

CELIS Issue Note

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by

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Abstract

The German investment screening mechanism provides cooperation between national authorities at various points. First and foremost, the Federal Ministry of Economics and Climate Action, the BMWK, as the lead ministry, involves other federal ministries whose remits could be affected by the transaction under review and requires the approval or consensus of different authorities in the event of prohibition or acquisition-restricting measures. At the EU level, coordination with other Member States takes place via the EU cooperation mechanism, the importance of which is likely to increase in practice as part of the planned revision of the EU Screening Regulation. Closer coordination between the Member States is to take place, and the Member States and the European Commission should also be able to launch the cooperation mechanism on their own initiative in future.

The investor has a central role in the German investment screening procedure and is obliged to make the notification in case of a notification requirement. The seller usually undertakes in the SPA (APA) to support the purchaser in the investment screening procedure. Investors have formal rights as the FDI screening is a procedure governed by administration law and can proactively support the procedure as well as contribute to the practical and timely processing of the review by providing additional information as part of the notification or responding quickly to queries from the ministry. Political aspects (and lobbying) can also have an influence on the outcome of the process.

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1. General Competence for Investment Screening Procedures

In Germany, the Federal Ministry of Economics and Climate Action (*Bundesministerium für Wirtschaft und Klimaschutz*, “**BMWK**”) is the competent authority for investment screening pursuant to Sections 55 (1) and 60 (1) of the Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung*, “**AWV**”). The responsibility of BMWK covers all phases of the investment screening procedure, i.e., from the receipt of the notification to the review to the release, prohibition or imposition of acquisition-restrictive measures.

2. Consultations with Other Authorities

In German investment screening procedures, the BMWK regularly involves other domestic and European Union authorities. Within Germany, all other Federal Ministries whose business areas are potentially affected by the transaction to be screened are approached by the BMWK at the beginning of the procedure. If the BMWK intends to impose a prohibition or acquisition-restrictive measures, the involvement of other Federal Ministries is mandatory (see 2.1). In addition, the BMWK notifies the Commission and the EU Member States of implementing a review procedure – currently, at least if a Phase II review is carried out – via the so-called EU cooperation mechanism (see 2.2).

2.1. Cooperation within the German Federal Government

While the BMWK approaches other Federal Ministries as part of the review to obtain a specific assessment or comments, the involvement of other Federal Ministries is required by law in cases in which the transaction should be prohibited or acquisition-restricting measures should be issued.

Within the framework of the procedure set out in Article 65 sentence 2 of the Basic Law for the Federal Republic of Germany (*Grundgesetz*, “**GG**”) and Section 19 (1) of the Joint Rules of Procedure of the Federal Ministries (*Gemeinsame Geschäftsordnung der Bundesministerien*, “**GGO**”), the BMWK, as the lead ministry, involves all Federal Ministries whose remit is

potentially affected by the transaction to be screened. This procedure serves the purpose of ensuring the uniformity of the measures and declarations of the Federal Government. The Federal Foreign Office (*Auswärtiges Amt*, “**AA**”), the Federal Ministry of the Interior and Community (*Bundesministerium des Innern und für Heimat*, “**BMI**”) und (acquisitions in the area of critical infrastructures), the Federal Ministry of Defence (*Bundesministerium der Verteidigung*, “**BMVg**”) (acquisitions in the area of defence) and the Federal Office for Information Security (*Bundesamt für Sicherheit in der Informationstechnik*, “**BSI**”) (acquisitions in the area of IT and cyber security) are involved on a regular basis. In practice, as soon as it receives a notification, the BMWK forwards the notification to the ministries whose business areas it considers to be affected and requests a statement within a reasonable period of time (e.g., three weeks). In practice, also the Federal Office for Economic Affairs and Export Control (“**BAFA**”) is incorporated in the procedure. The ministries concerned review with regards to their business area whether there will be a likely effect on the public order or security of the Federal Republic of Germany, of another Member State of the European Union or in relation to projects or programs of Union interest. The ministries involved subsequently provide feedback to the BMWK or – if they deem it necessary – forward queries about the transaction to the parties via the BMWK. Particularly in transactions in the defence sector, the BMVg as well as the German Armed Forces and their authorities like its procurement agency are regularly deeply involved in the screening. They submit comprehensive request catalogues to the acquirer and sometimes insist on a clearance based on conditions or assurances (e.g., avoidance of ITAR infection for goods delivered to the German Armed Forces). Naturally, the involvement of other authorities, in particular several downstream departments of a ministry, has an impact on the review period. The processing time of the BMWK has already been significantly reduced in recent years. While procedures often took more than a year a few years ago, almost 75% of procedures are now completed within two months.¹ This is because of the adjustment and standardization of the review periods under Section 14a of the German Foreign Trade and Payments Act (*Außenwirtschaftsgesetz*, “**AWG**”) (two months for Phase I review and four months for Phase II review) as part of the AWG reform in 2020 and the BMWK has significantly increased its personnel in charge for investment screening.

¹ Cf. Official statistics of BMWK dated 30 January 2024, Investitionsprüfung in Deutschland, Zahlen und Fakten: https://www.bmwk.de/Redaktion/DE/Publikationen/Aussenwirtschaft/investitionspruefung-in-deutschland-zahlen-und-fakten.pdf?__blob=publicationFile&v=3, last accessed on 15 February 2024.

In addition to the direct involvement of other ministries via the BMWK, individual ministries can also request the BMWK to review acquisitions within their jurisdiction, for which no screening procedure has been initiated so far.²

If the BMWK intends to prohibit a transaction or to impose acquisition-restricting measures (e.g., clearance with conditions) after the review procedure has been carried out, other Federal Ministries must be involved, depending on the type of review procedure. According to Section 13 (3) of the AWG within the scope of the cross-sectoral review procedure, prohibitions require approval of the Federal Government, i.e., the cabinet of the Federal Chancellor and the Federal Ministers.³ Decisions of the Federal Government require a simple majority of the members involved. In the event of parity of votes, the Federal Chancellor decides.⁴ In our experience, cases of envisaged prohibitions are getting known to the public as soon as the cabinet is involved, even though, unlike antitrust proceedings, investment review proceedings are generally not published.⁵ Acquisition-restricting measures require consensus with the AA, BMI, BMVg and consultation with the Federal Ministry of Finance (*Bundesministerium der Finanzen*, “**BMF**”). Within sector-specific review procedures, prohibitions or acquisition-restricting measures require consensus with the AA, BMI and BMVg.

2.2. Cooperation within the European Union

With Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union (“**EU Screening Regulation**”) published on 19 March 2019, the EU has, for the first time, created a cooperation mechanism for investment screening procedures between Member States (and the European Commission). In accordance with the provisions of Article 6 et seq. of the EU Screening Regulation, the Member State notifies the European Commission and the other Member States of all foreign direct investments that are subject to screening and provides the relevant information on the transaction. If another

² Cf. Explanatory Notes to Section 53 AWV, BT-Drs. 16/10730, p. 13.

³ Cf. Article 62 GG.

⁴ Cf. Section 24 (2) of the Rules of Procedure of the Federal Government (Geschäftsordnung der Bundesregierung, “**GOBReg**”).

⁵ For instance in case of the prohibition of the acquisition of IMST by a Chinese acquirer: <https://www.concurrences.com/en/bulletin/news-issues/december-2020/the-german-government-prohibits-the-acquisition-of-a-telecommunications-company>, last accessed on 16 April 2024. In some cases BMWK proactively announces press releases, e.g.: <https://www.bmwk.de/Redaktion/DE/Pressemitteilungen/2022/10/20221026-bundeskabinett-verabschiedet-teiluntersagung-im-investitionsprufverfahren-hamburger-hafen.html>, last accessed on 15 February 2024.

Member State or the European Commission is of the opinion that the transaction affects security or public order in its territory, it shall send comments or an opinion to the Member State carrying out the screening procedure. If a Member State or the European Commission becomes aware of a transaction that is not subject to a review in the Member State concerned, it may also address comments to the Member State. The Member State concerned should take the comments into account accordingly. However, the final decision on the review remains with the Member State.

The cooperation mechanism has yet to fully achieve the desired success in practice. Some Member States report every transaction, while others only report **Phase II cases** (including the BMWK in Germany). For this reason, the European Commission's draft of a new Foreign Direct Investment Screening Regulation published on 24 January 2024 now provides for a more extensive cooperation mechanism. The draft regulation makes a distinction: Phase I procedures only need to be notified if the target company participates in a project or program of EU interest or is active in an area where there is a licensing requirement and the investor is either controlled by a government of a state or is subject to sanctions. In addition, all Phase II procedures must be notified to the cooperation mechanism. Following their decision within the framework of the cooperation mechanism, the Member States must, in future, justify why they have not followed the recommendations of the other Member States or the European Commission. In addition, the Member States and the European Commission should have the right to launch the cooperation mechanism on their own initiative – even in cases where the Member State in which the investment is made has not submitted to the cooperation mechanism. In principle, comments and recommendations on potentially problematic investments can also be submitted unsolicited and must be considered by the receiving Member States.

3. Investor's Influence on the Proceeding

In the German investment review procedure, the investor and the parties to the transaction may be able to influence the procedure at several stages.

First of all, the investor, who is obliged to make the notification, is a party to an administrative procedure according to Section 13 of the German Administrative Procedures Act (*Verwaltungsverfahrensgesetz*, “**VwVfG**”) and has corresponding rights as a party. In particular, the investor as a party involved must be heard in advance pursuant to Section 28 (1)

VwVfG in the event that an onerous administrative act is issued – for example, in the form of a prohibition or acquisition-restricting measures.

When submitting the notification, the acquirer must provide all information and documents required for the review by BMWK in accordance with § 14a (2) of the AWG. The extent and details of the documents to be submitted are set out in a General Decree issued by the BMWK.⁶ In Germany, an attempt was recently made to ensure that only relevant information and facts are transmitted to the BMWK by submitting the notification online via the so-called Federal Portal (*Bundesportal*). However, it is common practice that investors attach a supplementary submission to the information requested in the online form. In this context, the investor or the parties can explain why the transaction in question, even if the scope of application of the investment review is opened in principle, will not affect the public security or public order of the Member State. The investor's long-term strategy or more detailed descriptions of the target company's product portfolio are often decisive here.

Furthermore, the BMWK or other ministries or Member States involved by the BMWK regularly send requests for information to the parties to the transaction, usually to and via the investor. Prompt and precise response from the investor is essential to facilitate a timely and effective procedure.

Apart from the aforementioned possibilities for the investor to influence the screening process, there is also a political component. This recently became obvious in the case of the Chinese state-owned company Cosco's planned investment in a terminal at the Port of Hamburg.⁷ The BMWK, as the ministry in charge, intended to prohibit the planned acquisition of 35% of the shares in a terminal. As already explained, a prohibition in the cross-sector procedure requires the approval of the Federal Government, i.e. the cabinet of the Federal Chancellor and the Federal Ministers. In the Hamburg harbor case, political pressure and a certain amount of lobbying resulted in only a partial prohibition – at the request of the Federal Chancellor. Instead of the planned acquisition of 35%, Cosco was, as a result, allowed to acquire just under 25% of the shares.

⁶ Cf. General Decree of BMWK, BAnz AT 27.11.2023 B1.

⁷ Cf. BMWK press release dated 26 October 2022: <https://www.bmwk.de/Redaktion/DE/Pressemitteilungen/2022/10/20221026-bundeskabinett-verabschiedet-teiluntersagung-im-investitionsprufverfahren-hamburger-hafen.html>, last accessed on 15 February 2024.

About the CELIS Institute

The CELIS Institute is an independent non-profit, non-partisan research enterprise dedicated to promoting better regulation of foreign investments in the context of security, public order, and competitiveness. It produces expert analysis and fosters a continuous trusting dialogue between policymakers, the investment community, and academics. The CELIS Institute is the leading forum for studying and debating investment screening policy. More about the Institute's activities under www.celis.institute.

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CELIS Country Reports (hereafter "Report") are produced by leading experts for any European and select non-European jurisdiction following an elaborate model, allowing for comparison and evaluation across jurisdictions. The project's aim is to identify and suggest best practice and to propose a common European (model) law on investment screening.

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