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Recent Changes in the German Investment Screening Mechanism in Light of the EU Screening Regulation

- **ABSTRACT:** *In 2020 and 2021, the German investment screening laws, namely Außenwirtschaftsgesetz (AWG) and Außenwirtschaftsverordnung (AWV) were again subject to considerable reform induced by new legislation at the European level and a reshaped industry policy agenda at the national level. This article critically reviews the most significant changes brought about by one law (Erstes Gesetz zur Änderung des Außenwirtschaftsgesetzes und anderer Gesetze) and three ordinances (Fünfzehnte, Sechzehnte und Siebzehnte Verordnung zur Änderung der Außenwirtschaftsverordnung) and provides an overview of the reformed screening procedure. Although claims in this direction have been made, neither the reform nor the underlying Screening Regulation (EU) 2019/452 have altered the objective of review – the protection of public order or security – or bar for governmental intervention – actual and sufficiently serious danger. Both these were not ‘overwritten’ by secondary law and continue to be determined by the pertinent jurisprudence of the Court of Justice of the European Union. Notwithstanding this, the reform has considerably widened the ‘sensitive sectors’ in which pertinent investments must be notified to and cleared by the authorities. ‘Gun jumping’ is prohibited and parties moving forward nonetheless risk criminal prosecution. Reform has also standardised the deadlines for governmental intervention and brought about procedural clarity. What the many and frequent changes reveal on a more fundamental level is a progressing politicisation and securitisation of investment screening law.*
- **KEYWORDS:** Außenwirtschaftsgesetz (AWG), Außenwirtschaftsverordnung (AWV), Germany, investment screening, EU Screening Regulation, investment control, public order or security, ordre public.

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1. Introduction

Although the Roman proverb *pecunia non olet* originally referred to ‘unpleasantly’ sourced tax revenue, its logic can be transferred to the realm of foreign investment; where capital is in demand, its geographical provenience is typically not relevant, at least from an economic perspective.³ While the underlying motivation is complex (if eventually self-serving),⁴ the Member States of the European Union (EU or Union) have embraced this thinking and have accordingly pledged that ‘all restrictions on the movement of capital between [...] Member States and third countries’ (art. 63 (1) Treaty on the Functioning of the European Union (TFEU)) shall be prohibited. Decades later, it seems that the Member States have grown unsure of their pledge. Foreign investments are increasingly being subject to scrutiny by investment screening and control mechanisms (ISCMs). Existing ISCMs have recently been broadened in scope, and new ones have been enacted in the EU and its Member States.⁵ Looming concerns regarding (especially, but not exclusively) Chinese investment, or more precisely, the intentions and actors behind it, intensified with the economic fallout of the COVID-19 pandemic.⁶ Fears of foreign buyout and technology drain joined those of vulnerability and dependence regarding medical products. Additional worry around the deflated value of many pandemic-stricken businesses vis-à-vis a swiftly recovering Chinese economy and buying power began to spread.⁷

In light of the above, perhaps (some) *pecunia olet* after all? Even if so, while the guarantee of free movement of capital in the TFEU is not unlimited, neither are the grounds that justify restricting it:⁸ ‘The provisions of [art.] 63 [TFEU] shall be without prejudice to the right of Member States: [...] to take measures which are justified on grounds of public policy or public security’ (art. 65 (1) (b) TFEU). Being one of the main driving forces behind the changing attitude towards foreign investment at the EU level, Germany took (additional) steps to fend off certain investments should the need arise, in 2020 and 2021. The challenge the German legislature had to meet was to effectively protect public policy or security without creating exuberant restrictions on foreign

3 This is at least true for foreign direct investment (FDI) – the ‘Mother Teresa of foreign capital’ (Chang, 2007, p. 88), which is believed to be less volatile than portfolio investment (Griffith-Jones and Tobin, 2001, pp. 38–39). If capital can travel unrestrictedly, it will typically seek and settle where highest returns are to be expected (Obstfeld and Taylor, 1998, p. 356; Viterbo, 2012, p. 189).

4 Cf. Hindelang, 2009, pp. 18–31.

5 For the EU, see the list at https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf (accessed 2 May 2021); more broadly OECD, 2020, pp. 113 et seqq. In detail see the chapters on Germany, France, Italy, Spain, Portugal, Greece, Poland, Lithuania, Latvia, Hungary, Romania, Finland, Norway, Sweden, and Denmark in Hindelang and Moberg (2021). For central European countries, see also Poljanec and Jaksic, 2020, pp. 126 et seqq., 134 et seqq. and Juhart, 2020, p. 87.

6 Annweiler, 2019, p. 528; Lippert, 2021, p. 194.

7 Sahin, 2020, p. 192; see also Braun and Röhling, 2020, FAZ; Breyton, 2020, Welt.

8 In detail Hindelang, 2009, pp. 214 et seqq.

investment. Its most recent legislative efforts to reinforce its ISCM against ‘undesired’ foreign investment are discussed in the following sections.

In Part 2, this article outlines the historical and political background of the recent amendments to the German ISCM, which is enshrined in the Foreign Trade and Payments Act (*Außenwirtschaftsgesetz* (AWG)), a piece of parliamentary legislation, and the Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung* (AWV)), an administrative decree.⁹ Part 3 provides a detailed and critical account of the changes made in the course of the 2020/21 reform.¹⁰ Part 4 shows how these changes shape the screening procedure. This contribution comes to a close by offering, in Part 5, some conclusions.

2. Background of the 2020/21 Reform

When Germany first expanded the scope of its ISCM, which was originally limited to the defence sector, to investments into all sectors of the economy in 2009,¹¹ it was expected that only a handful of investments would be subject to screening each year.¹² Little more than a decade later, the legislature expects over a hundred screening procedures annually, and this number is increasing.¹³ This increase was accompanied by constant legislative changes at ever shorter intervals especially in recent years: In 2017, the legislature introduced an exemplary list of sectors with high relevance for security¹⁴ (‘sensitive sectors’) in which foreign takeovers may pose a threat to public order and security, and established a corresponding notification obligation.¹⁵ 2018 saw Chinese attempts to invest in 50Hertz, a company operating the electricity transmission system in north and east Germany, and in Leifeld, a mechanical engineering company.¹⁶ The latter investment was the first to be blocked by the German ISCM. The same year, these experiences prompted a drop in the notification threshold from 25 to 10 per cent of the voting rights with respect to takeovers in the sensitive and defence sectors.¹⁷

9 Cf. art. 80 (1) art. 103 (2) Basic Law for the Federal Republic of Germany.

10 This article focusses on the reform of the cross-sectoral review (details below Part 4).

11 *Dreizehntes Gesetz zur Änderung des Außenwirtschaftsgesetzes und der Außenwirtschaftsverordnung* of 14 April 2009 (German Federal Law Gazette [*Bundesgesetzblatt – BGBl.*] I, p. 770); see Traugott and Strümpell, 2009, p. 187; Germelmann, 2009, p. 78.

12 BT-Drucks. 16/10730, pp. 1-2 (with no estimate of voluntary notifications).

13 BT-Drucks. 19/18700, p. 3. Between 2010 and 2020, the BMWi recorded around 600 investment reviews (BT-Drucks. 19/18929, p. 4). 2017 saw 66 cases; 2018: 78 cases; 2019: 106 cases; 2020: 159 cases (plus 31 cases from the EU cooperation mechanism); 2021 (until 12 April): 76 cases (plus 66 cases from the EU cooperation mechanism), see *Siebzehnte Verordnung zur Änderung der Außenwirtschaftsverordnung (Kabinettsfassung)*, https://www.bmwi.de/Redaktion/DE/Downloads/J-L/kabinettsfassung-siebzehnte-verordnung-zur-aenderung-der-aussenwirtschaftsverordnung.pdf?__blob=publicationFile&v=6 (accessed 30 April 2021), p. 23.

14 BT-Drucks. 18/13417, p. 13.

15 In detail Hindelang and Hagemeyer, 2017, p. 882.

16 Mohamed, 2019, pp. 766-767; Annweiler, 2019, p. 528.

17 *Zwölfte Verordnung zur Änderung der Außenwirtschaftsverordnung* of 19 December 2018, German Federal Gazette (*Bundesanzeiger – BAnz*) Official Part (*Amtlicher Teil – AT*) of 28 December 2018, VI.

In 2020 and 2021, Germany's ISCM was subject to significant overhaul, again. No less than four reforms¹⁸ in quick succession made significant amendments, amounting to a turning point and putting (the previously largely neglected) law on investment screening on the map alongside the merger review and antitrust laws.¹⁹ These reforms were: the First Law Amending the AWG and Other Laws of 10 July 2020 (*Erstes Gesetz zur Änderung des Außenwirtschaftsgesetzes und anderer Gesetze* – First Law)²⁰ as well as the Fifteenth, Sixteenth and Seventeenth Ordinance Amending the AWV of 25 May 2020, 26 October 2020, and 27 April 2021 (*Fünfzehnte, Sechzehnte und Siebzehnte Verordnung zur Änderung der Außenwirtschaftsverordnung* – 15th, 16th and 17th Amendment Ordinance).²¹

These reforms should be read as a single effort to incorporate the EU's Screening Regulation²² (below Part 2.1), pursue Germany's industrial policy strategy *Nationale Industriestrategie 2030* (below Part 2.2), and fend off perils to the health system and economic crisis related to the pandemic.²³ Consequently, this article refers to the amendments jointly as the '2020/21 reform'.

■ 2.1. The EU's Screening Regulation

Central provisions in the AWG and AWV on investment review were either added or significantly revised to take into account the Union's investment screening framework established by the Screening Regulation. The legislative changes took place a little more than three years after France, Germany, and Italy expressed their concerns regarding a sell-out of European technology to non-EU investors and voiced their criticism on the lack of reciprocity for EU investors in the home states of these non-EU investors.²⁴ These concerns resulted in the adoption of the Screening Regulation, which entered into force on 11 April 2019²⁵ and was based on the Union's exclusive competence (cf. art. 2 (1) TFEU) for the common commercial policy (art. 207 (2), 3 (1) (e) TFEU).²⁶

Art. 1 (1) of the Screening Regulation states its purposes as follows: to establish 'a framework for the screening by Member States of foreign direct investments into the Union on the grounds of security or public order' and a 'mechanism for cooperation

18 Some reforms only brought changes to the ordinance (AWV), which does not require formal laws passed by parliament.

19 Haak et al., 2020, p. 357; Mohamed, JZ 2019, 766.

20 BGBl I, p. 1637.

21 BAnz AT of 2 June 2020, V1; BAnz AT of 28 October 2020, V1; and BAnz AT of 30 April 2021, V1.

22 Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ L 79 I, 21 March 2019, pp. 1–14.

23 On the latter point, which will not be pursued here, see Jungkind and Bormann, 2020, p. 620.

24 Letter available at https://www.bmwi.de/Redaktion/DE/Downloads/S-T/schreiben-de-fr-it-an-malmstroem.pdf?__blob=publicationFile&v=5 (accessed 3 April 2021).

25 Art. 17 Screening Regulation. On the remarkably swift legislative process, see Hindelang and Moberg, 2020, pp. 1432–1435; Maillo, 2020, pp. 184–185.

26 Preamble sentence 2 and recital (6) of the Screening Regulation; in detail Hindelang and Moberg, 2020, pp. 1435–1445 (arguing for art. 64 (2) TFEU as equally suitable legal basis); similarly Korte, 2019, pp. 91–106. See also Herrmann, 2019, p. 437.

between Member States, and between Member States and the Commission, with regard to foreign direct investments likely to affect security or public order'.²⁷ In essence, the substantive portions of the Screening Regulation define standards for Member State ISCMs (art. 3, 4), put in place a cooperation mechanism between the Member States' ISCMs that is coordinated by the Commission (art. 6, 7, 11), also giving the Commission the right to issue opinions regarding investments in projects or programmes of Union interest (art. 8), and establish reporting and information obligations (art. 5, 9, 15).²⁸ The projects and programmes of Union interest are listed in the regulation's Annex.²⁹ These are projects and programmes heavily funded by the Union or fall under Union law regarding critical infrastructure, critical technologies or critical inputs which are essential for security or public order (art. 8 (3) Screening Regulation). Perhaps most surprising, the Screening Regulation does not oblige Member States to entertain an ISCM.³⁰ If a Member State chooses to do so, however, it needs to conform to certain standards set out in the Screening Regulation.

With a declared view to align its ISCM³¹ with the European framework³² and protect public order or security of the Federal Republic of Germany more effectively by closing certain loopholes in the existing legislation, Germany passed the First Law.³³ Even before the First Law, the German administration reacted to the COVID-19 pandemic by adding the manufacturers and developers of certain medical products (such as masks and vaccines) to the list of sensitive (and thus in the case of third country takeover: notifiable) sectors and took on certain portions of the Screening Regulation (especially the inclusion of investor-based factors in the list of review criteria) in the 15th Amendment Ordinance.³⁴ After these legislative reforms, the 16th Amendment Ordinance provided for the consideration of other Member States and the Union's interests for the first time in the screening procedure, in addition to public order or security concerns with respect to the Federal Republic of Germany.³⁵ The decisive adjustment of the AWV to the Screening Regulation's text was brought into effect by the 17th Amendment Ordinance, which specified some of the broadly defined investment-related factors in

27 Hindelang and Moberg, 2020, pp. 1445 et seqq.

28 See generally Bismuth, 2018; Maillo, 2020, p. 180; Klamert and Bucher, 2021, pp. 336-337.

29 As amended by Commission Delegated Regulation (EU) 2020/1298 of 13 July 2020 amending the Annex to Regulation (EU) 2019/452 of the European Parliament and of the Council establishing a framework for the screening of foreign direct investments into the Union C/2020/4721, OJ L 304, 18 September 2020, pp. 1-3.

30 Poljanec and Jaksic, 2020, p. 125; Herrmann, 2019, p. 467; Korte, 2019, p. 85; but in order to meet the notification requirements, Member States have to entertain a FDI monitoring mechanism (Hindelang and Moberg, 2020, p. 1457; Bismuth, 2018, pp. 51-53).

31 The German ISCM qualifies as a 'screening mechanism' in line with art. 2 (4) of the Screening Regulation.

32 The Screening Regulation, as any EU law, would call for reforming national rules if the latter are not in line with the former. The mere repetition of EU law content in national law is not an issue in terms of EU law (Herrmann, 2019, p. 468).

33 BT-Drucks. 19/18700, p. 1.

34 BAnz AT of 2 June 2020, B2, p. 1.

35 BAnz AT of 29 October 2020, B2, pp. 1-2.

art. 4 (1) of the Screening Regulation, which may be considered by the EU Member States when determining a likely effect on security and public order.³⁶ For example, the broad terms ‘artificial intelligence’, ‘robotics’, ‘semiconductors’, ‘cybersecurity’, ‘aerospace’, and ‘quantum and nuclear technologies’ (art. 4 (1) (b) Screening Regulation) have been fleshed out in sec. 55a (1) no. 13, 15, 16 (a), 17 to 20 AWW.

■ 2.2. National Industrial Strategy 2030

The second driving force behind the 2020/21 reform is the *Nationale Industriestrategie 2030* (National Industrial Strategy 2030), an industrial policy that formulates, *inter alia*, the goal to secure and regain economic and technological competence, competitiveness, and industry leadership at the national, European, and global levels.³⁷ Whereas Germany’s commitment to open (capital) markets is renewed, the policy white paper also implies that state intervention (proactively by participation or repressively by blocking) could be justified (if in exceptional cases) even to secure technological leadership.³⁸ Although this strategy may not be footed in sound economic reasoning, it is in line with the proliferated understanding of the global economy as a ‘geoeconomic’³⁹ zero-sum struggle between nations, in which investment is seen as one weapon in the armoury of economic warfare.⁴⁰

3. The 2020/21 Reform

In the following section, the amendments made to the German ISCM by virtue of the 2020/21 reform are critically reviewed in detail, differentiated by central (Part 3.1) and minor elements (Part 3.2). Changes to the sector-specific review procedure, which are applicable to the defence and military sectors alone, are only considered to demonstrate the convergence of the sector-specific and cross-sectoral review procedures.⁴¹

■ 3.1. Central Amendments

The most prominent changes following the 2020/21 reform are the expansion of the object of protection of the German ISCM (Part 3.1.1), the lowered bar for administrative intervention (Part 3.1.2), and the prohibition on ‘gun jumping’ (Part 3.1.3).

3.1.1. Object of Protection

Expanding the scope of protection of the German ISCM, the First Law enables investment review and regulatory intervention to guarantee the public order or security of

36 BAnz AT of 30 April 2021, B2, pp. 1-2.

37 BMWi, 2019, p. 4. In detail (and critical) Schnellenbach and Schwuchow, 2019.

38 BMWi, 2019, pp. 13-14.

39 The term is expressly used by the state officials, cf. BAnz AT of 30 April 2021, B2, p. 1.

40 In further detail, see Hagemeyer-Witzleb, 2021, Chapter 1.2.2.2 with further references, Chapter 4.

41 Details on these procedures are found in below, in Part 4.

other EU Member States and relating to projects or programmes of Union interest within the meaning of art. 8 of the Screening Regulation (sec. 4 (1) no. 4 and 4a AWG).⁴² Prior to the 2020/21 reform, the only objects of protection were the public order or security of the Federal Republic of Germany, as already indicated above.⁴³ Different, however, from the typical approach in German law, pre-First Law AWG and AWV meant the public order or security of the Federal Republic of Germany within the meaning of art. 36, 52 (1), 65 (1) TFEU and the interpretation of the Court of Justice of the European Union (CJEU or Court).⁴⁴

While such reference to primary Union law legal bases for justification of regulatory intervention is unorthodox for the German lawmaker,⁴⁵ the pre-First Law AWG even *verbatim* transposed the CJEU's language into national law, requiring 'a *fundamental interest of society*' to be affected.⁴⁶ The highlighted requirement clarified that any possible interest forming a part of domestic *ordre public* did not suffice to justify administrative intervention, but that the pertinent legally protected interest had to be of paramount societal importance as defined by the CJEU. This qualifier was dropped by the First Law.⁴⁷

This raises the question of substance of the object of protection, namely public order or security,⁴⁸ after the 2020/21 reform (Part 3.1.1.1). In answering this question, the effects of the numerous examples of potential dangers to the *ordre public* provided in the AWV by the German lawmaker, partly resting on language in the Screening Regulation, must be considered (Part 3.1.1.2). Finally, the question of whether economic motives justify regulatory encroachments upon the relevant EU fundamental freedoms is addressed (Part 3.1.1.3).

3.1.1.1. Public Order or Security

Union law does not define the term 'public order and security' exhaustively.⁴⁹ The Court has emphasised that the Member States individually and discretionally determine what constitutes public order and security. They must, however, observe the boundaries of Union law.⁵⁰ The CJEU, on a case-by-case basis, decides whether or not restrictive

42 BT-Drucks. 19/18700, p. 11.

43 Sec. 4 (1) no. 4 AWG of 6 June 2013 (BGBl. I, p. 1482), as last amended by art. 4 of the Act of 20 July 2017 (BGBl. I, p. 2789) (AWG 2017).

44 BT-Drucks. 16/10730, 10 f.; Kollmann, 2009, p. 208; Mohamed, 2019, p. 771.

45 Böhm, 2019, p. 120.

46 Judgement of the Court of 14 March 2000, C-54/99, Association Église de scientologie de Paris, ECLI:EU:C:2000:124, para 17 (emphasis added) and sec. 5 (2) sentence 2 AWG 2017.

47 Art. 1, no. 4 of the First Law.

48 The terms are not used distinctively by the CJEU, cf. Tiedje, 2015, para 19.

49 Böhm, 2019, pp. 119-120 (also with an attempt at a definition).

50 Judgements of the Court of 4 December 1974, case 41/74, van Duyn, ECLI:EU:C:1974:133, para 18; of 27 October 1977, case 30/77, Boucherau, ECLI:EU:C:1977:172, para 35; of 10 July 1984, case 72/83, Campus Oil Limited, ECLI:EU:C:1984:256, para 34; of 14 October 2004, C-36/04, Omega, ECLI:EU:C:2004:614, para 3.

Member State measures do so.⁵¹ This makes the concept dynamic and malleable, especially with respect to future developments.

The Court's case law – which, noteworthy, has so far involved only intra-EU constellations⁵² – includes the safeguarding of supplies of products and services such as petroleum products, telecommunications, and electricity in the event of a crisis.⁵³ This strand of case law has been interpreted to extend to safeguarding the supply of 'services of general economic interest' (cf. art. 106 (2) TFEU).⁵⁴ A red line was drawn by the Court for measures pursuing economic or financial interests of the Member States or 'an interest in generally strengthening the competitive structure of the market in question'.⁵⁵ In short, *ordre public* is no basis for protectionism or the hidden promotion of a Member State's economy.⁵⁶

It is this 'policed deference approach' that EU and Member State legislatures relied on when concretising the grounds for investment screening:⁵⁷ art. 4 of the Screening Regulation contains a catalogue of factors that 'Member States [...] may consider' or 'may also take into account', many of which have never been evaluated by the Court and whose qualification as services of general interest is questionable (e.g. artificial intelligence; whatever its exact meaning). Similarly, some of the items in sec. 55a (1) of the AWV, a provision created by the 17th Amendment Ordinance, seem to exceed what the Court has qualified thus far as public order and security (e.g. provision of cloud computing services or certain software).⁵⁸ Investor-based factors, first introduced by the 15th Amendment Ordinance and moved to sec. 55a (3) of the AWV by the 17th Amendment Ordinance, have not been considered by the Court to date, either.

With these catalogues in the Screening Regulation, some say, the EU legislature left the footing of the Court's case law and further specified by secondary law the *ordre public* exception provided for in EU primary law.⁵⁹ While this is, in principle, possible under EU law, it should be noted that the catalogue items in art. 4 of the Screening Regulation are only of a non-binding, exemplary character. Further, both the factors in art. 4 of the Screening Regulation⁶⁰ and the items in its German equivalent, in sec. 55a (1) and (3) of the AWV⁶¹, are non-exhaustive and non-barring. A threat to public order

51 Haferkamp, 2003, p. 136.

52 Herrmann, 2019, p. 447.

53 Judgments of the Court of 10 July 1984, case 72/83, *Campus Oil Limited*, ECLI:EU:C:1984:256, para 34; of 13 May 2003, C-463/00, *Commission v Spain*, ECLI:EU:C:2003:272, para 71; of 2 June 2005, C-174/04, *Commission v Italy*, ECLI:EU:C:2005:350, para 40; of EuGH, 11 November 2010, C-543/08, *Commission v Portugal*, ECLI:EU:C:2010:669, para 84; of 8 November 2012, C- 244/11, *Commission v Greece*, paras 65 et seqq.

54 Herrmann, 2019, p. 445; Hindelang and Hagemeyer, 2017, p. 887.

55 Judgments of the Court of 4 June 2002, C-367/98, *Commission v Portugal*, ECLI:EU:C:2002:326, para 52; of 2 June 2005, C-174/04, *Commission v Italy*, ECLI:EU:C:2005:350, para 37.

56 Martini, 2008, p. 319; Thoms, 2020, para 9.

57 For Germany see BT-Drucks. 19/18700, p. 18.

58 Cf. Hindelang and Hagemeyer, 2017, p. 890.

59 Herrmann, 2019, p. 465.

60 Brauneck, 2018, 194; Maillo, 2020, p. 206.

61 Hindelang and Hagemeyer, 2017, pp. 883-884.

or security is not *necessarily* prevalent if one or several of the catalogue factors or items apply. The consideration of other factors in the assessment of a threat to public order or security is not *barred*, either. Pertinently, the German legislature expressly stated that items under sec. 55a of the AWW are to be understood as ‘especially *relevant* to investment review’, ‘especially *safety-relevant*’, or ‘cases in which an effect on public order or security is particularly *likely*’.⁶²

In light of the above, it is difficult to perceive the non-binding, exemplary guidance of the Screening Regulation as harmonisation *stricto sensu* via EU secondary law with concretising effects on EU primary law.⁶³ Thus, the criteria formulated by the Court’s rulings on the scope of the EU public order exception to the fundamental freedoms, including especially the *fundamental interest of society* requirement, remains unchanged by the Screening Regulation. Claiming to be a transposition of the latter, the First Law and the 17th Amendment Ordinance can go no further since, despite their discretion, the Member States have to keep within the boundaries of EU law with respect to public order or security.⁶⁴ An extension of the boundaries of the *ordre public*, and thus, the restrictive powers of the Member States in this field can thus not be observed. The Court may consider the catalogue factors (in the Screening Regulation) in further developing the – by its own account *dynamic* – concept of public order and security and these factors may raise awareness of the growing political sensitivity of expanding the scope of ISCMs, but by no means is it a ‘carte blanche’ to deviate from the pertinent fundamental freedoms to the detriment of protected investors.⁶⁵ A Member State authority (still) has to carefully determine and weigh the relevant facts of the individual case in its assessment (as it was administrative practice prior to the reform).⁶⁶ This process may prove to be particularly delicate and politically sensitive in cases where the BMWi is confronted solely with other Member State’s public order or security concerns in the balancing process.

3.1.1.2. Catalogue Items

With the 2020/21 reform, the number of sensitive sectors under sec. 55a (1) of the AWW has grown considerably, to a total of 27 fields of operation of potential target companies. If a target company falls under any of the enumerated items, the legal consequences for the acquirer are twofold. First, any transaction above the relevant threshold must be notified to the Federal Ministry for Economic Affairs and Energy (*Bundesministerium für Wirtschaft und Energie* – BMWi or Ministry) (sec. 55a (4) AWW). The relevant threshold

62 BAnz AT of 30 April 2021, B2, p. 4 (emphasis added).

63 Hindelang and Moberg, 2020, pp. 1451–1454; different views Herrmann, 2019, p. 465; Klamert and Bucher, 2021, p. 338.

64 It would seem that this is also recognized by the legislature (cf. BT-Drucks. 19/18700, p. 18: ‘The amendments leave the actual criterion of review – public order or security – untouched’ (translation from German original by authors).

65 Hindelang and Moberg, 2020, p. 1452; on the question of the applicable fundamental freedom, see Klamert and Bucher, 2021, pp. 338–341.

66 For Germany: Stein and Schwander, 2020, p. 257; BAnz AT of 30 April 2021, B2, p. 4.

triggering review and the notification obligation is lowered to an acquisition of 10 or 20 per cent of voting rights, depending on the sector (sec. 56 (1) AWW). Second, an execution prohibition applies, which means that the transaction cannot go forward without approval (sec. 15 (3) and (4) AWG; in detail below Part 3.1.3).

The number of businesses captured by the catalogue in sec. 55a (1) of the AWW is significant. It can roughly be categorised by operators and developers of critical infrastructure including (digital) telecommunications, and producers of critical raw materials (no. 1-5, 7, 24-25); media companies (no. 6); developers and manufacturers of certain medical goods (no. 8-11); high-tech software and hardware developers and manufacturers (no. 12-18 first alternative, 20-23, 26); users, modifiers, developers, or manufacturers of dual use goods (no. 18 second alternative, 19); and certain agricultural operations (no. 27). Especially the technology-oriented items in no. 13-22 are described as critical by the legislature to the sustainability and resilience of the German economy in the future, either as key technologies for other industries or formative innovations for German and EU public welfare.⁶⁷ Further, a number of items intend to specify the broad language in art. 4 (1) of the Screening Regulation.⁶⁸ However, not all items in art. 4 (1) of the Screening Regulation were included in sec. 55a (1) of the AWW, either because the aforementioned legal consequences were deemed too far-reaching or because the items were already sufficiently reflected in the (pre-reform) law.⁶⁹ In any case, even the factors included only in art. 4 (1) of the Screening Regulation, for instance, the ‘potential effects on [...] access to sensitive information, including personal data, or the ability to control such information’ (item (d)), are perceived by the German legislature as indicative of a potential effect on public order or security.⁷⁰

While sec. 55a (1) of the AWW is oriented towards the target company, the provision’s third paragraph contains investor-related factors based on the model of art. 4 (2) of the Screening Regulation.⁷¹

Apart from serving as a trigger for the legal consequences mentioned above, the value and significance of the items provided in sec. 55a (1) and (3) of the AWW is sometimes doubtful. A third country investor, for example, acquiring a 25 per cent stake in a 10,000-hectare poultry farm does not have to notify the BMWi, but may be subject to an investment review (cf. sec. 55, 56 (1) no. 3 AWW). Curiously, the acquisition of less than 25 per cent would not even trigger a review. Now, an additional square centimetre would result in such notification obligation (and review, obviously) (sec. 55a (1) no. 27, (4) AWW), remarkably even if only a 20 per cent stake were acquired. Whether either

67 BAnz AT of 30 April 2021, B2, p. 5.

68 For instance, sec. 55a (1) no. 13, 15, 16 (a), 17, 20 concretize the parts of art. 4 (1) (b) of the Screening Regulation dealing with critical technologies like artificial intelligence, robotics, cybersecurity, aerospace, and quantum and nuclear technologies; sec. 55a (1) 14, 16 (b), 21, and 22 claim to concretize further critical technologies that are not expressly mentioned under art. 4 (1) (b) of the Screening Regulation.

69 BAnz AT of 30 April 2021, B2, p. 4.

70 BAnz AT of 30 April 2021, B2, p. 4.

71 BAnz AT of 2 June 2020, B2, p. 3.

acquisition scenario poses a threat to public order or security, perhaps the security of supply with foodstuffs, cannot be answered with reference to the catalogue item but only on an individual basis. The additional square centimetre can impossibly have a bearing for this assessment.

3.1.1.3. Economic Security?

The argument made above does not support government interventions based on economic or financial policies. Safeguarding an economy's 'crown jewels' from foreign ownership or grooming 'national champions' finds no footing in the – still valid – doctrine of the Court.

State-sponsored or even State-led investment schemes like Made in China 2025, a heavily funded industrial policy plan to update the Chinese manufacturing sector and establish China's self-sufficiency and technological leadership,⁷² has raised the question of whether the defence against such foreign (economic) policies may justify encroachments upon fundamental freedoms. With a view to the Union's aims to 'work for [...] a highly competitive social market economy' and to 'contribute to [...] free and fair trade' (art. 3 (3) and (5) TEU) as well as the inclusion of 'a system ensuring that competition is not distorted' in the internal market (Protocol No. 27 on the internal market and competition), it has been argued that in a third-state context such defensive measures, based on (also) economic considerations, could – in contrast to the intra-EU context – be qualified by the Court as forming a part of public order or security.⁷³ Others have gone further and embraced the concept of national *economic* security as part of the EU's 'strategic autonomy',⁷⁴ allegedly also forming an exception to the freedom of capital movement in a third country context.

Whereas nations like the United States (US) have openly geared their ISCM towards State-led investment schemes,⁷⁵ the Union's approach is indirect. Instead of making it a review factor under art. 4 of the Screening Regulation, the EU has dedicated a mere recital to the issue: 'In [determining whether a foreign direct investment may affect security or public order], it should also be possible for Member States and the Commission to take into account the context and circumstances of the foreign direct investment, in particular whether a foreign investor [...] is pursuing State-led outward projects or programmes' (recital (13) sentence 2 Screening Regulation). This phrase is neither reflected in art. 4 of the Screening Regulation nor found in the AWW. While the

72 Wübbecke et al., 2016; Jungbluth, 2018.

73 Herrmann, 2019, p. 448.

74 Poljanec and Jaksic, 2020, p. 130. On the concept of strategic autonomy, see Sahin, 2021, pp. 349-351.

75 Cf. 50 U.S.C. § 4565 (m) (3) (A): '[T]he President [...] shall include in the annual report [...] an evaluation of whether there is credible evidence of a coordinated strategy by 1 or more countries or companies to acquire [US] companies involved in research, development, or production of critical technologies for which the [US] is a leading producer; [...]'. Whether the list of investment review factors in 50 U.S.C. § 4565 (f) will be read to capture 'national economic security' remains to be seen (cf. Bonnitche, 2019, p. 647).

non-exhaustive language of both provisions would technically allow the consideration of this factor, it does not seem justifiable to let the mere existence of a state-sponsored investment regime suffice to void the foreign investor's fundamental freedom (if applicable). As suggested by the language of the Screening Regulation, the investor would at least have to 'pursue' the State-led program. In any case, in addition hereto, a specific and concrete risk to public order or security emanating from this particular investor and transaction would have to exist. To return to the abovementioned example, it is not clear how the acquisition of a 10,000-hectare (plus one square centimetre) poultry farm by a Chinese investor imperils Germany's public order or security for the sole reason that the Made in China 2025 framework exists.

In summary, even after the 2020/21 reform and despite the allusions of the National Industrial Strategy 2030, economic security in itself is still not a sanctioned motivation for administrative encroachments. Only individual and concrete dangers to public order or security can justify it. And although the differentiated catalogue of industries under sec. 55a (1) of the AWV may be suspected to – contra the Court's reasoning – generally strengthen the competitive structure of some of the listed sectors (namely those that do not qualify as 'services of general economic interest'), the non-binding and indicative character of the items as investment review criteria makes them *a priori* unsuitable to achieve this protective effect. For now, it seems that the German ISCM cannot be commissioned to pursue industrial policies.⁷⁶

3.1.2. Bar on Administrative Intervention

In addition to the above, the First Law changed the standard of review from an *actual and sufficiently serious danger* to public order or security affecting a fundamental interest of society, to a test of '*likely to affect*' security or public order (sec. 5 (2) sentence 1 AWG, sec. 55 (1) AWV). This amendment too is inspired by the Screening Regulation, namely its art. 4. It aims at emphasising the forward-looking approach that is inherent in the investment review: an impairment of public order and security that has not yet occurred but is possible in the future because of an investment to be prevented.⁷⁷

However, it does much more than that. The bar on government intervention – not only on initiating a screening procedure – is lowered in two respects: vis-à-vis the severity of threat, 'affect' takes the place of 'endanger'; and, simultaneously, vis-à-vis the likelihood of threat, a 'likely' rather than an 'actual danger' suffices. This ('downward') deviation from the Court's requirement of '*an actual and sufficiently serious danger*'⁷⁸ is problematic considering the grave implications for pertinent fundamental freedoms in case of a blocked or conditioned transaction. Considering the lack

⁷⁶ The fact that the takeover of 50Hertz (above Part 2) was not blocked by the ISCM but by the acquisition of the shares in question by the *Kreditanstalt für Wiederaufbau*, a state-owned development bank (cf. Johannsen, 2018, p. 225), may be seen as evidence of the mechanism's resilience to usurpation.

⁷⁷ BT-Drucks. 19/18700, p. 18.

⁷⁸ Judgement of the Court of 14 March 2000, C-54/99, *Association Église de scientologie de Paris*, ECLI:EU:C:2000:124, para 17 (italics added).

of harmonisation by the Screening Regulation (Part 3.1.1.1), the significance of the ‘likely-to-affect-standard’ has to be limited to the relevant threshold for the activation of the coordination mechanism and the notification obligation therein,⁷⁹ because only the cooperation mechanism is established by the binding language of the Screening Regulation, so that ‘[i]t is important to provide *legal certainty* for Member States’ screening mechanisms on the grounds of security and public order, and to ensure Union-wide coordination and cooperation’.⁸⁰ In contrast, the language concerning Member State ISCMs and especially the factors and criteria in art. 4 of the Screening Regulation are non-exhaustive, inspirational, and merely provided thus: ‘to *guide* Member States and the Commission in the application of this Regulation’ with ‘a list of factors that *could* be taken into consideration’.⁸¹ Against this background, it is doubtful whether the Court will accept undercutting its requirement for an *actual and sufficiently serious danger* as a bar on administrative intervention into the free movement of capital and freedom of establishment. In contrast, a lower bar on notification requirements and intra-EU administrative information exchange seems less invasive and proportionate in light of the threats and is thus not objectionable.

3.1.3. Prohibition of Execution

Stirring palpable upheaval among transaction counsel,⁸² the 2020/21 reform made it illegal to consummate agreements between seller and acquirer (sale and purchase agreements – SPAs) that fall under the notification obligation and investment review according to the AWG/AWV, prior to the Ministry’s clearance or lapse of the deadline to initiate a screening procedure (sec. 15 (4) sentence 1 AWG).⁸³ This prohibition extends both to transactions under sector-specific review and *notifiable* transactions under cross-sectoral review. The range of activities that qualify as consummation is extensive and *inter alia* includes the disclosure of information on the target company to the acquirer. To reinforce the prohibition, violations are criminalised (sec. 18 (1b) AWG).⁸⁴ By doing so, the prohibition needs to conform to constitutional standards for criminal law, especially the *nulla poena sine lege certa* principle.⁸⁵ Given the width of the prohibited actions under the first sentence in sec. 15 (4) of the AWG as well as the need to exchange certain company-related information in pre-signing stages, it remains

⁷⁹ Hindelang and Moberg, 2020, p. 1453.

⁸⁰ Recital (7) of the Screening Regulation (italics added).

⁸¹ Recital (12) of the Screening Regulation (italics added).

⁸² See, for instance, Besen and Slobodjenjuk, 2020, p. 445.

⁸³ Any agreement to consummate the SPA is provisionally invalid (sec. 15 (3) sentence 1 AWG). The SPA itself is, irrespective of a notification obligation, subject to a condition subsequent (sec. 158 (2) German Civil Code): Upon the timely decision to block the transaction by the BMWi, the SPA is invalidated (sec. 15 (2) AWG). The dichotomy between the SPA and its consummation is a consequence of the so-called separation principle (*Trennungsprinzip*, in detail see Füller, 2008, pp. 199 et seqq.).

⁸⁴ Negligent violations are punished as an administrative offence under sec. 19 (1) no. 2 AWG.

⁸⁵ Cf. art. 103 (2) Basic Law for the Federal Republic of Germany.

to be seen whether these standards are fully met by the reformed provisions.⁸⁶ The background for these rules are fears around ‘gun jumping’,⁸⁷ wherein the acquirer may, despite obligations to notify and stand still, extract information and technology from the target, thus possibly affecting public order or security.⁸⁸ In view of the legislature, the potential risk to public order or security emanating from transactions that must be notified is high enough to put them on hold during the screening procedure.⁸⁹

■ 3.2. Other Changes

The three main pillars in the reform as mentioned above were accompanied by minor amendments of the types of transactions falling within the ambit of the AWV (below Part 3.2.1), the procedural deadlines the Ministry has to comply with (below Part 3.2.2), and the roles attributed to the Ministry in the screening process (below Part 3.2.3).

3.2.1. Captured Transactions: Thresholds and Stake Expansions

Once again,⁹⁰ the acquisition thresholds triggering review and notification obligation were amended. For the cross-sectoral review,⁹¹ the legislature tied the applicable threshold to the sector of the target company: those in the fields listed in sec. 55a (1) no. 1-7 of the AWV, namely sectors of critical infrastructure and media, are subject to a 10 per cent threshold; items no. 8-28, namely the rest of the sensitive sectors, are subject to a 20 per cent threshold; and all other acquisitions only come under the scope of application in case of a 25 per cent acquisition of voting rights (sec. 56 (1) AWV). Worth noting is also the new power of the BMWi to grant the approval of an acquisition subject to the condition to notify further below-threshold acquisitions (sec. 58a (3) AWV). By tying the scope of application of the ISCM primarily⁹² to (in some cases, relatively low) percentage thresholds (to which even intermediately held voting rights are added in accordance with sec. 56 (4) and (5) of the AWV), the German lawmaker brought both third country non-controlling portfolio and controlling direct investment within the scope of the ISCM.⁹³ In turn, this places the legislation within reach and subjects it to the requirements of the freedom of capital movement (art. 63 (1) TFEU).⁹⁴

86 Dammann de Chaptot and Brüggemann, 2020, pp. 376-377; Barth and dos Santos Goncalves, 2020, p. 2510 remark that the obligation to notify (and thereby, the prohibition) could be triggered by memoranda of understanding preceding the signing of the SPA.

87 Dammann de Chaptot and Brüggemann, 2020, p. 376.

88 BT-Drucks. 19/18700, p. 19-20.

89 BT-Drucks. 19/18700, p. 19.

90 The threshold was lowered before from 25 to 10 per cent in 2018 (see above fn. 15 and Mohamed, 2019, p. 770).

91 The uniform threshold is 10 per cent in the sector-specific review (sec. 60a (1) AWV).

92 Sec. 56 (3) of the AWV covers constellations in which foreign investors gain control over the target without acquiring above-threshold stakes.

93 Klamert and Bucher, 2021, p. 341. Critical on the attribution of indirectly held stakes is Böhm, 2019, pp. 117-118.

94 Cf. Hindelang and Moberg, 2020, p. 1450. On the notion of ‘(foreign) direct investment’ see Hindelang, 2009, pp. 82-88.

Putting an end to a lively debate among practitioners,⁹⁵ the 17th Amendment Ordinance inserted sec. 56 (2) of the AWV, which captures the additional acquisition of voting rights by acquirers that already have an above-threshold stake. Additional acquisitions leading to or exceeding certain voting rights thresholds⁹⁶ have also to be notified (sec. 55a (4) sentence 1 AWV). The question was disputed because the acquirer had already, in the course of the first acquisition surpassing the respective threshold, fallen within the scope of application of the ISCM. Without picking up this debate, the lawmaker labelled this amendment as mere clarification.⁹⁷

3.2.2. *Standardised and Simplified Deadlines*

The many deadlines and timeframes regarding (cross-sectoral and sector-specific) screening procedures have been simplified, standardised, and moved from provisions scattered in the AWV to a central one in sec. 14a of the AWG. Notifications and applications for a certificate of non-objection trigger a two-month deadline for the BMWi to act (i.e. to open up an investment review procedure).⁹⁸ In principle, the procedure can take up to four months.⁹⁹ Remarkably, the 2020/21 reform does not adjust the German ISCM, especially its deadlines, to suit the cooperation mechanism established by the Screening Regulation. Whereas practitioners are still somewhat concerned about the maximum duration of the screening procedure, the standardised deadlines have been welcomed for their transparency and legal certainty.¹⁰⁰

3.2.3. *Role of the BMWi*

Another element of the 2020/21 reform subtly rebalanced the powers of the BMWi. Before the reform, the BMWi could block or condition transactions under cross-sectoral review only with the consent of the Federal Government.¹⁰¹ Now, the Ministry requires this consent only to prohibit transactions, whereas conditions require the agreement of three federal ministries and the hearing of a fourth.¹⁰² All interfering measures in

95 See Traugott and Strümpell, 2009, p. 191; Marquardt and Pluskat, 2009, p. 1316; Besen/Slobodnjuk, 2012, p. 2390; Hensel and Pohl, 2013, p. 854; Pottmeyer, 2013, para 22; Becker and Sachs, 2017, p. 1338.

96 20, 25, 40, 50, or 75 per cent in case of sec. 55a (1) no. 1-7 AWV; 25, 40, 50 or 75 per cent in cases falling under no. 8-27; and 40, 50 or 75 per cent in all other cases (sec. 56 (2) AWV).

97 BAnz AT of 30 April 2021, B2, p. 10.

98 Details below Part 4.1.

99 Details below Part 4.3.

100 Lippert, 2021, pp. 199-200; Barth and dos Santos Goncalves, 2020, p. 2511.

101 Sec. 59 (1) sentence 2 of the AWV of 2 August 2013 (BGBl. I, p. 2865), as last amended by art. 1 of the Ordinance of 19 December 2018 (BAnz AT 28 December 2018, V1).

102 See sec. 13 (3) in conjunction with (2) no. 2 (c), 4 (1) no. 4 and 4a of the AWG (Federal Foreign Office; Federal Ministry of the Interior, Building and Community; Federal Ministry of Defence; the Federal Ministry of Finance has to be heard). Formerly, according to sec. 19 of the Joint Rules of Procedure of the Federal Ministries of 30 July 2020 (*Gemeinsame Geschäftsordnung der Bundesministerien*, official translation available at https://www.bmi.bund.de/SharedDocs/downloads/EN/themen/moderne-verwaltung/ggo_en.pdf;jsessionid=7A85EABFD33C1DD5B80661552AEFA5C4.2_cid295?__blob=publicationFile&v=1 (accessed 12 June 2021)), the BMWi had to include those other ministries whose remits were affected by the transaction.

sector-specific review procedures require the aforementioned consent as well.¹⁰³ As was the case prior to the reform, the clearance of transactions falls within the sole responsibility of the BMWi.¹⁰⁴

To comply with art. 11 (1) of the Screening Regulation, which requires Member States to establish contact points for the implementation of the regulation, the First Law assigned the BMWi the role of the national contact point.¹⁰⁵ The BMWi takes on prosecutorial responsibilities: Where ‘gun jumping’ occurs out of negligence, the Ministry assumes jurisdiction over the prosecution of regulatory offences (sec. 22 (3) sentence 3 AWG).¹⁰⁶

Finally, the BMWi is also entitled to task trustees with the oversight and monitoring of conditions to transactions it has ordered or agreed upon with the parties to such transactions (sec. 23 (6b) sentence 1 AWG, sec. 59 (4) AWV).

4. Screening Procedure After Reform

The amendments described above have reshaped the screening procedure:¹⁰⁷ To determine the applicable investment review regime, the German ISCM differentiates between the *activity* of the target and the *nationality* of the investor:¹⁰⁸

For investments in domestic companies in the *defence sector* (as defined by sec. 60 (1) sentence 1 no. 1 to 4 AWV) any such from *non-German investors* trigger the sector-specific examination under sec. 60 to 62 of the AWV if the acquisition gives the investor control over at least 10 per cent of the voting rights of the target (sec. 60a (1) AWV). Asset deals trigger review if non-German investors acquire a distinguishable part of the target operation or all essential operational resources necessary for the target’s business activity (sec. 60 (1a) AWV). In sector-specific investment reviews, the BMWi investigates the effects of the transaction on the *essential security interests of the Federal Republic of Germany* (sec. 4 (1) no. 1, 5 (3) AWG).

Outside the defence sector, investments by *non-EU investors* are subject to cross-sectoral examinations (sec. 55 (1) AWV).¹⁰⁹ A review is triggered by the acquisition of voting rights of at least 10 per cent if the target company is or its operations are attributable to one of the sensitive sectors listed in sec. 55a (1) no. 1 to 7 of the AWV

¹⁰³ Sec. 13 (4) in conjunction with (2) no. 2 (d), 4 (1) no. 1, 5 (3) of the AWG.

¹⁰⁴ A fact now expressly enshrined under sec. 58a (1) sentence 1 of the AWV for cross-sectoral review. For sector-specific review, see sec. 61 sentence 1 of the AWV.

¹⁰⁵ Sec. 13 (2) no. 2 lit. e) of the AWG.

¹⁰⁶ See also Part 3.1.3.

¹⁰⁷ Sec. 82a of the AWV stipulates that the provisions on investment review as reformed by the 17th Amendment Ordinance apply to transactions concluded on 1 May 2021 or later.

¹⁰⁸ Barth and dos Santos Goncalves, 2020, p. 2507.

¹⁰⁹ This includes investors who do not reside within the territory of the Member States of the European Free Trade Association (EFTA), see sec. 5 (2) sentence 3 AWG and sec. 55 (2) sentence 4 AWV.

(which, *inter alia*, includes operators of critical infrastructure¹¹⁰ and related software developers, cloud computing providers above a certain threshold, high-impact media companies, and certain medical technology enterprises), of at least 20 per cent if listed in sec. 55a (1) no. 8 to 27 of the AWV, and of at least 25 percent in the case of any other target company that is not specifically listed (cf. sec. 56 AWV).¹¹¹

The object of protection in cross-sectoral investment screening procedures is the *public order or security of the Federal Republic of Germany or of another Member State of the European Union* and *public order or security relating to projects or programmes of Union interest* (sec. 4 (1) no. 4, 4a AWG).

Sec. 62a of the AWV enables the BMWi to switch between cross-sectoral and sector-specific review procedures if it is found in the course of the review that the transaction falls within the scope of the respective other procedure.

■ 4.1. Notification or Other Knowledge

Above-threshold investments or expansions of investments must be notified to the BMWi without undue delay after the conclusion of the SPA, unless the investment neither pertains to the defence sector nor the sensitive sectors (sec. 60 (3) sentence 1, 55a (4) sentence 1 AWV).¹¹² The direct acquirer is under an obligation to notify the BMWi (sec. 60 (3) sentence 7, 55a (5) AWV). Even acquisition vehicles incorporated under German or other Member State law may have an obligation to notify the BMWi.¹¹³ The inclusion of indirect acquisitions can have far-reaching consequences. For example, if one-third of the shares in German company A are owned by Japanese company B, the acquisition of B by Russian company C falls under the purview of the German ISCM.¹¹⁴

Above-threshold foreign investments outside the defence and sensitive sectors may voluntarily be notified to the BMWi (cf. sec. 14a (3) sentence 1 AWG).¹¹⁵ Such investors may, in accordance with sec. 58 of the AWV, also apply for a certificate of non-objection.¹¹⁶

110 As defined under sec. 2 (10), 10 (1) of the Act on the Federal Office for Information Security (*Gesetz über das Bundesamt für Sicherheit in der Informationstechnik – BSI*) in conjunction with the Ordinance to Determine Critical Infrastructure in Accordance with the BSI (*Verordnung zur Bestimmung Kritischer Infrastrukturen nach dem BSI-Gesetz*). According to this, critical infrastructure operators are certain enterprises in the energy, water, food, IT and telecommunication, health, finance and insurance, and transport and traffic sectors.

111 For the expansion of stakes, see Part 3.2.1.

112 Initially, the German ISCM did not include a notification obligation for transactions qualifying as cross-sectoral (cf. Schweitzer, 2010, p. 270). The BMWi had to rely on parties' voluntary notification or notification by other authorities (Pottmeyer, 2013, para 30).

113 Whether the requirements of sec. 60 (1) or 55 (1) of the AWV are met by the direct acquirer is immaterial (see also BAnz AT of 2 June 2020 B2, p. 4).

114 See Hensel and Pohl, 2013, p. 854; Seibt and Wollenschläger, 2009, p. 838.

115 Pottmeyer, 2013, para 30.

116 Cf. Traugott and Strümpell, 2009, pp. 189-190.

■ 4.2. Phase 1: Preliminary Investment Review

Upon notification, the BMWi has two months to notify the acquirer and target if it opts to investigate the transaction (sec. 55 (3) sentence 1, 60 (4) AWV in conjunction with sec. 14a (1) no. 1, (3) AWG). This is often referred to as preliminary (or phase 1) investment review during which the BMWi determines whether the transaction is captured by the AWV and possibly poses a relevant threat to the relevant object of protection.¹¹⁷ Phase 1 has three possible outcomes for notifiable transactions. First, the BMWi may open the main investment review, cf. sec. 55 (3) of the AWV.¹¹⁸ Second, the Ministry can clear the transaction, cf. sec. 58a (1) of the AWV. Third, if it does not act within two months after receipt of the notification, the clearance is deemed to have been issued, cf. sec. 58a (2) of the AWV. This corresponds to the sector-specific review (sec. 61 AWV).

This regime is not applicable to investments that do not fall into the defence (cf. sec. 60 AWV) or sensitive sectors (cf. sec. 55a (1) AWV). Voluntary notifications cannot trigger clearance.¹¹⁹ However, acquirers of such investments can apply for a certificate of non-objection.¹²⁰ If issued, the certificate will attest that there are no objections to the acquisition in terms of public order or security (sec. 58 (1) sentence 1 AWV). If the BMWi does not initiate an investment review within two months after receipt of the application, the certificate is deemed to have been issued (sec. 58 (2) sentence 1 AWV).

Where a voluntary notification is not made or certificate of non-objection has not been applied for, the BMWi has the power to initiate investment review *ex officio* within two months of acquiring knowledge of the SPA in keeping with sec. 14a (1) no. 1 of the AWG.¹²¹ In lack of notification or other knowledge of the BMWi, this power – and with it the risk of investment review and rewinding after completion of the transaction – only expires five years after the SPA was concluded (sec. 14a (3) sentence 2 AWG).

■ 4.3. Phase 2: Main Investment Review

If the BMWi so decides in due time, the transaction is subject to what is often referred to as the main (or phase 2) investment review.¹²² In this case, the direct acquirer and target company have to be informed of the decision in an administrative act (*‘Eröffnungsbescheid’*, sec. 60 (4), 55 (3) AWV). Therein, the BMWi may discretionarily request further information or necessary documentation (sec. 14a (2) sentence 4 AWG) in addition to the documentation that must be submitted with the notification (sec. 60 (3) sentence

117 Pottmeyer, 2016, p. 271; Mohamed, 2019, p. 772.

118 Phase 2, below Part 4.3.

119 Sec. 58a (2) sentence 1 of the AWV requires a ‘notification in accordance with sec. 55a (4)’ of the AWV – a provision that only captures the sensitive sectors.

120 Following the 2020/21 reform, the certificate of non-objection is no longer available to notifiable transactions (sec. 58 (3) AWV). A certificate of non-objection would not free the parties to the transaction from the prohibition on execution (cf. sec. 14 (3) sentence 2 AWG and BAnz AT of 30 April 2021, B2, p. 11).

121 Stein, 2020, para 1.

122 Mohamed, 2019, p. 773.

4, 55a (4) sentence 4 AWW). Such requests may also be directed at all parties directly or indirectly involved in the transaction (sec. 14 (2) sentence 5 AWG).

Once the BMWi has received the documentation, the main investment review cannot, in principle, last longer than four months (sec. 14a (1) no. 2 AWG). Exceptions to this rule can be found in sec. 14a (4) and (5) of the AWG: An extension by three months is possible in case the individual investment review proves especially difficult on a factual or legal level; an additional, final extension by one month is possible if the defence or security interests¹²³ of the Federal Republic of Germany are affected and this is notified to the BMWi by the Federal Ministry of Defence within the three-month extension. Finally, the seller and direct acquirer may consensually agree to an extension of the deadline. The period for the main investment review is suspended if the BMWi requests additional information or documents (until they are fully submitted) or if the parties involved negotiate a contractual agreement with the BMWi (until negotiations are concluded) (sec. 14a (6) AWG).¹²⁴ At the end of the main investment review, the BMWi will either clear, block, or condition the transaction (cf. 61, 62, 58a (1), (3), 59 AWW).

■ 4.4. Cooperation Mechanism

Whereas neither AWG nor AWW make provision for the European cooperation mechanism,¹²⁵ the direct applicability of the Screening Regulation impels to consider it a part of the reformed cross-sectoral¹²⁶ screening procedure. The cooperation mechanism requires Member States to notify the Commission and other Member States of any transactions undergoing screening as soon as possible (art. 6 (1) Screening Regulation). Potentially affected Member States and those with relevant information may issue comments to the screening Member State and shall inform the Commission thereof (art. 6 (2) Screening Regulation). If it has relevant information or deems that the transaction is likely to affect security or public order in more than one Member State, the Commission may issue an opinion in the sense of art. 288 (5) of the TFEU directed at the screening Member State (art. 6 (3) Screening Regulation). These rights must be exercised, in principle, within 35 days after the receipt of the notification by the screening Member State; additional information may be requested, and such a request can extend the deadline (art. 6 (6) and (7) Screening Regulation).

This procedure would seem to fit the case of a main investment review conducted by the BMWi because in this phase, it is not doubtful that the transaction is ‘undergoing

123 On this term, see Art. 30 (3) sentence 3 of the Dir. 2009/81/EC of the European Parliament and the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ L 219, 20 August 2009, p. 76).

124 For a recommencement of the main investment review period, see sec. 14a (7) of the AWG.

125 Cf. BT-Drucks. 19/18700, p. 19; BAnz of 30 April 2021, B2, p. 1.

126 Owing to the Member States’ sole responsibility for safeguarding their national and essential security interests (cf. art. 4 (2) Treaty on European Union (TEU); art. 346 (1) (b) TFEU), the cooperation mechanism only applies to the cross-sectoral review (as does the Screening Regulation as a whole).

screening’ within the meaning of art. 6 (1) of the Screening Regulation. What remains unclear is the treatment of transactions that never leave the preliminary investment review phase. Is the BMWi required to notify such investments under the cooperation mechanism? While some authors believe that this is not the case,¹²⁷ the language of the Screening Regulation suggests otherwise. The trigger of the notification obligation under art. 6 (1) of the Screening Regulation – the ‘foreign direct investment [...] that is undergoing screening’ – is defined as ‘a foreign direct investment undergoing a formal assessment or investigation pursuant to a screening mechanism’, the latter being ‘an instrument of general application, such as a law or regulation [...] setting out the terms, conditions and procedures to assess, investigate, authorise, condition, prohibit or unwind foreign direct investments on grounds of security or public order’ (art. 2 (5) and (4) Screening Regulation). Not only does the Screening Regulation’s wording differentiate between ‘assessment’ (German: ‘*Prüfung*’) and ‘investigation’ (German: ‘*Untersuchung*’), it also consistently lets the ‘assessment’ precede the ‘investigation’, which is why the former can be understood to include preliminary screening such as the German preliminary investment review. In addition, the preliminary investment review is governed by laws and regulations, namely AWG and AWV, which formulate the terms and conditions such as strict deadlines and the required documentation (above Part 4.2). It is thus a ‘formal’ assessment within the meaning of the regulation. If only transactions that entered the main investment review phase were to be notified, the Commission and other Member States would not acquire knowledge of the majority of investments and would not be in a position to assess whether these are likely to affect security or public order or whether relevant information is available.¹²⁸ The effectiveness of the cooperation mechanism would not be ensured (cf. recital (23) Screening Regulation). This reading does not contradict art. 7 of the Screening Regulation, which applies to transactions that do not undergo screening. The provision maintains a scope of application, for instance in Member States without an ISCM, an ISCM which only covers particular sectors and – in the German case – investments that were not even preliminarily investigated by the BMWi, completed without its knowledge or fall outside the ambit of the AWG and AWV.¹²⁹

127 Dammann de Chaptot and Brüggemann, 2020, p. 375. Unclear the position of the BMWi itself, which cites the Commission as favouring the notification of all notified transactions while the Ministry only seems to notify the phase 2 investigations (see *Siebzehnte Verordnung zur Änderung der Außenwirtschaftsverordnung Verordnung der Bundesregierung (Kabinettsfassung)*, https://www.bmwi.de/Redaktion/DE/Downloads/J-L/kabinettsfassung-siebzehnte-verordnung-zur-aenderung-der-aussenwirtschaftsverordnung.pdf?__blob=publicationFile&v=6 (accessed 30 April 2021), p. 24).

128 As the Screening Regulation does not link the notification requirement to a ‘screening mechanism’, but to the process of screening, it includes any kind of *ad hoc* screening on a legal basis that is not specifically tailored towards FDI screening (Hindelang and Moberg, 2020, p. 1455). *A maiore ad minus*, it must include preliminary screening, which is specifically tailored towards FDI.

129 See Mohamed, 2019, p. 774.

As the cooperation mechanism and the screening procedure framework are not synchronised, the possibility exists that the Commission or another Member State may issue an opinion or comment after the BMWi clears a transaction, allows the deadline to initiate a main investment review pass either upon notification of an investment (for notifiable ones) or upon an application to issue a certificate of non-objection (for non-notifiable ones).¹³⁰ In order to withdraw or revoke any (deemed) clearance of a transaction in this setting, the BMWi would have to take action in a timely¹³¹ manner and meet the applicable administrative procedural standards.¹³²

5. Conclusion and Outlook

Of the numerous changes implemented by the 2020/21 reform, the widened scope of ‘sensitive sectors’, the notification obligation, and the prohibition on the execution of notifiable transactions falling under cross-sectoral investment review stand out. Without doubt, these changes, together with the cooperation mechanism, will lead not only to an increased workload for the BMWi but also provide the administration with yet another tool to intervene into processes that are actually governed by rational market forces. One may object saying that fortified ISCMs do not impede ‘normal’ or rational market processes (free of market failure) but rather aim to prevent political influence by foreign powers, which is very remote from the market rationale. As persuasive as this sounds in theory, in practice it must be shown that the mechanism does not degenerate into an instrument of dirigisme. Typical safeguards against market interventions according to political weather conditions, that is, judicial control, have thus far offered only weak protection for market participants in the present context of foreign trade and investment policy.¹³³

On what this contribution would describe as a positive note for market participants, it was argued above that due to lacking harmonization by virtue of the Screening Regulation, the material criteria for review, namely public order or security, and bar on governmental intervention, namely actual and sufficiently serious danger, have not

130 See Lippert, 2021, p. 200; Mohamed, 2019, p. 774. This can also happen after the five-year deadline (sec. 14a (3) sentence 2 AWG) has passed.

131 Whether the one-year-deadline under sec. 48 (4) sentence 1, 49 (2) sentence 2 of the Administrative Procedure Act is ‘overridden’ analogously to EU state aid law (cf. Judgment of the Court of 20 March 1997, C-24/95, *Alcan*, ECLI:EU:C:1997:163) remains to be seen, see Lippert, 2021, p. 200.

132 Whether the decision of the BMWi can be withdrawn or revoked depends on a number of factors including whether the initial clearance (also in light of any information provided by the Commission or Member States) was lawful or unlawful, cf. sec. 48, 49 of the Administrative Procedure Act. Information that was available at the time of the BMWi’s decision (or lapse of the deadline to initiate the main investment review), would normally not allow a revocation, but possibly a withdrawal (cf. Judgement of the Bundesverwaltungsgericht of 19 September 2018, 8 C 16.17, ECLI:DE:BVerwG:2018:190918U8C16.17.0, paras 18 et seqq.).

133 See generally Hagemeyer, 2020.

been altered or, more specifically, lowered by the various reforms of the German ISCM. A lowered threshold can only be observed regarding the notification obligations. The above outlined developments are likely to inform the debates on ongoing and future legislative changes in the ISCMs of Central and Eastern European countries which follow the German model.¹³⁴

On a more fundamental level, both the quick concatenation of reforms in the German ISCM since 2017 as well as the many changes brought about by the 2020/21 reform demonstrate that the screening of foreign investment has become a highly politicised issue. The obvious convergence of cross-sectoral and sector-specific review procedures (to name only two alignments: the notification obligation and prohibition of execution) shows that it is becoming more and more difficult to separate security from economic and industrial policies and to prevent the usurpation of one by the other. This is a new development in the field of investment. Some may even call it a step back, at least from the perspective of German law, which has traditionally favoured a liberal approach to international economic policy and has been critical of political interventions into market processes.¹³⁵

134 For Croatia cf. Poljanec and Jaksic, 2020, p. 133.

135 Cf. Bryde, 1996, paras 4-5, 13, 29, 45.

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