".

[17] In favour of a relative attribution: Christoph H. Seibt and Bernward Wollenschläger, *Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis,* 833, 838 (2009); Thomas Voland, *Europäische Zeitschrift für Wirtschaftsrecht,* 519, 520 (2009); Georg-Pottmeyer in Hans-Michael Wolffgang and Olaf Simonsen, AWR, Section 52, para 26 with regard to the similarly structured Section 52 of the AWV. In favour of an absolute attribution: Katarina Kollmann, *Außenwirtschaftliche Praxis*, 205, 206 (2009).

II. Purchase of Assets

It is disputed whether the new foreign investment regime is also applicable to asset deals.[18] The wording of Section 53(1) of the AWV refers to "the purchase of a resident company or a direct or indirect acquisition of shares of such a company", and thus clearly demonstrates that the purchase of the entire Target by way of asset deal is within the scope of the law.

Beyond this, the spirit and purpose of the new foreign investment regime suggest that it also applies to asset deals that only relate to the acquisition of parts of the Target.[19] Otherwise the Purchaser could acquire a nation-wide electricity network from a large company without the possibility of administrative intervention by simply structuring the transaction as an asset deal. In practice, the applicability of the law to these kinds of deals should be discussed with the BMWi in advance, *e.g.* before signing.

III. Exemptions: No jurisdiction of the BMWi

There are several exemptions from the scope of application of the German foreign investment regime, none of them explicitly mentioned in the law. However, they can either be identified from the wording of Section 53(1) of the AWV by reverse argument or derived from the spirit and purpose of the new foreign investment regime (see below). It is important to note that the BMWi does not have established forms of practice for certain exemptions and, thus, some of the forms in this paper are assumptions of the author. The BMWi has even rejected some other exemptions in its recent practice, even though there are good arguments as to why these exemptions should not be subject to the BMWi's scrutiny. Thus, the BMWi should reconsider its approach.

1. No Acquisition of Voting Rights / "Safe Harbour" if Voting Rights Account for Less Than 25%

The BMWi does not have jurisdiction if the Purchaser acquires less than 25% of the voting rights or acquires shares in the Target that do not grant voting rights ("non-voting stock").

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[18] In favour: Oliver von Rosenberg, Juliane Hilf, and Martin Kleppe, *Der Betrieb*, 831, 833 (2009); Christoph H. Seibt and Bernward Wollenschläger, *Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis*, 833, 836 (2009); Georg-Pottmeyer in Hans-Michael Wolffgang and Olaf Simonsen, AWR, Section 52, para. 22; Friedrich in Ernst Hocke, Siegfried Berwald, Heinz D. Maurer, and Friedrich, AWR, Section 52, para 23 (the latter two with regard to the similarly structured Section 52 AWV); dissenting Thomas Voland, *Europäische Zeitschrift für Wirtschaftsrecht*, 519, 520 (2009): only share deals.

[19] Georg-Pottmeyer in Hans-Michael Wolffgang and Olaf Simonsen, AWR, Section 2, para. 22; Friedrich in Ernst Hocke, Siegfried Berwald, Heinz D. Maurer, and Friedrich, AWR, Section 52 para. 23 (both with regard to the similarly structured Section 52 AWV); dissenting Christoph H. Seibt and Bernward Wollenschläger, *Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis*, 833, 836 (2009).

In other words, there exists a "safe harbour" if the Purchaser acquires less than 25% of the voting rights, no matter whether he intends to exercise his investment in an "active" or "passive" way. This exemption is obvious from the text of Section 53 of the AWV and accepted by the BMWi. The BMWi's right of scrutiny may also be ruled out in cases where, for example, a silent partnership (*stille Beteiligung*), profit-sharing rights (*Genussrechte*) or call options are acquired.[20]

2. Formation of a New Company

The BMWi does not have jurisdiction if the non-EU investor launches a new company. According to the legislation, only the acquisition of voting rights in an existing company may be subject to examination. The formation of a new company is thus not affected. This exemption is accepted by the BMWi.[21]

3. Increase in Voting Rights Beyond 25%

Once the Purchaser has already acquired 25% or more of the Target, a further increase in voting rights should not be subject to scrutiny by the BMWi. The wording of Section 53(1) is dubious on this issue, so that the law can well be understood to apply to voting rights increases even though the foreign investor already holds 25% (and this has possibly already been examined by the BMWi). The BMWi nevertheless assumes comprehensive jurisdiction in these cases,[22] where it could at least have limited its alleged right of intervention to acquisitions that it did not yet have the chance to examine (e.g., because the initial acquisition of 25% or more took place before the entry into force of the new German foreign investment law and is now increased).

There are two reasons, however, why the German foreign investment regime should not apply. First, the explanatory memorandum on the new foreign investment regime demands causality between the acquisition of the voting rights and the holding of a

[20] Christoph H. Seibt and Bernward Wollenschläger, *Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis*, 833, 836 (2009), with further examples; Georg-Pottmeyer in Hans-Michael Wolffgang/Olaf Simonsen, AWR, Section 52, para. 23 with regard to the similarly structured Sec. 52 AWV; Friedrich in Ernst Hocke, Siegfried Berwald, Heinz D. Maurer, and Friedrich, AWR, Section 52, para. 19: Also no right to examination by the BMWi if limited partnership shares are acquired.

[21] See, *supra,* note 4, Question 16.

[22] Klaus-Marinus and Hoenig, *Börsenzeitung*, 23 September 2009, 2, "*Mehr Verwaltungsaufwand für Unternehmen und Ministerium*", giving an account of the BMWi's position in TDK/Epcos; dissenting: Rainer Traugott and Philipp Strümpell, *Die Aktiengesellschaft*, 186, 191 (2009); Harmut Krause, *Betriebs-Berater*, 1082, 1083 (2009); Rudiger Theiselmann, 10 GERMAN LAW JOURNAL No. 11, 1495, 1498 (2009).

blocking minority.[23] When increasing the voting rights beyond 25%, such a blocking minority already exists in practice and, thus, cannot be established anymore. Second, if the legislator intends to lay down different thresholds for administrative intervention, he must do so expressly and clearly. For example, in German merger control, a transaction is only subject to scrutiny if it surpasses the thresholds of (a) competitively significant influence (shareholding below 25%), (b) 25%, (c) control and (d) 50%.

4. Intra-Group Transfer of Shares

Internal restructuring, i.e. the intra-group transfer of shares from a non-EU entity to another or from a EU resident company to a non-EU entity, should not be subject to scrutiny by the BMWi. Formally, the new foreign investment regime applies to internal restructurings and this is also the view of the BMWi.[24] But, it follows from the spirit and purpose of the law that the transfer of shares within a group of companies cannot affect public policy and security of the Federal Republic of Germany anymore than it possibly did before the deal. German merger control law stipulates in Section 37(2) of the Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, "GWB") that, with regard to similar situations expressly, even though the prerequisites for a notification are formally met, no filing is necessary if the transaction "does not result in a substantial strengthening of the existing affiliation between the undertakings". This reflects the general principle that restructurings within a group are exempt from merger control.[25]

The alleged BMWi's examination right in these constellations does not only create legal uncertainty and bureaucracy. Companies may not even be aware of the fact that internal processes involving the transfer of shareholding in a German company may attract the attention of the German administration.

C. Public Policy or Security

The question whether a transaction does affect public policy or security is the "million dollar question" of the new law. There is not really a definite answer to this. Even the

[23] In accordance with Section 52 of the AWV an examination is conducted, provided that the transaction results in the non-EU purchaser obtaining at least 25% of the voting rights in the company and thus potentially holding a blocking minority.

[24] Klaus-Marinus and Hoenig, *Börsenzeitung*, 23 September 2009, 2, "*Mehr Verwaltungsaufwand für Unternehmen und Ministerium*", giving an account of the BMWi's position in TDK/Epcos; dissenting: Christoph H. Seibt and Bernward Wollenschläger, *Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis*, 833, 836 (2009).

[25] Higher Regional Court of Düsseldorf, WuW/E DE-R, 647 ff. – *OTZ*; Rainer Bechtold, GWB, 5th ed. 2008, Section 37, para 46.

German legislator only points at EU law provisions and their interpretation by some scattered judgments of the Court of Justice of the European Union (ECJ). In practice, with all due respect to the necessity for a transaction's legal certainty, practitioners should not too quickly assume that public policy or security is concerned, keeping in mind that the legislator did expect an examination by the BMWi in only "few/rare individual cases" [26].

Public policy or security is a well-known term in EU law.[27] It applies wherever restrictions to fundamental freedoms are concerned. The explanatory memorandum on the German foreign investment regime expressly refers to Art. 52 and Art. 65(1) of the Treaty on the Functioning of the European Union (TFEU)[28], according to which restrictions on the freedom of establishment and the free movement of capital are admissible on grounds of public policy or security.[29] This is important for the understanding of the terms, as they must consequently be interpreted in line with European law and the interpretation given to it by the ECJ. Ultimately, the ECJ will decide on questions of public policy and security if any of the decisions of the BMWi are to be challenged in court.

I. Relevant Industries

According to the general concept of the new foreign investment regime, public security concerns are not limited to particular industry sectors or to companies of a certain size.[30] The negative side effect of the resulting vast area of application is a lack of legal certainty for many transactions. The BMWi has confirmed that this has resulted in numerous applications for certificates of non-objection in "plain sailing" matters whose connection to public policy or security was not always obvious. Consequently, the BMWi quickly cleared all requests.

In previous rulings, the ECJ has expressly recognized that public security is affected when it comes to safeguarding the provision of services in the event of a crisis in the fields of telecommunications,[31] electricity,[32] gas[33] and petroleum[34]. Public security may generally

[26] Explanatory Memorandum, BT-Drs. 16/10730, 2.

[27] On a general point, see, Georg Ress and Jörg Ukrow in Eberhard Grabitz and Meinhard Hilf, EUV/EGV, Art. 58, para 33 *et seq.*; for the foreign investment control regime in particular, see Weller, ZIP, 857, 861 (2009).

[28] According to the new numbering of the TFEU (former EC-Treaty) by the Treaty of Lisbon, which has entered into force on 1 December 2009.

[29] Explanatory Memorandum, BT-Drs. 16/10730, 11.

[30] See, *supra,* note 4, Question 2.

[31] Case C-463/00, *Spain v. Commission,* 2003 E.C.R. I-4581, para. 71.

[32] *Id.* Case C-174/04, *Italy v. Commission*, 2005 E.C.R. I-4933, para. 40.

become relevant with regard to the provision of strategic services.[35] According to the strict requirements established by Art. 52 and Art. 65(1) of the TFEU, a restriction or prohibition is only permitted in case of a genuine and sufficiently serious threat affecting one of the fundamental interests of society. This will only be the case in rare and exceptional circumstances. An investment may generally not be restricted or prohibited on the grounds of industrial policy or economic or financial interests. Banking, the tobacco and the automotive industries will probably not be held to have a connection to public policy and security.[36]

II. Guidance for Practitioners: The Concept of "Critical Infrastructures"

In a different context (protection against acts of God, technical and human failure, terrorism, crime and war), the German government has identified certain critical infrastructures as "main arteries of modern societies"[37]. Critical infrastructures are organizational and physical structures and facilities of such vital importance to a nation's society and economy that their failure or degradation would result in sustained supply shortages, significant disruption of public safety and security, or other dramatic consequences. They include:[38]

- Transport and traffic (with aviation, railways, local traffic, roads, postal service and maritime shipping and inland waterways transport subsectors);
- Energy (with electricity, nuclear power stations, gas and petroleum subsectors);
- Hazardous materials (with chemicals and biomaterials, hazardous materials transportation and defence industry subsectors);

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[33] Case C-174/04, *Italy v. Commission*, 2005 E.C.R. I-4933, para. 40.

[34] Case C-483/99, *France v. Commission,* 2002 E.C.R. I-4781, para. 47; Case C-503/99, *Belgium v. Commission,* 2002 E.C.R. I-4809, para. 46; Case 72/83, *Campus Oil Limited,* 1984 E.C.R. 2727, para. 34; see also, Case C-398/98, *Greece v. Commission*, 2001 E.C.R. I-7915, para. 29 *et seq*; Case C-463/00, *Spain v. Commission*, 2003, E.C.R. I-4581, para. 71.

[35] Explanatory Memorandum, BT-Drs. 16/10730, 11; Georg Ress and Jörg Ukrow in Eberhard Grabitz and Meinhard Hilf, EUV/EGV, Art. 58, para 34.

[36] Case C-463/00, *Spain v. Commission*, 2003 E.C.R. I-4581, para. 70; Opinion C-112/05, *VW-Gesetz*, 2007 *Advocate General Colomer,* para. 53; available at: http://www.curia.europa.eu, last accessed 27 January 2010.

[37] Federal Ministry of the Interior, NATIONALE STRATEGIE ZUM SCHUTZ KRITISCHER INFRASTRUKTUREN (KRITIS-STRATEGY) (2009), 3. Available at: http://www.bmi.bund.de/cae/servlet/contentblob/544770/publicationFile/27031/kritis.pdf, last accessed 27 January 2010.

[38] See, https://www.bsi.bund.de/cln_164/ContentBSI/EN/topics/Criticalinfrastructures/Introduction/Definition/definitions.html, last accessed 27 January 2010.

- Information technology and telecommunications;
- Finance, monetary system and insurance (with banking, insurance companies, financial service providers and stock exchange subsectors);
- Supply services (with health care, emergency and rescue services, disaster control, food supply, water supply and waste disposal subsectors); and
- Media and large-scale research institutes.

Given the different context, this list may not be directly relied upon when identifying industries possibly protected by the new foreign investment regime. The concept of critical infrastructures does, however, offer some valuable guidance on what the German administration might consider relevant for public policy or security.

D. Filing and Review Process

In order to minimize the bureaucratic burden on investors, notifications to the BMWi remain wholly voluntary. Contrary to merger control, there is no requirement of authorisation or registration. Parties who do not provide a notification, however, bear the risk that their transactions are blocked or unwound if the BMWi decides to investigate the transaction *ex officio* within three months from signing. If the parties decide to voluntarily notify their transaction to the BMWi, they may receive a certificate of non-objection within short notice, i.e. within one month.

By the end of September 2009, the BMWi has not initiated any *ex officio* proceedings and has cleared all applications for certificates of non-objection (a telephone call with the BMWi revealed that it had received and cleared 19 applications up to that point, with one undergoing scrutiny at that time, which is likely to be cleared, and five more in the pre-application talks stage). The BMWi encourages pre-filing talks with the parties and gives guidance on formal and material issues on request.

The purchase contract remains valid throughout the entire examination procedure. However, the acquisition is, according to Section 31(3) of the AWG, subject to the "condition subsequent" of prohibition: In other words, should the BMWi prohibit the investment, the purchase contract becomes void. In practice, this results in a factual suspension obligation that should be – in line with merger control conditions – be dealt with in a share/asset purchase agreement.

I. Regular Two-Stage Process

The BMWi may decide to initiate a review of the investment within three months of the signing of the purchase contract ("Phase I").[39] If the BMWi does not take any action within

[39] In cases involving a public offer, the period begins with the publication of the decision to make the offer or with the publication of the fact that control of the company has been attained, see, Section 53(1) AWV.

this period of time, the acquisition may not be examined thereafter. When a review is initiated, however, the Purchaser must submit all required information concerning the acquisition (*vollständige Unterlagen*). The BMWi, by way of announcement in the Federal Gazette, has defined which information is required.[40] The information is partly identical to the documents required in merger control proceedings.

The BMWi may subject the acquisition to certain conditions or even order a prohibition within two months of receipt of the information ("Phase II"). Other ministries whose responsibilities are concerned in the concrete case may be involved in the process. If the examination of a foreign acquisition is initiated, the BMWi informs the Federal Government about the result of the examination. If restrictions or a prohibition according to Section 53(4) are considered necessary, the BMWi must obtain approval of the Federal Government. In other words, a decision of the Federal Cabinet is required, as per Section 53(2) of the AWV. If the BMWi does not take any action within this period of time, the acquisition may not be examined thereafter.

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[40] *BMWi*, *Runderlass Außenwirtschaft* No. 5/2009, *Umfang der Meldepflicht gemäß Sections 53 Abs. 2 der Außenwirtschaftsverordnung*, 21 April 2009. The documents to be submitted must contain the following particulars:

Should this not be formatted the same way as footnote 6?

1. The name and the registered seat of the acquirer and of the target business and if necessary of other companies or natural persons that hold 25% or more of the voting rights of these companies, the places of business, the names of the authorised representatives, a current extract from the commercial register or comparable documents, the purchase contract.
2. The type of business and a description of the products sold (goods and services) by the acquirer as well as by the target business.
3. The annual financial statements and management reports of the last three business years as well as the consolidated financial statements (including the shareholding in other companies) of the companies described in No.1, as far as the company is obliged to prepare such annual statements, prepares them voluntarily or is included in such.
4. In the case of an acquisition of shares the amount of the direct or indirect shareholding (voting rights) in the target business held at the time of reporting and the amount to be acquired.
5. An acquirer not resident in Germany has to appoint a person that is authorised to accept service in Germany.
6. The direct and indirect shareholdings in third undertakings held by the shareholders of the companies described in No.1 as far as the voting rights reach or exceed 25%.
7. Information about other shareholdings (in particular any interests in other companies) that reach or exceed 25% of the voting rights as well as the direct or indirect shareholdings that reach or exceed 25% of third companies in the acquirer or in the target business.
8. Name of the customers of the products sold by the target business and, if applicable, of its subcontractors as well as of the acquirer as far as he is directly active in the same markets.
9. The market shares of the acquirer and of the target business for the products sold, broken down into Germany, other EU member states and – as far as it is known – third countries. The information can be substituted – as the case may be – by documents submitted in the course of an antitrust examination procedure.

All decisions of the BMWi can be challenged in the administrative court of Berlin. The basis for appeals may include not only possible restrictions on and prohibitions of the investment, but also the BMWi's decision to initiate a review.[41]

II. Practical Approach: Fast-Track Clearance by Applying for a Certificate of Non-Objection

In order to attain legal certainty promptly, the investor may, according to Section 53(3), apply for a certificate of non-objection instead of waiting for the three-month deadline to pass while hoping that the BMWi will not tackle the purchase. The certificate can be requested from the BMWi before signing, as long as the parties have the good faith intention of signing.[42] The application for the certificate merely needs to outline the basic elements of the planned acquisition, the investor and his field of business (*Darstellung in den Grundzügen*). There is no need to submit full documentation (*vollständige Unterlagen*) on the acquisition unless a formal review might be initiated.

If the BMWi does not launch a formal review within one month of receiving the investor's application in writing for a certificate of non-objection, the certificate of non-objection is deemed to have been issued. Upon issuance, the legally binding certificate confirms that the investment does not endanger public policy or public security.
The BMWi does apparently accept English applications, as long as a German translation will be provided later.[43] This may speed up the process, even though it remains unclear whether the one-month deadline is already set off by the receipt of the English version.

The existence of the right to apply for a certificate of non-objection and the corresponding one-month deadline for issuance is good news for transaction practice. This makes the new foreign investment regime run alongside the timelines of merger control, where most of the cases are also cleared within the first month.

E. Conclusion

The legal practice has now had approximately nine months to become acquainted with the new German foreign investment law and to draw some first conclusions. All in all, there were neither any prohibitions nor did any transactions undergo a deeper scrutiny by the BMWi. This suggests that the German foreign investment regime does not pose a threat to

[41] See, *supra,* note 4, Question 11.

[42] Explanatory Memorandum, BT-Drs. 16/10730, 15.

[43] Hans-Joachim Prieß and Bärbel Sachs, *Frankfurter Allgemeine Zeitung*, 7 October 2009, 23, "*Noch kein einziges Verbot für ausländische Investoren*."

investing in German companies. However, one should hope that the BMWi indeed abandons some of its very restrictive practices and that legal counsels carefully consider which transactions need and which do not need to be notified, as they do not concern public policy or security.