



Risk, Resilience
and Reputation

**Focus on Funds | Risk, Resilience
and Reputation**

Foreign Direct Investment

28 April 2022

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Presenting today



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UK

- The National Security & Investment Act 2021
- Mandatory filings
- Voluntary filings
- Call-in power
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- Foreign Trade and Payments Ordinance
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- Indirect acquisition
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Key Practical Points

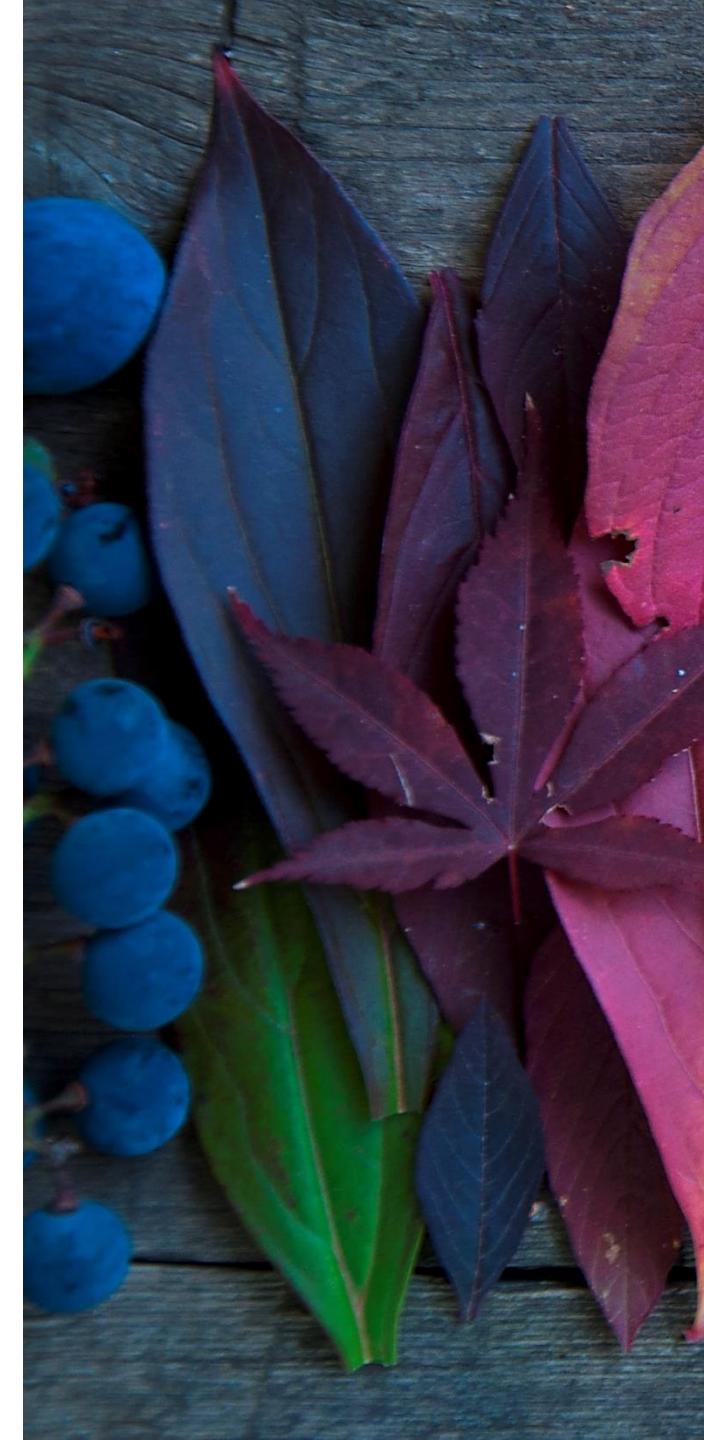
- Preparation
- Due diligence considerations
- Managing parallel notifications
- SPA
- Managing the process

1

EU Framework

Regulation (EU) 2019/452

- Establishes core requirements for screening mechanisms but no obligation to implement one
- Establishes only a cooperation mechanism
 - no genuine EU proceedings
 - no "one-stop shop"
- Main cooperation elements are
 - Information exchange between national authorities
 - Member States and European Commission can submit opinions / raise concerns
 - Deadlines for cooperation



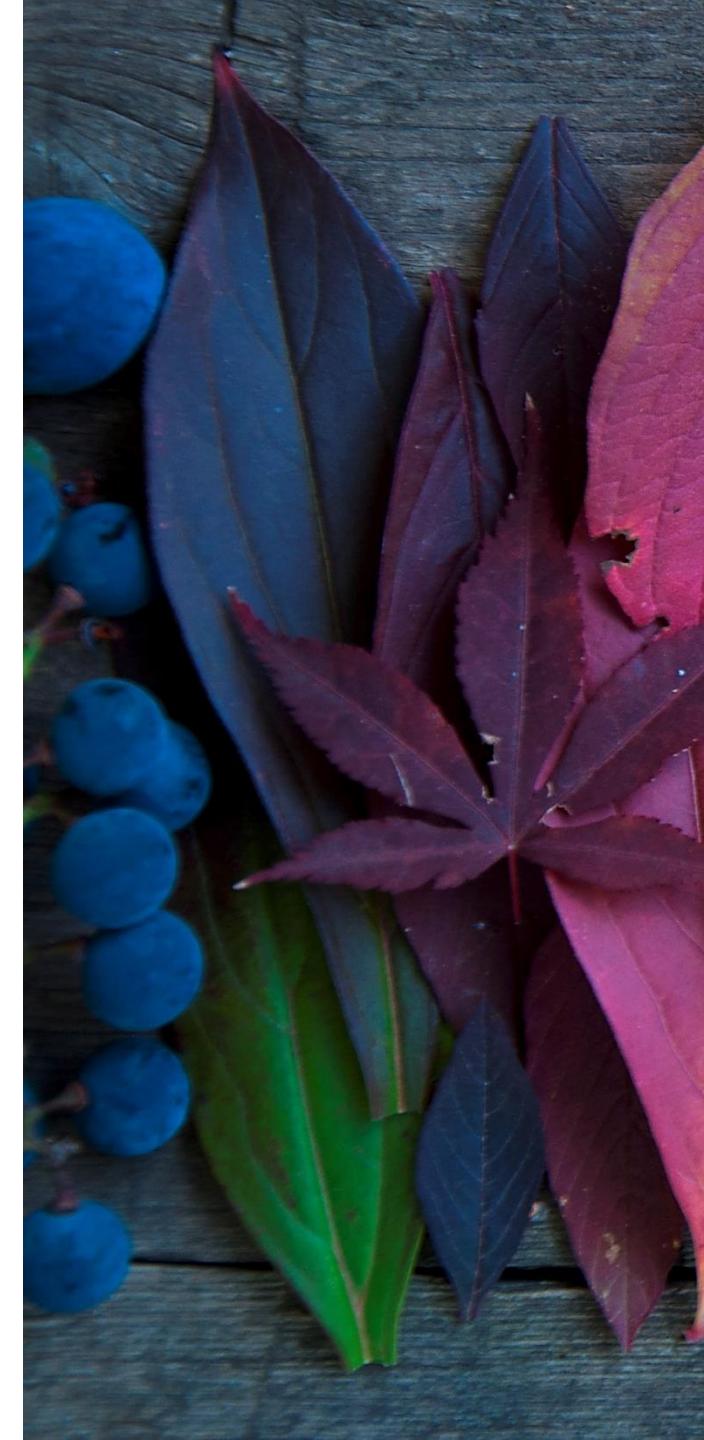
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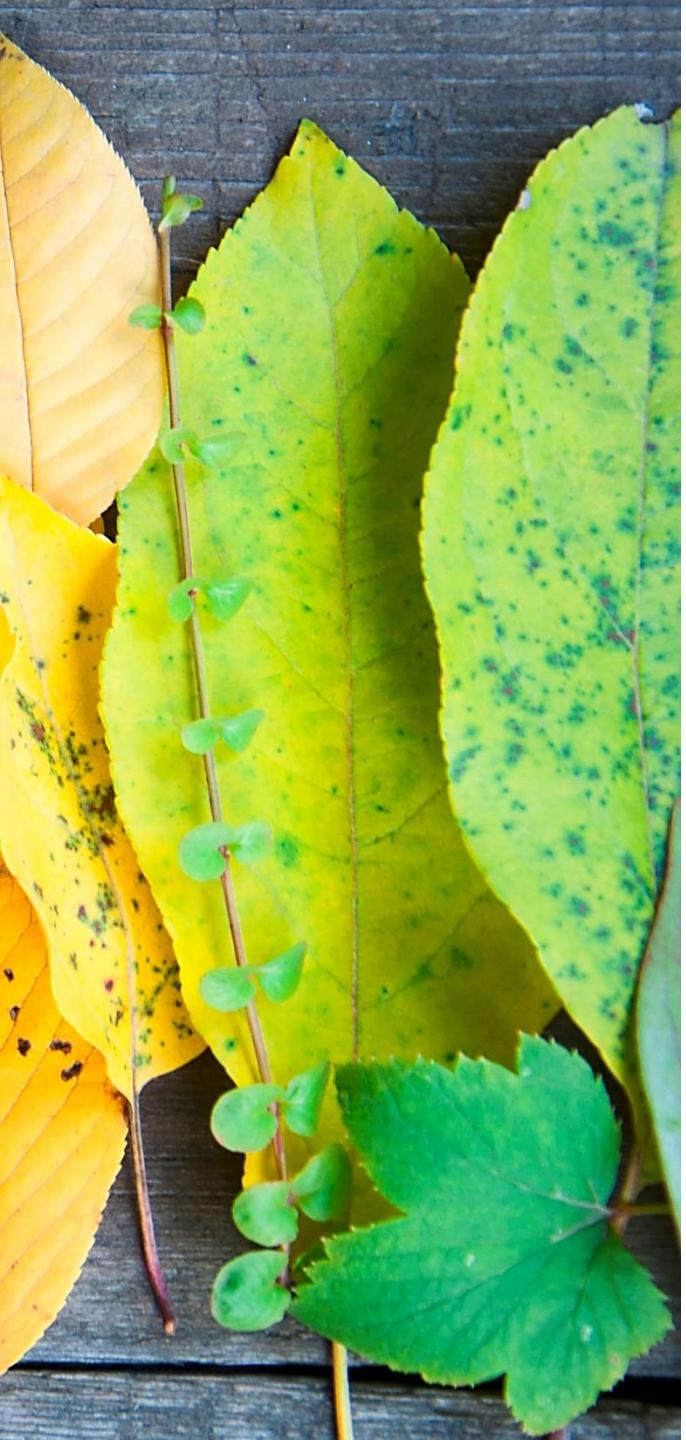
UK



The UK National Security and Investment Act 2021 (NSIA)

- **Stand-alone regime to screen transactions** for national security purposes – since 4 January 2022
 - Ability to assess transactions applies retrospectively to those completed on or after **12 November 2020**
- No strict definition of **national security** – gives UK Government lots of flexibility
- Operated by Investment Security Unit (**ISU**) within the Department for Business, Energy and Industrial Strategy (**BEIS**)
- Includes a hybrid **mandatory** and **voluntary** notification elements
- Secretary of State for BEIS (**SoS**) has the ability to '**call in**' transactions within scope of the regime
 - including those that do not give rise to a mandatory notification requirement





Mandatory filing: qualifying entities and trigger event

Qualifying Entities

- **Any entity** (other than an individual), whether or not a legal person
- Includes **UK companies**, limited liability partnerships, partnerships, unincorporate associations and trusts, and bodies corporate
- **Foreign entities** are caught **if they carry on activities in the UK**, or supply goods or services to persons in the UK
- Asset acquisitions **not** included

Trigger Events

- Percentage of **shares** held by the acquirer increases to **more than 25%, more than 50%, or to 75% or more**
- Percentage of **voting rights** held by the acquirer increases to **more than 25%, more than 50% or to 75% or more**
- Acquisition of voting rights to secure or prevent the passage of any class of resolution
 - minority veto rights – where the holder acquires the right to vote on “*all or substantially all matters governing the affairs of the entity*”.



17 high-risk sectors

Advanced materials	Cryptographic authentication	
Advanced robotics	Data infrastructure	Suppliers to emergency services
Artificial intelligence	Defence	
Civil nuclear	Energy	Synthetic biology
Communications	Military and dual use	
Computing hardware	Quantum technologies	
Critical suppliers to the government	Satellite and space technology	Transport

Note: definitions are complex and remain untested



Consortia / indirect holdings / multiple filings

- Mandatory regime was intended to **create bright line test** for jurisdiction
- But provisions on consortia and indirect holdings are complex
- **Example 1: indirect holdings**
 - Cascading majority stakes ‘down the chain’ to an interest which triggers
 - Right to exercise or actual exercise of “*dominant influence or control*” is sufficient for “majority stake” – means acquisition of minority stake may also qualify in certain circumstances
- **Example 2: common purpose rules**
 - e.g. A and B each have 10% in Target. A and B have co-ordinated their voting or influence on target. A acquires an additional 6%
 - A and B’s stakes may be treated together. They have passed the 25% gate and trigger a mandatory filing
 - More generally, **sequential filings for same asset possible** as an acquirer moves through the gates



Voluntary filing: qualifying entities / assets and trigger events

	Qualifying item acquired	Trigger Events
Entities	<ul style="list-style-type: none">Entities as per mandatory filings except only those wholly outside the 17 high-risk sectors	<ul style="list-style-type: none">As per mandatory filingAcquisition of material influence over policy relevant to behaviour of the target entity in the marketplace – but falling short of holding a blocking vote
Assets	<ul style="list-style-type: none">LandTangible moveable propertyIdeas, information or techniques which have industrial, commercial or other economic value, and which are used in connection with either activities carried on in the UK, or the supply of goods or services to persons in the UK<ul style="list-style-type: none">e.g. trade secrets, databases, source code, algorithms, formulae, designs, plans, drawings, specifications and software	<ul style="list-style-type: none">Acquisition of a right or interest in (or in relation to) an asset which gives the acquirer the ability to either:<ul style="list-style-type: none">use the asset, or use it to a greater extent than prior to the acquisition; ordirect or control how the asset is used, or direct or control how the asset is used to a greater extent than prior to the acquisition



Call-in power

- SoS may ‘call in’ transactions that fall within scope of the regime, provided a ‘trigger event’ has occurred.
 - **Notified transactions** – within 30 working days of notification
 - **Unnotified transactions** – within six months of the SoS becoming aware of the transaction, provided that is within five years of completion (but five-year rule not applicable to unnotified transactions that should have been notified under mandatory regime)
- Used where there **may be a potential for immediate or future harm to UK national security**. Call-in risk factors:
 - **Target risk**: could the acquired entity / asset be used in a way that risks national security?
 - **Control risk**: does the type and level of control being acquired allow it to pose a risk?
 - **Acquirer risk**: does the acquirer possess characteristics that suggest there is, or may be, a risk to national security from them having control of the target?
- Each trigger event to be assessed case-by-case, taking account of all relevant considerations



Civil and criminal sanctions

- A notifiable acquisition (i.e. where mandatory regime applies) completed without being approved by the SoS will be **void** and of no legal effect
- **Potential offences** (for bodies corporate **and** individuals) under NSIA include:
 - completing a notifiable acquisition without approval
 - breach of an order from the SoS
 - other offences relating to supply of information and attendance of witnesses (e.g. failure to comply with an information request)
- Criminal penalties: up to **five years' imprisonment**
- Civil penalties:
 - if business, **up to greater of £10 million or 5% of total worldwide turnover** (including any businesses owned or controlled by the offender)
 - if individual, **up to £10 million**
- Where a body corporate commits an offence under the act, **an officer may also be found guilty**

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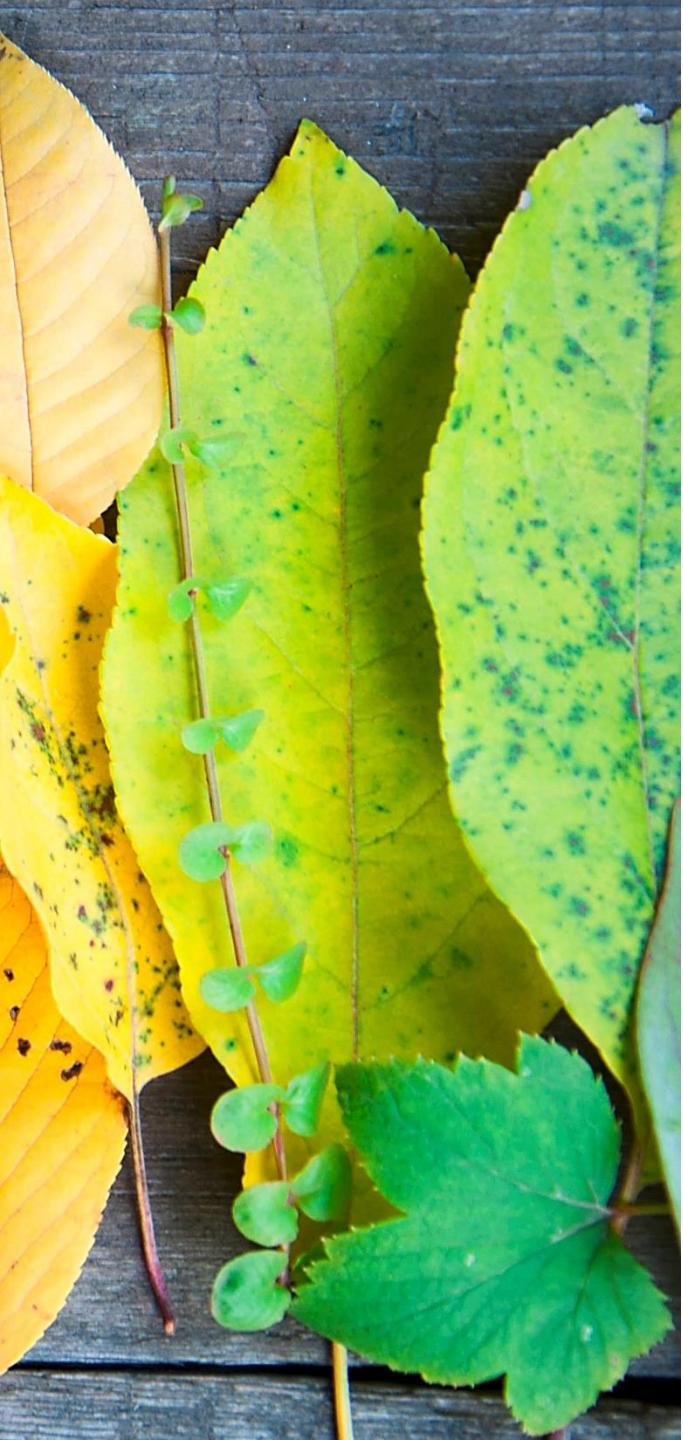
Germany



Sec. 55 et seqq. Foreign Trade and Payments Ordinance (AWV)

- **Stand-alone regime to screen transactions** for purposes of public order and security of Germany, EU states or EU projects or for purposes of national security
- Operated by Investment Screening Units (**ISU**) within the Federal Ministry for Economic Affairs and Climate Action (**BMWK**)
- Germany has a **hybrid mandatory and voluntary notification regime**, depending on (i) amount of voting rights acquired, (ii) activity of the German target company and (iii) nationality of acquirer(s)
- BMWK has the ability to **call in transactions** whenever non-EU/non-EFTA person acquires directly or indirectly at least 25% of voting rights in Germany company (irrespective of activity)





Mandatory filing: qualifying entities and trigger event

Qualifying Entities

- Any German entity or
- Substantial assets of a German entity
- Active in any of the 31 listed activities / technologies

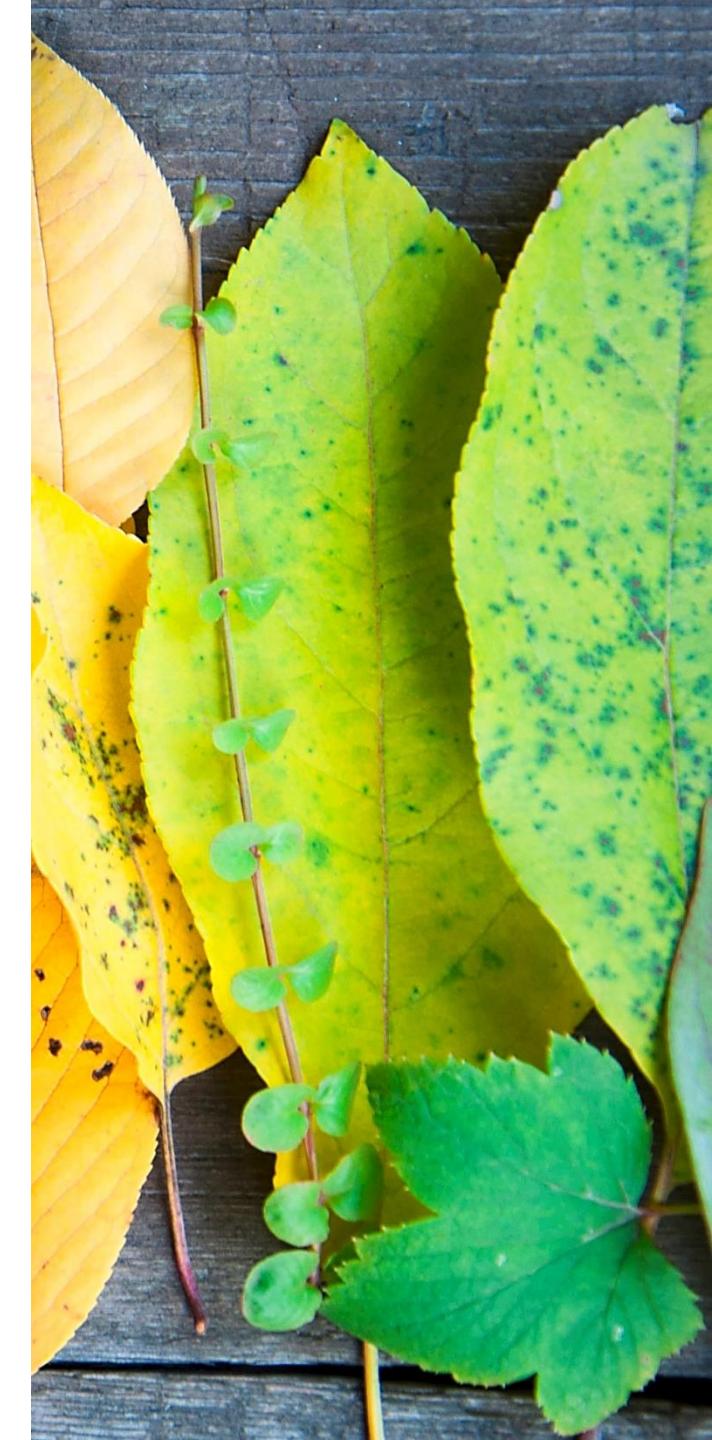
Trigger Events

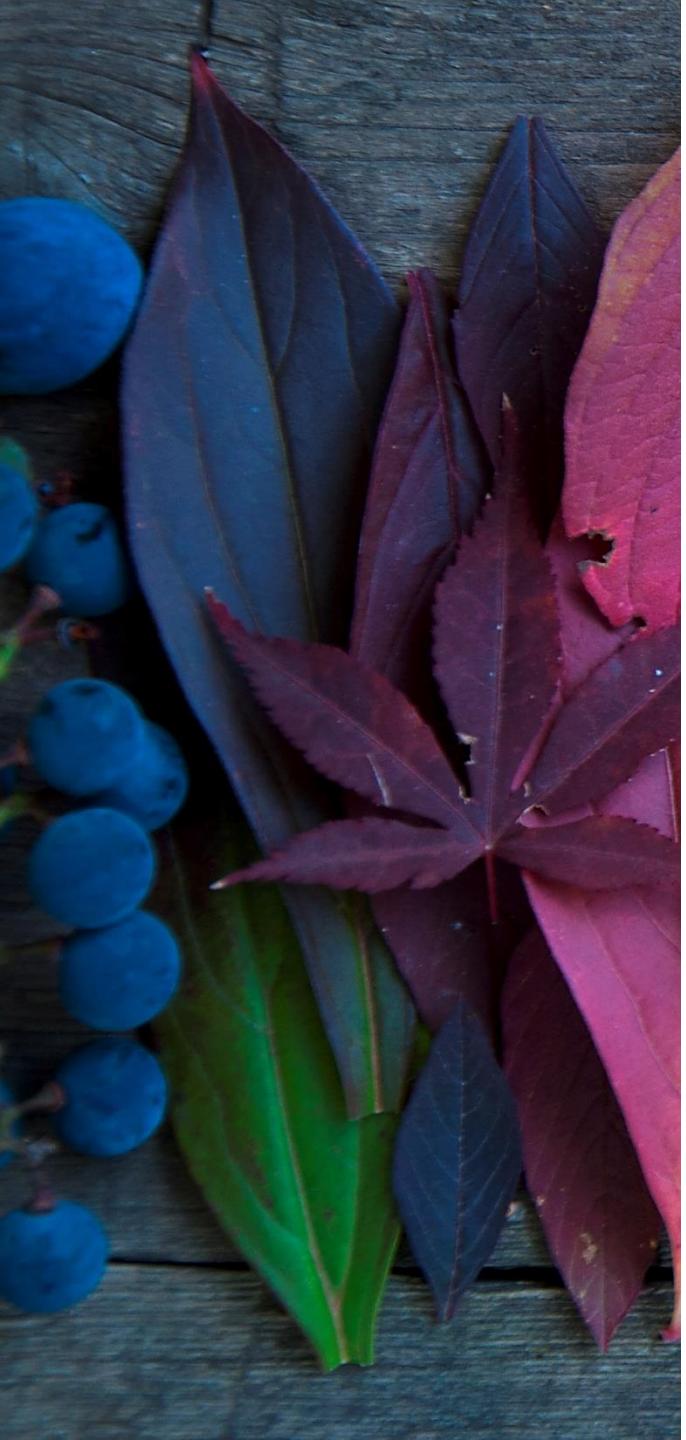
If German target operates in activities / technologies listed in

- sec. 60 (1) AWV and acquirer non-German: Percentage of voting rights held by the acquirer increases to 10%, 20%, 25%, 40%, 50% or 75% or more
- sec. 55a (1) No 1 to 7 AWV and acquirer non-EU/non-EFTA: Percentage of voting rights held by the acquirer increases to 10%, 20%, 25%, 40%, 50% or 75% or more
- sec. 55a (1) No 8 to 27 AWV and acquirer non-EU/non-EFTA: Percentage of voting rights held by the acquirer increases to 25%, 40%, 50% or 75% or more

31 listed technologies (mandatory filing)

Personal protective equipment / filter fleeces	Nuclear technology	Software for the operation of or components for critical infrastructures
Medicinal products	Quantum technology	Surveillance of telecommunications
Medical devices	Additive manufacturing / 3D printing	Cloud-Computing
In-vitro-diagnostics	Network technology	Electronic Health Card
Earth remote sensing system	Smart-metering	Media
Artificial intelligence	Vital facilities	State communication infrastructures/BDBOS
Automated driving / flying	Critical resources	
Robotics	State classified intellectual rights	Weapons, ammunition and armament materiel
Semi-conductors	Agriculture	State classified intellectual rights re defence technology
Cybersecurity		Products with IT-security function
Aviation and Aerospace	Critical Infrastructure	Defence critical facility





Problem: Indirect acquisition



→ = transaction

→ = current shareholdings

Percentages = shares with voting rights



Consequences of mandatory filing

- **Stand-still obligation** (restrictions on information exchange and prohibition to exercise voting rights)
 - Natural persons face criminal penalties of up to five years' imprisonment
 - Legal entities face fines of up to EUR 10 million and confiscation of proceeds
- Acquisition completed without being approved will be **void and of no legal effect**
- **Screening procedure**
 - Phase 1 = **2 months**
 - Phase 2 = **4 months, can be extended** unilaterally by up to 4 months, stop-the-clock pending formal requests for information and negotiation of mitigation agreements (commitments)



No mandatory filing

- **No stand-still obligation**
- BMWK may "**call in**" any acquisition if percentage of voting rights held by **non-EU/non-EFTA acquirer** in German company reaches **25%, 40%, 50% or 75%** for **up to 5 years after signing**
- Acquisition will become **void and of no legal effect following prohibition decision**
- **Voluntary** notification / information possible
- **Screening procedure**
 - Phase 1 = **2 months**
 - Phase 2 = **4 months, can be extended** unilaterally by up to 4 months, stop-the-clock pending formal requests for information and negotiation of mitigation agreements (commitments)

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Key Practical Points



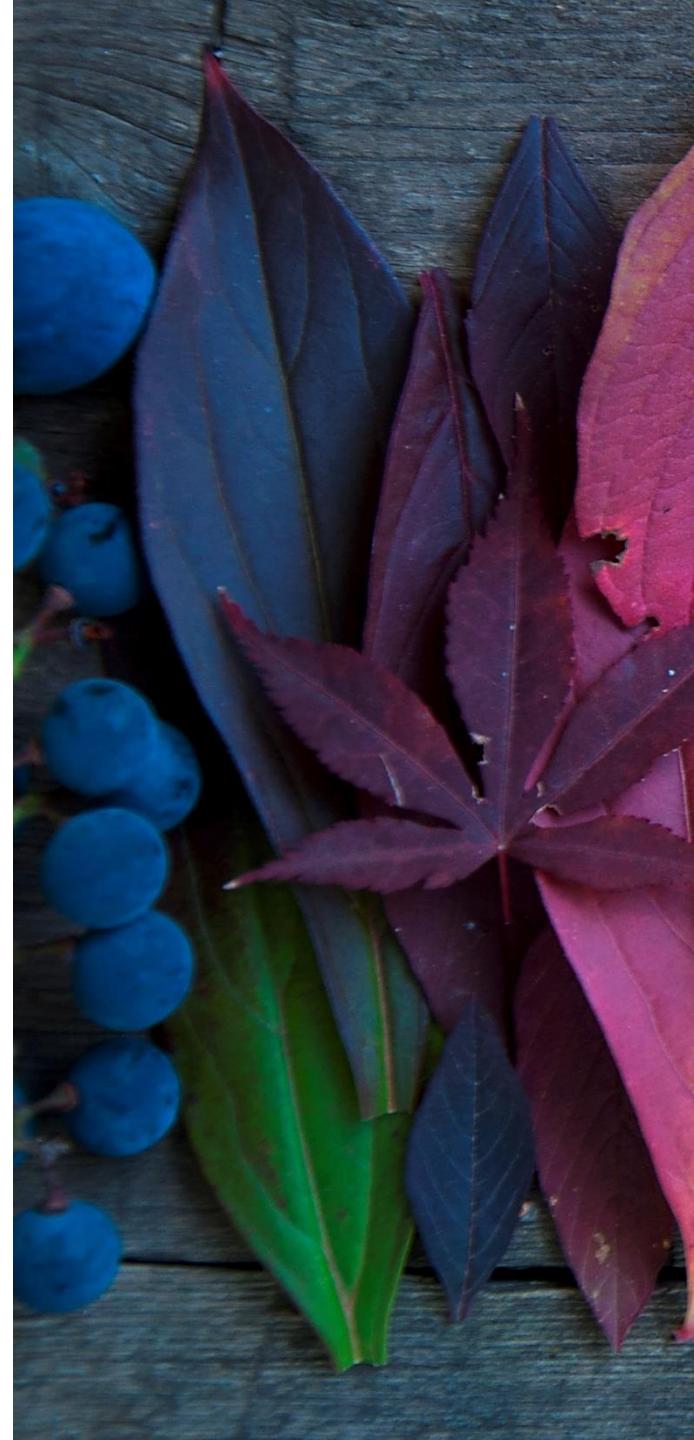
Preparation

Consider impact of FDI control as early as possible

↳ **Target:** Active in sectors which trigger FDI controls?

↳ **Purchaser:** "Foreign" investor?

- Expectation management
- **Timing** (FDI control may well be "the long pole in the tent")
- As a **seller**: Select bidders early in the process
- As a **purchaser**: Does FDI control increase / reduce your chances?
- Strategy if FDI controls are voluntary
- If necessary: develop **mitigation strategy**





Due diligence considerations

Issues

- Does the target operate in a '**sensitive**' sector? Government contracts? Military or dual-use sales?
- Scope of **national regimes differ** (e.g. supermarkets within scope in France, US looking at educational software)
- Location of subsidiaries and branch offices is a good place to start - but some regimes triggered simply by local sales / activities
- Merger control analysis (and information gathered for that) may help but typically additional specific technical details concerning products and services are needed – difficult to do desk-top analysis
- Target will often need to call on local subsidiaries to provide specific information about activities – will impact on timing – and how to ask the questions without leaking knowledge of a deal?
- May lead to knock-on scrutiny of other regulatory areas e.g. by asking about 'dual use' items will we discover that target's products subject to **export controls** – does target know and have export control policy in place?

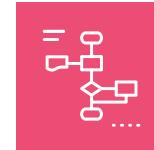
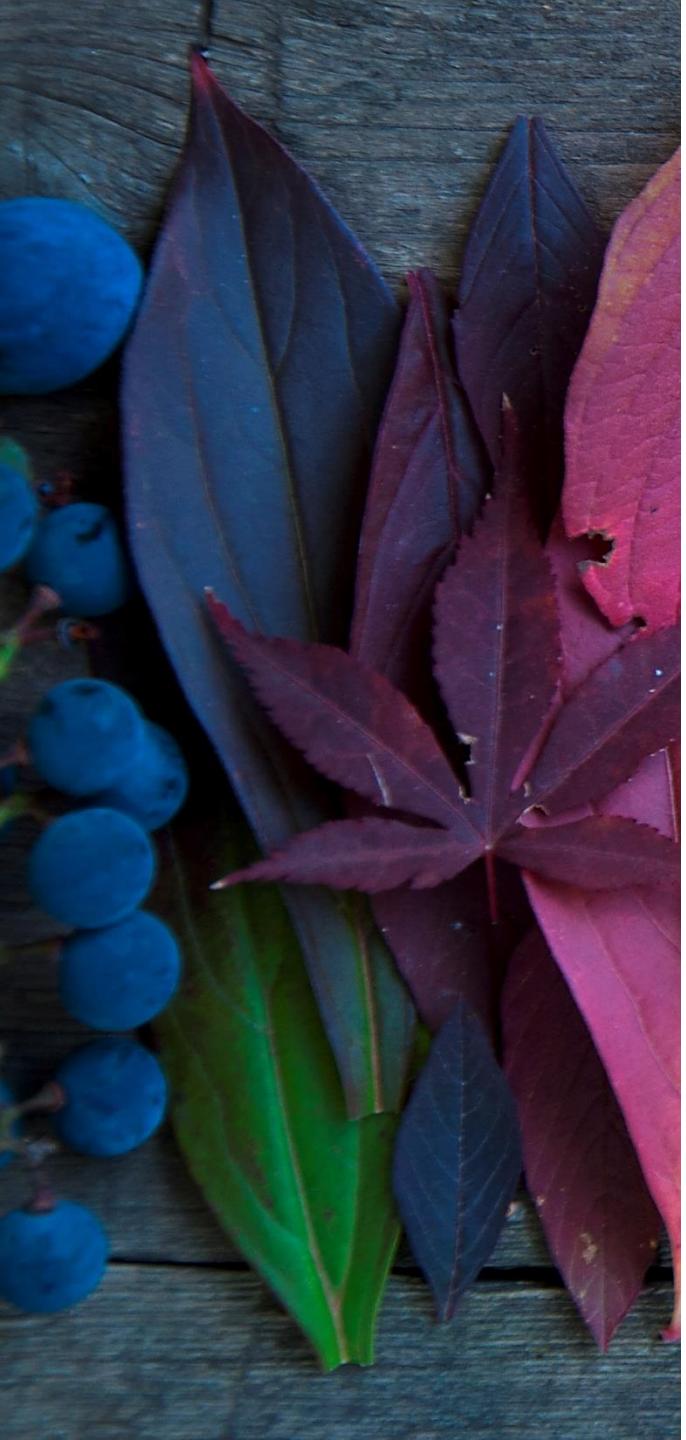
Tips

- *Essential to send early requests for information to target – takes time to establish position*
- *Potential short-cuts:*
 - *Has target / seller undertaken analysis?*
 - *Have previous filings been made?*



Managing parallel notifications

- Multi-jurisdiction assessments now include FDI alongside merger control globally as a matter of course
- Timings can be unpredictable in some jurisdictions. Authorities will want to know where else being filed – significant behind-the-scenes discussions and contact
- **Managing risk between jurisdictions:**
 - Could a remedy offered in first-mover jurisdiction (where initial review has been completed quickly) jeopardise ability to offer another remedy in more important jurisdiction (e.g. access to IP)?
 - Clear global strategy required (sequencing / managing)
 - Particular difficulties can arise if merger control requirements conflict with FDI control requirements (e.g. if merger control requires divestments, these divestments must also be acceptable under FDI control perspective)



SPA: Conditionality, cooperation, long-stop date...

- Majority of regimes are suspensory, i.e. CP required and usual cooperation requirements
- CP may need to accommodate shifting / developing legislation
- **Caution:** Universal HOHW may fetter ability to provide suitable remedies and / or clearance in all jurisdictions
- Where multiple filings needed, will need bespoke conditions and careful thought as to acceptable remedies
- Long-stop date to reflect unpredictable timing
- Limitations on information exchange differ from antitrust restrictions



Managing the process

- Accept that FDI is a political as much as a legal process
- It's generally the buyer's notification
- BUT sellers may want to lead at first:
 - auctions – talking to the relevant authorities about candidate buyers
 - listed sellers
 - Dealing with important national assets/keeping Governments happy about sale
- High-level initial conversations may be at principal level – but take legal advice first
- Needs particular coordination where multiple regimes to consider
- Legal counsel can help you with draft briefing notes, filings. Earlier involvement is better





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