SOVEREIGN WEALTH FUNDS INVESTING IN GERMANY

Marc-Philippe Weller & Luca Kaller[*]

INTRODUCTION

Sovereign wealth funds ("SWFs") have been around for a while—at least since the 1950s.[1] But only in the past fifteen to twenty years have they become of global power and interest. As of 2015, there were seventy-three SWFs owning assets amounting to an estimated $6.3 trillion.[2] In comparison, private hedge funds managed assets of around $3 trillion in the same year.[3] As James Surowiecki for the *New Yorker* put it: "These funds now have the buying power to shape market prices and acquire assets throughout the developed world. Were China's fund so inclined, it could buy

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* Prof. Dr. Marc-Philippe Weller, Licencié en droit (Montpellier), is director of the Institute of Foreign Private and Economic Law at the University of Heidelberg. Luca Kaller, LL.B. (London/Cologne), is a research assistant at the Institute of Foreign Private and Economic Law at the University of Heidelberg. The Article is, inter alia, based on Marc-Philippe Weller, *Ausländische Staatsfonds zwischen Fusionskontrolle, Außenwirtschaftsrecht und Grundfreiheiten*, 2008 ZIP 857 (2008).

1. *See* Simon Johnson, *The Rise of Sovereign Wealth Funds*, 44 FIN. & DEV. 56, 56–57 (2007) http://www.imf.org/external/pubs/ft/fandd/2007/09/pdf/straight.pdf; Gerard Lyons, *State Capitalism: The Rise of Sovereign Wealth Funds*, 14 L. & BUS. REV. AM. 179, 184 (2008).

2. PREQIN, 2015 PREQIN SOVEREIGN WEALTH FUND REVIEW: EXCLUSIVE EXTRACT 5 (2015), https://www.preqin.com/docs/reports/2015-Preqin-Sovereign-Wealth-Fund-Review-Exclusive-Extract-June-2015.pdf; *see also Institutional Investor Profiles,* SWFI http://www.swfinstitute.org/sovereign-wealth-fund-profiles/ (last visited Nov. 7, 2017). Some estimate that the total assets under management amounted to approximately $5.7 trillion in February 2016. *See* Veljko Fotak et al., *A Financial Force to be Reckoned With? An Overview of Sovereign Wealth Funds* 2 (European Corp. Governance Inst., Working Paper No. 476, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2825928.

3. Svea Herbst-Bayliss, *UPDATE 1–Hedge Funds Suffer Biggest Quarterly Drop in Assets Since 2008–Data*, REUTERS (Oct. 20, 2015, 2:25 PM), http://www.reuters.com/article/hedgefunds-assets-idUSL1N12K1QK20151020; *see also* Valeria Miceli et al., *Opportunities or Threats? The Current and Future Role of Sovereign Wealth Funds in Financial Markets*, DEUTSCHE ASSET & WEALTH MGMT., March 2015, at 6, http://at.e-fundresearch.com/files/deutsche_awm_white_paper_sovereign-wealth_funds_mar2015.pdf.

Ford, G.M., Volkswagen, and Honda, and still have a little money left over for ice cream."[4]

This emerging power of SWFs has not solely triggered joyous reactions. At times, one could even get the impression that hedge funds had found a(n evil) bigger brother—SWFs, the new "villains of the global economy."[5] Their lack of transparency[6] and regulation,[7] the number of recent corruption scandals,[8] and their vast financial power—combined with inextricable ties to politics—are only some of the factors raising suspicion among domestic politicians.[9] Therefore, in 2008, when China announced its plans to establish a SWF with assets of up to $300 billion, German politicians felt obliged to take action.[10] The German Foreign Trade and Payments Act (*Außenwirtschaftsgesetz*, "FTPA") and the appendant Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung*, "FTPO") were first amended in 2009, with provisions of the FTPO having been revised very recently.[11] These acts now grant the Federal

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4. James Surowiecki, *Sovereign Wealth World*, NEW YORKER (Nov. 26, 2007), http://www.newyorker.com/magazine/2007/11/26/sovereign-wealth-world.

5. Ulrich Schäfer, *Unheilsbringer und Retter zugleich*, SÜDDEUTSCHE ZEITUNG, Jan. 25, 2008, at 22.

6. *See* WISSENSCHAFTLICHE DIENSTE DES DEUTSCHEN BUNDESTAGES, DIE BEDEUTUNG VON STAATSFONDS UND PUBLIC PRIVATE PARTNERSHIPS FÜR DIE DEUTSCHE WIRTSCHAFT UND POLITIK 10 (2007), https://www.bundestag.de/blob/436208/6150ed6358bc22436d731c4ad69f9c97/wd-5-184-07-pdf-data.pdf.

7. Lyons, *supra* note 1, at 184–85, 191; Miceli et al., *supra* note 3, at 19. The International Monetary Fund had made attempts to increase the regulation of SWFs by developing the so-called Santiago Principles. INT'L WORKING GRP. OF SOVEREIGN WEALTH FUNDS, SOVEREIGN WEALTH FUNDS: GENERALLY ACCEPTED PRINCIPLES AND PRACTICES: "SANTIAGO PRINCIPLES" (2008), http://www.ifswf.org/sites/default/files/santiagoprinciples_0_0.pdf. However, they have so far proven to be a toothless tiger. *See* Robert Weber & Christoph Schalast, 45 STUDIEN DES DEUTSCHEN AKTIENRECHTS 11, 27 (2009). *See generally* Uwe Schneider, *Die Santiago-Principlies—am Problem vorbei*, 2009 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 553 (2009).

8. Michael Ferber, *Skandale machen Schlagzeilen*, NEUE ZÜRICHER ZEITUNG (June 16, 2016, 6:00 AM), http://www.nzz.ch/finanzen/aktien/staatsfonds-korruption-ch-ld.89251.

9. INT'L MONETARY FUND, SOVEREIGN WEALTH FUNDS—A WORK AGENDA 4 (Mark Allen & Jamie Caruana eds., 2008).

10. *See* Ulf Marquardt & Sorika Pluskat, *Die Kontrolle von Unternehmenserwerben nach dem novellierten AWG*, 2009 DEUTSCHES STEUERRECHT 1314, 1314 (2009); Wilhelm Reinhardt & Annekatrin Pelster, *Stärkere Kontrolle von ausländischen Investitionen—Zu den Änderungen von AWG und AWV*, 2009 NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT 441, 441 (2009).

11. Official English translations of the FTPA and FTPO, issued by the Language Service of the Federal Ministry for Economic Affairs and Energy in 2013, will be cited to throughout this Article. *See* BMWi, FOREIGN TRADE AND PAYMENTS ACT (AUßENWIRTSCHAFTSGESETZ—AWG) (2013) [hereinafter FTPA], http://www.gesetze-im-internet.de/englisch_awg/englisch_awg.pdf; BMWi, FOREIGN TRADE AND PAYMENTS ORDINANCE (AUßENWIRTSCHAFTSVERORDNUNG—AWV) (2013) [hereinafter FTPO], http://www.gesetze-im-internet.de/englisch

Ministry of Economics and Technology (*Bundesministerium für Wirtschaft und Technologie*, "the Ministry") the ability to review and prohibit investments of third-country nationals in domestic companies across all sectors. This Article illustrates the issues related to this cross-sectoral examination power. For this purpose, this Article will take a closer look at the characteristics, opportunities, and risks of SWFs in Part I and the new regulations established by the FTPA and the FTPO in Part II. The focus in Part III will then shift towards the question of whether the new legislation infringes the right to free movement of capital, as granted by European Union ("EU") law in article 63(1) of the Treaty on the Functioning of the European Union ("TFEU").[12] Finally, the Article will conclude with some critical remarks on the new FTPA and FTPO.

I. SOVEREIGN WEALTH FUNDS: CHARACTERISTICS, OPPORTUNITIES, AND RISKS

SWFs are state-owned investment funds, designed to invest public funds abroad for profit.[13] Most of the funds originate from a country's fiscal surplus or export revenues, usually from exporting natural resources or commodities, such as oil or gas.[14] These funds primarily serve the purpose of accumulating wealth to create

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_awv/englisch_awv.pdf. Note that the recent revisions made to the FTPO have not been officially translated into English; the Article's authors will provide unofficial translations when relevant. *See* BMWi, *Außenwirtschaftsverordnung* (2017) [hereinafter FTPO (revised)], http://www.gesetze-im-internet.de/awv_2013/index.html. The FTPO is an ordinance of the Federal Government and the Federal Ministry of Economics and Technology issued in 2004 pursuant to authorization in FTPA sections 4, 12 (1) (formerly section 7), an authorization within the meaning of article 80 of the German Basic Law ("GG"). The FTPO's recent revisions were implemented on July 12, 2017, through an ordinance of the Federal Government pursuant to its authorization under the FTPA. *See* FTPA, *supra* note 11, §§ 4, 12 (1). This revision of the FTPO reflects the government's reaction to the increased number of acquisitions of and investments in domestic companies and its effort to clarify the scope of the FTPO's application. *See* Press Release, Federal Ministry for Economic Affairs and Energy, Zypries: "Fairer Wettbewerb und besserer Schutz bei Firmenübernahmen" (July 12, 2017), https://www.bmwi.de/Redaktion/DE/Pressemitteilungen/2017/20170712-zypries-besserer-schutz-bei-firmenuebernahmen.html. For an overview of the recent revisions to the FTPO, see BMWI, NEUNTE VERORDNUNG ZUR ÄNDERUNG DER AUßENWIRTSCHAFTSVERORDNUNG (July 12, 2017), https://www.bmwi.de/Redaktion/DE/Downloads/V/neunte-aendvo-awv.html.

12. *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 63(1), Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU].

13. Dana Choi et al., *Sovereign Wealth Funds: New Target for Foreign Corrupt Practices Act Investigations*, 4 BLOOMBERG L. REP.—BANKING & FIN., 2008.

14. *See* INT'L MONETARY FUND, *supra* note 9, at 5–6.

"buffers" for swings in commodity prices or budget gaps once these resources run dry or to prepare for future public expenditures due to an aging population.[15] Unsurprisingly, those countries that are now rich in commodities—such as Norway, Saudi Arabia, and the United Arab Emirates—are at the forefront of making use of such funds.[16]

In economic terms, SWFs are double-edged swords.[17] On the one hand, they "exist to facilitate macroeconomic stability *and* invest a country's assets over the long term,"[18] making these funds desirable investors, especially in times of economic instability and financial crisis.[19] Recent studies even suggest that SWFs "may benefit financial markets both in micro and macro terms."[20]

On the other hand, SWFs are perceived to pose two particular types of risks—first, the risk of strategic investments.[21] Instead of pursuing purely commercial agendas, these funds may pursue the geopolitical interests of their home state.[22] For example, SWFs might gain access to technologies, know-how, and patents by

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15. GORDON CLARK ET AL., SOVEREIGN WEALTH FUNDS: LEGITIMACY, GOVERNANCE, AND GLOBAL POWER, at xii, 4 (2013); *see also* INT'L MONETARY FUND, *supra* note 9, at 5–6.

16. SACHVERSTÄNDIGENRAT, DAS ERREICHTE NICHT VERSPIELEN 398 (2008), https://www.sachverstaendigenrat-wirtschaft.de/86.html.

17. *See generally* Maximilian Preisser, *Entwicklung eines umfassenden Konzepts für die Regulierung von Staatsfonds*, *in* 7 SCHRIFTEN ZUM UNTERNEHMENS- UND KAPITALMARKTRECHT 46 (2013).

18. CLARK ET AL., *supra* note 15, at 5.

19. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Common European Approach to Sovereign Wealth Funds*, at 4–5 COM (2008) 115 (Feb. 27, 2008), http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52008DC0115&from=DE; INT'L MONETARY FUND, *supra* note 9, at 10.

20. Miceli et al., *supra* note 3, at 20; *see also* INT'L MONETARY FUND, *supra* note 9, at 10.

21. *See* Fotak et al., *supra* note 2, at 13.

22. CLARK ET AL., *supra* note 15, at xiii, 5; *see also* Mario Martini, *Zu Gast bei Freunden?—Staatsfonds als Herausforderung an das europäische und internationale Recht*, DÖV, 2008, at 314; Miceli et al., *supra* note 3, at 19. *But see* SACHVERSTÄNDIGENRAT, *supra* note 16, at 397; STEFFEN KERN, DEUTSCHE BANK, STAATSFONDS UND INVESTITIONSPOLITIK—DER AKTUELLE STAND 14 (2009) (noting that SWFs aim to diversify their investment portfolio and arguing that gaining a controlling influence over a major German company would require a concentration of funds in a way that was contrary to this purpose). However, the joint venture announced in 2010 between China Investment Corporation and Canadian Penn West Energy Trust, in which the former contributed forty-five percent and acquired and additional five percent from its venture partner, at least points to the possibility that some SWFs may also aim to take an active part in operations. *See Penn West Energy Trust and China Investment Corporation Announce Closing of Previously Announced Joint Venture and Equity Financing*, MARKETWIRED (June 1, 2010), http://www.marketwired.com/press-release/penn-west-energy-trust-china-investment-corporation-announce-closing-previously-announced-tsx-pwt.un-1269023.htm.

investing in domestic companies which they may, then, (mis)use to support their own domestic industries.[23]

Second, SWFs might constitute a new form of state capitalism.[24] A non-representative study conducted by the International Monetary Fund in 2008 showed that government officials had majority representation in SWFs in 36% of cases and minority representation in 32% of cases.[25] However, Western economies have just freed themselves of most state-controlled companies.[26] SWFs may just reverse this development[27]—a "cold re-nationalisation" (*kalte Verstaatlichung*) might lurk.[28]

II. THE NEW RULES ON FOREIGN INVESTMENTS

A. Examining and Prohibiting Investments that Endanger Public Order or Security

Germany's social market economy, as well as the market freedoms of the European Union, guarantee—in principle—the freedom of investment.[29] However, some exceptions exist, namely regulated in the German Foreign Trade Law ("GFTL").

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23. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Common European Approach to Sovereign Wealth Funds*, *supra* note 19, at 4, 6; Jenik Radon & Julius Thaler, *Staatsfonds vor den Toren*, FRANKFURTER ALLGEMEINE ZEITUNG, Feb. 2, 2008, at 13. Generally, the management board is obliged to protect the best interests of the company and act accordingly, i.e. it generally has to prohibit and prevent any such intellectual property transfers. Otherwise, it breaches its obligations under the German Stock Corporation Act. *See* Aktiengesetz [AktG] [German Stock Corporation Act], Sept. 6, 1965, BUNDESGESETZBLATT, Teil I [BGBL I] at 1089, as amended, § 93 (1), no. 3, https://www.gesetze-im-internet.de/aktg/AktG.pdf (Ger.). Nevertheless, there are exceptions, such as for a due diligence investigation or if there is a controlling agreement with the recipient company. *Id.* § 291 (1), no. 1. Furthermore, trade secrets may also have to be shared due to vertical and horizontal integration. *Cf.* UWE HÜFFER & JENS KOCH, AKTIENGESETZ: GERMAN STOCK CORPORATION ACT (AktG) § 93, ¶ 6 (12th ed., 2016).

24. Friedrich Germelmann, *Der gemeinschaftsrechtliche Rahmen für Schutzmaßnahmen gegenüber Investitionen aus Drittstaaten im Energiesektor*, 2009 DVBL 78, 78; Lyons, *supra* note 1, at 180.

25. Cornelia Hammer at al., *Sovereign Wealth Funds—Current Institutional and Operational Practices* 9 (Int'l Monetary Fund, Working Paper No. 08/254, 2008) https://www.imf.org/external/pubs/ft/wp/2008/wp08254.pdf. It should, however, be noted that the possibilities of exerting political influence on a SWF differ greatly from fund to fund. *See* Preisser, *supra* note 17, at 13.

26. *See* Martini, *supra* note 22, at 322.

27. *Id.* at 316.

28. *See generally* Schneider, *supra* note 7.

29. Marc-Philippe Weller, *Ausländische Staatsfonds zwischen Fusionskontrolle, Außenwirtschaftsrecht und Grundfreiheiten*, 2008 ZIP 857, 860 (2008).

Until 2009, this GFTL only allowed the Ministry to control investments in specific sensitive industries, such as the production of war weapons or cryptographic systems.[30] Since the GFTL's amendment in 2009, such control has been possible across all industries and economic sectors.[31] The current FTPA section 4 (1) no. 4 reads:

> In foreign trade and payments transactions, legal transactions and actions can be restricted and obligations to act can be imposed . . . in order . . . to guarantee the public order or security of the Federal Republic of Germany within the meaning of Articles 36, 52(1) and Article 65(1) of the Treaty on the Functioning of the European Union . . . .[32]

Read in conjunction with FTPO sections 55 and 56,[33] the Ministry may examine a transaction if: (1) the investment is made by an EU- or a European Free Trade Association ("EFTA")-foreign investor (FTPO section 55 (1) in conjunction with FTPA sections 2 (18), 2 (19), 5 (2) 2); (2) the investor thereby acquires a domestic company or direct or indirect participation of at least twenty-five percent of the voting rights[34] (FTPO sections 55 (1), 56);[35] and (3)

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30. For an overview of the changes added through the 13th Act Amending the Foreign Trade and Payments Act and the Foreign Trade and Payments Regulation, see generally BMWi, EXPLANATORY MEMORANDUM TO THE FOREIGN TRADE AND PAYMENTS ACT AND FOREIGN TRADE AND PAYMENTS REGULATION (2008) https://www.bmwi.de/Redaktion/DE/Downloads/Gesetz/englische-begruendung-eines-dreizehnten-gesetzes-zur-aenderung-aussenwirtschaft.pdf?__blob=publicationFile&v=2. For the version as it appeared in the draft legislation, see REGIERUNGSENTWURF [Cabinet Draft], DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 16/0730, https://www.juris.de/jportal/docs/news_anlage/nlhg/pdf/1610730.pdf (Ger.).

31. Former FTPA section 7 (1) 1 and 7 (2) 5, are now section 4 (1) 1 and 5, respectively, and act in conjunction with FTPO section 60. The FTPA was again amended in 2013, primarily in order to simplify the legislation. As a result, the numbering of the relevant paragraphs was altered; the content of the provisions of interest here, however was not changed.

32. FTPA, *supra* note 11, § 4.

33. FTPO, *supra* note 11, § 55.

34. Pursuant to FTPO section 56 (3), an indirect acquisition is to be found if the acquirer holds at least twenty-five percent of the voting rights in an intermediary that, in turn, holds at least twenty-five percent of the voting rights in the domestic company within the meaning of section 56 (1), (2). *Cf. infra* Figures 1, 2 (illustrating the cases covered by FTPO sections 56 (2), (3)).

35. It is *not* relevant how many shares the investor acquires through the individual transaction, only how many voting rights the investor will hold in total after the transaction. *See id.* It is equally *not* relevant how the acquisition of voting rights takes place in legal terms. *See id.* The investor may simply acquire shares; alternatively, the conclusion of an agreement on the exercise of voting rights will, for example, suffice. *See* Hermann Müller & Rolf Hempel, *Änderungen des Außenwirschaftsrechts zur Kontrolle ausländischer Investoren*, 2009 NEUE JURISTISCHE WOCHENSCHRIFT 1638, 1638 (2009). Furthermore, it also includes the acquisition of shares through donation,

the acquisition poses an actual and sufficiently serious threat to the public order or security of the Federal Republic of Germany (FTPA sections 4 (1) no. 4, 5 (2) in conjunction with FTPO section 55 (1)).[36]

B. Taking a Closer Look at the Examination Procedure: A Two-Stage Process

The examination procedure is divided into two parts. From the moment the Ministry gains knowledge of the conclusion of an acquisition contract,[37] it has three months to decide whether to commence a formal examination procedure.[38] According to the revised provisions of the FTPO, the parties are now under the obligation to notify the Ministry of the acquisition.[39] If the Ministry

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exchange, or loans, including the lending of securities—the latter of which plays an important role in practice. GEORGE ACKER, DIE WERTPAPIERLEIHE 3 (1991); Christoph Seibt & Bernward Wollenschläger, *Unternehmenstransaktionen mit Auslandsbezug nach der Reform des Außenwirtschaftsrechts*, 2009 ZIP 833, 836 (2009), https://www.zip-online.de/heft-18-2009/zip-2009-833-unternehmenstransaktionen-mit-auslandsbezug-nach-der-reform-des-aussenwirtschaftsrechts/. For simplification, the Article uses the phrase "acquisitions of shares" only when referring to an acquisition of voting rights.

36. *See* FTPA, *supra* note 11, § 4; FTPO, *supra* note 11, § 55.

37. Note that any measures of the Ministry under the FTPA and the FPTO directly affect only the contract within the law on obligations. FTPA, *supra* note 11, §§ 4–5. The consequences that a prohibition of this contract has on the transactions within the law on fulfillment are a different matter. In German law, the performance of the contract is considered separable and abstract from the contract establishing the obligation (*Trennungs- und Abstraktionsprinzip*), and, therefore, any transaction within the law on fulfillment must be unraveled according to the Civil Code. *See* BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 812 (Ger.). This will regularly prove rather difficult and complicated. It might, therefore, be advisable for the parties to perform only under the condition precedent that a certificate of non-objection will be awarded or that the acquisition will not be prohibited, which will avoid the application of Civil Code section 812. *See id.* § 158(1); *see also* Müller & Hempel, *supra* note 35, at 1640. According to revised FTPO section 59 (3), the Ministry may also appoint a trustee (at the acquirer's expense) in order to supervise the unwinding of a completed acquisition.

38. FTPO (revised), *supra* note 11, § 55 (3). Since the recent revision of the FTPO, the three-month period no longer commences with the conclusion of the acquisition contract but rather is dependent on the Ministry's knowledge of the acquisition. Only if five years have passed since the acquisition is the Ministry barred from commencing an examination procedure. *See id.*

39. *Id.* § 55 (4). Before the revision of the FTPO, the parties were under no obligation to notify the Ministry; it acted *ex officio*. As the three-month period also commenced independently of the Ministry's knowledge about the acquisition, the vital question of how the Ministry would, in practice, become aware of such acquisitions arose. In the case of listed stock corporations (*börsennotierte AG*), the Federal Financial Supervisory Agency was, and still is, under the obligation to inform the Ministry of any offers on an acquisition of shares of which it itself has been informed. *See* Wertpapiererwerbs- und Übernahmegesetz [WpÜG] [Securities Acquisition and Takeover Act], Dec. 20, 2001, BGBL I at 3822 §§ 7 (1) 2, 10 (1) 1 no. 3, https://www.gesetze-im-internet.de/wp_g/BJNR382210001.html (Ger.). This,

decides to carry out a formal examination, it must then, in turn, inform the acquirer and the domestic company targeted by the acquisition about its decision.[40] This notification initiates the second stage of the examination procedure. The acquirer, upon request of the Ministry, must submit all relevant documentation on the transaction.[41] Once all relevant documents are submitted, the Ministry has another four months to prohibit the acquisition or to issue instructions.[42] However, any such measure requires the approval of the Federal Government.[43]

During these (in total) seven months, the contract is subject to a condition subsequent,[44] that is, it stays effective unless and until the Ministry prohibits the transaction or issues instructions according to FTPO section 59.[45] The acquirer may expedite the process by requesting a certificate of nonobjection.[46] In such case, the Ministry must act within two months instead of three.[47] If the Ministry fails to do so, the certificate is deemed to be granted.[48]

C. Why Do the New Rules Apply Indistinctly to Public and Private Investors and Why Within the Foreign Trade Law, Instead of the Law on Competition?

Two aspects are worth noting at this point. First, the scope of the new rules is fairly wide, as they do not only apply to investments made by SWFs but rather to any investment made by a private or public investor.[49] This lack of differentiation has been heavily

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however, did not and still does not apply to non-listed stock corporations (*nicht börsennotierte AG*) or limited liability companies ("GmbH"). In fact, no such automatic notification system was or is in place for these companies. There was, accordingly, a danger that the Ministry would not acquire knowledge in time. Possibly, the German legislature assumed that an unwanted acquisition of shares would, in these cases, not occur all too regularly. This danger is now reduced, potentially because the Federal Government realized that the danger of not being aware of relevant acquisitions was too great. Meanwhile, the possibility of gaining knowledge through other sources, such as the press, of course, also remains. Equally, the Federal Cartel Authority (*Bundeskartellamt*) may inform the Ministry of a planned merger of which it has been informed. *See* Gesetz gegen Wettbewerbsbeschränkungen [GWB] [Competition Act], June 26, 2013, BGBL I at 1750, § 50c (3), https://www.gesetze-im-internet.de/englisch_gwb/index.html (Ger.).

40. FTPO, *supra* note 11, at § 55 (3).
41. *See id.* § 57.
42. *See id.* § 59 (1) 1.
43. *See id.* § 59 (1) 2.
44. FTPA, *supra* note 11, § 15 (2).
45. FTPO, *supra* note 11, § 59.
46. *Id.* § 58.
47. *Id.* § 58 (2).
48. *Id.*
49. FTPA, *supra* note 11, § 2 (1)–(2).

criticized[50] but may, when examined more closely, prove reasonable. If the rules only applied to SWFs, they could be rather easily circumvented—for example, by carrying out the investment through an intermediary or a trust structure.[51]

Second, by amending the FTPA and the FTPO, the German legislature opted for a different solution than the one recommended by the German Council of Economic Experts (*Sachverständigenrat für Wirtschaft,* "Council"). The latter suggested a solution within the law on competition, namely within the law on merger controls.[52] However, this would have had a number of drawbacks.[53] The most prominent appears to be that the law on competition addresses issues related to market power.[54] The dangers associated with an undue transfer of trade secrets or political influence being exerted on vital institutions of the national economy are, however, not necessarily related to market power. In relation to those dangers, foreign trade law, therefore, appears generally better suited.

III. COMPATIBILITY WITH THE PROVISIONS ON THE FREE MOVEMENT OF CAPITAL: TFEU ARTICLE 63(1)

Nevertheless, the investment restrictions stated in the GFTL equally bear a number of issues.[55] The new rules may not be compatible with the European provisions on the free movement of capital under TFEU article 63(1).[56]

A. Is It Not Actually the Freedom of Establishment: TFEU Article 49?

Whether the rules are or are not compatible depends on the applicability of TFEU article 63(1). For investments in companies, article 63(1) may be superseded by the freedom of establishment

50. For a perspective on the (in this regard, identical) draft legislation, see Walter Bayer & Christoph Ohler, *Staatsfonds ante portas*, 2008 ZEITSCHRIFT FÜR GESETZGEBUNG, 12, 28 (2008); Radon & Thaler, *supra* note 23, at 13.

51. Martini, *supra* note 22, at 316; Preisser, *supra* note 17, at 113.

52. SACHVERSTÄNDIGENRAT, DAS ERREICHTE NICHT VERSPIELEN 429, ¶ 674 (2008), https://www.sachverstaendigenrat-wirtschaft.de/fileadmin/dateiablage/download/gutachten/jg07_ges.pdf.

53. *See* Weller, *supra* note 29, at 859–60.

54. *Id.*

55. The Article will not analyze whether the German legislature was still competent to legislate in the field of direct investments. This may prove problematic with a view to the new competence of the EU granted by article 207 of the TFEU. *See* TFEU art. 207. For an analysis of this provision, see Sophie Luise Beuttenmüller, *Das deutsche Außenwirtschaftsgesetz vor dem Hintergrund der neuen Unionskompetenz für ausländische Direktinvestitionen*, 28 RITSUMEIKAN L. REV., 281, 288 (2011), http://www.ritsumei.ac.jp/acd/cg/law/lex/rlr28/BEUTTENMULLER.pdf.

56. TFEU art. 63(1).

under article 49,[57] i.e. TFEU article 49 may, in this particular case, be *lex specialis*. If it was *lex specialis*, FTPO sections 55 et seq. could not be in conflict with the EU market freedoms. After all, the freedom of establishment does not apply to third-country situations—only the provisions on the free movement of capital do[58]—while FTPO section 55 (1) solely addresses EU- and EFTA-foreign investors[59] and, thus, from its outset only covers such third-country situations. In other words, if investments in domestic companies only fell into the substantive scope of application of the freedom of establishment, a third-country investor would not enjoy the protection of EU law. Therefore, a closer look at the substantive scope of application of the free movement of capital, on the one hand, and the freedom of establishment, on the other hand, becomes vital.

The term "capital" is defined neither in the EU treaties nor comprehensively by the European Court of Justice ("ECJ").[60] Nevertheless, it is generally accepted that direct[61] and portfolio investments[62]—as covered by FTPO sections 55 (1) and 56—fall under the scope of TFEU article 63(1).[63] Therefore, the investments covered by the FTPA and the FTPO may be protected under TFEU article 63(1).

At the same time, such investments may also fall into the scope of TFEU article 49. As soon as an acquisition of shares in a

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57. On the complicated and still not comprehensively decided relationship between the free movement of capital and the freedom of establishment, see STEFFEN HINDELANG, THE FREE MOVEMENT OF CAPITAL AND FOREIGN DIRECT INVESTMENT 88 (2009).

58. Georg Ress & Jörg Ukrow, *Einzelstaatliche Beschränkungen*, *in* DAS RECHT DER EUROPÄISCHEN UNION, at AEUV art. 63, ¶ 120 (Eberhard Grabitz, Meinhard Hilf & Martin Nettesheim eds., 2004).

59. FTPO, *supra* note 11, §55 (1). FTPO § 55 (2) allows an examination of acquisitions by EU-nationals under exceptional circumstances. *Id.* § 55 (2). Therefore, in some cases, investments made by EU-nationals may also be subject to examination by the Ministry. Discussion of this issue is beyond the scope of this Article.

60. Ress & Ukrow, *supra* note 58, at AEUV art. 63, ¶ 126. The ECJ thereby takes guidance from Directive 88/361 and its annexed nomenclature. *See* Case C-222/97, Trummer & Mayer, 1999 E.C.R. I-1661, ¶ 21.

61. According to the Court, direct investments are "characterised by the possibility of participating effectively in the management and control of a company." Case C-174/04 Comm'n of the European Communities v. Italian Republic, 2005 E.C.R I-4961, ¶ 28; *see also* Case C-98/01, Comm'n of the European Communities v. U.K., 2003 E.C.R. I-4648, ¶¶ 5, 20.

62. It is a portfolio investment if the shares are acquired "solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking." Case C-182/08, Glaxo Wellcome GmbH & Co. v. Finanzamt München II, 2009 E.C.R. I-8591, ¶ 40.

63. Joined Cases C-282/04 & C-283/04, Comm'n v. Neth. 2006 E.C.R. I-09141, ¶ 19.

company[64] shows signs of entrepreneurial engagement,[65] the investment also falls into the ambit of TFEU article 49.[66] Because FTPO section 55 (1) applies to acquisitions of *at least twenty-five percent* of the voting rights,[67] this rule will also cover cases where such entrepreneurial activity may be found and which, accordingly, fall under the scope of TFEU article 49.

Thus, investments covered by FTPO section 55 (1) may fall under the scope of both articles 63 and 49 of the TFEU. Nonetheless, this does not imply that both freedoms will in fact be applicable. As mentioned, article 49 of the TFEU may be *lex specialis* in the cases of interest here, and it would be *lex specialis* if the rules of the FTPA and the FTPO *always* covered investments that show such entrepreneurial activity.[68] In such a case, the free movement of capital would be considered a mere reflex of the rules on the freedom of establishment.[69]

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64 Although the wording of TFEU article 49(2) only refers to the setting up and management of new companies, an acquisition of shares in an existing company also falls under the scope of the article. TFEU art. 49(2). After all, TFEU article 49 aims at protecting entrepreneurial activity. *Id.* The kind of entrepreneurial activity is not decisive, whether it be setting up a new company or investing in existing ones. *See* JULIA LÜBKE, DER ERWERB VON GESELLSCHAFTSANTEILEN ZWISCHEN KAPITALVERKEHRS- UND NIEDERLASSUNGSFREIHEIT 207 (2006); UTE HAFERKAMP, DIE KAPITALVERKEHRSFREIHEIT IM SYSTEM DER GRUNDFREIHEITEN DES EG-VERTRAGS, 170 (2003); FRIEDEMANN KAINER, UNTERNEHMENSÜBERNAHMEN IM BINNENMARKTRECKT, 61 (2003).

65. LÜBKE, *supra* note 64, at 208; Wolfgang Schön, *Das Bild des Gesellschafters im Europäischen Gesellschaftsrecht*, 64 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 1, 11 (2000); *see* Case C-221/89 The Queen v. Sec'y of State for Transp., *ex parte* Factortame Ltd. & Others, 1991 E.C.R. I-3965, ¶ 20.

66. *See* TFEU art. 49.

67. FTPO, *supra* note 11, at § 55 (1).

68. Case C-31/11, Scheunemann v. Bremerhaven, ECLI:EU:C:2012:481, ¶ 23 (July 9, 2012), ("[I]t should be noted that . . . national legislation which is intended to apply only to shareholdings enabling the holder to exert a definite influence over a company's decisions and determine its activities is covered by the Treaty provisions on freedom of establishment. On the other hand, national provisions which apply to shareholdings acquired solely with the intention of making a financial investment, with no intention of influencing the management and control of the undertaking, must be examined exclusively in the light of the free movement of capital . . . ."); *see also* Case C-35/11, Test Claimants in the FII Grp. Litig. v. Comm'n of Inland Revenue & The Comm'n for Her Majesty's Revenue & Customs, ECLI:EU:C:2012:707, ¶ 90 (Nov. 13, 2012).

69. This jurisprudence is often referred to as the "centre of gravity" approach. *See, e.g.*, Case C-284/06 Finanzamt Hamburg-AM Tierpark v. Burda GmbH, 2008 E.C.R. I-4571, ¶ 74; Case C-524/04, Test Claimants in the Thin Cap Group Litigation v. Comm'n of Inland Revenue, 2007 E.C.R. I-2178, ¶ 37; Case C-452/04, Fidium Finanz AG v. Bundesanstalt für Finanzdienstleistungsaufsicht, 2006 E.C.R. I-9580, ¶¶ 48, 49; Case C-36/02,

According to the ECJ, investors are "entrepreneurial" investors if they acquire "definite influence over the company's decisions" through the investment.[70] Therefore, the question is: does someone who holds at least twenty-five percent of the voting rights in a company *always* have a definite influence[71] over the company's decisions? Some answer this question in the affirmative and quote the decision in *Lasertec Gesellschaft für Stanzformen mbH v. Finanzamt Emmendingen*[72] as evidence.[73] However, this interpretation misreads *Lasertec*.[74]

In *Lasertec*, the court did not actually decide whether twenty-five percent of the voting rights would confer a "definite influence" on an investor.[75] Instead, the decision merely stated that twenty-five percent constituted a "significant" holding within the meaning of the national legislation.[76] Since *Lasertec* held two-thirds of the

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Omega Spielhallen und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, 2004 E.C.R. I-9651, ¶ 27.

70. *See* Case C-196/04, Cadbury Schweppes & Cadbury Schweppes Overseas v. Comm'n of Inland Revenue, 2006 E.C.R. I-8039, ¶ 21; Case C-251/98, C. Baars v. Inspeceur der Belastingdienst Particulieren /Ondernemingen Gorinchem, 2000 E.C.R. I-2815, ¶ 22; Case C-436/00, X, Y & Riksskatteverket, on the interpretation of Articles 43 EC, 46 EC, 48 EC, 56 EC & 58 EC, 2002 E.C.R. I-10861, ¶ 37.

71. Note that the term "definite influence" should not be equated with the term "direct investment." While direct investments enable the investor to "participate effectively in the management of the company," a definite influence may only be found if the investor has the possibility to "determine" its activities; therefore, direct investments may cover both scenarios of minority and majority holdings, while only majority holdings will enable the investor to exercise such definite influence over the company. *See* HAFERKAMP, *supra* note 64, at 171; HORST KRENZLER & CHRISTIAN PITSCHAS, DIE AUßENWIRTSCHAFTSPOLITIK DER EUROPÄISCHEN UNION NACH DEM VERFASSUNGSVERTRAG 30 (Christoph Herrmann, Horst Krenzler & Rudolf Streinz eds., 2006) (describing those who equate controlling and passive investments with direct and portfolio investments, respectively); Weller, *supra* note 29, at 857. *But see* Christian Tietje, *Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon*, BEITRÄGE ZUM TRANSNATIONALEN WIRTSCHAFTSRECHT, 2009, at 15–16, http://telc.jura.uni-halle.de/sites/default/files/altbestand/Heft83.pdf.

72. Case C-492/04, Lasertec Gesellschaft für Stanzformen mbH v. Finanzamt Emmendingen, 2007 E.C.R. I-3786.

73. Germelmann, *supra* note 24, at 81; Preisser, *supra* note 17, at 99; Michael Sedlaczek & Mario Züger, *in* EUV/AEUV: VERTRAG ÜBER DIE EUROPÄISCHE UNION UND VERTRAG ÜBER DIE ARBEITSWEISE DER EUROPÄISCHEN UNION, at AEUV art. 63, ¶ 33 (Rudolf Streinz ed., 2012); Thomas Schürmann, *Kapital- und Zahlungsverkehr*, *in* EU-VERTRÄGE KOMMENTAR, at AEUV art. 63, ¶ 15 (Carl-Otto Lenz & Klaus-Dieter Borchardt eds., 2012); Jürgen Tiedje, *Niederlassungsfreiheit*, *in* EUROPÄISCHES UNIONSRECHT, AEUV art. 49, ¶ 25 (Hans von der Groeben, Jürgen Schwarze & Armin Hatje eds., 2015).

74. *See also* FELIX GEIGER, BESCHRÄNKUNGEN VON DIREKTINVESTITIONEN AUS DRITTSTAATEN 136–37 (2013).

75. Case C-492/04, Lasertec Gesellschaft für Stanzformen mbH v. Finanzamt Emmendingen, 2007 E.C.R. I-3784, ¶ 20.

76. *Id.* ¶ 21.

voting rights and "[s]uch a holding unquestionably confers . . . a determinative influence on the applicant's decisions and activities,"[77] the court was able to refrain from determining an abstract threshold.[78]

To date, the ECJ has not determined an abstract threshold as to when a definite influence may be found. Therefore, the national rules may be consulted for guidance.[79] Under German company law, twenty-five percent of the voting rights grant no less and no more than a blocking minority.[80] The shareholder may veto changes of the company statute, but no consultation is needed for other major entrepreneurial decisions—such as investments in other companies or a shift in strategic focus—as long as these measures are covered by the existing company statute.[81] A shareholder with a mere blocking minority is, therefore, usually unable to decisively influence the company's decisions[82]—the investor may only exercise *passive* influence on the company's decisions.[83] For an *active* influence, a majority holding is required.[84] Therefore, FTPO

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77. *Id.* ¶ 23.

78. *See id.* ¶¶ 25–26.

79. GEIGER, *supra* note 74; M. Nettesheim, *Unternehmensübernahmen durch Staatsfonds: Europarechtliche Vorgaben und Schranken,* 2008 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT, 729, 754 (2008); Helmut Rehm & Jürgen Nagler, *Verwaltung verweigert faktisch Anwendung von Art. 56 EG gegenüber Drittstaaten*, 2007 INTERNATIONALES STEUERRECHT 700, 701 (2007).

80. Aktiengesetz [AktG] [German Stock Corporation Act], Sept. 6, 1965, BGBL I at 1089, as amended, §§ 179 (2), 262 (1) 2, https://www.gesetze-im-internet.de/aktg/AktG.pdf (Ger.); Gesetz betreffend die Gesellschaften mit beschränkter Haftung [GmbHG] [Act on Limited Liability Companies], Apr. 20, 1892, BGBL III at 1142, as amended, §§ 53 (2), 60 (1) 2 (Ger.).

81. Section 133 of the German Stock Corporation Act determines that any decision of the annual stockholders' meeting (*Hauptversammlung*) requires, in principles, a majority of the votes cast, unless a different majority is required by statute or the company statute. AktG § 133. Section 47 (1) of the Act on Limited Liability Companies establishes the same for Limited Liability Companies. GmbHG § 47 (1). From these provisions, and the already mentioned provisions on the required majority for changes of the company statute, it follows *e contrario* that unless and until the measure requires a change of the company statute, a shareholder with only twenty-five percent of the voting rights may not block the decision. *See id.* He or she may only influence the decision in other ways, for example through campaigning.

82. Only if other factors grant the shareholder additional power, such as voting agreements with other shareholders or a persistently low participation in the annual stockholders' meeting, may a decisive influence be found with a holding of just twenty-five percent. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 13, 1977, NEUE JURISTICHE WOCHENSCHRIFT [NJW] 104 (107), https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BGH&Datum=13.10.1977&Aktenzeichen=II%20ZR%20123%2F76 (Ger.).

83. *See id.*

84. *See* GEIGER, *supra* note 74, at 137–39; LÜBKE, *supra* note 64, at 213; Germelmann, *supra* note 24, at 81; Kaspar Krolop, *Staatliche Einlasskontrolle*

section 55 (1) does not apply exclusively to cases of decisive influence; it applies to cases of decisive and non-decisive influence.

In the case of such indistinctly applicable national legislation, the ECJ now at least secondarily applies the free movement of capital.[85] For example, in *Holböck v. Finanzamt Salzburg-Land*,[86] the court stated that since the Austrian legislation in question was "not intended to apply *only* to those shareholdings which enable the holder to have a definite influence on a company's decisions and to determine its activities . . . [it would] fall within the scope of both Article 43 EC[87] on freedom of establishment and Article 56 EC[88] on free movement of capital."[89] Despite the two-thirds holding of Mr. Holböck in the company, the court then proceeded to examine the Austrian legislation with a view to both freedoms.[90] Thus, the freedom of establishment did not supersede the free movement of capital in this case.[91]

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bei Staatsfonds und anderen ausländischen Investoren im Gefüge von Kapitalmarktregulierung, nationalem und internationalem Wirtschaftsrecht, 2008 HFR 1, 11 (2008); Martini, *supra* note 22, at 318; Jens Schönfeld, *EuGH, 24.5.2007 – C-157/05: Besteuerung von Dividenden, die von einer in einem Drittstaat ansässigen Gesellschaft gezahlt werden* 2007 INTERNATIONALES STEUERRECHT 441, 443 (2007).

85. Ulrich Forsthoff, *in* DAS RECHT DER EUROPÄISCHEN UNION, *supra* note 58, at AEUV art. 49, ¶ 129; Peter-Christian Müller-Graff, *in* EUV/AEUV: VERTRAG ÜBER DIE EUROPÄISCHE UNION UND VERTRAG ÜBER DIE ARBEITSWEISE DER EUROPÄISCHEN UNION, *supra* note 73, at AEUV art. 49, ¶ 117.

86. Case C-157/05, Holböck v. Finanzamt Salzburg-Land, 2007 E.C.R. I-4051.

87. This is now TFEU art. 49. *See* 2012 O.J. (C 326) 47, 67.

88. This is now TFEU art. 63. *See* 2012 O.J. (C 326) 47, 71.

89. Case C-157/05, Holböck v. Finanzamt Salzburg-Land, 2007 E.C.R. I-4051, ¶¶ 23, 24 (emphasis added); *see also* Case C-182/08, Glaxo Wellcome GmbH & Co. v. Finanzamt Muchen II, 2009 E.C.R. I-8591, ¶ 52.

90. *Id.* ¶ 26.

91. *Id.* ¶¶ 30, 32. This is a welcome development. In such cases of indistinctly applicable legislation, some claimed that if the investor in the individual case actually had a decisive influence over the company, the freedom of establishment should be the only applicable freedom. To this effect, see Sedlaczek & Züger, *supra* note 73, at AEUV art. 63, ¶¶ 34–35; Schürmann, *supra* note 73. This would, however, have caused odd results since the freedom of establishment does not apply to third-country situations. Therefore, if the free movement of capital was trumped at the stage of applicability and could not "resurge" if the freedom of establishment was later denied protection, the scope of protection would be inversely proportional to the size of the investment. Smaller investments would enjoy protection under TFEU article 63(1). Bigger investments would not be protected at all. Rehm & Nagler, *supra* note 79, at 512; *Schönfeld, supra* note 84, at 443; Dietmar Völker, *Kapitalverkehrsfreiheit für Drittstaatendividenden – Widerspruch zur BFH-Rechtsprechung oder Bestätigung des BFH durch den EuGH-Beschluss vom 4.6.2009?*, 2009 INTERNATIONALES STEUERRECHT 705, 707 (2009). *See generally Jens Schönfeld, EuGH konkretisiert Anwendung der Kapitalverkehrsfreiheit im Verhältnis zu Drittstaaten: Mögliche Konsequenzen und offene Fragen aus steuerlicher Sicht*, 2007 DER BETRIEB 80 (2007).

The ECJ affirmed this in *Test Claimants in the FII Group Litigation*,[92] adding that "the interpretation of Art. 63 (1) TFEU as regards relations with third countries does not enable economic operators who do not fall within the limits of the territorial scope of [the] freedom of establishment to profit from that freedom."[93] By that, the Court clarified that the application of TFEU article 63(1) may not lead to a protection of cases which primarily fall under the scope of the freedom of establishment. Otherwise, the territorial restriction of TFEU article 49 would be undermined.[94]

So far, this statement remains an obiter dictum. *Holböck* and *Test Claimants in the FII Group Litigation* both concerned taxation issues.[95] The primarily applicable freedom was found in TFEU article 63. Hence, the freedom of establishment was only an ancillary issue and the question of unduly extending the scope of TFEU article 49 was not decisive. For our purposes, however, this dictum may prove fatal—at least for some investors. The FTPA and FTPO aim at the investments themselves instead of their indirect consequences, such as payable taxes or the receipt of tax dividends. As established, TFEU article 49 could, in some of the cases, be the primarily applicable freedom, instead of TFEU article 63. Then, the issue of article 49's scope of protection will become critical. Whether the court's view is convincing is, of course, a matter for debate. While one indeed needs to pay regard to the limited scope of application of article 49, this issue would have better been addressed at the stage of justification.[96] It remains to be seen whether the ECJ will, in fact, apply this restriction.

Either way, if one follows the court in at least subsidiarily applying TFEU article 63 to cases of indistinctly applicable measures, which would not unduly extend the scope of article 49, there will still be a number of investors able to claim protection under article 63(1).[97] Thus, it is still necessary to examine the new legislation in light of TFEU article 63.

B. Scope of the Free Movement of Capital

As has been established, the free movement of capital generally covers portfolio as well as direct investments made by EU residents

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92. Case C-35/11, Test Claimants in the FII Grp. Litig. v. Comm'n of Inland Revenue and Comm'n for Her Majesty's Revenue & Customs, ECLI:EU:C:2012:707, ¶ 100 (Nov. 13, 2012).

93. *See id.*

94. TFEU art. 49.

95. Case C-35/11, Test Claimants in the FII Grp. Litig., ECLI:EU:C2012: 707, ¶ 100 (Nov. 13, 2012); *see also* Case C-157/05, Winfried L. Holböck v. Finanzamt Salzburg-Land, 2007 E.C.R. I-4063, ¶ 23.

96. Martini, *supra* note 22, at 318.

97. Particularly if the *Sachverständigenrat für Wirtschaft* argument holds true that SWFs will, in most cases, not seek to acquire a substantial holding in one particular company.

and EU foreigners. However, another question remains: may public- or private-law companies owned by the state, like SWFs, claim protection under TFEU article 63(1)?

They can, according to the ECJ. While public-law companies are protected under the German Basic Law (*Grundgesetz*) only in exceptional cases,[98] the free movement of capital protects private- and public-law companies alike.[99] This outcome is based on TFEU article 106.[100] The ECJ argues that if public undertakings are—as stipulated by this provision—bound by the obligations imposed by the TFEU, they must also enjoy the rights it grants.[101] In essence, the state may neither be advantaged nor disadvantaged when it invests in private companies.[102]

C. Limiting the Freedom: The FTPA and the FTPO

The FTPA and the FTPO, thus, impose restrictions on the free movement of capital. After all, any investment by a third-country national may be examined, and possibly prohibited, under the new rules of the GFTL.[103] Even if, in reality, a transaction is rarely forbidden by the Ministry, the mere possibility of prohibition may dissuade investors from making an investment. This mere possibility is sufficient to find a restriction of the free movement of capital.[104] Since FTPO section 55 (1) expressly applies only to

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98. Grundgesetz [GG] [Basic Law] art. 19, ¶ 89 *et seq* (Ger.).

99. Case C-174/04, Comm'n of European Communities v. Italian Republic, 2005 E.C.R. I-04933, ¶ 32.

100. Case C-303/88, Italian Republic v. Comm'n of the European Communities, 1991 E.C.R. I-1433, ¶¶ 16, 20; Christian Jung, *in* EUV/AEUV: DAS VERFASSUNGSRECHT DER EUROPÄISCHEN UNION MIT EUROPÄISCHER GRUNDRECHTECHARTA—KOMMENTAR, at AEUV art. 106, ¶ 3 (5th ed. 2016). *But see* Jürgen Kühling, *in* EUV/AEUV: VERTRAG ÜBER DIE EUROPÄISCHE UNION UND VERTRAG ÜBER DIE ARBEITSWEISE DER EUROPÄISCHEN UNION, *supra* note 73, at AEUV art. 106, ¶ 2 (arguing that EC Treaty article 86, now TFEU article 106, does not establish a principle of equal treatment but rather prohibits more favorable treatment of the state).

101. Case C-157/94, Comm'n of European Communities v. U.K. of Br. Brit. & N. Ir. & Kingdom of the Neth., 1997 E.C.R. I-5777, ¶ 29; Joined Cases, C-188 to 190/80, Transparency Directive I, 1982 E.C.R. I-2545, ¶ 12.

102. TFEU art. 96.

103. *Id.*

104. Ress & Ukrow, *supra* note 58, ¶ 158. The ECJ refers to its *Dassonville* jurisprudence on finding a restriction. *See* Case C-531/06, Comm'n of the European Communities v. Italian Republic, 2009 E.C.R. I-04103; Case C-112/05, Comm'n of the European Communities v. Federal Republic of Ger., 2007 E.C.R. I-8995; Joined Cases C-463/04 & C-464/04, Federconsumatori, 2007 E.C.R. I-10491, ¶ 21. For a more detailed analysis of the interpretation of "restrictions" by the ECJ, see Jürgen Oechsler, *Erlaubte Gestaltungen im Anwendungsbereich des Art. 56 I EG – Zugleich zur Entscheidung EuGH, NZG 2006, 942 – Golden Shares VI,* 2007 NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT 161, 162 (2007). Note that the same concept of restriction applies to investments undertaken by member state residents and third-

investments by EU-foreign investors, this rule even constitutes a directly discriminatory measure,[105] namely discriminating on the grounds of nationality.[106]

D. Justifying Limitations on the Free Movement of Capital[107]

Such directly discriminatory measures may only be justified by one of the express derogations named in TFEU article 65.[108] The protection of public policy and security is one of the legitimate aims recognized therein.[109] In an attempt to secure undeniable compatibility with the EU treaties,[110] FTPA section 4 (1) no. 4 and FTPO sections 55 (1) and 59 (1) therefore stipulate that an examination and intervention require a threat to public policy and security[111] of the German Federal Republic within the meaning of

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country nationals. *See* CATHERINE BARNARD & STEVE PEERS, EUROPEAN UNION LAW 455 (2014).

105. *See* Case C-279/93, Köln-Altstadt v. Schumacker, 1995 E.C.R. I-225; Case C-302/97 Konle v. Republic of Austria, 1999 E.C.R. I-3099.

106. Others claim that the concept of discrimination only applies to EU-internal situations, i.e. that it is not possible to discriminate third-country nationals on grounds of their nationality. JOHANNA WOLFF, AUSLÄNDISCHE STAATSFONDS UND STAATLICHE SONDERRECHTE: ZUM PHÄNOMEN "SOVEREIGN WEALTH FUNDS" UND ZUR VEREINBARKEIT DER BESCHRÄNKUNG VON UNTERNEHMENSBETEILIGUNGEN MIT EUROPARECHT 174–75 (2009). Wolff bases her argument on the fact that the concept of discrimination was developed within the other freedoms (that do not apply to third-country situations) and was only transferred to TFEU article 63 (1). *Id.* However, the argument appears flawed. A different treatment of EU-foreigners and EU-residents appears contrary to the system of indistinct application of TFEU article 63 (1). Third-country nationals would enjoy a lower level of protection as not only the express derogations of TFEU article 65 could justify a restriction of the freedom but also the unwritten exceptions developed by the ECJ.

107. The Article proceeds by exclusively examining the compatibility of FTPA and FTPO with the requirements of TFEU article 65. However, any measure taken by the Ministry would correspondingly need to fulfill the criteria pointed out herein.

108. CATHERINE BARNARD, THE SUBSTANTIVE LAW OF THE EU 537 (2d ed., 2007); *Special Rights in Privatised Companies in the Enlarged Union: A Decade Full of Developments*, at 28, 29 (July 22, 2005), http://ec.europa.eu/internal_market/capital/docs/privcompanies_en.pdf; Sedlaczek & Züger, *supra* note 73, at AEUV art. 63, ¶ 29. While the ECJ pays lips service to this rule, see Case C-367/98, Comm'n of the European Communities v. Portuguese Republic, 2002 E.C.R. I-4731; Case C-302/97, Konle v. Republic of Austria, 1999 E.C.R. I-3099, it does not always strictly adhere to it in its own case law. *See* Sedlaczek & Züger, *supra* note 73, at AEUV art. 65, ¶ 28.

109. Case C-54/99, Association Église de Scientologie de Paris, 2000 E.C.R. I-1335.

110. BMWI, *supra* note 30, at 3.

111. The official English versions of FTPA §§ 4 (1) 4, 5 (2) and FTPO §§ 55 (1), 58, 59 all use the term "public order and security," while TFEU article 65(1)(b) refers to "public policy and security." It is unlikely that this variation in terminology is intended to cause any diversion in substance, particularly since FTPA § 4 (1) 4 expressly states that the term "public order

TFEU article 65(1)(b). On their face, the FTPA and the FTPO accordingly serve an aim compatible with the TFEU's provisions.

Merely serving a legitimate aim is, however, not sufficient. According to the ECJ, investment restrictions must also: (1) be sufficiently certain,[112] (2) adhere to the principle of proportionality,[113] and (3) provide for effective legal protection.[114] The Court is rather strict in applying these criteria. In all but one case on national legislation attempting to limit or control foreign investments, the ECJ decided against the national legislation.[115] Likewise, one may be skeptical that the FTPA and the FTPO could withstand the court's scrutiny.

1. Legal Certainty

Public policy and security are vague legal terms, and the ECJ grants a margin of discretion to the member states in defining their scope.[116] However, the member states must do so in a way that is sufficiently precise and clear. The national legislation must enable "individuals to be apprised of the extent of their rights and obligations"[117] (that is, adhere to the *principle of legal certainty*).[118]

In *Église de Scientologie*,[119] French legislation similar to the FTPA and FTPO was at issue.[120] The ECJ found this law in breach of TFEU article 63(1), explaining:

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and security" is to be understood "within the meaning" of TFEU article 65(1). Furthermore, the German versions of the FTPA, the FTPO, and TFEU article 65(1)(b) all use the term "öffentliche Ordnung und Sicherheit" (literally translating to "public order and security").

112. *See* Case E-3/11 Pálmi Sigmarsson v. Cent. Bank of Ice., 2011 EFTA Ct. Rep. 430, ¶ 52; Case C-54/99 Association Église de Scientologie de Paris, Scientology International Reserves Trust v. The Prime Minister, 2000 ECR I-1335, ¶ 22.

113. *See* Case C-503/99 Comm'n v. Belg., 2002 ECR I-4809, ¶ 45; Joined Cases C-163/94, C-165/94 & C-250/94 Sanz de Lera & Others, 1995 ECR I-4821, ¶ 23.

114. *Cf.* Case C-222/86 Unectef v. Heylens, 1987 ECR 4097, ¶¶ 14, 15 (regarding the free movement of workers). The ECJ's reasoning may, however, be transposed to the free movement of capital. *See* BARNARD & PEERS, *supra* note 104, at 459.

115. SACHVERSTÄNDIGENRAT, *supra* note 16, at 402–03.

116. Ress & Ukrow, *supra* note 58, at AEUV art. 65, ¶ 52. This margin of discretion does not lead to a lower level of scrutiny by the ECJ. *See* Case C-483/99, Comm'n of European Communities v. Fr., 2002 E.C.R. I-4781; Case 36/75, Rutili v. Minister for the Interior, 1975 E.C.R. I-1219.

117. Case C-54/99, Association Église de Scientologie de Paris, 2000 E.C.R. I-1335.

118. This principle of legal certainty is a general requirement of EU law, but "only in capital" is it "so clearly stated." *See* BARNARD & PEERS, *supra* note 104, at 547; *see also* Leo Flynn, *Coming of Age: The Free Movement of Capital Case Law 1993–2002*, 39 COMMON MKT. L. REV. 773, 802–03 (2002).

119. Case C-54/99, Association Église de Scientologie de Paris, 2000 E.C.R. I-1335.

120. *Id.*

> T]he essence of the system in question is that prior authorization is required for every direct foreign investment which is "such as to represent a threat to public policy [and] public security," without any more detailed definition. Thus, the investors concerned are given no indication whatever as to the specific circumstances in which prior authorization is required . . . . That being so, the system established is contrary to the principle of legal certainty.[121]

By that, the court clarified that it requires the national legislation itself to be sufficiently clear and precise.[122] The legislation may not simply leave the decision to the (unguided or unrestricted) executive.[123] Excessively wide discretion could, after all, enable the executive to take measures safeguarding national economic targets that are disguised as measures protecting public policy and security. Accordingly, the member states do not only have the *possibility* of defining the scope of public policy and security but they are also under an *obligation* to do so.

Whether the FTPA and the FTPO—in contrast to the French legislation—sufficiently clarify the circumstances in which an investment may be reviewed, prohibited, or restricted is doubtful. Like the French legislation, these laws used to primarily repeat the expression used in TFEU article 65(1)(b)[124] but, unlike the French legislation, used to also expressly refer to article 65 and, thereby, to the ECJ's jurisprudence. With the recent revision of the FTPO, the legislature added an exemplary list of cases in which a threat to public policy and security could be found.

Before the revision of the FTPO, some argued that even the mere reference to TFEU article 65 was sufficient. That is, through this reference, the terms of "public policy and security" were "decrypted,"[125] meaning that an investor would, thus, be able to predict in which cases the Ministry would commence an examination and take measures. However, expecting investors to evaluate the vast jurisprudence of the ECJ themselves in order to predict the reaction of the Ministry appeared illusive and unreasonable, particularly since it would have been easy for the national legislature to at least offer some guidance on the legislation's scope of application.[126] The recent of revision of the

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121. *Id.*
122. *Id.*
123. *Id.*
124. *See* TFEU art. 65(1).
125. WOLFF, *supra* note 106, at 205; Reinhardt & Pelster, *supra* note 10, at 445.
126. *See* Martini, *supra* note 22, at 320; Preisser, *supra* note 17, at 109, 111; Joachim Bast, *in* AUßENWIRTSCHAFTSRECHT: GESETZE, VERORDNUNGEN UND ERLASSE ZUM AUßENWIRTSCHAFTSRECHT MIT KOMMENTAR, 145. EL 2009, AWG § 7, ¶ 10b *et seq.* (2016); Bayer & Ohler, *supra* note 50, at 27; Germelmann, *supra* note 24, at 84.

FTPO clearly shows this point by, for example, including an exemplary list of cases that would generally be considered problematic or unproblematic.[127] Therefore, until its revision, the legislation was not sufficiently certain and, thus, in breach of EU law.[128]

Following its revision, however, FTPO section 55 (1)–(3) now contains such an exemplary list.[129] Still, the list is not incorporated into the FTPA—that is, the formal legislation passed by parliament—but into the FTPO. Accordingly, it is a piece of legislation that the executive has passed to limit its own competences and, lacking parliamentary procedure, it may be changed rather easily[130] and, thus, is less reliable. Furthermore, it may be questionable whether it suffices if the executive is allowed to define its competences without immediate parliamentary involvement. The ECJ has, after all, expressed concerns about insufficiently restricted powers of the executive in relation to (again

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127. *See* FTPO, *supra* note 11, §§ 55 (1)–(3); Martini, *supra* note 22, at 320.

128. *See* SACHVERSTÄNDIGENRAT FÜR WIRTSCHAFT, JAHRESGUTACHTEN: 2007/2008, at 431 (2007), https://www.sachverstaendigenrat-wirtschaft.de/86.html; Hermann Müller & Rolf Hempel, *Änderungen des Außenwirtschaftsrechts zur Kontrolle ausländischer Investoren*, NJW, 2009, at 1638, 1640; Ress & Ukrow, *supra* note 58, AEUV art. 63, ¶ 280; *see also* PETER BIESENBACH & BENEDIKT WOLFERS, MEHR SCHUTZ VOR AUSLÄNDISCHEN INVESTOREN? 10–11, 33–34 (2008), https://bdi.eu/media/presse/publikationen/Publikation_Mehr_Schutz_vor_auslaendischen_Investoren.pdf; Christian Tietje, *Beschränkungen ausländischer Unternehmensbeteiligungen zum Schutz vor "Staatsfonds"—Rechtliche Grenzen eines neuen Investitionsprotektionismus* 7 (Pol'y Papers on Transnat'l Econ. L., Paper No. 26) (2007), http://www2.jura.uni-halle.de/telc/PolicyPaper26.pdf.

129. FTPO (revised) *supra* note 11, § 55. Such a sufficiently serious threat may particularly be found if the domestic company:

1. operates vital infrastructure (*kritische Infrastruktur*) within the meaning of sections 2 (10), 10 (1) 1 of the Act on the Federal Office for Information Security (*Gesetz über das Bundesamt für Sicherheit in der Informationstechnik*),
2. develops software specifically designed for the operation of such vital infrastructure,
3. supervises measures within the meaning of section 110 of the Telecommunications Act (*Telekommunikationsgesetz*) or produces or has produced technical equipment used for telecommunication surveillance purposes or has special knowledge on such technology,
4. provides cloud-computing services and, thereby, meets or exceeds the relevant thresholds within the meaning of annex 4 part 3 no. 2 of the Ordinance on the Identification of Vital Infrastructures, or
5. has obtained a license for the production of modules or services of the telematics infrastructure within the meaning of section 291b (1a) or (1e) of the Fifth Book of the Social Law Code.

Id.

130. Barbara Remmert, *Art. 80 GG*, in GRUNDGESETZ-KOMMENTAR 80. EL Juni 2017, ¶ 7. (Theodor Maunz & Günter Dürig, eds, 80th ed. 2017).

French) national legislation, stating, "[s]uch a wide discretionary power constitutes a serious interference with the free movement of capital, and may have the effect of excluding it altogether."[131] Thus, one might need to be more critical about the executive limiting its own powers than about such limitations set by parliament.

On the other hand, one would be mistaken to assume that the executive could freely determine the content of the secondary legislation it passes. Such power is a mere derivative of the legislative power of parliament and, therefore, any secondary legislation may not go beyond the limits set by parliament.[132] Additionally, the ECJ did not explicitly require parliamentary legislation itself to be sufficiently clear and precise.[133] Bearing in mind that the primary objective of the principle of legal certainty, as the court has repeatedly emphasized, lies in ensuring the foreseeability of actions taken by the executive,[134] the emphasis should instead lie on the fact that a binding legal instrument limits the competences of the executive. The FTPO, although only an ordinance, is such a binding legal instrument;[135] its application by the Ministry is fully subject to judicial review.[136] For this reason, it should suffice if any legislation—parliamentary or secondary—authoritatively clarifies its scope of application and, by that, limits the competences of the executive.

Still, the list contained in FTPO section 55 (1)–(3) is only an exemplary list of cases in which a sufficiently serious threat to public policy and security will usually be found. With a view to the

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131. Case C-483/99 Comm'n v. Fr., 2002 E.C.R. I-4781, ¶ 51.

132. Thus, if the ordinance exceeds the powers granted by parliament, it is not only ineffective but void. *See* Arnd Uhle, *Art. 80 GG (Erlass von Rechtsverordnungen), in* BECKOK GRUNDGESETZ, ¶ 29 (Volker Epping & Christian Hillgruber, eds., 34th ed. 2017). On the nature of ordinances, see Barbara Remmert, *supra* note 130, ¶¶ 7 *et seq.*

133. *See* Arnd Uhle, *supra* note 132.

134. *Cf.* C-483/99 Comm'n v. Fr., 2002 E.C.R. I-4781, ¶ 50; C-54/99, Association Église de Scientologie de Paris, 2000 E.C.R. I-1335, ¶ 22.

135. Ordinances are part of the competence of the executive to set binding legal norms (*Gesetze im materiellen Sinne*). *See* BUNDESVERFASSUNGSGERICHTSGESETZ: BVERFGG § 90, rn. 188 (Maunz et al. eds, 51st ed. 2017); Uhle, *supra* note 132, ¶¶ 1 *et seq.*

136. Any actions of the Ministry and, thus, any breach of the rules of FTPO sections 55 *et seq.* may be challenged in court, according to section 42 (1) alt. 1 of the Code of Administrative Court Procedure (VwGO). After all, any measures taken by the Ministry according to FTPO sections 55 *et seq.* constitute an administrative act within the meaning of section 35 of the Act on Administrative Procedure (VwVfG). Regarding the certificate of nonobjection, see Marius Boewe & Christian Johnen, *Die Änderung der Außenwirtschaftsverordnung und deren Relevanz für Unternehmenskäufe*, 2017 NZG 1095, 1097 (2007); Carsten Flaßhoff & Stefan Glasmacher, *Wankende Verwaltungsakte im Außenwirtschaftsrecht bei Unternehmenskäufen*, 2017 NZG 489, 490 (2017). Accordingly, the administration does not have the final word in interpreting the terms used in the FTPA and FTPO.

examination procedures initiated so far (on the basis of the now-outdated law) that, at times, have caused some astonishment, it might have been preferable if the legislature had introduced an extensive, instead of exemplary, list of cases in which such a threat to public policy and security could be found.[137] The fact that it might have been preferable does not, however, lead to a lack of legal certainty. From this exemplary list, investors will sufficiently be able to deduce abstract criteria indicating when the Ministry will take action. No more is required.

Therefore, since the introduction of the list of examples in FTPO section 55 (1)–(3), the FTPA and FTPO no longer lack legal certainty and are, insofar, in conformity with TFEU articles 63 and 65.

2. Proportionality

Nonetheless, the FTPA and the FPTO may still breach EU law—they may not be proportionate.[138] For a national measure to be proportionate, it must be suitable and necessary for achieving the legitimate aim.[139] While suitability merely "is a floor, a threshold control,"[140] the principle of necessity sets high standards. A national measure is necessary only if there are no less restrictive, equally-effective means of achieving the legitimate aim.[141]

First, to note the positive aspects of the new legislation—the fact that the contract remains valid during the period of examination is a notable improvement from the propositions of the draft legislation that intended to render the contract provisionally ineffective.[142] Furthermore, the FTPA and the FTPO opt for a system of subsequent examination instead of a more restrictive prior-authorization scheme.[143] They only require notification of the

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137. *See* Michael Hippeli, *Novelle der Außenwirtschaftsverordnung zum besseren Schutz vor ausländischen Unternehmensübernahmen vom 12./17.07.2017*, JURIS (Aug. 22, 2017) https://www.juris.de/jportal/portal/page/homerl.psml?nid=jpr-NLHGADG000217&cmsuri=%2Fjuris%2Fde%2Fnachrichten%2Fzeigenachricht.jsp (jurisPR-HaGesR 8/2017 anm. 1). For a similar perspective regarding the old versions of the FTPA and the FTPO, see BIESENBACH & WOLFERS, *supra* note 128, at 30–31.

138. *Cf.* Case C-503/99, Comm'n of the European Communities v. Kingdom of Belg. 2002 E.C.R. I-4809.

139. Sedlaczek & Züger, *supra* note 73, at AEUV art. 65, ¶ 45.

140. BARNARD & PEERS, *supra* note 104, at 465; *see also*, Flynn, *supra* note 118, at 801; Sedlaczek & Züger, *supra* note 73, at AEUV art 65, ¶ 47.

141. BARNARD & PEERS, *supra* note 104, at 465.

142. *See* Unterrichtung durch die Bundesregierung [Information from the Federal Government], DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 16/7083, ¶ 678, http://dip21.bundestag.de/dip21/btd/16/070/1607083.pdf (Ger.).

143. The ECJ has repeatedly rejected a system of prior authorization as not being necessary. *See* Joined Cases C- 163/94, C-165/94 & C-250/94, Sanz de Lera & Others, 1995 E.C.R. I-4821, ¶ 23; Joined Cases C-358/93 & C-416/93 Criminal Proceedings against Aldo Bordessa & Others, 1995 E.C.R. I-361, ¶¶ 23

conclusion of the contract. Clear (although no longer particularly short) time limits as well as the obligation to give reasons for a decision add to these positive features.

However, the scope of application of the FTPA and FTPO may still be too wide. According to FTPO section 55 (1) 1, the Ministry may, in principle, review investments in all industries and companies of all sizes. Only FTPO section 55 (1) 2 and 3 then limits this power.

The Ministry, when introducing the new competences in 2009, argued that the provisions of the FTPA and FTPO were necessary and that it was impossible to restrict the legislation any further, since a threat to public policy and security would not necessarily be related to certain economic sectors or companies of a certain size.[144] Instead, its obligation to observe the principle of proportionality for every individual case, per FTPA section 4 (4), would suffice.

At first sight, the argument appeared to bear some validity. After all, a piece of legislation is an abstract instrument that needs to be sufficiently flexible in order to cover a number of different scenarios. However, the legislature is not free to simply forfeit investors' interests in the interest of flexibility, particularly because an examination procedure—let alone a prohibition—constitutes a far-reaching restriction of the investors' rights. Therefore, while the ECJ probably grants the legislature a margin of deference as to where exactly to set the relevant threshold in size or to draw the line for relevant affected sectors, such a margin certainly does not go as far as to allow disregard of standards altogether.[145] The recent revision of the FTPO again shows that it is, in fact, possible to specify more precisely when such a threat to public policy and security may be found. Essentially, the Ministry proved itself wrong.

In more detail: To comply with the principle of proportionality as established by the ECJ, it is first necessary to enumerate the sectors in which an investment could touch upon public policy and security at all, such as the telecommunications or energy sectors.[146] A sufficiently serious and actual threat to public policy and security, as demanded by the court,[147] may simply not be found across all

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et seq. A system of prior notification will only be considered necessary in exceptional cases. *See* Flynn, *supra* note 118, at 801.

144. BMWi, *supra* note 30, at 6; BMWi, FRAGEN UND ANTWORTEN ZUR PRÜFMÖGLICHKEIT FÜR AUSLÄNDISCHE INVESTITIONEN (ÄNDERUNG DES AUßENWIRTSCHAFTSGESETZES UND DER AUßENWIRTSCHAFTSVERORDNUNG) 1 (2009).

145. *See* WOLFF, *supra* note 106, at 202.

146. *See* Preisser, *supra* note 17, at 114.

147. *See* Case C-348/96, Calfa, 1999 E.C.R. I-11. The ECJ demands a "genuine and sufficiently serious threat to a fundamental interest of society." Case C-348/96, Calfa, 1999 E.C.R. I-11; Case 36/75, Rutili v. Minister for the Interior, 1975 E.C.R. 1219. FTPA section 5 (2) accordingly requires an actual and sufficiently serious danger affecting a fundamental interest of society.

sectors at all times. But even a general reference to particularly sensitive and vital sectors still appears too far-reaching. To put it bluntly, if the Chinese SWF acquires shares in a local mobile phone provider, national security will not be at risk simply for this reason. Therefore, the legislature should also pay regard to the specific circumstances within the sector, such as a quasi-monopolistic network infrastructure or the degree of specialization of the individual producers.[148] With the list introduced in FTPO section 55 (1) 2 and 3, the FTPA and FTPO now meet these criteria. The new parts of section 55 (1) not only refer to specific sectors— namely, vital infrastructures within the meaning of the Act on the Federal Office for Information Security ("FOIS") section 2 (10),[149] telecommunications and cloud-computing industries, and particular software industries—but also restrict themselves to particularly critical industries whose downfall or impediment would have severe consequences on the general supply of certain goods to the public. The ECJ has, correspondingly, accepted that "common interests concerning, in particular, the minimum supply of energy resources and goods essential to the public as a whole, the continuity of public service, national defence, the protection of public policy and public security and health emergencies... warrant certain restrictions of the exercise of fundamental freedoms."[150]

Secondly, it would have been favorable to additionally clarify when an investment within these particular sectors would pose a sufficiently serious threat to public security and policy.[151] This

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148. *See* Ress & Ukrow, *supra* note 58, at AEUV art. 63, ¶¶ 278–81.

149. According to FOIS section 2 (10), vital infrastructures are facilities or parts thereof that

> 1. are part of the energy, information technology and telecommunication, transport, health, water, food, or finance and insurance sector, and
> 2. are of great significance for the functioning of society as a whole as any failures, breakdowns or impairment would cause substantial shortfalls in supply or threats to public security.

Gesetz über das Bundesamt für Sicherheit in der Informationstechnik [BSIG] [Act on the Federal Office for Information Security], Aug. 14, 2009, BGBL I at 2821, last amended June 23, 2017 BGBL I at 1885, § 2 (10), https://www.gesetze-im-internet.de/bsig_2009/index.html #BJNR282110009BJNE001008116 (Ger.). Section 10, then, grants the Federal Ministry of the Interior to specify the term "vital infrastructures" further by way of ordinance. *Id.* § 10. The Ministry of the Interior has done so with the Ordinance Determining Vital Infrastructures within the Meaning of the FOIS. *See* Verordnung zur Bestimmung Kritischer Infrastrukturen nach dem BSI-Gesetzk [BSI-KritisV] [Ordinance Determining Vital Infrastructures within the Meaning of the FOIS], Apr. 22, 2016, BGBL I at 958, as amended (Ger.).

150. Case C-326/07 Comm'n v. It., 2009 E.C.R. I-2291, ¶ 45; *see also* C-503/99 Comm'n v Belg., 2002 ECR I-4809.

151. This is essentially another facet of the lack of legal certainty discussed above. *See supra* Subpart III.D.1. Despite being closely related, they are not identical. A piece of legislation may be sufficiently certain but still go beyond

could, for example, be achieved through a "negative definition," i.e. a provision on when an acquisition of voting rights would *not* be considered problematic.[152] The degree of transparency implemented by the SWF could be declared decisive—that is, whether the SWF allowed for a periodic, systematic, and externally conducted audit or whether it acknowledged and adhered to corporate governance standards.[153] By establishing such criteria, the legislation would not only have become proportionate but would, at the same time, have set incentives for SWFs to commit to more transparency and enhanced self-regulation. Unfortunately, the FTPA and FTPO do not do so. Whether this lack of specification leads to a lack of proportionality is not entirely clear. While the ECJ is strict in applying these criteria, one may not disregard the fact that it has accepted cases where the national legislation merely specified the sector in which investments could be prohibited.[154] Therefore, to our minds, the FTPA and FTPO are now proportionate–although improvements could still be made.

3. Effective Legal Redress

As previously noted, both the decision to review the acquisition as well as a prohibition or an instruction may be challenged according to section 42 (1) alt. 1 of the Code of Administrative Court Procedure.[155] Thus, the national legislation provides for effective legal redress, as demanded by the ECJ.[156]

E. Criticism

The Explanatory Memorandum to the Foreign Trade and Payments Act and Foreign Trade and Payments Regulation highlights that "Germany's open investment regime is one of the cornerstones of its economic development."[157] The amendments of the FTPA and the FTPO in 2009 were not supposed to "signal any abandonment of the country's open investment strategy."[158]

Based on what has been said above, the accuracy of this statement is debatable. From an economic perspective, the cross-sectoral examination may prove to be a boomerang, causing more

what is necessary. An insufficiently certain piece of legislation may (although this will surely be more difficult) still be considered necessary.

152. Martini, *supra* note 22, at 320.

153. *See id.*

154. *Cf.* C-503/99 Comm'n v Belg., 2002 ECR I-4809.

155. *See* Verwaltungsgerichtsordnung [VwGo] [Code of Administrative Court Procedure], Mar. 19, 1991, BGBL I. at 686, as amended, § 42 (1).

156. For a detailed account of what is necessary to find effective judicial review, see Case C-222/86, Unectef v. Heylens, 1987 E.C.R. 4097 (regarding the free movement of workers). The ECJ's reasoning may be transposed to the free movement of capital. *See* BARNARD & PEERS, *supra* note 104, at 459.

157. BMWI, *supra* note 30, at 1.

158. *Id.*

damage than it prevents.[159] Particularly following the recent legislative revision, it is also doubtful that examination procedures are only to occur in exceptional cases. Rather, it appears as if examining investments under the GFTL has become a powerful (and gladly used) weapon for fending off particular investments.[160]

When newly introduced in 2009, the legislation was also rather astonishing in that it almost certainly breached EU law despite an intense debate on these issues during the legislative procedure.[161] At least this problematic aspect has now arguably been removed.

But even when disregarding the question of infringements of EU law, the new rules constitute a foreign matter within the GFTL: While the GFTL previously protected vital security interests and foreign relations of Germany and safeguarded the peaceful coexistence of peoples, it now serves the general protection of public policy and security.[162] Certainly, the law on competition would not have been an adequate alternative to tackle the issues associated with investments by SWFs. However, internationally coordinated efforts to regulate SWFs would be much more desirable,[163] improving transparency and imposing investment guidelines.[164] Such measures would increase trust and confidence in these economic actors and prevent protective measures of individual nation states.

CONCLUSION

SWFs are state-owned, profit-driven investment funds designed to invest public funds abroad. While they are not a new phenomenon, only in recent years have they risen to global power and importance. While the investments made by SWFs may have positive macro- and micro-economic effects, there is a growing fear of politically influenced investments and a new form of state capitalism. On the basis of these concerns, the German legislature decided to amend the GFTL in 2009 and again recently in 2017. The Ministry of Trade and Technology now has the power to examine investments undertaken by EU- or EFTA-foreign investors, when as a result of which the investor holds at least twenty-five percent of the voting rights in a domestic company.

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159. Heike Göbel, *Das neue Außenwirtschaftsgesetz—ein Bumerang*, FRANKFURTER ALLGEMEINE ZEITUNG (Aug. 20, 2008), http://www.faz.net/aktuell/wirtschaft/staatsfonds-das-neue-aussenwirtschaftsgesetz-ein-bumerang-1683420.html.

160. Carsten Flaßhoff & Stefan Glasmacher, *Wankende Verwaltungsakte im Außenwirtschaftsrecht bei Unternehmenskäufen*, 2017 NZG 489, 489 (2017).

161. Preisser, *supra* note 17, at 115.

162. Müller & Hempel, *supra* note 35, at 1638.

163. SACHVERSTÄNDIGENRAT, *supra* note 16, at 400.

164. *Id.*

The German rules of 2009 used to be in clear breach of the, at least subsidiarily applicable, right to free movement of capital under TFEU article 63 (1). They were neither sufficiently certain nor proportionate. Only with the recent revision of the FTPO in 2017 is it possible to reach a different conclusion. The restrictions imposed by the FTPA and the FTPO are now arguably in conformity with the requirements of TFEU article 65, as interpreted by the ECJ. Nonetheless, they are still open to improvement. In particular, the FTPO could introduce cases in which investments would generally not be considered problematic, for example, in cases in which the investor committed to transparency, external audits, and the like. This would be another welcome development. Ultimately, international efforts tackling the risks associated with the investments of SWFs in domestic companies would, however, be preferable.

APPENDIX

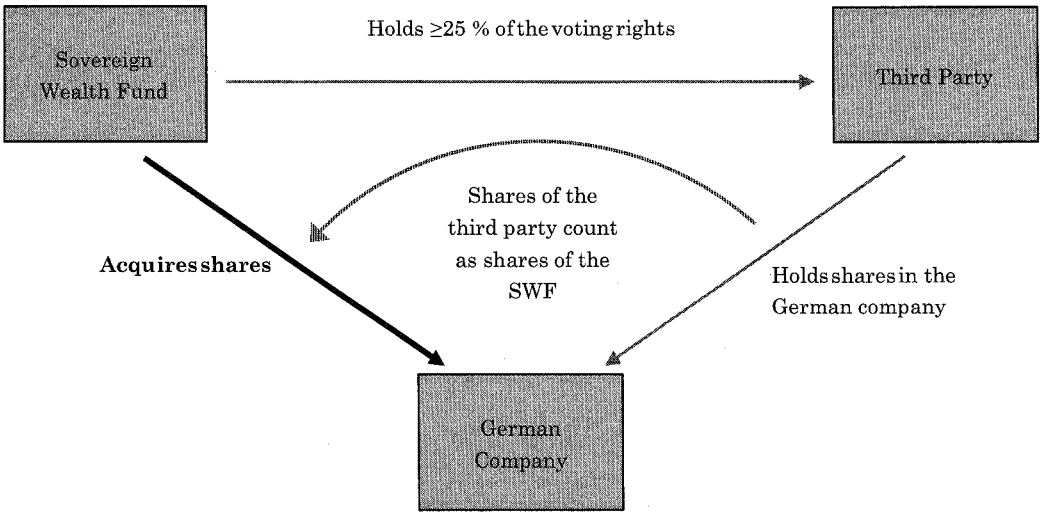
FIGURE 1: CALCULATING THE 25% THRESHOLD PURSUANT TO FTPO § 56 (2)

The FTPA and FTPO apply **if**

	# of shares acquired or already held by the SWF itself
+	# of shares of a third party to be considered as shares of the SWF according to FTPO § 56 (2)
=	at least 25% of the voting rights in the German company

When determining the threshold of FTPO section 56 (1) (i.e, the twenty-five percent threshold), the number of shares held by a third party are added to the number of shares already held or acquired by the SWF in the following cases:

As according to FTPO section 56 (2) no. 1:



As according to FTPO section 56 (2) no. 2:

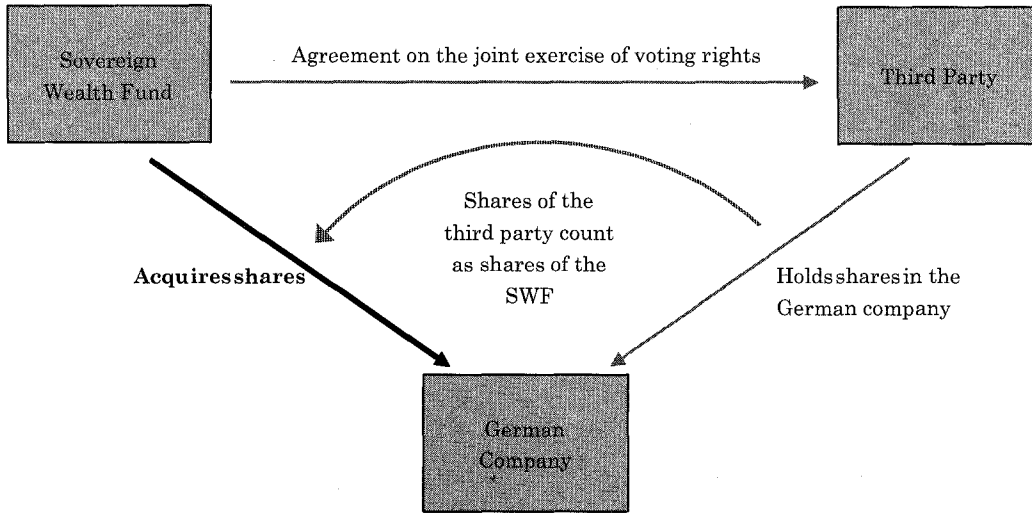
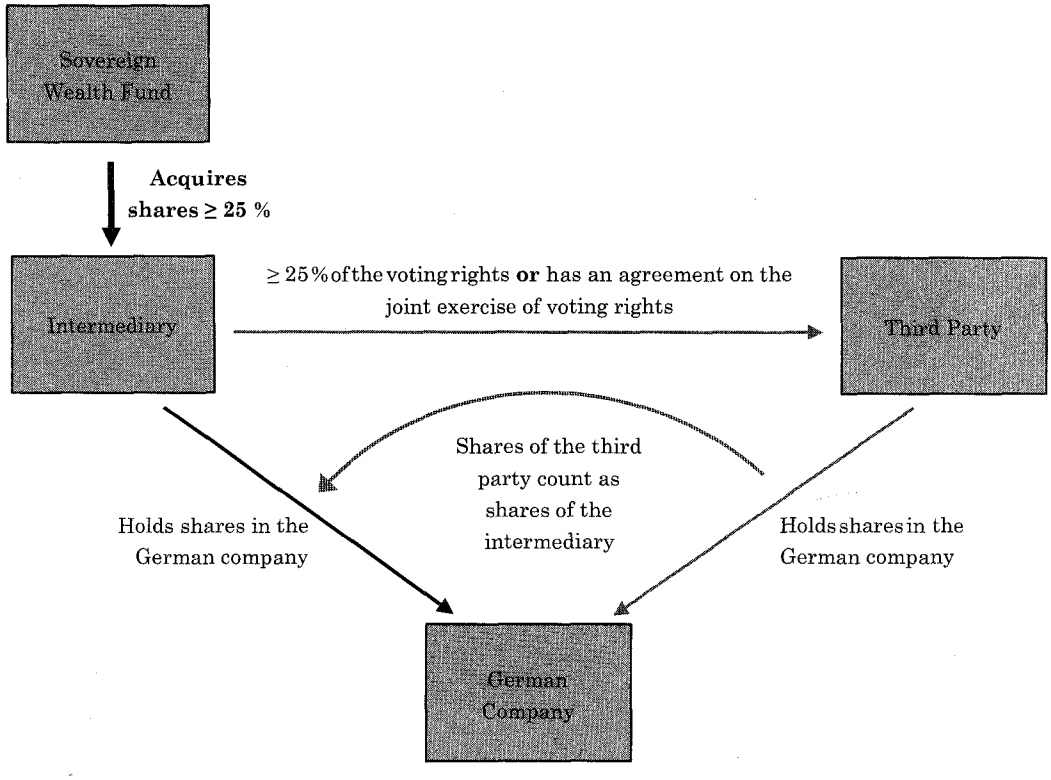


FIGURE 2: CASES OF INDIRECT PARTICIPATION, FTPO § 56 (1), (3)

Meanwhile, the FTPA and FTPO also apply in the case of an indirect participation if the SWF and the respective intermediate shareholder, the attribution principles pursuant to subsection (2) being applied *mutatis mutandis*, possess at least twenty-five percent of the voting rights in the respective subsidiary:



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