

Surviving Investment Screening in Germany and Europe

*Virtual training on how to prevent the prohibition and restriction of Arab investment in
Germany and Europe*

May 25, 2021

Speakers:

Dr. Philipp Stompfe, Attorney, Alexander & Partner, Germany

Professor Dr. Steffen Hindelang, Uppsala University, Sweden

Jens Hillebrand Pohl, Adjunct Lecturer, Maastricht University, The Netherlands

Convenor:

Dr. Philipp Stompfe

PROGRAM

THE NEW EUROPEAN AND GERMAN INVESTMENT SCREENING FRAMEWORK

Chair: Dr. Philipp Stompfe, Attorney, Alexander & Partner, Berlin

09:00 CET **Opening remarks**

Dr. Philipp Stompfe

Attorney, Alexander & Partner, Berlin

09:15 CET **EU Screening Regulation 2019/452 and the updated German screening legislation**

- *Legislative background, principal policy considerations and design choices*
- *Key elements of the EU screening framework: application, process, redress*
- *The five critical sectors: technology, infrastructure, inputs, data and media.*

Dr. Philipp Stompfe, Attorney, Alexander & Partner, Berlin

10:45 CET **Multilevel European FDI screening: multi-jurisdictional and multi-sectoral**

- *The new EU cooperation mechanism and the role of the European Commission*
- *Sector-specific screening and multi-agency cooperation*
- *Synchronising investment control and merger control*

Jens Hillebrand Pohl, Adjunct Lecturer, Maastricht University

12:00 CET **The concept of national security and public order**

- *Review of EU and German jurisprudence on 'public policy' and 'public security' for purposes of the derogation from the free movement of capital.*
- *Concretizing 'security' and 'public order' in practice in the application of the Screening Regulation: executive autonomy vs legal certainty*

Professor Dr. Steffen Hindelang, Uppsala University

13:00 CET **End of Training**

Programme subject to amendment.

About the Topic

German investment control is regulated by the Foreign Trade and Payments Act (“AWG”) and the Foreign Trade and Payments Ordinance (“AWV”). In March 2018, following an initiative of Germany, France and Italy, the Council and Parliament of the European Union approved a Regulation on establishing a framework for screening of foreign direct investments (“FDI”) into the European Union (“Regulation”). The new Regulation became fully effective in October 2020. The Regulation creates an enabling framework for Member States to screen foreign direct investments on grounds of security and public order. The European Commission and the EU Member States possess wide authority to directly interfere in FDI screening processes taking place in a certain Member State. The Regulation in conjunction with the current amendments of relevant national laws in major European economies further enlarges legal policy protectionism towards FDI.

In the last three years, German investment control has been the subject of several reforms, in the course of which the German government substantially tightened the applicable regulatory framework for the review of foreign investment by significantly extending the investment sectors subject to review and by lowering the relevant thresholds triggering the screening mechanism.

The structure and scope of investment review provided for under the AWG in conjunction with the AWV is that the Federal Ministry of Economics, the competent German authority, possesses an extensive ex-post examination competence regarding, for example, the acquisition of shares of German companies by foreign, especially non-EU nationals. This competence is divided into sector specific and cross-sectoral investment screening.

Recently, the German legislator has lowered the threshold for the screening of FDI to the acquisition of 10 per cent of the voting rights of a German company being active in the military and encryption sector and of German companies which are operating in the field of critical infrastructure. Critical infrastructure currently includes facilities and systems in the energy, water, food, telecommunications, transport, financial, insurance and healthcare sectors.

Furthermore, the 15th AWV amendment which became effective in June 2020 is primarily related to the consequences of the COVID 19 pandemic and stipulates further state control of foreign investments in such German target companies that are active in the health care and infection control sectors. To this end, acquisitions of these companies must be reported to the Federal Ministry of Economics. This also applies to share acquisitions above a participation threshold of 10 per cent. In this context, it cannot be ruled out that the Federal Ministry of Economics will also further tighten its administrative practice in this regard and could make greater use of its powers to restrict and prohibit investment in the areas of public health and infection control.

In general, the reforms undertaken will have a serious impact on the practice of international investments in connection with German target companies. Therefore, a detailed analysis of investment control law risks will become more important than ever for foreign investors in order to avoid execution obstacles, unexpected delays and even criminal sanctions for violations of the execution prohibition. This also applies to ongoing transactions that have not yet been consummated at the time the relevant legislative amendments come into force and therefore fall under the new, stricter rules. Overall, international investors need to be aware of the increasing hurdles for direct and indirect acquisitions of German target companies.

About the Speakers

Dr. Philipp Stompfe, LL.M., Rechtsanwalt / Attorney at Law (Germany)

Dr. Philipp Stompfe, LL.M. (London) is attorney at law at Alexander & Partner (Berlin/Stuttgart/Paris/Vienna/Doha/Riyadh/Ras Al Khaimah/Cairo/Muscat). Dr. Stompfe is primarily involved in international litigation and arbitration. He regularly represents and advises states and commercial clients in international commercial and investment arbitration. He is specialized in international investment and economic law as well as in public international law.

Furthermore, Dr. Stompfe is an Adjunct Professor of Law at the University of Southern Denmark for public international law, private international law and international business law. He is further an Adjunct Professor in international investment and business law at the University of Cologne/Germany and the University of Saarbruecken/Germany.

Dr. Philipp Stompfe is constantly acting as counsel in commercial arbitrations before all of the major arbitral institutions mainly related to construction, energy, distribution, real estate and M&A disputes. He further advises on international contract, corporate and construction law (FIDIC, NEC, VOB) and on the structuring and implementation of cross-border investment projects in the Gulf States. Dr. Stompfe has negotiated, drafted and enforced numerous construction contracts based on the FIDIC Red, Silver and Yellow Book.

Dr. Stompfe regularly publishes on public international law, international business and investment law as well as on topics of international arbitration.

Philipp Stompfe has lived and studied in the Middle East and has great knowledge of Arab legal systems, in particular with regard to Qatar, UAE, Kuwait, Libya and Egypt. Prior to joining Alexander & Partner in 2017, Philipp Stompfe worked for an international law firm being mainly responsible for the structuring and implementation of construction and infrastructure projects in the MENA-Region, especially in Libya and Qatar.

Philipp Stompfe studied law at the University of Marburg (Germany) and passed his first State Exam (J.D. equivalent) in 2010. He obtained his LL.M. (Master of Law) in International Business Law and International Dispute Resolution from Queen Mary University of London. In 2016, he received his doctor's degree with summa cum laude from the University of Cologne (Germany) for his doctoral dissertation on "The Formation and Protection of International Investment Agreements in the Arab World and Example of Libya and Qatar". He was awarded the Best Dissertation in International Law of 2016 by Osborne Clarke.

More information and contact at <https://www.alexander-partner.com/team/dr-philipp-stompfe.html> and LinkedIn.

About the Speakers

Professor Dr. Steffen Hindelang, LL.M.

Steffen Hindelang initiated CELIS in 2019 with Andreas Moberg and is one of its directors.

He is currently professor of international investment and trade law at Uppsala University in Sweden. He teaches and researches in the areas of international economic law, esp. international investment law, EU law and German public law. He is also faculty at the University of Southern Denmark and adjunct faculty at Humboldt-Universität zu Berlin and Technical University Berlin. He is senior fellow at the Walter Hallstein Institute of European Constitutional Law at Humboldt-Universität zu Berlin and academic advisor to the International Investment Law Centre Cologne (IILCC). Previously, he was guest professor at, among others, the University of Uppsala as a Riksbankens Jubileumsfond – Alexander von Humboldt Stiftung Swedish Prize Laureate, at Nagoya University, Bocconi University Milan, the University of Lausanne, the Charles University Prague, the Moscow State Institute of International Relations (MGIMO), and the Turkish-German University Istanbul.

Furthermore, he regularly advises, inter alia, European governments in international investment disputes, overhauling national legislation on investment screening and international organisations, such as UNCTAD, on matters of reform of the current international investment law regime. Steffen is also fully qualified for the offices of a German judge and advocate. He was repeatedly invited by the European Parliament's INTA Committee to prepare studies on the evolution of the EU Common Commercial Policy in the area of investment. Since 2019, he serves at the ICSID Panel of Conciliators designated by the Federal Republic of Germany.

More information and contact at <https://www.steffenhindelang.eu/> and LinkedIn.

Jens Hillebrand Pohl, LL.M., Solicitor (England and Wales, Ireland) / Attorney (New York)

Jens Hillebrand Pohl is one of CELIS' directors.

He further serves as Course Director at the Academy of European Law (Europäische Rechtsakademie, ERA) in Trier, Germany. He is also adjunct lecturer and doctoral fellow at the Institute of Globalization and International Regulation (IGIR), Maastricht University, the Netherlands. He holds an LL.M. from Harvard Law School and is a PhD candidate under the supervision of Prof. Dr. Peter Van den Bossche at Maastricht University where he focuses his dissertation on the law and practice of foreign investment control. Prior to returning to academia, he practised before the U.S. Federal Bankruptcy Court for the Southern District of New York as an associate in the New York head office of the law firm Paul, Weiss, Rifkind, Wharton & Garrison LLP and served as legal and compliance officer at the European Financial Stability Facility, the forerunner of the European Stability Mechanism (ESM). He is an English and Irish solicitor and a member of the New York Bar. His nationality is Swedish.

More information and contact at LinkedIn.