Concurrences
Antitrust Publications & Events

# e-Competitions

Antitrust Case Laws e-Bulletin

Foreign Investment

# Foreign Investment: An overview of EU and national case law

FOREWORD, FOREIGN INVESTMENT, COMPETITION POLICY

Davina Garrod | Akin Gump Strauss Hauer & Feld (London)
Sebastian Casselbrant-Multala | Akin Gump Strauss Hauer & Feld (London)
Lennart Garritsen | Akin Gump Strauss Hauer & Feld (London)

e-Competitions Special Issue Foreign Investment | 16 January 2020

## 1. Introduction

Foreign investment restrictions and National Security laws have become important tools in States' foreign policy-making, as well as a topic of great interest for investors, politicians, lawyers and economists alike. The US, through the Committee on Foreign Investment in the United States ("**CFIUS**"), arguably has the most established and restrictive National Security regime in the world. EU countries have been playing catch-up, and have recently agreed a framework approach to the screening of foreign direct investments ("**FDI**") at a European level in order to protect security and public order, whilst a number of EU Member States ("**Member States**") are upgrading their existing tools or introducing altogether new mechanisms to regulate FDI. Some Member States are going further still, seeking broader reform of European industrial policy in the pursuit of safeguarding or indeed promoting the creation of national or 'European' champions.

The EU and its Member States aim to balance their economic interests with the need – which Germany and France view as a supranational issue – to protect the public interest, whether in terms of military/dual-use assets/technologies, intelligence, cybersecurity or other strategic interests such as quantum computing and other evolving technologies. The need to screen FDI stems from the emergence of the 'new investors', [1] referring primarily to China and Russia, who are suspected of rigging the playing field to their own advantage, [2] and of harbouring potentially damaging non-financial motivations for their investments (including alleged espionage, geo-political positioning and technology-acquisition). [3] Meanwhile, these 'new investor' States are taking additional steps to protect their own national public interests from inbound Western investors. [4]

The purpose of this foreword is to provide an overview of foreign investment regulation and practice at EU-level, as well as in the UK, Germany, and other EU Member States (France and the Netherlands in particular). We conclude this foreword by identifying key themes driving the various European approaches to foreign investment regulation.

## 2. Foreign investment review in the European Union

### *a. Background to FDI in Europe*

In the wake of globalisation, economic protectionism is intensifying and continues to challenge the status quo of the international rules-based order. In recent years US-China (and to a lesser extent US-EU) trade tensions, international sanctions (e.g. against Russia and Iran), boycotts and walkouts from important international treaties have become the norm [5] The weaponisation of trade, both in rhetoric and in practice, [6] has contributed to a rebalancing of investment flows from 'new investor' countries, such as China, seemingly toward Europe. [7] While Chinese investment in the US fell in 2017, it grew in the EU by 73% in the same year, although a recent survey suggests that Chinese FDI into Europe fell off again in the first half of 2019 [8] as Germany and France, in particular, have reacted to increasing Chinese investment in critical European infrastructure and assets. China's growing importance in global trade and as a source of inbound investment in the EU (and Portugal, Greece and Italy in particular), [9] has had a strong influence in shaping European approaches to FDI. Although welcomed in some quarters, investment by China (especially by Chinese State-owned enterprises, so-called 'SOEs') is viewed with some suspicion in others. [10] China's explicit policy to overtake its Western counterparts in several strategic industries, [11] and the Chinese government's role in supporting Chinese industry in achieving that end, [12] has resulted in accusations by both European and US leaders that China refuses to offer a level playing field. [13]

Against a background of surging populism, State-backed investors and evolving national security risk profiles driven by technological advancements and facilitated by cyber terrorism concerns, some nations have drifted toward increasingly political, rather than economic, foreign policy-making. Indeed, some EU Member States have chosen to upgrade or introduce entirely new FDI screening tools in response. [14] 15 Member States now operate some form of FDI screening, usually aimed at investments in sensitive industries, sectors and technologies. [15] Other, often smaller, Member States have opted to welcome investment and to remain open by eschewing foreign investment screening regimes. This divergence in approaches is amplified by the fact that Member States may have different concerns and priorities regarding foreign investment from specific origins due to their geopolitical position.

### *b. The EU FDI Regulation*

For some time, differences in attitude among EU Member States stifled the development of a coordinated EU approach to the screening of foreign investments. [16] However, the recent mix of circumstances described in the previous section has facilitated the emergence of an arguably very 'European' compromise approach to screening EU FDI. The FDI Regulation [17] proposed by the European Commission (**Commission**) in September 2017 [18] and which entered into force on 10 April 2019 [19] creates a consistent framework for the review by Member States of foreign investments on grounds of security or public order.

The FDI Regulation is based on Article 207 of the Treaty on the Functioning of the European Union [20] is directly applicable, and features a central role for the Commission. [21] Moreover, Member States will be subject to notification requirements to the Commission and other Member States in relation to any FDI that they choose to review under their own national mechanisms, [22] and may be requested to provide certain information even in respect of FDI that they do not review themselves. [23] The FDI Regulation also introduces new annual reporting obligations [24] and information sharing mechanisms, [25] as well as imposing certain minimum procedural requirements on all existing and any new national review mechanisms regarding review timeframes, transparency, non-discrimination, confidentiality and rights of appeal. [26] One possible consequence of the FDI Regulation is that it may have "*the surprising effect of strengthening the position of third-country investors*" by bringing Member States' national review mechanisms within the scope of EU law, extending to those investors potentially powerful procedural rights under EU law with respect to national reviews which they did not previously enjoy. [27]

However, and significantly, unlike CFIUS, the Commission will not be able to veto or condition proposed foreign investment under the FDI Regulation. Member States will remain the ultimate decision-makers. Instead, the Commission will be able to issue non-binding opinions and Member States will be able to provide non-binding comments to the Member State into which an investment is being made, which must be taken into account by the latter in its final decision. Opinions and comments may be provided in respect of investments that are likely to affect security or public order [28] in more than one Member State and which are either already undergoing Member State screening [29] or which are not undergoing Member State screening. [30] In addition, the Commission will also be able to issue non-binding opinions on investments that are likely to affect projects or programs of European Union interest on security or public order grounds. [31] The lack of an EU-level standalone CFIUS-like review mechanism, or the ability for the EC to overrule Member State decisions, may reflect the fact that screening of FDI remains in effect a Member State rather than an EU competence. [32] Nevertheless, the Commission's central role in this framework arrangement could form the foundation for a future 'CFIEU' regime, should Member States' approaches to FDI align sufficiently in that direction.

Although the FDI Regulation does not expressly refer to China, Russia and other 'new investor' countries, it is clear from early discussions [33] that the concept of reciprocity was an important consideration in the negotiations that led to the FDI Regulation, intended to both justify the reforms and to encourage counterparts to adopt a level playing field. The *Travaux préparatoires* however reveal disappointment in the fact that reciprocity was not in the end addressed in the FDI Regulation. [34]

*c. Calls for further action*

Certain Member States do not feel that the compromises in the FDI Regulation go far enough to protect 'European interests' around the globe. On 19 February 2019, the French and German Ministers of Economy, Bruno Le Maire and Peter Altmaier respectively, issued a joint manifesto calling for the development of a European industrial policy to ensure the continued competitiveness of the European manufacturing industries. [35] The manifesto was published shortly after the Commission prohibited a tie-up between the two European rail giants, Germany's Siemens and France's Alstom, following failure by the Commission and the companies to agree concessions to remedy the Commission's competition concerns. [36] The two companies, and the governments of their respective Member States, claimed that *Siemens/Alstom* would create a European champion – a 'Railbus' – of a sufficient scale to counter China's State-owned CRRC [37] and to assume a global leadership role to the benefit of European industry. [38]

In the manifesto, the French and German Ministers of Economy called for heavy investment in innovation and urged Europe to adopt a regulatory framework that would enable EU companies to better compete on the world stage. They also called for more effective legal protections to defend European technology, business and markets, including through a robust application of the FDI Regulation. Although the manifesto focused more on Europe's competitiveness, it should also be seen in the wider context of FDI controls: while it does not focus on scrutinising FDI as such, it does call for increased protectionism to the benefit of key European industrial players. It remains to be seen whether this call for action amounts to levelling the playing field to allow European champions to compete fairly with non-European companies, or if it instead is designed to keep those EU companies from collapsing in the face of increasingly competitive foreign challengers, and should be viewed through a protectionist lens. In any event, these concerns appear to have gained some traction with the Commission. In December 2019, Margrethe Vestager announced [39] that the Commission would review its 1997 Notice on Market Definition [40] with a view to adapting it to the "new age" of globalization and digitalization. The proposal is not for a fundamental reworking of the Commission's competition toolbox, but rather a fine-tuning of its approach to defining the relevant market. The geographic aspect of relevant markets in particular is in scope, as competition is increasingly taking place at an EEA-wide or worldwide level. Companies like Siemens and Alstom might in the future face less resistance from the Commission in acknowledging the presence of, and competitive pressure exerted by, Chinese rivals, for instance. [41]

In a further development aimed at levelling the global playing field for EU companies, the Commission has launched an initiative to address unfair competitive advantages enjoyed by certain (and most likely Chinese) State-backed foreign companies. [42] The Commission will publish a White Paper on an "Instrument on Foreign Subsidies" in March 2020 [43]. In a position paper prepared by the Dutch government during the preparatory stages of the White Paper, [44] the Commission has been called-on to draw up new powers to prevent foreign State-backed companies from acquiring EU businesses at inflated valuations or undercutting them with artificially low selling prices. [45]

### 3. United Kingdom

The UK has not historically had a dedicated or centralised mechanism for the screening of foreign investment, such as those in force in the US, Germany or France. Instead, the UK has had in place a mix of targeted powers, [46] which have developed organically, reflecting the UK's traditionally open attitude to commerce and foreign investment. More specifically, at the time of writing, the UK government can intervene in acquisitions of material influence or control over undertakings which may give rise to 'public interest' considerations, in the realm of defence (national security), media plurality (e.g. broadcasting or newspapers) and prudential rules (e.g. banking mergers). However, recent foreign investments involving key UK industrial targets operating outside of the above three public interest areas have prompted a re-think of UK Industrial Strategy, amendments to the UK's merger control regime as well as proposals for a new UK-wide national security framework focused on screening foreign investments of any size and in any sector which raise potential security concerns.

*a. Development of the UK's tools and legislative basis for screening of FDI*

Following rumours in 2006 of a bid by Gazprom for Centrica, the UK government publicly warned that the bid would face 'robust scrutiny', [47] despite the government lacking clear powers to review the deal at the time. The transaction never went ahead, but it did raise questions over the UK's capacity to deal with foreign takeovers of critical infrastructure. These questions were resurrected in 2010 by Kraft's takeover of Cadbury, a seminal case in shifting the debate in the UK from openness to foreign investment toward the need to protect strategic assets and UK workers. Kraft's offer document contained positive forward-looking statements regarding Kraft's intention to maintain jobs and to "continue to operate UK facilities threatened by closure in order to protect manufacturing jobs." [48] However, when Kraft reneged on these promises soon after completing the acquisition, [49] the government lacked powers to enforce Kraft's forward-looking statements. With no action having been taken to address this apparent lacuna, the debate was reignited in 2014 in connection with Pfizer's offer for AstraZeneca. Pfizer made several public commitments in respect of research and development under the UK Takeover Code, which it said were of a 'binding nature' under the UK Takeover Code – that is to say 'binding', *unless* there has been a "*material change of circumstance*". [50] MPs were wary of allowing a repeat of the Cadbury debacle amid concerns that Pfizer was motivated more by short-term tax efficiency than by AstraZeneca's long-term prospects and as the Takeover Code still lacked the option for truly binding commitments. Pfizer eventually abandoned its bid following intense Parliamentary questioning of Pfizer's leadership. [51] Following Pfizer's failed bid for AstraZeneca, the Takeover Code was amended in 2015 to distinguish between non-binding 'statements of intent' and legally binding voluntary specific undertakings, requiring companies to make binding post-offer undertakings ("**POUs**").

Nevertheless, the political interest in defending critical infrastructure and symbolic industrial actors, coupled with the shortcomings of the existing legal framework, sparked a desire for broader reform. Hinkley Point C, which is discussed further below, appears to have been a catalyst, displaying the difficulties faced by the government in intervening in FDI in (nuclear) energy generation, which whilst potentially impacting national security did not technically fall within the defence/public security public interest ground under the Enterprise Act. [52] Shortly thereafter, the government announced its campaign to introduce new foreign investment screening powers on much broader grounds of 'national security' [53]. The review was launched in earnest under Theresa May's government in October 2017, [54] and resulted in limited reforms being introduced in June 2018 as a stopgap in anticipation of more far-reaching measures, to allow the government to intervene in foreign direct investments that would not previously have met the UK merger control thresholds. [55]The more ambitious reform, set out in some detail in a government White Paper and accompanying consultation, [56] was intended to involve an entirely new voluntary regime and a dedicated government function with a call-in power, separate from the merger control thresholds and the CMA, granting the government the power to intervene in a broader set of sectors involving 'core areas' of the economy [57] and in respect of a wider range of transactions. Like CFIUS, that regime would have allowed the government to amend, condition, block or unwind transactions giving rise to material national security concerns as well as to issue fines of up to 10% of worldwide turnover and order imprisonment for individuals.

The May government's FDI reforms were overtaken by other policy imperatives in 2019 and stalled, until they were revived by the Johnson government in the 14 October [58] and 18 December [59] 2019 Queen's speeches. The outline of the regime resembles and indeed is likely to be based at least in part on the more detailed regime set out in the May government's 2018 White Paper. The proposed new legislation is intended to upgrade the UK's existing powers of review with respect to "hostile parties". It would introduce a UK-wide, economy-wide [60] notification system "allowing" businesses of any size to flag transactions with potential security concerns to the UK government. As under the May proposal, the government would be granted powers to condition and block transactions, as well as sanction non-compliance. In exchange for what appears to be a considerably broader regime, the proposals promise "quick and efficient" screening and note that the vast majority of transactions raise no national security concerns. Mr. Johnson and cabinet ministers told reports at recent election events that progress is being made with respect to the FDI proposals. [*61*] Indeed, the size of the Parliamentary majority achieved by the Conservatives in December 2019 should enable them to push through their legislative agenda, including FDI reform, in relatively quick order with a new regime enacted before 2021.

The reforms come at a critical juncture in the UK's political and economic trajectory, with Brexit presenting the government with the difficult proposition of balancing the possible harm to the UK's reputation for openness [*62*] with the impetus for reform from rising State-sponsored FDI and difficulties encountered by the government in conditioning these to its satisfaction. The reforms have been injected with additional urgency due to the pressure on the sterling in recent years, [*63*] resulting in UK public companies becoming cheaper to foreign investors, creating opportunities for further foreign acquisitions of strategic UK industrial players. It is no surprise in light of the opposing perspectives that observers have criticised the reforms, fearing that the broad scope for political intervention [*64*] could jeopardise the UK's reputation for openness at a critical time. [*65*]

*b. Notable Government interventions in the UK*

As discussed above, the government's recent interventions have taken place under a patchwork of powers. POUs have been used on several occasions since they were introduced. SoftBank's acquisition of ARM, a UK high tech company, was approved by Theresa May's government subject to the first-ever POUs, which related to maintaining ARM's UK research and development functions, employees and balance of skilled labour as well as its UK headquarters. [*66*] The POUs in *SoftBank/ARM* appear to have formed the basis of the Takeover Panel's subsequent changes to strengthen POUs under the Takeover Code in January 2018. [*67*] The government has since extracted similar POUs in the case of a UK (turnaround specialist) acquirer in *Melrose/GKN* [*68*], an investment by a Chinese company in a UK provider of essential services in *Hytera/Sepura* and in relation to the acquisition of a UK defence company by a US private equity firm in *Advent/Cobham*.

Another form of intervention was seen in the Hinkley Point C case, which involved Theresa May's government delaying the go-ahead for a nuclear power station being developed by EDF in partnership with China General Nuclear Power ("**CGNP**"), which held a 33.5% minority stake in the venture. CGNP was accused by the US government of unlawfully engaging in nuclear espionage, thereby threatening the UK's 'special relationship' with the US. The government eventually approved the deal subject to a 'golden share' arrangement requiring government approval for any increase in CGNP's investment.

The FDI power used most commonly by the UK government is its ability to intervene in transactions in respect of 'legitimate interests' under Regulation 139/2004. [*69*] Since 2004, there have been eleven so-called 'public interest interventions' on grounds of public security, five on the grounds of media plurality and one on prudential grounds. [*70*] The interventions on public security grounds are of greatest interest from an FDI perspective, as consistency has formed around the conditions (or 'undertakings') required by the government, often the Secretary of State for Defence [*71*], in these cases. This was appropriately demonstrated in *Hytera/Sepura*, where a public interest intervention was issued in relation to the acquisition by a Chinese manufacturer of radio transceivers of a UK provider of digital mobile radio technology used by emergency services. Hytera agreed national security undertakings, designed to protect Sepura's sensitive information and technology from unauthorised access, [*72*] in lieu of a reference for an in-depth Phase II review. Similarly, the government's public interest intervention notice in the proposed acquisition by a consortium of investors led by the private equity firms Apax and Warburg Pincus of UK satellite and communications operator Inmarsat led to national security undertakings with respect to the maintenance of Inmarsat's capabilities in delivering certain services to the Ministry of Defence, the protection and exploitation of sensitive information and compliance with certain security requirements for UK defence contractors. [*73*]]

The government's first intervention under the revised June 2018 temporary jurisdictional merger control thresholds took place in *Gardner/Northern*. [*74*] Gardner Aerospace, which is owned by Chinese aerospace and mining company SLMR, acquired Northern Aerospace, a developer and manufacturer of 'restricted goods' in respect of which it also held sensitive information. The deal nearly collapsed due to the CMA's review pursuant to the intervention notice jeopardising the deal timetable. However, it was revived at the eleventh hour when the deal was cleared unconditionally by the CMA. No undertakings were needed in this case, as SLMR had previously entered into Deeds of Undertaking with Gardner and the UK government, respectively.

On 17 September 2019 the government intervened in the proposed acquisition by Advent International, a US-based private equity group, of Cobham, a long-standing UK aerospace and defence manufacturer. The undertakings accepted by the government on 20 December 2019 contain the usual commitments as to the maintenance of Cobham's UK headquarters, jobs and strategic capability, the protection of sensitive information and compliance requirements for UK defence contractors. [*75*]

Finally, the government's most recent intervention in Gardner's proposed acquisition of a second sensitive UK business, namely precision engineering firm Impcross, is set to further develop UK foreign investment decisional practice. The CMA has until 2 March 2020 to deliver its report.

As set out above, the UK government currently has a mix of powers that it has used to deal with targeted concerns, such as public security, critical infrastructure including nuclear plants, or concerns over UK jobs, and R&D. Although the new national security regime proposed by the Johnson government will clearly provide a wider, more consolidated basis for reviewing these concerns, the 2018 White Paper and the October and December 2019 Queen's Speech indicate that the new regime should not expressly extend to pure economic or industrial considerations.

**4. Germany**

According to the OECD, Germany is one of the most open countries for foreign investment, [*76*] making it a particularly interesting case study from a foreign investment screening perspective. Although Germany is one of the 15 EU Member States to have adopted an FDI screening mechanism, the German mechanism for foreign direct investment control had not been utilized to prevent foreign investment until relatively recently when a number of Chinese acquisitions were effectively prevented or restructured. Since it came into force in 2004, the German FDI regulatory regime has been used to issue only one formal prohibition decision in *Leifeld* [*77*] Nonetheless, an influx of FDI into Germany in recent years, especially from China, has sparked a shift toward tighter regulation, embodied in the successive adoption of ever-stricter rules that expand the BMWi's [*78*] jurisdiction to review FDI.

*a. Legislative basis for screening of FDI in Germany*

The rules that regulate FDI into Germany are contained in the AWG [*79*] and the AWV, [*80*] which empower the BMWi to intervene in foreign investments that fulfil certain criteria. Until 2009, the BMWi could only review acquisitions or participations by non-German investors in German entities active in the field of military technology. [*81*] This 'sector-specific' review mechanism enables the BMWi to examine whether Germany's 'essential security interests' [*82*] could be endangered due to the target being active in certain defence or IT industries [*83*]. In 2009, the regime was expanded to include a cross-sectoral toolbox, which enabled the BMWi to review acquisitions by non-EU [*84*] investors in German companies, irrespective of industry, where such acquisitions pose a threat to public order or security. These reforms also introduced a new ownership threshold applicable to both the sector-specific and cross-sectoral mechanisms. Powers under the AWV allowed interventions in respect of transactions leading to a relevant foreign investor holding at least 25% of the voting rights in the German company.

Subsequent amendments to the AWV in 2017 [*85*] were considered [*86*] a reaction to foreign, especially Chinese, takeovers of German businesses. Whereas prior to 2017 mandatory notification only applied to transactions falling within the sector-specific regime, the 2017 amendments introduced a mandatory notification requirement for investments in certain [*87*] cross-sectoral categories as well. In addition, the 2017 amendments extended the BMWi's review periods. [*88*]

*b. Notable FDI interventions in Germany*

In the 15-year history of the German FDI regime, the BMWi has only once been authorised to issue a formal prohibition order, although it came close to doing so in a number of other noteworthy cases as well and its actions have effectively scuppered several Chinese acquisitions.

One of the first instances in which the BMWi came close to issuing a formal prohibition order was in 2016 when it reviewed Fujian's proposed acquisition of the German semiconductor producer Aixtron. The BMWi initially cleared the deal, but withdrew its clearance a month later based on "*previously unknown security-related information*" reportedly received from CFIUS, [*89*] which ultimately blocked the deal on 2 December 2016. Fujian abandoned the deal on 8 December 2016 in response to the CFIUS block, and so the need for the BMWi to exercise its prohibition powers fell away.

The next case concerned the proposed acquisition by State Grid Corporation of China ("**SGCC**") of a 20% indirect equity stake in 50Hertz Transmission GmbH ("**50Hertz**"). 50Hertz operates one of Germany's four transmission grids, which are considered critical infrastructure. [*90*] [*91*] However, the BMWi did not have jurisdiction over the deal, as SGCC's investment would not represent a trigger event under the AWV, which would have required an acquisition of a 25% stake or more. Instead, the German government came to an agreement with Elia Group, a Belgian transmission grid operator and the owner of the remaining indirect 80% majority stake in 50Hertz, to exercise its pre-emption right to buy the 20% stake, precluding SGCC from doing so. Elia Group (which had no strategic or financial motive of its own to acquire the 20% stake), [*92*] would immediately on-sell the minority stake to KfW, a German State-owned bank, on identical terms and financial conditions. KfW subsequently cited a government request as the motivation for the transaction, noting that it would not take any entrepreneurial or strategic responsibility in relation to 50Hertz. [*93*] As set out above, the government is now considering plans to formalise this mechanism, which would allow it to circumvent the need to involve any private parties.

Shortly after the 50Hertz decision was announced, the BMWi was authorized by the German government to issue its first formal prohibition decision under the AWV in respect of Yantai Taihai Group's ("**Yantai**") proposed acquisition of Leifeld Metal Spinning AG ("**Leifeld**") on national security grounds. Leifeld is a German developer and manufacturer of machine tools for chipless metal forming, which reportedly had applications in nuclear technology. [*94*] Yantai has extensive interests in the Chinese nuclear energy sector, and provides smelting, forging, and processing capabilities to China's civil nuclear power market. The BMWi's month-long investigation reportedly raised potential concerns related to national security interests, [*95*] causing the government to authorise the BMWi to prevent the acquisition. Evidencing the deterrent effect of the German screening regime, Yantai chose to withdraw its offer in response to the rumoured veto authorisation. This meant that although authorised to do so, the BMWi did not need to issue a formal prohibition order. By effectively blocking the takeover of a relatively smaller company, the German government signalled that it is highly concerned about the rise of FDI in Germany and that it is willing to take a harder line in applying its FDI regime.

The BMWi's most recent probe of a foreign investment targets CRRC's proposed acquisition of Vossloh's locomotives business, which was announced in August 2019. [*96*] The BMWi is currently reviewing the transaction, and is rumoured to be considering a veto. [*97*] The timing of CRRC's investment, and the BMWi's decision to review it, is especially significant given the backdrop of the EC's competition review of *Siemens/Alstom* which turned, in part, on whether CRRC could be seen as a serious competitive force in the EU.

*c. Recent and anticipated legislative reform*

On 19 December 2018, in a reaction to BMWi's inability to review SGCC's proposed acquisition of a 20% stake in 50Hertz, the German government adopted its latest round of amendments to its FDI screening toolbox, lowering the threshold for screening and prohibiting acquisitions of stakes in companies which would be subject to mandatory notification (that is, sector-specific acquisitions and cross-sectoral acquisitions which involve 'critical infrastructure') from 25% to 10%. [*98*] On 29 November 2019, the government published a policy paper [*99*] announcing its intention to once again revise the FDI regime. The proposed amendments would introduce further flexibility with respect to FDI. For instance, the government intends to formalise the model it applies in 50Hertz by introducing powers to enable the government to intervene in planned acquisitions by non-EU investors of high-tech companies by taking a temporary stake in the target company. The proposal also aims at aligning the German regime with the FDI Regulation. [*100*] In particular, the German government intends to further expand the definition of 'critical infrastructure' to include areas such as artificial intelligence, robotics, semiconductors, biotech and quantum technology, [*101*] , [*102*] and to introduce provisions in relation to the information sharing mechanism introduced by FDI Regulation. Furthermore, it is expected that the requirements for the prohibition of an acquisition will be modified, such that whereas the BMWi is at present only able intervene where an acquisition poses a 'threat' to public order or security in Germany, the revised rules will lower the threshold to "foreseeable impairment" [*103*] to German public order or security. [*104*] The responsible minister, Peter Altmaier, insisted that the government has no intention of "expanding the state sector", adding that the German government does not want protectionism, but merely wants to avoid 'clearance sales'. [*105*]

**5. Other notable European FDI interventions**

Although the FDI regimes in the UK and Germany have been subject to significant developments in recent years, they are not the only European countries to have controlled FDI. This section identifies a few of the particularly noteworthy cases involving other Member States.

The acquisition by Fincantieri, the Italian state-controlled builder of commercial and military vessels, of a 50% stake in Chantiers de l'Atlantique [*106*] ("**Chantiers**", formerly owned by South Korea's STX Shipbuilding), a French shipyard operator is one example. Chantiers was the only shipbuilding company in France capable of building aircraft carriers and other large warships. The French government took a 33.3% strategic stake in Chantiers in 2008. [*107*] When STX Shipbuilding announced its bankruptcy in 2016, Fincantieri offered to acquire its 66.6% stake in Chantiers. The French government opposed the acquisition due to Chantiers' strategic importance to France and, in July 2017, announced its intention to increase its stake in Chantiers, effectively nationalising the company. The government insisted its intervention related to Fincantieri's links with China, including through a recent contract with China State Shipbuilding Corporation, and the resulting risk that China could gain access to sensitive French technology and know-how. However, French concerns over jobs appear to have played an important part as well, [*108*] sparking tensions between Paris and Rome. [*109*] President Macron's government has since given the green light to a variation of the deal through a joint venture controlled by Fincantieri, which includes protections for French jobs. [*110*] The venture is currently in Phase II of the Commission's competition review, having been 'referred up' by the German and French competition authorities. [*111*]

In 2017, American paint giant PPG Industries launched a hostile bid to acquire Dutch AkzoNobel. AkzoNobel rejected three offers from PPG, arguing that the takeover would reduce jobs and that the two companies' cultures clashed. [*112*] [*113*] Although the Dutch government had long refrained from interfering in FDI, [*114*] this takeover attempt came at a particularly sensitive time due to national elections in which national identity and anti-globalist sentiment played a significant role. Against this backdrop, both prominent politicians [*115*] and AkzoNobel itself [*116*] sought to leverage the populist sentiment [*117*] against the deal to their respective ends. PPG's campaign was complicated by the fact that Dutch law provides for a 'poison pill' mechanism allowing independent shareholder foundations known as 'stichtings' to effectively block hostile takeovers [*118*] eventually causing PPG to abandon its bid for AkzoNobel after the rejection of its third offer. [*119*] Despite AkzoNobel's successful rebuff of PPG, the Dutch government brought forward a legislative proposal for a 'cooling-off' period that could be triggered in response to hostile takeover bids and would preclude any significant strategic changes to be made, or executive members of the target company's board to be dismissed for an extended period of time, allowing the target company a window to consult stakeholders and consider its options without external pressure. [*120*]

**6. Conclusion**

The European foreign investment intervention cases considered in this foreword reveal some notable trends.

One observation from these cases is that the concerns held by EU Member States are clearly not limited to 'new' investors (or 'hostile governments') like China and Russia. Instead, concerns also extend to 'traditional' investors such as Japanese (e.g. Softbank), American (e.g. PPG, Advent) and Canadian (Apax and Warburg Pincus) companies and funds (and in particular financial investors with reputations, whether deserved or not, for asset-stripping, regardless of where they are headquartered [*121*]) targeting actual or potential 'national champions' or otherwise important targets.

Furthermore, France's initial opposition to Fincaniteri's acquisition raises questions about the true motivations of the larger Member States in advocating for a 'European' industrial policy and the creation of 'European' champions. Allowing Fincantieri to take a majority stake in Chantiers would have been a step toward a Franco-Italian 'seabus' along the lines of Siemens/Alstom's 'railbus'. Yet, the arrangement received French blessing only subject to the same types of national (as opposed to 'European') interest guarantees that one would have expected to result from traditional interventions against FDI from third country industrial powers such as China.

In addition, some larger Member States have accepted the need for reactionary FDI policy-making, resorting to quasi-judicial or extra-judicial interventions in the absence of formal powers to review certain types of investments as a stopgap to introducing tougher rules ex-post. These approaches raise questions as a matter of rule of law. For instance, it is clear that the German government engaged in an extrajudicial lobbying exercise in connection with 50Hertz in order to circumvent the express intent of its own legislation, which was to capture certain investments resulting in an acquisition of 25% or more of voting rights. The extrajudicial nature of the intervention arguably deprived SGCC of its procedural rights under the German FDI regime, in particular of its right to challenge a formal prohibition decision before the courts. The necessity of the intervention, which must be connected to its justifiability, is also debatable. Elia Group's 80% shareholding would have granted it ultimate control of 50Hertz, regardless of the identity of the minority shareholder. [*122*] More appropriate and proportionate measures would arguably have been available to address concerns related to SGCC's access to sensitive information in its capacity as a shareholder. [*123*]

Investors need legal certainty, or at least transparent and predictable application of existing rules. It is to be hoped that the continued evolution of the European approach to regulating FDI will ultimately strike the right balance between efficient capital allocation from ex-EU sources and the need to safeguard the legitimate public interests of national security and critical infrastructure, without straying into blatant economic protectionism.

[*1*] European Commission, *Commission Staff Working Document on Foreign Direct Investment in the EU*, 13 March 2019.

[*2*] See for instance Régis Bismuth, *Screening the Commission's Regulation Proposal Establishing a Framework for Screening FDI into the EU*, European Investment Law and Arbitration Review, 2018:3:45, 48.

[*3*] See for instance Julien Chaisse, *Promises and Pitfalls of the European Union Policy on Foreign Investment – How Will the New EU Competence on FDI Affect the Emerging Global Regime?*, Journal of International Economic Law 2012:15:1, 68.

[*4*] The National People's Congress of China passed a new Foreign Investment Law on 15 March 2019 whereas the Russian Prime Minister recently signed an Order obliging global distribution system operators to localise any servers with personal data of Russian passengers on Russian soil, with the aim of, *inter alia*, preventing "*acts of unlawful interference*" in the sphere of transport security. Available at: *https://www.rbc.ru/society/01/08/2019/5d414ec69a79477355ae5e9a* ↗ [Accessed 16 December 2019].

[*5*] See for instance Guardian, *Trump Says US Will Withdraw from Nuclear Arms Treaty with Russia, 20 October 2018, New York Times, Trump Abandons Iran Nuclear Deal He Long Scorned*, 8 May 2018.

[*6*] Rebecca Harding and Jack Harding, *The Weaponization of Trade: The Great Unbalancing of Politics and Economics*, 2017.

[*7*] Li Shuyan and Michal Fabus, *Study on the Spatial Distribution of China's Outward Foreign Direct Investment in EU and its Influencing Factors*, Entrepreneurship and Sustainability Issues March 2019:6:3. The eruption of the ongoing trade war between the US and China has cast CFIUS' practice in sharp relief, offering arguments both for and against a similar approach in the EU and the Member States. CFIUS has proven an effective tool of foreign policy allowing the US to leverage its economic heft onto the political sphere. However, the consequences of the 'weaponisation' of CFIUS may also serve as a warning to some. The opacity of the CFIUS process and the political taint from leveraging it have economic repercussions, which likely contributed to falling Chinese investment in the US from 2017 to 2018, as Chinese flows were redirected elsewhere. While the US economy may be large enough to shrug this off relatively easily, the risks would be greater for smaller economies, such as those of many Member States.

[*8*] Ernst & Young, *How can Europe Raise its game? EY Attractiveness Survey Europe*, June 2019.

[*9*] China's outbound foreign direct investment has grown steadily during the 2000s, and particularly since 2008 following China's 'going out' strategy and the opportunities presented by the financial crisis in terms of discounts on US and European equities. Ibid, 1283.

[*10*] Differing approaches result from unique perceptions of security threats, reflecting different economic and political structures and experience. Investors from China and Russia in particular are suspected by some of harboring non-commercial motivations. See Julien Chaisse, *Promises and Pitfalls of the European Union Policy on Foreign Investment – How Will the New EU Competence on FDI Affect the Emerging Global Regime?*, Journal of International Economic Law, February 2012, 15:1:51-84, 68.

[*11*] The "Made in China 2025" strategy. According to Shuyan and Fabus (supra note 8, 1282 and 1293), the EU's attractiveness to China includes the region's economic integration and especially its advanced technology. It is arguable that China is repeating a pattern observed in respect of Japan in the 1980s, catching up to developed economies including through investment in their companies and technology, as it pursues a dual policy of investing in developing and developed economies.

[*12*] See for instance European Political Strategy Centre, *EU Industrial Policy After Siemens-Alstom: Finding a new balance between openness and protection*, 18 March 2019, 5.

[*13*] While numerous sectors are prohibited or restricted to EU firms in China, they are entirely open to Chinese firms in the EU. See for instance European Parliamentary Research Service, *Foreign direct investment screening: A debate in light of China-EU FDI flows*, May 2017, 4. Available at: *http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/603941/EPRS_BRI(2017* ↗)603941_EN.pdf [Accessed 16 December 2019].

[*14*] The United States' hawkish approach to foreign investment, symbolised by CFIUS, has provided a useful template for interventionist voices in Europe, advocating for tougher investment screening regimes at home.

[*15*] The trend amongst more interventionist Member States, such as Germany, the UK and France has been to target specific investments into "sensitive sectors" generally understood to mean sectors or products with potential dual military and civilian use applications, critical infrastructure such as energy grids and air traffic control, and sectors of other strategic interest or sensitivity such as personal data, quantum computing, AI or robotics. 15 Member States currently have mechanisms that enable them to screen FDI: Austria, Denmark, Germany, Finland, France, Latvia, Lithuania, Hungary, Italy, the Netherlands, Poland, Portugal, Romania, Spain and the United Kingdom. See European Commission, List of screening mechanism notified by Member States, 12 December 2019. Available at: *https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf* ↗ [Accessed 16 December 2019]. See also for instance ***Izzet Sinan, Christina Renner,***

***Andrew Lipman***, *The EU adopts first foreign direct investment regulation (FDI), 19 March 2019, e-Competitions Bulletin March 2019, Art. N° 89910* ; ***Tobias Heinrich, Tilman Kuhn, Sabine Kueper***, *The EU Council greenlights the regulation on the screening of foreign direct investments into the EU (FDI), 19 March 2019, e-Competitions Bulletin March 2019, Art. N° 89911* ; ***Renato Antonini, Jurgen Beninca, Nicolas Brice, Eva Monard, Stefano Crosio, Byron Maniatis, Federico Merino***, *The EU Parliament and Council establish a framework for the screening of foreign direct investments into the Union (FDI), 19 March 2019, e-Competitions Bulletin March 2019, Art. N° 90214.*

[***16***] The screening of foreign investments had also been historically opposed by the Commission: Jochem de Kok, *Toward a European Framework for Foreign Investment Reviews,* European Law Review, 2019, 14.

[***17***] Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union ("**FDI Regulation**"), OJ 2019 L79 I/1.

[***18***] European Commission, *State of the Union 2017—Trade Package: European Commission proposes framework for screening of foreign direct investments"*, 14 September 2017. Available at: *http://europa.eu/rapid/press-release_IP-17-3183_en.htm* ↗ [Accessed 16 December 2019]. See ***Porter Elliott***, *The EU Commission proposes a new regulation that would allow the Commission and Member States to adopt rules for screening foreign direct investment, 14 September 2017, e-Competitions Bulletin September 2017, Art. N° 84911* ; ***Davina Garrod, Sebastian Casselbrant-Multala, Daniel Lund***, *New EU Law on the Screening of Foreign Direct Investments in Europe, 18 September 2017.* Available at: *https://www.akingump.com/images/content/6/0/v2/60405/International-Trade-Alert-New-EU-law-on-the-Screening-of-Foreign.pdf* ↗ [Accessed 16 December 2019].

[***19***] Although an 18-month transition period means that the FDI Regulation will not become fully operational until 11 October 2020. See ***Davina Garrod, Sebastian Casselbrant-Multala*** *EU Foreign Investment Law In Force from April, 6 March 2019* . Available at: *https://www.akingump.com/images/content/1/0/v2/102254/EU-Foreign-Investment-Law-In-Force-from-April.pdf* ↗ [Accessed 16 December 2019].

[***20***] Which grants the EU exclusive competence in the field of common commercial policy.

[***21***] Jochem de Kok, *Toward a European Framework for Foreign Investment Reviews*, op cit.

[***22***] FDI Regulation, Article 6(1).

[***23***] Ibid, Article 7(5).

[***24***] Ibid, Article 5.

[***25***] See for instance ibid, Articles 6(2), 7(2) and 9. Some commentators believe that the information sharing mechanism established by the FDI Regulation could be one of the key competitive advantages of the European regime over other examples. See for instance Jukka Snell, *EU Foreign Direct Investment Screening: Europe Qui Protege?*, E.L. Rev. 2019, 44(2), 137-138.

[***26***] FDI Regulation, Article 3.

[***27***] Jukka Snell, *EU foreign Direct Investment Screening: Europe Qui Protege?,* op cit. Previously, by virtue of the Court of Justice of the European Union's case law, national screening mechanisms that only concerned the acquisition of control over European targets by third country investors were not considered to involve the EU's 'Four Freedoms', and therefore third country investors were unable to rely on any rights under EU law that would otherwise be associated with those Four Freedoms. However, the FDI Regulation now brings national screening mechanisms within the scope of EU law, thereby extending potentially powerful EU law rights to third country investors in respect of interventions under these national screening mechanisms.

[***28***] In determining whether a foreign investment is likely to affect security or public order, Member States and the Commission may consider its potential effects on various critical sectors including energy, transport, water, health, media and data processing and storage as well as critical technologies, inputs and sensitive information: Article 4. The FDI Regulation thereby extends the scope of public interest beyond the 'legitimate interests' in respect of which Member States have previously been able to intervene in the context of the EU Merger Regulation. It has however been questioned to what degree purely economic factors will seep into these analyses, given that they are not technically within the scope of the FDI Regulation. See for instance Jukka Snell, *EU Foreign Direct Investment Screening: Europe Qui Protege?*, op cit.

[***29***] FDI Regulation, Article 6(3).

[***30***] Ibid, Article 7(3). In certain circumstances, Member States and the Commission will be able to issue comments and opinions on completed investments for a period of 15 months after completion: Ibid, Article 7(8).

[***31***] Ibid, Article 8.

[***32***] EU competence over the screening of FDI is in direct conflict with Member States' sole competence over national security issues: Treaty on European Union, Article 4(2); Jochem de Kok, *Toward a European Framework for Foreign Investment Review,* op cit.

[***33***] In February 2017, France, Germany and Italy wrote to the EU Commissioner for Trade, expressing their concern that "*a growing number of non-EU investors buying European technologies which could be used for strategic objectives in their own country while they themselves maintain barriers for investments from our countries" and that they were "worried about the lack of reciprocity and about a sell-out of European expertise which [they were] currently unable to combat with effective instruments.*"

[***34***] See e.g. Council of the European Union, *OPINION of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council Establishing a Framework for Screening of Foreign Direct Investments into the European Union - COM (2017) 487 final - 2017/0224 (COD),* 27 April 2018, 1.19, 2.4 and 2.13; European Parliament, *REPORT on the Proposal for a Regulation of the European Parliament and of the Council Establishing a Framework for Screening of Foreign Direct Investments into the European Union,* 4 June 2018.

[***35***] France and Germany, *A Franco-German Manifesto for a European Industrial Policy for the 21st Century,* February 2019. Available at: *https://www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf?__blob=publicationFile&v=2* ↗ [Accessed 16 December 2019]. See ***Martin Favart***, *The French and German governments publish a joint manifesto calling for a new European industrial policy with changes to merger control and State aid rules, 19 February 2019, e-Competitions Bulletin February 2019, Art. N° 89639.*

[*36*] European Commission, Mergers: Commission Prohibits Siemens' Proposed Acquisition of Alstom, 6 February 2019. Available at: *https://europa.eu/rapid/press-release_IP-19-881_en.htm* ↗ [Accessed 16 December 2019]. See ***David Henry, Jacques Buhart***, *The EU Commission prohibits a merger in the railway sector and reaffirms that industrial policy objectives have no role to play when it comes to applying the EU merger control rules (Siemens / Alstom), 6 February 2019, e-Competitions Bulletin February 2019, Art. N° 89282* ; ***European Commission***, *The EU Commission prohibits a merger in the market of railway signalling systems and very high-speed trains (Siemens / Alstom), 6 February 2019, e-Competitions Bulletin February 2019, Art. N° 89220* ; ***Porter Elliott***, *The EU Commission prohibits a merger in the market for railway signalling and very high-speed trains (Siemens / Alstom), 6 February 2019, e-Competitions Bulletin February 2019, Art. N° 89603.*

[*37*] CRRC is itself the result of a 2015 mega-merger between China's two then-leading rolling stock companies, CNR and CSR. Irish Times, *Chinese Rail Giants Merge into World's Second Biggest Industrial Firm*, 15 June 2015.

[*38*] According to Guy Verhofstadt: "*though Alstom and Siemens have each managed to win contracts in several Western and African countries in recent years, their luck could soon run out" and "barring a stronger response from Europe, China's emergence as the dominant player in the global rail market is not a matter of 'if', but 'when'":* G. Verhofstadt, *Europe's Missing Champions*, 1 March 2019. Available at: *https://www.project-syndicate.org/onpoint/europe-s-missing-champions-by-guy-verhofstadt-2019-03?barrier=accesspaylog* ↗ [Accessed 16 December 2019].

[*39*] Margrethe Vestager, *Defining Markets in a New Age*, 9 December 2019. Available at: *https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/defining-markets-new-age_en* ↗ [Accessed 16 December 2019].

[*40*] European Commission, *Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law* (97/C 372/03), 9 December 1997. Available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y1209(01* ↗)&from=EN [Accessed 16 December 2019].

[*41*] See for instance Mlex, *EU to Refresh 'Market Definition' Approach, Vestager Says*, 9 December 2019. Available at: *https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1148613&siteid=190&rdir=1* ↗ [Accessed 16 December 2019].

[*42*] See Mlex, *EU preps options for tackling Chinese companies backed by state subsidies*, 4 December 2019. Available at: *https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1147530&siteid=190&rdir=1* ↗ [Accessed 16 December 2019].

[*43*] European Commission, *Liste des Points Prévus Pour Figurer a l'Ordre du Jour Des Prochaines Réunions de la Commission*, 3 December 2019. Available at: *https://ec.europa.eu/transparency/regdoc/rep/2/2019/EN/SEC-2019-2317-F1-EN-MAIN-PART-1.PDF* ↗ [Accessed 16 December 2019].

[*44*] PaRR, *Dutch Government Calls for New EC Powers to Investigate Foreign Takeovers – Report,* 4 December 2019. Available at: *https://app.parr-global.com/intelligence/view/prime-2949228#* ↗ [Accessed at 16 December 2019].

[*45*] Financial Times, *Brussels Urged to Rein in State-backed Foreign Rivals*, 4 December 2019. Available at: *https://www.ft.com/content/f1ef1896-15fa-11ea-9ee4-11f260415385* ↗ [Accessed at 16 December 2019].

[*46*] The government can review transactions under the Enterprise Act on public interest grounds involving defense (e.g. *Gardner/Northern, Hytera/Sepura*), media (e.g. *Fox/Sky* and *Trinity Mirror/Northern & Shell Media*) or prudential (e.g. *TSB/HBOS*) concerns; Section 13 of the Industry Act 1975 gives the government broad (untested) powers to intervene in the transfer of control of manufacturing firms to foreign owners "*where that change of control would be contrary to the interests of the United Kingdom*"; there are several sector-specific powers available to the government, as well as contractual terms in agreements with private undertakings, including change of control clauses and the government holds 'golden shares' in a limited number of UK companies. See for instance Alex Potter, *The Foreign Investment Regulation Review (6th ed.) – Chapter 6: United Kingdom*, 2018.

[*47*] Financial Times, *Gazprom Warned over Centrica Takeover,* 2 February 2006.

[*48*] Kraft Foods, *Offer to Exchange*, 29 January 2010. Available at: *https://www.sec.gov/Archives/edgar/data/1103982/000119312510022303/d424b3.htm* ↗ [Accessed 16 December 2019].

[*49*] BBC, *Cadbury Factory Closure by Kraft 'Despicable'*, 10 February 2010.

[*50*] BBC, *Pfizer Offers Legal Guarantees over AstraZeneca Bid*, 12 May 2014.

[*51*] Telegraph, *MPs Grill Pfizer and Vince Cable over AstraZeneca Offer - live*, 12 May 2014.

[*52*] Section 58(1) of the Enterprise Act 2002.

[*53*] Rt Hon Greg Clark MP, oral statement to Parliament, 15 September 2016. Transcript available at: *https://www.gov.uk/government/speeches/hinkley-point-c* ↗ [Accessed 16 December 2019].

[*54*] Department for Business, Energy & Industrial Strategy, *National Security and Infrastructure Investment Review*, October 2017. Available at: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652505/2017_10_16_NSII_Green_Paper_final.pdf* ↗ [Accessed 16 December 2019]. See also ***Davina Garrod, Sebastian Casselbrant-Multala***, *New UK Regime for National Security and Infrastructure Investments, 18 October 2017*. Available at: *https://www.akingump.com/images/content/6/1/v2/61197/International-Trade-and-Competition-Alert-New-UK-Regime-for-Na.pdf* ↗ [Accessed 16 December 2019].

[*55*] The short-term reforms leverage the UK's current thresholds for merger control notifications by revising the thresholds in respect of acquisitions of entities active in the fields of military or dual-use products, computing hardware or quantum technology from £70 million turnover to £1 million and by removing the need for an increment to the share of supply. See for instance Competition & Markets Authority, Guidance on Changes to the Jurisdictional Thresholds for UK Merger Control, 11 June 2018. See also ***Davina Garrod, Sebastian Casselbrant-Multala***, *New U.K. National Security Powers to Call In Investments and Other Transactions, 26 July 2018*. Available at: *https://www.akingump.com/en/news-insights/new-u-k-national-security-powers-to-call-in-investments-and.html* ↗ [Accessed 16 December 2019].

[*56*] Department for Business, Energy & Industrial Strategy, *National security and investment: proposed legislative reforms,* 24 July 2018. Available at: *https://www.gov.uk/government/consultations/national-security-and-investment-proposed-reforms* ↗ [Accessed 16 December 2019].

[*57*] The precise scope of the "core areas" remains uncertain, however the phrase is expected to cover those areas already subject to enhanced scrutiny under the Enterprise Act 2002, as well as a broad set of other areas, e.g. covering certain parts of national infrastructure (listed as civil nuclear, defence, communications, energy and transport), advanced technologies, critical suppliers of the government and emergency services, and dual-use technologies.

[*58*] UK government, *Queen's Speech background briefing*, October 2019, 71-72.

[*59*] UK government, *Queen's Speech background briefing*, December 2019, 104-105.

[*60*] Although the term "economy-wide" was dropped in the December background briefing.

[*61*] See Mlex, *UK's investment-screening regime needs tightening, ministers say*, 29 November 2019. Available at: *https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1146458&siteid=190&rdir=1* ↗ [Accessed 16 December 2019].

[*62*] See for instance Financial Times, *Plan to Tighten UK Takeover Rules are 'Disproportionate', 14 November 2018; John Fingleton, Mergers and the Public Interest: A Wolf in Sheep's Clothing*, October 2018.

[*63*] See Financial Times, Pound under Renewed Pressure on Rising Brexit Jitters, 30 July 2019, although sterling has recovered sharply in the aftermath of the 12 December election.

[*64*] Financial Times, *Plan to Tighten UK Takeover Rules are 'Disproportionate'*, 15 November 2018

[*65*] The UK the Department for Business, Energy and Industrial Strategy has predicted that the permanent rules will result in 200 notifications per year, of which 100 will raise issues with 50 requiring intervention.

[*66*] SoftBank Group Corp., *Recommended cash acquisition of ARM Holdings plc by SoftBank Group Corp.*, 3 August 2016, 18-21. Available at: *https://www.arm.com/company/investors/-/media/arm-com/company/Legacy%20Financial%20PDFs/Scheme-Document-final.pdf?la=en* ↗ [Accessed 16 December 2019].

[*67*] The Takeover Panel introduced changes to strengthen the Takeover Code in relation to POUs and statements of intention, which came into effect on 8th January 2018 and which (i) require offerors, when making statements of intention, to make specific statements of intention in relation to R&D, balance of the skills and functions of employees and management, and the location of headquarters and headquarter functions, (ii) require offerors to make statements of intention at the time of announcing an intention to make a firm offer, (iii) introduce a 14 day waiting period between an announcement of a firm intention to make an offer and the publication of an offer document, in order to grant the offeree more time to defend itself in a hostile scenario (unless the Board of the offeree waives this period) and (iv) require the companies to publish reports on POUs and post-offer intention statements during the course of an offer.

[*68*] *Melrose/GKN* involved an acquisition by a UK listed turnaround specialist of a UK automotive and aerospace component manufacturer. Despite Melrose's status as a UK listed company, national security concerns were raised by politicians due to Melrose's reputation as an asset-stripper. GKN held several meetings with UK ministers (including Gavin Williamson, then Defence Secretary) following which Melrose announced an initial set of POUs including maintaining GKN's UK headquarters and listing, ensuring that the majority of directors are UK nationals and maintaining R&D spend at an agreed level, in each case for a period of five years. However, political concerns remained, with Greg Clarke (then Business Secretary) stating in March 2018 that he had asked the MoD to prepare a comprehensive report on potential national security issues. Subsequently Melrose agreed additional undertakings to address the remaining concerns identified. No formal public interest intervention was made.

[*69*] Public security, plurality of the media and prudential rules are automatically regarded as legitimate interests, although interest other than the three already mentioned must be communicated to and approved by the Commission before they are relied on.

[*70*] These interventions include all Public Interest, Special Public Interest and European Intervention Notices.

[*71*] More recently, the Secretary of State for Business, Energy and Industrial Strategy has become increasingly involved, as well as the Secretary of State for Digital, Culture, Media and Sport.

[*72*] *Anticipated Acquisition By Hytera Communications Corporation Ltd of Sepura PLC - Undertakings Given to the Secretary of State for Business, Energy and Industrial Strategy*, 12 May 2019. Available at: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/613860/sepura-hytera-signed-undertakings.pdf* ↗ [Accessed 16 December 2019].

[*73*] See *Anticipated Acquisition By Connect Bidco Limited of Inmarsat PLC - Undertakings Given to the Secretary of State for Digital, Culture, Media and Sports, , Energy and Industrial Strategy*, (29 October 2019). Available at: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/843009/Enterprise_Act_2002_Undertakings__1_.pdf* ↗ [Accessed 16 December 2019

[*74*] UK Government Intervention Notice in relation to the anticipated acquisition of Northern Aerospace Limited by Gardner Aerospace Holdings Limited (17 June 2018). Available at: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/717303/Northern-Gardner_PII_Notice_-_17_June_2018_v1.pdf* ↗. [Accessed 16 December 2019]

[*75*] See *CMA, Advent International / Cobham merger inquiry: : Deed of covenant and undertaking*. Available at: *https://www.gov.uk/government/publications/proposed-acquisition-of-cobham-plc-by-ai-convoy-bidco-limited-deed-of-covenant-and-undertaking?utm_source=253ee081-dcd9-495f-aa51-828aeb93d17d&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate* ↗. [Accessed 16 December 2019].

[*76*] OECD, *FDI Regulatory Restrictiveness Index, 2018*. Available at: *https://stats.oecd.org/Index.aspx?datasetcode=FDIINDEX#* ↗ [Accessed 16 December 2019]. In a recent survey on investor perceptions, 69% of the respondents identify Germany as their preferred country to invest in in Europe: Ernst & Young, UK Attractiveness Survey 2019, June 2019.

[*77*] In Leifeld, the German Government authorized the BMWi to issue a prohibition order against the proposed acquisition of Leifeld. However, the bidder (Yantai) withdrew its bid before the BMWi issued its order, after having become aware of the Government's authorization to do so.

[*78*] The German Federal Ministry for Economic Affairs and Energy, or Bundeswirtschaftsministerium ("**BMWi**").

[*79*] The Foreign Trade and Payments Act, or Aussenwirtschaftsgesetz ("**AWG**").

[*80*] The Foreign Trade and Payments Ordinance, or Aussenwirtschaftsverordnung ("**AWV**").

[***81***] Jan Bonhage and Vera Jungkind, The Law Reviews, *The Foreign Investment Regulation Review – Edition 6: Germany*, October 2018. Available at: *https://thelawreviews.co.uk/edition/the-foreign-investment-regulation-review-edition-6/1174879/germany* ↗ [Accessed 16 December 2019].

[***82***] While the term "essential security interests" is rooted in EU law, it leaves room for interpretation by EU Member states. According to the German legislation, "essential security interests of the Federal Republic of Germany" are particularly concerned where (i) the access to core competencies of the German military industry is at risk, and/or (ii) the reliability of crypto-technology used by public authorities in critical areas (in particular, in military and other sensitive communication) is endangered: BMWi, *Investment Screening*, 2019. Available at: *https://www.bmwi.de/Redaktion/EN/Artikel/Foreign-Trade/investment-screening.html* ↗ [Accessed 16 December 2019].].

[***83***] Under the current form of the AWV (which came into force on 29 December 2018), that is where the target company: (i) manufactures or develops goods within the meaning of Part B of the War Weapons List; (ii) manufactures or develops specially designed engines or gears to drive battle tanks or other armoured military tracked vehicles (iii) manufactures products with IT security functions to process classified state information or components essential to the IT security function of such products or has manufactured such products and still disposes of the technology if the overall product was licensed with the knowledge of the company by the Federal IT Security Agency; (iv) manufactures or develops goods listed under item numbers 0005, 0011, 0014, 0015 or 0017 in Part I Section A of the Export List, or (v) manufactures or develops goods listed under item number 0018 in Part I Section A of the Export List, provided that these are intended to be used in the production of goods within the meaning of no. 4. (Section 60(1) AWV).

[***84***] If the direct buyer is resident in the territory of the EU, such review may be performed if there are indications of an abusive approach or a circumvention transaction (Section 55 Subsection 2 of the Foreign Trade and Payments Ordinance). EFTA member States are deemed equivalent to EU Member States.

[***85***] *Ordinance for the Amendment of the AWV,* 14 July 2017; Published in the Federal Gazette of 17 July 2017 Available at: *https://www.bundesanzeiger.de/ebanzwww/contentloader?state.action=genericsearch_loadpublicationpdf&session.sessionid=998606720d811bde19a67b280434a9fb&fts_search_list.destHistoryId=50242&fts_search_list.selected=54999e6d187c5886&state.filename* [Accessed 16 December 2019].

[***86***] Jan Bonhage and Vera Jungkind, The Law Reviews, *The Foreign Investment Regulation Review – Edition 6: Germany,* October 2018, op. cit.

[***87***] The cross-sectoral categories now subject to a notification requirement are those falling within one of the newly defined sensitive business areas which relate to critical infrastructures, (that is, energy, information technology and telecommunication, transport and haulage, finance, health, and insurance), as well as manufacturing of industry-specific software for the infrastructures, as well as providers of cloud computing (section 55 of the AWV).

[***88***] Pursuant to the amendments, the BMWi has up to 7 months to complete its review.

[***89***] Reuters, *Germany Stall Chinese Takeover of Aixtron, Citing Security Worries,* 24 October 2016.

[***90***] Section 55(1)(1), AWV which refers to the Act on the Federal Office for Information Security (BSI Act of 14 August 2009 (Federal Law Gazette I p. 2821) last amended by Article 1 of the Act of 23 June 2017 (Federal Law Gazette I p. 1885)). Courtesy translation of the instrument into English available at: *https://www.bsi.bund.de/SharedDocs/Downloads/EN/BSI/BSI/BSI_Act_BSIG.pdf?__blob=publicationFile* ↗ [Accessed 16 December 2019].

[***91***] BMWi, *KFW Acquires Temporary Stake in German TSO 50Hertz on Behalf of the Federation*, 27 July 2018. Available at: *https://www.bmwi.de/Redaktion/EN/Pressemitteilungen/2018/20180727-kfw-acquires-temporary-stake-in-german-tso-50hertz-on-behalf-of-the-federation.html* ↗ [Accessed 16 December 2019].

[***92***] Elia Group, *Elia to Partner with Bank KfW as Shareholder in German Transmission System Operator 50Hertz*, 27 July 2018. Available at: *https://www.elia.be/en/news/press-releases/2018/07/20180727b_press-release-elia-partner-bank-kfw-shareholder-german-transmission-50hertz* ↗ [Accessed 16 December 2019].

[***93***] KfW Group, KfW Acquires 20% of Shares in Eurogrid/50Hertz on Behalf of the German Federal Government, 27 July 2018. Available at: *https://www.kfw.de/KfW-Group/Newsroom/Latest-News/News-Details_481216.html* ↗ [Accessed 16 December 2019].

[***94***] Carsten Koenig, *Current Developments in Foreign Direct Investment Control*, European Competition and Regulatory Law Review (CoRe), vol. 2, no. 3, 2018, pp. 221-225. HeinOnline

[***95***] Wirtschaftswoch, *Bundesregierung Verbietet Erstmals Firmenverkauf an Chinesen*, 26 July 2018.

[***96***] Vossloh, *Vossloh signs contract on the divestiture of its Locomotives business*, 26 August 2019.

[***97***] Reuters, *Germany mulls vetoing sale of Vossloh's locomotives unit: source*, 4 November 2019. The transaction is currently also undergoing a Phase II investigation by Germany's Federal Cartel Office: Global Competition Review, *Germany probes Vossloh locomotive sale in depth*, 27 November 2019.

[***98***] The 10% threshold applies, in particular, to acquisitions of companies in the defense sector and operators of security-relevant civil infrastructure, but also companies active in the development of manufacturing of devices for surveillance of telecommunication, companies active in cloud-computing services, and media enterprises that contribute to the shaping of public opinion in Germany.

[***99***] German Federal Ministry for Economic Affairs and Energy, *National industrial Strategy 2030*, 29 November 2019. Available at: *https://www.bmwi.de/Redaktion/EN/Publikationen/Industry/national-industry-strategy-2030.pdf?__blob=publicationFile&v=9* ↗ [Accessed 16 December 2019].

[***100***] Mr Altmaier expects that the requisite amendments to the AWV will be enacted by October 2020, i.e. in advance of the FDI Regulation becoming fully operational.

[***101***] Financial Times, *Germany acts to stop sale of tech companies to non-EU investors*, 29 November 2019. Available at: *https://www.ft.com/content/d0964cd0-12af-11ea-a7e6-62bf4f9e548a* ↗ [Accessed: 16 December 2019].

[***102***] These technologies, which were expressly mentioned by Mr. Altmaier during his presentation of the policy paper, are a sample of the technologies that are classified in the FDI Regulation as security-relevant. However, the list of security-relevant technologies listed in the FDI Regulation is more comprehensive and also covers aerospace- and nano-technologies. It remains to be seen to what extent these additional technologies will also find their way into a revised AWV.

[***103***] This wording is consistent with the language used in Article 4 of the German language version of the FDI Regulation. Since the notion of "foreseeable impairment" is less well defined than the term "threat", the amendment would arguably afford the BMWi greater scope for intervention, while at the same time exposing the FDI screening procedure to greater unpredictability.

[***104***] Axel Vogelmann and Markus Käppler (Akin Gump Strauss Hauer & Feld LLP), *Germany's Foreign Direct Investment Regime: Further Changes Ahead*, 16 December 2019. Available at: *https://www.akingump.com/en/news-insights/germany-s-foreign-direct-investment-regime-further-changes-ahead.html* ↗ [Accessed 16 December 2019].

[***105***] Financial Times, *Germany acts to stop sale of tech companies to non-EU investors*, 29 November 2019. Available at: *https://www.ft.com/content/d0964cd0-12af-11ea-a7e6-62bf4f9e548a* ↗ [Accessed: 16 December 2019].

[***106***] At the time Chantiers de l'Atlantique was known as STX France. STX France changed its name to Chantiers de l'Atlantique in 2018.

[***107***] Financial Times, *French State Takes Stake in Shipyard,* 7 November 2008.

[***108***] Fincantieri was reportedly under pressure of the Italian government to relocate employment to Italy: DefenseNews, *France Nationalizes Shipyard, Halts Plan for a 'Naval Airbus' for Now*, 27 July 2017.

[***109***] Italy's finance and economic development ministers complained that "nationalism and protectionism are not an acceptable basis for establishing relations between two great European countries." DefenseNews, France Nationalizes Shipyard, Halts Plan for a 'Naval Airbus' for Now, 27 July 2017.

[***110***] In order for the 50/50 venture to be managed efficiently post-post transaction, the French government has agreed to transfer an additional 1% stake on loan to Fincantieri. However, as the deal presumably still had to satisfy France's protectionist sentiment, the agreement specifies that France could call in the 1% on-loan stake if Fincantieri would fail to fulfill commitments to governance, intellectual property and employment: The Wall Street Journal, *Italy's Fincantieri to Take Effective Control of STX France Shipyards*, 27 September 2017.

[***111***] Case M.9162 – Fincantieri/Chantiers de l'Atlantique, The case is currently under in-depth review by the Commission, with a 17 March 2020 provisional deadline. Available at: *https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9162* ↗ [Accessed 16 December 2019].

[***112***] Reuters, *Dutch Reject PPG's Request to Extend Akzo Nobel Offer Deadline,* 30 May 2017.

[***113***] AkzoNobel, AkzoNobel Rejects Second Unsolicited proposal from PPG, 22 March 2017. Available at: *https://www.akzonobel.com/en/for-media/media-releases-and-features/akzonobel-rejects-second-unsolicited-proposal-ppg* ↗ [Accessed 16 December 2019].

[***114***] Bloomberg, *Dutch See Red Over Foreign Bid for Paint Giant,* 9 March 2017.

[***115***] For example, the Dutch minister of Economic Affairs, Henk Kamp, was reported as saying that the potential acquisition was "not in the interest of the Netherlands": BBC, *AkzoNobel Wins Dutch Political Support Against Possible Bid,* 21 March 2017; Jeroen Dijsselbloem of the Dutch Labour Party called for legislative intervention and proposed a law that would give the national government the power to block any takeovers not in the Dutch interest: BBC, *AkzoNobel Wins Dutch Political Support Against Possible Bid,* 21 March 2017.

[***116***] AkzoNobel played up Dutch sentiment by tweeting a Bloomberg article about AkzoNobel's rejection of PPG's offers, accompanied by the hashtag "#Dutchpride": *https://twitter.com/akzonobel/status/839759182274392064* ↗ [Accessed 16 December 2019].

[***117***] Dutch media have over the years frequently reported on foreign direct investment, using dramatic headlines such as "Hostile take-overs are the dark side of capitalism" and "Stop selling off our companies". NOS, *Vijandige Overnames Zijn de Donkere Zijde van het Kapitalisme,* 23 March 2017; De Telegraaf, *Stop Uitverkoop van Onze Bedrijven,* 12 November 2016.

[***118***] Stichtings are able to raise barriers to unwanted approaches by calling in options to acquire pre-authorized, newly issued preference shares in such quantity that the stichting ends up with 50% of the voting rights in the company, effectively allowing it to block hostile takeover attempts. This mechanism was utilized by Royal KPN NV, the most significant Dutch telecoms company, as well as drugmaker Mylan NV. S.J. van der Graaf, Understanding the Dutch Poison Pill, 19 June 2018. Available at: *https://corpgov.law.harvard.edu/2018/06/19/understanding-the-dutch-poison-pill/* ↗ [Accessed 16 December 2019].

[***119***] Reuters, *BRIEF-PPG Withdraws Offer for AkzoNobel*, 1 June 2017.

[***120***] Aviva Investors, *Cool Off: Could Proposed Dutch Legislation Diminish Corporate Accountability?*, 19 March 2019. Available at: *https://www.avivainvestors.com/en-lu/views/aiq-investment-thinking/2019/03/could-proposed-dutch-legislation-diminish-corporate-accountability/* ↗ [Accessed 16 December 2019].

[***121***] For instance, Melrose PLC is a listed UK company which nevertheless had to offer POUs in order to acquire GKN.

[***122***] Noting that Germany has a tradition of viewing even smaller minority stakes as potentially significant. For instance, Germany's merger control regime captures "competitively significant" stakes, such as the 16.7% minority stake (plus a director on E.ON's board) that RWE will receive in E.ON as part of the Innogy asset swap.

[***123***] Information barriers of this nature are a common feature in competition reviews of mergers, as well as in the FDI context as seen in the commitments agreed in a number of public interest interventions in the UK.