



Latin America Desk Newsletter

The purpose of this newsletter is to highlight the key legal developments and business trends in Germany and other parts of Europe in the second half of 2018. We have also included a few transactions which we have recently advised on, including the ones where we have worked jointly with our 'Best Friend' firms in Europe.

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Thresholds Effective – Foreign Investment in Germany

The 2017 amendment to the German Foreign Trade Regulation (AWV) can be characterized as the beginning of a stricter and more comprehensive foreign investment control by the German Federal Ministry for Economic Affairs and Energy (BMWi). An example of this is the abandoned acquisition of Leifeld Metal Spinning AG (Leifeld), a German manufacturer of metal forming technology, by the Chinese investor Yantai Taihai Group (Yantai), a company active in the nuclear sector. On 1 August 2018, Yantai withdrew from the acquisition of Leifeld after the German government had stated that it would prohibit the acquisition.

Another example of a similar approach taken last year by the German Government, even if beyond the foreign investment control regime, was when the German state-run bank KfW blocked State Grid Corporation of China (SGCC) from buying a 20% stake in 50Hertz, high-voltage energy network operator, which supplies electricity to about 18 million people.

As of 2017, a notification to the BMWi is required for certain foreign investments in German companies that are 'critical infrastructures' and therefore deemed to be particularly relevant to the maintenance of German public policy and security. Until very recently, foreign investment in Germany was subject to review by the BMWi if a non-European person or entity acquired a German company or a direct or indirect shareholding in the company and, after the acquisition, held at least 25 per cent of the voting rights in the target. However, with effect from 29 December 2018, this threshold has



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been now significantly lowered to include acquisitions of at least 10% of the voting rights in the target company in Germany, if the target company operates in the area of critical infrastructures and related technology or manufactures certain military related products or technology.

In addition to companies active in defence, IT security sector, critical infrastructures and software for such critical infrastructure, the lower threshold will now also apply to certain companies active in the media sector i.e. companies that contribute to the shaping of public opinion by means of broadcasting, teledmedia or print products and which are characterised by providing up-to-date information and of having a widespread impact. Accordingly, foreign investments in those companies now require notification to the BMWi.

The increased scrutiny of acquisitions in the aforementioned sectors is expected to extend the duration of the applicable review periods and consequently, likely affect the deal timelines for the transaction. In view of the recent developments, foreign investors should pay particular attention to German foreign investment control issues, particularly in relation to newly emphasised business areas of potential concern. However, despite increasing state control and intervention in recent times, it can be assumed that prohibitions of foreign investments will remain the exception. As in the past decade, the German government will most likely continue welcoming the majority of foreign investments as a source of economic growth.

Enhanced Cooperation and Scrutiny – Foreign Investments in the EU

Another important development for foreign investments in Europe is that the EU will soon be able to coordinate scrutiny of investments from third countries in strategic sectors. A new regulation, that is expected to enter into force in the first quarter of 2019, will enable the Commission to issue advisory opinions to the member states where it considers that an investment, whether planned or completed, would likely affect security or public order in one or more member states. The draft also provides for a cooperation mechanism among member states and with the Commission. Member states will need to inform each other and the Commission of any foreign direct investment that is undergoing screening by their national authority. Upon request, they will also need to make available comprehensive acquisition-related information, such as the ownership structure of the foreign investor and the financing of the investment.

New DIS Rules of Arbitration create an attractive dispute resolution framework for international parties

The new arbitration rules of the German Arbitration Institute (DIS) entered into force on 1 March 2018. The new rules offer a comprehensive reform that takes into account key developments in international commercial arbitration law and practice over the last two decades. More than ever, the 2018 DIS Rules offer international parties an attractive



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institutional framework for the resolution of disputes – whether or not they involve German parties or have some other connection to Germany or German law.

In general the 2018 DIS Rules focus on efficiency, transparency and flexibility.

Some key developments of the 2018 DIS Rules are as follows:

- Arbitrations under the 2018 DIS Rules need not be seated in Germany and can be conducted in English (or any other language the parties agree on)
- Various new regulations are aimed at making proceedings more efficient and therefore more attractive and cost-effective for the parties. For example:
 - A case management conference, with a mandatory agenda aimed at maximizing the efficiency of the proceedings, shall in principle be held 21 days after the constitution of the arbitral tribunal.
 - A time limit of 21 days (after having received the request for arbitration) for the respondent to nominate an arbitrator and comment on certain fundamental aspects of the arbitration proceedings (such as the seat of the arbitration, the language of the arbitration and the law applicable to the merits).
 - A time limit of 45 days (which may be extended by the DIS by not more than 30 days) for the respondent to file its answer to the request for arbitration.
 - The final award shall in principle be issued within three months after the last hearing or the last authorized submission.
- Irrespective of the amount at dispute, the rules for expedited proceedings will only apply if the parties agree. In that case, only one round of written submissions is permitted in addition to the request and answer. Moreover, an arbitral award shall in principle be issued within six months of the case management conference.
- In order to encourage efficient proceedings, the effectiveness of conducting the proceedings can be taken into account by the DIS when determining arbitrators' fees. Arbitrators' fees are determined ad valorem, and the DIS has the power to reduce arbitrators' fees based on the time taken to issue the final award.
- Like the previous version, the 2018 DIS Rules provide that the arbitral tribunal shall encourage an amicable settlement between the parties at every stage of the arbitration absent a party objection. This obligation of the arbitral tribunal, together with the ability of the arbitral tribunal to provide the parties with a preliminary non-binding assessment of the case, is considered an important contribution towards early and efficient resolution of disputes.
- The 2018 DIS Rules contain relatively straightforward provisions for multi-party and multi-contract arbitration which foresee minimal involvement of the DIS.

The DIS has broad experience in dealing with international parties: one out of three proceedings involves at least one foreign party. Additionally, the costs of arbitration proceedings administered by the DIS are noticeably below the costs of other established arbitral institutions (see table below). The DIS keeps all details of proceedings confidential.



Illustrative comparison of costs of proceedings (arbitrators' fees and administrative fees only) with a three-member tribunal

Institution	Value of dispute ...	
	... USD 5 million	... USD 50 million Institution
DIS	204,000	415,000
SIAC	227,000	510,000
ICC	307,000	613,000

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Whistleblower protection in the EU

Recently the European Parliament Committee on Legal Affairs voted for improved whistleblower protection. The report on the proposal for a Directive on the protection of persons reporting on breaches of EU law (the so-called “Whistleblowers Directive”) was adopted.

The report provides, inter alia, that internal notifications within the organization and external notifications to authorities are placed on the same level and treated in the same way from a legal point of view. Whistleblowers should be free to choose whether to use an internal or external (i.e. via authorities) reporting channel. However, if a whistleblower provides information to the public, an internal or external notification must normally still have been made in advance. The Committee on Legal Affairs also advocates the possibility of anonymous reporting. Finally, it is envisaged that EU member states should provide financial assistance to whistleblowers if they suffer economic losses as a result of their actions.

The EU Parliament must now formally adopt this report in order to enter into negotiations with the Council and the Commission. The resulting draft will then be put to the vote in the EU Parliament. After that, the final directive must be incorporated into the national law of the member states.

The protection of whistleblowers is a balancing act. The Reporting of misconduct within the company to the Compliance Department as the responsible unit is in the very interest of the company itself. Misconduct within the company can lead to sanctions worth billions, as recent cases in Europe have shown. On the other hand, companies must be protected against damage to their reputation and betrayal of secrets. The Legal Affairs Committee’s proposals will most likely lead to an increase in the number of notifications of (potential) misconduct to authorities by employees. Pressure on companies to establish effective compliance systems and create incentives to report violations internally will increase.



In depth review of cross border transaction by German merger control watchdog in 2018

As in previous years, the German merger control watchdog, the Federal Cartel Office (FCO), reviewed numerous cross border transactions in 2018. Due to comparatively low filing thresholds¹ hundreds of international transactions are subject to mandatory merger control review in Germany each year. Almost all of those cases are cleared within one month after notification in first phase proceedings. However, a few are subject to in depth review. In 2018, this was the fate of three cross border transactions.

The first matter concerned the acquisition of CIT Rail Holdings (Europe) S.A.S. (CIT), a French based rail rental company by its German competitor VTG AG (VTG). As the matter gave rise to substantial competition concerns related to the European markets for dry bulk and wet rail car lease from the FCO's perspective VTG had to offer a remedy to mitigate such concerns in order to obtain clearance. Interestingly, VTG committed that CIT, the target, would sell part of its assets, mainly its subsidiaries in Germany and Luxembourg to a third party competitor. Such sale needed to be done before the acquisition of CIT by VTG could be closed as the FCO cleared the transaction subject to the condition precedent of the completion of the remedy sale. The FCO requested, in other words, in a "fix it first" sale under a strict timeline.²

Another matter related to the acquisition of the marine cargo handling business of TTS Group ASA, Norway, by MacGregor, a subsidiary of Cargotec Oyj, Finland (MacGregor)³ MacGregor and the TTS target business were both active in the markets for the development and construction of ship cranes, hatch covers and winches and in the respective markets for the maintenance and repair of these products. Although the transaction resulted in high market shares in several markets, the FCO had to clear the transaction as those markets were so-called "minor markets".⁴

The third transaction concerned the envisaged acquisition of Brink International B.V., the Netherlands (Brink) by Horizon Global Corporation, USA (Horizon). Both Brink and Horizon are manufacturer of towbars for cars and light commercial vehicles. The FCO found that the market share of Horizon post-merger would have amounted to 55-60% whilst the only major competitor had a market share of 35-40%. Contrary to the parties' claims, the FCO found that car manufacturers (OEM) would not have sufficient buying power to countervail the resulting market power of Horizon and its main competitors. When the FCO consequently raised concerns and its intention to block the deal Horizon withdrew the notification.

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¹ A transaction basically requires notification in Germany if in the last completed business year (i) the aggregated worldwide turnover of the companies concerned exceeds EUR 500 million, (ii) at least one of the companies concerned had sales of more than EUR 25 million in Germany (iii) another company concerned had sales in Germany of more than EUR 5 million and (iv) the matter has effects in Germany, unless EU merger control applies. Since 2017, an alternative consideration based threshold has been added.

² Hengeler Mueller advised VTG in the merger control proceedings.

³ Hengeler Mueller advised Cargotec/MacGregor in the merger control proceedings.

⁴ A „minor market“ basically is a market with a volume of less than EUR 15 million in Germany (even if it geographically goes beyond Germany) and exists for more than five years.



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Recent transactions

Hengeler Mueller advised **J.P. Morgan** on financing of acquisition of Qualtrics by SAP. SAP SE and Qualtrics International Inc. have entered into a definitive agreement under which SAP will acquire all outstanding shares of Qualtrics, a global pioneer in experience management, for USD 8 billion in cash. SAP is financing the acquisition through a syndicated loan arranged and underwritten by J.P. Morgan.

Hengeler Mueller advises **Hymer** on sale to Thor Industries. The enterprise value is approximately EUR 2.1 billion.

Hengeler Mueller advised **Magna** on sale of Fluid Pressure & Controls business to Hanon Systems, a South Korea-based global supplier of thermal and energy management systems. The sale price is approximately USD 1.23 billion, before the assumption of net debt and pension liabilities at closing, and subject to customary closing adjustments for net working capital.

Hengeler Mueller advised **Takeaway.com** in an integrated team together with Best Friend law firm De Brauw Blackstone Westbroek, on the acquisition of Delivery Hero's German food delivery operations. The transaction volume amounts to approximately EUR 930 million in cash and equity. Takeaway.com, a leading online food delivery marketplace in Continental Europe, Israel and Vietnam, is already active in Germany with its brand Lieferando.de.

Hengeler Mueller advised **GEG German Estate Group** on acquisition of Eurotheum from Commerz Real. The total investment volume amounts to approximately EUR 250 million.

Hengeler Mueller advised **Cerberus** on privatisation of HSH Nordbank. Previously controlled by the federal states of Hamburg and Schleswig-Holstein, the acquisition of the bank constitutes the first privatisation of a German Landesbank.

Hengeler Mueller advised **Günther Group** on ZEAL Network's takeover offer for Lotto24. On completion, the transaction will create a digital lottery group with currently more than 5 million combined customers globally and current combined billings of about EUR 500 million per year.

Hengeler Mueller advised **Groupe PSA** on strategic partnership with Segula Technologies. Segula intends to establish a European engineering campus in Rüsselsheim with up to 2,000 employees joining from the Opel International Technical Development Center along with acquisition of facilities from the vehicle and propulsion development of Opel.

Hengeler Mueller advised affiliates of the **Blackstone Group** on the acquisition of a multinational logistics properties portfolio.



Hengeler Mueller advised **Aareal Bank Group** on the acquisition of Düsseldorfer Hypothekenbank.

Hengeler Mueller advised Finnish **Uponor Group** on the sale of Zent-Frenger to Swedish Swegon group.

Hengeler Mueller advised adidas on EUR 500 million equity-neutral convertible bond offering.

Hengeler Mueller advised **Shanghai Pudong Development Bank** on financing of Ningbo Jifeng's tender offer to the shareholders of Grammer.

Hengeler Mueller advised **GfK SE** on sale of four global divisions to Ipsos SA. The sale includes GfK's respective businesses in 25 countries.

Hengeler Mueller in an integrated team together with Best Friends, Slaughter and May and Bredin Prat advised **VTG Aktiengesellschaft**, one of the leading railcar leasing and rail logistics companies in Europe, on the acquisition of NACCO Group and in connection with the sale of business activities by NACCO

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The Latin America Desk advises Latin American companies and financial investors on their business activities in Germany and throughout Europe and in accompanying German companies and financial investors to Latin America. Members of the Latin America Desk regularly visit Latin America to meet corporates, financial investors and law firms and to attend conferences.

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