Foreign Investment Control in Germany Law Overview and Advice

德国外商投资审核 法条纵览以及实务建议

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SCOPE OF INVESTMENT REVIEW　德国外商投资审查的范围

Federal Ministry of Economic Affairs and Energy (BMWi)
联邦经济事务和能源部

The German legal framework for foreign investment review consists of two different procedures: Sector-specific investment review and cross-sectoral investment review.
德国外商投资审查框架包含两套不同的程序：特定行业的投资审查和跨行业的投资审查。

- Both procedures aim to safeguard public order and security;
  两套程序都旨在保障公共秩序与安全；
- Industrial policy is not a matter of public order or security.
  不能因为产业政策或类似原因禁止投资。

Sector-Specific Investment Review 特定行业的投资审查	Cross-Sectoral Investment Review 跨行业投资审查	
Security-Sensitive Sectors 涉及安全隐患的产业部门	Listed Business 被列出的业务	General Security Concern 一般安全考量
Acquisition **must be notified** 此类收购**必须申报**	Acquisition **must be notified** 此类收购**必须申报**	Notification of acquisition optional 可选择就此类进行备案

SCOPE OF APPLICATION – CROSS-SECTORAL PROCEDURES

申报范围 - 特定行业和跨行业的投资审查

Cross-sectoral Investment Review (Sec. 55–59 AWV)

- Every acquisition by Non-EU / Non-EFTA-foreigners
- At least 10% of critical infrastructure or public health
- At least 25 % of any other business
- Public order or security

Reporting obligation if target company is an operator of a critical infrastructure or public health

Acquirer requests clearance certificate

Proactive by BMWi

Clearance certificate BMWi

Prohibition/ instructions BMWi with consent of BReg

跨行业投资审查（《对外经济条例》第55–59条）

- 所有来自非欧盟或非欧州自由贸易联盟成员国的投资者
- 在关键性的基础设施或公共健康领域至少10%的表决权
- 其他业务领域中至少25%的表决权
- 公共秩序和安全

若标的企业是关键基础设施或公共健康的运营商，申报义务

收购者申请无异议证明

联邦经济部依职权主动调查

无异议证明 联邦经济能源部

否决/指示 联邦经济能源部取得联邦政府同意

REQUIREMENTS 要求

Cross-sectoral (Sec. 55 – 59 AWV)

Regular examples for subjects of the business activity which could endanger public security or order

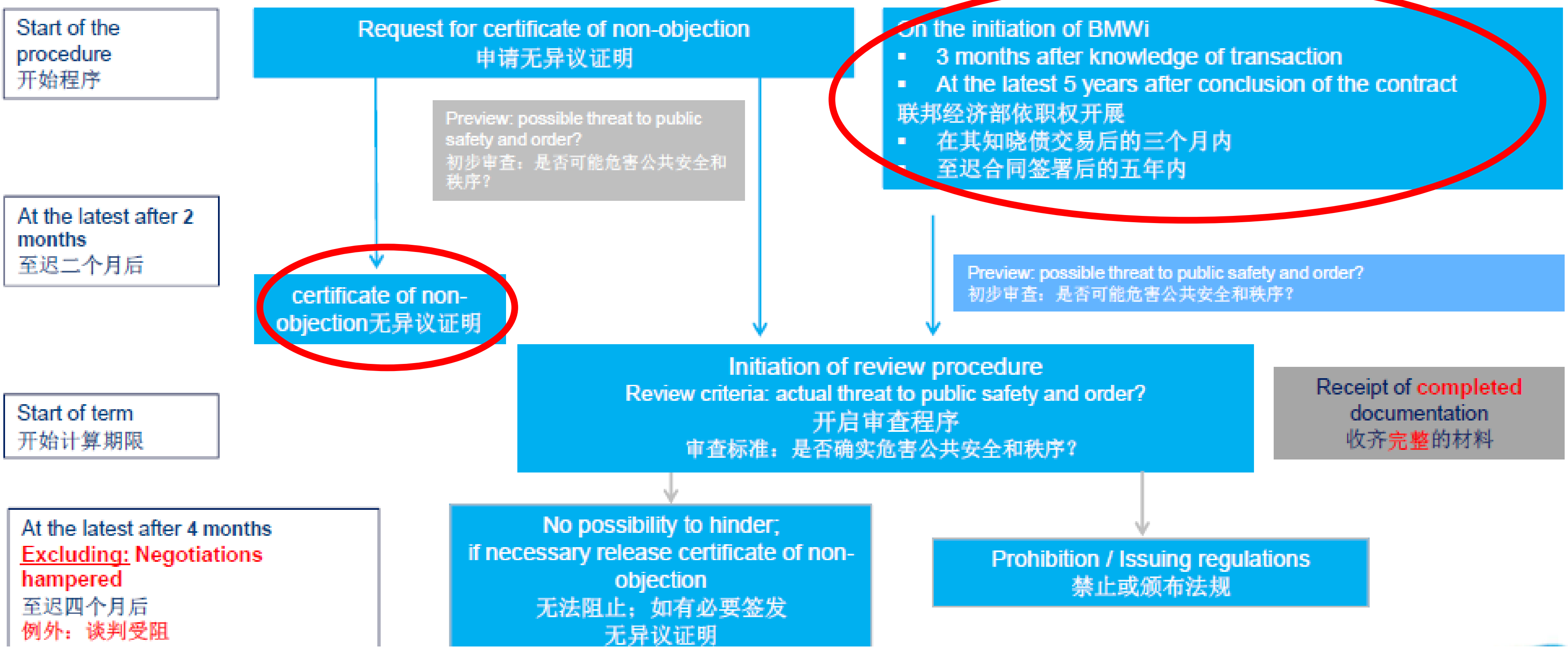
- Critical infrastructure (e.ga. energy supply)
- Industry-specific software in the sectors
  - Energy
  - Water
  - IT
  - Finance and insurance industries
  - Health
  - Transport
  - Nutrition
- Organizational measures pursuant to Sec. 110 TKG
- Cloud computing services
- Certain components of the telematics infrastructure pursuant to SGBV
- Media
- Public Health

跨行业投资审查
（《对外经济条例》第55–59条）

可能危及公共安全或公共秩序的商业项目其典型示例：

- 关键性的基础设施 (例如能源供应)
- 特定行业内的软件
  - 能源
  - 水利
  - 信息技术
  - 金融保险领域
  - 健康
  - 运输
  - 食品
- 根据《电信法》第110条的组织措施
- 云计算服务
- 根据《社会法典》第五部规定的远程基础设施的特定组件
- 媒体行业
- 公共健康

PROCESS OF CROSS-SECTORAL PROCEDURE 跨行业审查流程



SANCTIONS 处罚

- Section-Specific Investment Review (acquisition must be notified)
  特定行业投资审查 （收购必须申报）
  - Closing is prohibited prior to approval
    在审查通过前无法交割
- Cross-Section Investment Review
  跨行业投资审查
  - Prior to Closing: Goverment can prohibit transaction
    交割前：政府有权阻止交易
  - After Closing: If prohibited, transaction becomes void and must be unwound
    交割后：如果审查未通过，则交易本身无效须恢复原状
  - Alternatively: Restrictions can be imposed on transactions or target must enter into contractual obligations vis-à-vis the goverment
    其他可能：交易本身可被限制或标的必须与政府签订合同承诺
- A violation may trigger fines up to EUR 500,000
  违规可被处以最高50万欧元的处罚

NON-OBJECTION CERTIFICATE 无异议证明

- **Advantages of obtaining a non-objection certificate:**
  获得无异议证明的优点：

  - Speed up transaction: Avoid disadvantage especially at auction.
    加速交易：避免尤其在竞价过程中的劣势。
  - Legal certainty: The Ministry has 3 months upon knowledge of the transaction to pick up the case whereby such investigation ex officio may occur within 5 years after signing of the transaction.
    法律确定性：经济部在知晓相关交易后有三个月的时间进行立案并且可以在签署交易后的五年内依职权对此类进行调查。
  - Cooperation bonus: Ex officio administrative proceedings are often less cooperative than administrative proceedings in addition to an application.
    合作加分：依职权开展的行政程序相较依申请开展的行政程序通常情况下配合度较差。

A piece of advice for tech companies
对科技公司的实务建议

- Reality check at an early stage of the planned investment
  在德国投资时，请在投资计划的早期阶段检查您的投资是否有可能受到外商投资审查

- Allow yourself enough time for the transaction
  给自己留出足够的时间进行交易，例如：如果您的投资很可能受到外商投资审查，可以考虑选择一个相对较晚的交易最终完成日期 (long stop date)

- Obtain clearance as early as possible prior to Signing
  尽量在签约前尽早获得许可