



Foreign Investment Review

in 24 jurisdictions worldwide

2014

Contributing editor: Oliver Borgers



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**Contributing editor:
Oliver Borgers
McCarthy Tétrault LLP**

Getting the Deal Through is delighted to publish the fully revised and updated third edition of *Foreign Investment Review*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and clients.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 24 jurisdictions featured.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.GettingTheDealThrough.com.

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

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Law and policy

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

In general, German policies and laws welcome and encourage foreign investments just like domestic investments. German law generally makes no distinction between German and foreign investors. However, there are rules concerning foreign investments that focus on sensitive industry sectors, namely defence, encryption, and satellite industries. Further, in 2009, catch-all rules were adopted in the foreign trade legislation. These rules apply whenever a foreign investor acquires a certain amount of the nominal capital or voting rights in a German company.

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

The main laws that regulate foreign investments in Germany on the basis of national interest regardless of the industry sector are:

- the Foreign Trade and Payments Act (AWG); and
- the Foreign Trade and Payments Regulation (AWV).

Further, on a national level, merger control rules are laid down in the Restriction of Competition Act (GWB). Other important laws concerning (foreign) investments in specific sectors are:

- the State Broadcasting Treaty (RStV);
- the Telecommunications Act (TKG);
- the Postal Services Act (PostG);
- the Satellite Data Security Act (SatDSiG);
- the Aviation Compliance Documentation Act (LuftNaSiG);
- the Banking Act (KWG); and
- the Act on the Supervision of Insurance Undertakings (VAG).

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

In general terms, the statutes listed under question 2 refer to the acquisition of an interest or voting rights in a German company. Therefore, all types of investments and transactions (such as share and asset purchases, joint ventures and incorporations) are included. In most cases, the relevant rules already apply if the contemplated acquisition relates to a minority interest (ie, a participation smaller than 50 per cent of the nominal capital or voting rights of the company). The relevant thresholds depend on the industry sector (10 per cent to 40 per cent). However, in some cases (the broadcasting and telecommunications industries) there are no defined thresholds.

Some rules concerning certain industries (broadcasting, telecommunications, banking, insurance and the postal sector) make no general distinction between foreign and domestic investments. The sectors are generally regulated and, therefore, any investment may be subject to a review. Hence, this article will cover these sectors only to a limited extent and will focus on the rules that make a distinction between foreign and domestic investors with regard to the regulation and review of investments.

The very sensitive defence and encryption sectors are subject to special scrutiny of the competent authorities. The reviews in the defence sector cover companies that are active in the manufacture and development of war weapons and specially designed engines or gears for combat tanks or other armoured military tracked vehicles. Reviews in the encryption sector cover companies that are active in the development of IT security measures admitted for the transmission of governmental classified information by the Federal Office for Information Security Technology with the approval of the target company.

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

The Foreign Trade and Payments Act does not define 'foreign investors' but defines 'foreigners' as persons or partnerships that are not nationals (section 2(5) AWG). Nationals are defined as natural persons with residence or habitual residence in Germany, legal persons or partnerships with residence or head office in Germany as well as branch offices and sites of legal persons or partnerships with their administration based in Germany (section 2(15) AWG). The Foreign Trade and Payments Act also makes a distinction between EU-based persons and persons not based in the EU (section 2(18) and (19) AWG).

Under the catch-all rules, foreign investors are (natural or legal) persons and partnerships neither based in the EU nor based in the territory of the European Free Trade Association (EFTA: Iceland, Liechtenstein, Norway and Switzerland).

Under the rules regulating investments in the defence, encryption, and the satellite sector, foreign investors are defined as in section 2(5) and (15) AWG (see above).

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

No special rules apply concerning SOEs or SWFs under German law.

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

The Federal Ministry for Economic Affairs and Energy (the Ministry of Economics) is competent with regard to the catch-all rules (sections 55ff, AWV) as well as the rules concerning the defence,

encryption (sections 60ff, AWW) and the satellite industry (section 10 SatDSiG) sectors. However, if the Ministry of Economics intends to restrict or prohibit the investment under the catch-all rules, it needs approval from the Federal government.

The Federal Cartel Office is responsible for merger control.

The respective State Media Authority and its umbrella organisation (the Commission for Admission and Supervision) are competent with regard to investments in the broadcasting sector.

The Federal Network Agency is entitled to oversee investments in the telecommunications and the postal sector.

The Federal Financial Supervisory Authority and the Bundesbank (the German Central Bank) supervise the banking sector.

The Federal Financial Supervisory Authority or the respective state supervisory authorities are competent with regard to the insurance sector.

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

In general, German authorities have wide discretion to approve or reject transactions on national interest grounds, especially as far as sensitive sectors such as the defence, encryption and the satellite industry are concerned.

Procedure

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

Catch-all rules

The Ministry of Economics is entitled to carry out a review of a foreign investment if the foreign non-EU investor obtains at least 25 per cent of the shares or voting rights in the German target company (sections 55 and 56 AWW). The scope of review is limited to violations of public order and security, namely, national interest. In order to prevent circumvention, the Ministry of Economics is also entitled to review transactions involving an investor based in the EU but with a shareholder based outside the EU and holding at least 25 per cent in the EU-based investor (section 56(2) AWW). EFTA-based investors (Iceland, Liechtenstein, Norway and Switzerland) are treated as EU-based investors.

Notification or filing is not mandatory. The review has to be initiated by the Ministry of Economics.

Defence, encryption, satellite systems

Different rules apply where certain economic sectors are concerned. When a foreign investor obtains at least 25 per cent of the shares in a German target company that is active in the defence or encryption sector, he or she has to notify the Ministry of Economics in writing and file necessary documentation (section 60 AWW). Section 60 AWW is *lex specialis* to sections 55 and 56 AWW.

Similar rules apply when a foreign investor invests in satellite systems (section 10 SatDSiG).

Mergers

As far as mergers are concerned, both parties have to apply for approval of the Federal Cartel Office if certain turnover thresholds are met (section 35 GWB).

Other regulated sectors

Apart from rules that specifically apply to foreign investors or to mergers, there are several regulated sectors where notification and approval regulations apply, irrespective of the investor's nationality. For instance, a notification is mandatory for investments in the (licensed) postal sector (section 7 PostG: a 10 per cent threshold). With regard to broadcasting, prior approval of a transaction by the competent authorities is mandatory (section 29 RStV).

In the banking sector, there is a threshold defined as 'a qualified participating interest' (section 2c(1) sentence 1 KWG). According to section 1(9) KWG in conjunction with article 4(1) No. 36 Regulation (EC) 575/2013, this threshold is met if the investor directly or indirectly holds at least 10 per cent of the nominal capital or voting rights of the target. The amount of the intended participating interest must be reported to the Federal Banking Supervisory Office and the Bundesbank. Under the Act on the Supervision of Insurance Undertakings, any person who intends to hold a qualified participation in an insurance undertaking has to notify the supervisory authority (section 104(1) sentence 1 VAG). A 'qualified participation' shall be deemed to exist if the investor either directly or indirectly holds at least 10 per cent of the nominal capital or voting rights of the target (section 7a(2) sentence 3 VAG). In the banking and insurance sectors, notifications are also mandatory if a holder of a qualified participation intends to increase or decrease its participation in such a way that it exceeds or falls below the thresholds of 20, 33, or 50 per cent.

Other limitations apply, as far as foreign investments in listed German airlines are concerned. As soon as all (non-EU) foreign investors together hold 40 per cent or more in an airline, the airline is obliged to intervene in order to maintain its rights in air traffic. According to Council Regulation (EC) 2407/92, EU members have to hold the majority share in order to receive and maintain the operating authorisation.

Moreover, section 65 AWW needs to be considered, according to which nationals (only nationals) have to notify the Bundesbank about specifically defined property involving foreign investors. For instance, a German company is obliged to make a notification if foreign nationals hold at least 10 per cent of the company's shares.

- 9** What is the procedure for obtaining national interest clearance of transactions and other investments?

Catch-all rules

When a foreign investor acquires an interest in a German target (active in a generally unregulated industry) and meets the threshold of 25 per cent, it is the Ministry of Economics' responsibility to find out about the transaction because there is no obligation for notification. If the Ministry of Economics decides to open a review on grounds of national interest, the investor is obliged to file certain documents. The documentation that is necessary in order to obtain clearance in these cases is published in the Federal Gazette (section 57 AWW). For instance, annual and consolidated financial statements of the investor and the target for the last three years as well as information about the investor's holding companies and subsidiaries must be filed. In addition, section 57 AWW clearly states that the obligation to submit documentation regarding the acquisition concerns the direct purchaser. Hence, in cases where a foreign investor holds shares in an EU-based investor (see question 8: a threshold of 25 per cent applies), the EU-based investor is obliged to file the documents.

In order to obtain legal certainty in advance of a transaction meeting the 25 per cent-threshold in unregulated sectors, the foreign investor may apply for a (formal and binding) clearance certificate according to section 58 AWW. The certificate confirms that the intended transaction does not violate national interest issues. The investor may initiate this procedure before the authorities start their own review. The investor does not have to file comprehensive documentation but only has to outline the intended transaction. The transaction, the investor, the target and the fields of business of both the investor and the target must be described briefly (section 57 AWW). The clearance certificate is deemed granted if the Ministry of Economics does not initiate a formal process within one month after the investor has filed the required documents outlining the intended transaction.

Defence, encryption and satellite systems

In the case of investments in the defence and encryption sector, there is an obligation to notify the transaction to the Ministry of Economics (section 60(3) AWW). The documentation accompanying the notification does not have to be comprehensive. However, the transaction, the investor, the target and the fields of business of both the investor and the target must be outlined. The Ministry of Economics then explicitly approves the transaction (section 61 sentence 1 AWW), opens a review or does not react at all.

If the Ministry of Economics does not open a formal review within one month after the investor's notification, the approval is deemed granted. However, although the wording of section 61 AWW does not state this clearly, the Ministry of Economics is supposed to grant the approval explicitly and in writing in simple and straightforward cases.

If the Ministry of Economics decides to open a review based on this information, comprehensive documentation as it is published in the Federal Gazette must be filed (sections 61 sentence 3 and 57 AWW).

For investments in satellite remote sensing systems, comprehensive documentation must be filed with or after the notification.

Mergers

In the case of a merger, the Federal Cartel Office receives and reviews the documentation. The required information is listed in section 39 GWB.

Other regulated sectors

For investments in the postal or telecommunication sector, the Federal Network Agency must be notified. For investments in broadcasting, the State Media Authority of the respective state is competent to receive the application for approval. In the insurance sector, the notification shall contain the facts necessary to judge whether the requirements for holding a qualified participation have been met. For instance, any holder of a qualified participation must be reliable. The supervisory authority is entitled to request certain documents and have them audited at the expense of the prospective investor. For investments in the banking sector, the investor has to state all facts and file all documents specified in more detail by regulation (section 2c(1) sentence 2 KWG) in his or her report. The Federal Banking Supervisory Office is entitled to request further documentation.

There are no standard forms. Filing fees do not apply, unless a merger control filing is made.

10 Which party is responsible for securing approval?

The investor is (primarily) responsible in the case of investments in regulated sectors (defence, encryption and satellite systems) as well as reviews initiated by the Ministry of Economics in other cases under the catch-all rules. In other sectors, such as the broadcasting sector, only the target has to take care of notifications and approvals. However, in certain sectors (banking and insurance) both the investor and the target company are required to notify an intended transaction falling under the relevant regulatory rules. Finally, in the case of merger control procedures, all parties involved in the transaction (partly including the seller) are required to apply for the approval of the Federal Cartel Office.

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

Catch-all rules

When the 25 per cent threshold is met in any otherwise unregulated economic sector, the review has to be initiated by the Ministry of Economics within three months after the conclusion of the promissory contract (section 55(3) AWW). Otherwise a review of the specific

investment is precluded. If a review is opened within that time frame, the foreign investor is obliged to hand in all relevant documentation that is determined in the Federal Gazette. Afterwards, the transaction can be restricted or prohibited within a time frame of two months (section 59(1) sentence 1 AWW). This time period does not begin to run until the required documentation is complete. However, the Ministry of Economics is allowed to make these orders only with the consent of the Federal government (section 59(1) sentence 2 AWW).

Defence, encryption and satellite systems

In the case of investments in the defence and encryption sectors, approval is deemed granted if the Ministry of Economics does not open a formal review within one month after the investor's notification (section 61 sentence 2 AWW). If the Ministry of Economics opens a review in order to protect national interest, it demands comprehensive documentation and may restrict or prohibit the transaction within one month after this documentation was filed (section 62 AWW).

With regard to foreign investments in satellite systems, a review may be opened within one month after the necessary documentation was filed (section 10(1) sentence 4 SatDSiG).

However, in practice, the entire process may take much longer because of informal guidance in advance of a review.

Mergers

In the case of a merger, the Federal Cartel Office has to decide whether or not formal proceedings should be opened within one month after the application is completed. Within four months after the application, it has to either approve or prohibit the merger, otherwise it is deemed to be approved.

Other regulated sectors

The regulations concerning the telecommunications, postal and broadcasting sector do not provide for a time frame. In the banking and insurance sectors, the competent authority has to decide whether or not it wants to prohibit a transaction within 60 working days after the receipt of the notification is confirmed in writing. Under certain circumstances, this time frame can be extended to 90 working days.

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

Catch-all rules

As far as the 25 per cent threshold under the catch-all rules is concerned, promissory contracts, for example, the purchase contract, are valid as long as the Ministry of Economics does not decide to restrict or prohibit the transaction (section 15(2) AWW). Hence, the parties may close the transaction before completion of the review. However, the contracts' validity is subject to the condition subsequent to prohibition. If the Ministry of Economics, with the approval of the Federal government, prohibits the investment, the contracts become void ex nunc and the transaction must be unwound due to the lack of a legal basis. Therefore, it is advisable to wait for approval or the expiry of the time limit, respectively.

Defence and encryption

With regard to the sensitive defence and encryption sectors, legal transactions associated with the acquisition are provisionally ineffective up to the expiry of the applicable time limits or up to the completion of the review, respectively (section 15(3) sentence 1 AWW). The legal transactions become effective retroactively as soon as the Ministry of Economics either approves the transaction or the time limit expires (section 15(3) sentence 2 AWW). If the parties implement the transaction, even though it is not yet valid, it must be unwound.

Mergers

As far as mergers are concerned, closing is prohibited before the Federal Cartel Office has made a decision or the time limits have expired. Contracts concluded and executed despite this prohibition are null and void. The Federal Cartel Office is entitled to liquidate the merger.

Broadcasting

Prior approval before closing is necessary in the case of transactions in the broadcasting sector. Otherwise, the competent authorities may impose fines of up to €500,000 (section 49(1) sentences 2 and 4 RStV). Moreover, the broadcasting approval must be revoked if the transaction is closed before the respective State Media Authority approved the transaction and the requirements for approval are not fulfilled (section 29 sentence 4 RStV).

Banking and insurance

In the banking and insurance sector, the contracting parties may close the transaction after the time limit (60 working days) has expired. However, if they close it before the review is completed, legal transactions associated with the acquisition are still valid. In this case, sections 2c(2) KWG and 104(2) VAG apply and the competent authority may prohibit the holder of a qualified participation from exercising his or her voting rights.

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

It is possible and advisable to enter into informal discussions in order to ensure that complicated issues are resolved before a formal review begins. Thus, safeguarding measures (such as the information rights of the authorities) can be implemented and uncertainties can be clarified. In practice, authorities expect foreign investors to make sure that major issues are discussed in advance.

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

In Germany, all reviews of transactions are carried out confidentially (although merger control proceedings pending with the Federal Cartel Office are published on its official website). Usually, neither government relations nor public affairs or lobbying specialists are made use of, although lobbying is not prohibited under German law. However, in practice, lobbyists are involved to a limited extent.

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

Again, the powers of the competent authorities depend on the economic sector the investor and target is active in.

Catch-all rules

As far as the 25 per cent threshold applies under the catch-all rules, the competent Ministry of Economics is entitled to prohibit or restrict the transaction within the time frames stated above. If the transaction has to be unwound, the authorities may appoint a trustee to bring about and supervise the process. As soon as the time limits have expired, any review or power to challenge or unwind transactions is precluded.

Defence, encryption and satellite systems

If the foreign investor makes false statements with regard to the required outline of the transaction (sections 60(3), 58(1) sentence 2 AWW), the function of the approval (see section 61 sentence 2 AWW)

does not apply. If the Ministry of Economics explicitly approves the transaction on the basis of false statements, it may revoke the decision post-closing according to the general rules under German administrative law.

Broadcasting

With regard to investments in the broadcasting sector, authorities must revoke the licence of the broadcasting company post-closing if the investment does not meet the legal criteria for granting the licence.

Other regulated sectors

In the postal and telecommunications sector, the authorities are entitled to review compliance with applicable law of companies active in these sectors at any time. Therefore, if non-compliance is revealed, they may also revoke licences post-closing. Similar rules apply in the banking and insurance sector. The competent authority is entitled to prohibit the holder of a qualified participation from exercising his or her voting rights and make other stipulations post-closing if, for example, under the present circumstances, the transaction would have to be prohibited.

Substantive assessment

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

The grounds on which a transaction may be cleared, restricted or prohibited differ depending on the industry sector concerned.

Catch-all rules

Investments in unregulated industries subject to the catch-all rule may be prohibited or restricted if they endanger the public order or security of the Federal Republic of Germany (section 55 AWW). This apparently wide discretion is significantly restricted by EU law. Contrary to the broad wording of the relevant provision, the Ministry of Economics may only restrict or prohibit investments where there is an actual and sufficiently serious danger to the fundamental interests of society. Examples for such fundamental interests of society are ensuring the availability of supplies in times of crisis in the areas of telecommunications, electricity, water and energy and other services of strategic importance. The strengthening of competitiveness and the restructuring of certain sectors or companies or the reduction of public debt, for instance, are not sufficient grounds to prohibit or restrict transactions. The Ministry of Economics bears the burden of proof to show that the respective criteria are met.

Defence, encryption and satellite systems

Investments in the defence sector, encryption for government purposes (section 60 AWW) and satellite remote sensing industry (section 10 SatDSiG) may be prohibited by the Ministry of Economics to protect vital security interests of the Federal Republic of Germany. It has broad political discretion regarding the assessment whether vital national security interests may be endangered by a particular transaction. This political assessment is not subject to judicial review. Courts may only review whether the decision of the Ministry of Economics is logical or supported by accurate facts. For these facts, the Ministry of Economics bears the burden of proof.

Broadcasting

In the broadcasting sector, a change in ownership structure may only be classified as unproblematic by the competent authority if under these changed circumstances the broadcasting licence could still be granted (section 29 RStV). A broadcasting licence for nationwide broadcasting may only be granted to natural or legal persons residing or established in Germany, another EU member state or a signatory to the Agreement on the European Economic Area (section 20a RStV).

Hence, if the change in ownership structure meant that the company would henceforth be majority-owned or controlled by non-EU or non-EEA persons, the transaction will not be cleared. In addition, national and foreign public law entities as well as political parties may not own broadcasting companies (section 20a(3) RStV). Further, an investment or transaction will be restricted or prohibited if it would endanger the diversity of opinions within the Federal Republic of Germany (sections 26(3) and 29 RStV).

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

As a general rule, the competent German authorities do not consult or cooperate with foreign authorities during the substantive assessment but independently assess the question of whether an investment or transaction can and should be restricted or prohibited. Where they need information pertaining to other countries to assess the effects of a transaction, they will primarily require the parties involved in the transaction to provide the relevant information. In addition, they might ask the German Foreign Office or the German intelligence agencies for assistance.

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

The competent German authorities are not legally obliged to involve other interested parties (eg, competitors or customers) or government agencies in the review process, and customers or competitors are not able to challenge decisions regarding clearing, restricting or prohibiting an investment or a transaction. The competent authorities may, however, take other parties' concerns into account when exercising their discretionary power.

19 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The powers of the competent authorities to prohibit or otherwise interfere with a transaction differ among the different industry sectors.

Catch-all rules, defence, encryption and satellite systems

In unregulated sectors subject to the catch-all rule (section 59 AWW) as well as in the defence, encryption for government purposes (section 62 AWW) and satellite remote sensing industries (section 10 SatDSiG), the competent Ministry of Economics may prohibit a transaction to ensure the preservation of public order and security or the vital security interests of the Federal Republic of Germany respectively. However, subject to the principle of proportionality, transactions may only be prohibited if more moderate but equally effective means are not available. The applicable law does not say what other measures besides a prohibition of the transaction may be adopted to protect the public order, security and vital security interests of the Federal Republic of Germany. Therefore, the Ministry of Economics has a wide discretion as regards the question of whether it should interfere with the transaction and, if it should, which (proportionate) measure capable of mitigating dangers to public order, security and vital security interests of the Federal Republic of Germany it should adopt, for example, restriction of the voting rights of a foreign investor.

Broadcasting

In the broadcasting sector, a change in ownership structure must not be classified as unproblematic if under these changed circumstances authorisation could no longer be granted (section 29 RStV). Hence, the competent authorities do not enjoy any discretion if the investment is closed prior to obtaining an approval or despite the rejection of an approval. They have to revoke the broadcasting licence.

Aviation

In the aviation sector, Council Regulation (EC) 2407/92 of 23 July 1992 on Licensing of Air Carriers applies. According to its article 4, an airline company, which is not majority-owned and controlled by member states or nationals of member states, shall not be issued an operating licence by a member state. Consequently, under the aviation agreements concluded by the Federal Republic of Germany with non-EU states, airline companies are required to provide evidence that they are majority-owned by German nationals in order to be issued an operating licence that allows them to exercise air traffic rights. Since air traffic rights may only be used by airlines that are majority-owned and controlled by German persons or entities, an operating licence will be withdrawn as soon as this criterion is no longer met. In order to avoid the revocation of the operating licence, airline companies are entitled to buy their own shares, issue new shares or order foreign investors to sell their shares as soon as 40 per cent of the company's share is held by foreign investors (section 4 LuftNaSiG).

Other regulated sectors

In the postal and telecommunications sectors, a clearance by the competent Federal Network Agency is not required. Yet, the Federal Network Agency may, at any time, review whether the operator still fulfils the requirements imposed on him or her by the relevant legislation. An investment or transaction might therefore be taken as an occasion by Federal Network Agency to carry out such a review.

20 Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings?

It is possible to avoid the authorities' objections to a transaction by giving certain undertakings. As a general rule, it is always advisable to inform the competent authorities as soon as possible about intended investments and transactions and to arrive at an agreement of how to proceed. The coordination with the competent authorities should ideally take place even before the required notifications for a transaction are filed. This is especially the case as regards investments in the defence, encryption for government purposes and satellite remote sensing systems industry and for investments in unregulated industries subject to the catch-all rule, which are reviewed by the Ministry of Economics. Since there are no administrative appeal proceedings against decisions by the Ministry of Economics, the parties to an intended transaction have no other option than to go to court once a negative decision has been issued. Hence, the lack of coordination only delays matters and results in unnecessary costs.

21 Can a negative decision be challenged?

As already mentioned in question 20, there are no prior administrative appeal proceedings against negative decisions by the Ministry of Economics, which is the competent authority for the review of investments in the defence, encryption for government purposes and satellite remote sensing systems industry and investments in unregulated industries subject to the catch-all rule. Such decisions can only be challenged before the administrative courts.

There are, however, administrative proceedings against negative decisions rendered by a State Media Authority regarding investments in the broadcasting industry, and these administrative appeal proceedings have to be completed before the decision can be challenged before an administrative court.

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

Confidential business information is not disclosed to the public. Instead, the confidentiality of information transmitted to the competent authorities for review and clearance is protected under

criminal law (see section 353b German Criminal Code). A breach of confidentiality by an official is liable to a penalty of imprisonment of up to five years or to a substantive fine, as well as to severe disciplinary sanctions up to the immediate dismissal from office. In order to enjoy protection of confidentiality, all confidential business information must be marked as such.

Recent cases

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

In Germany, reviews of foreign investments are carried out confidentially. Therefore, facts about the procedure are not disclosed. Under the amended AWG/AWV, about 120 clearance certificates have been issued in accordance with section 58 AWV so far and a small number of transactions has been reported to the Ministry of Economics under section 60 (3) AWV. So far, there have been no rejections; in a limited number of cases, assurances were demanded from the companies involved or public-law contracts were concluded to protect security interests of the Federal Republic of Germany.

Update and trends

The Foreign Trade and Payments Act as well as the Foreign Trade and Payments Regulation have recently been substantially revised. The amended legislation came into force in September 2013. These legislative amendments have already been taken into account in the answers provided.

Since the entry into force of the Lisbon Treaty on 1 December 2009, foreign direct investment falls within the exclusive competence of the EU (see articles 3(1)(e) and 207 of the Treaty on the Functioning of the European Union). The European investment policy is meant to be introduced progressively, namely, the almost 1,200 bilateral investment treaties (BITs) that are in force between EU member states and third states will be preserved until they are replaced by EU agreements. Regulation (EU) No. 1219/2012 grants legal security to these BITs until they are replaced by EU-wide investment deals. The first, and so far only, EU-wide investment deal concluded is the EU–Canada Trade and Investment Agreement, which was agreed upon on 18 October 2013 and is awaiting approval by the Council and the European Parliament.

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