



Update Corporate/M&A

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Upcoming Changes to German Foreign Investment Control Regime

On 8 April 2020, the German government adopted the draft bill of the Federal Ministry for Economic Affairs to amend the Foreign Trade and Payments Act (Außenwirtschaftsgesetz, AWG). The planned amendment tightens the provisions governing foreign investment screenings and expands the powers of the Federal Ministry for Economic Affairs to intervene when foreign investors intend to acquire German companies.

The draft bill also implements certain provisions of the EU's FDI Screening Regulation of 2019 which aims to create a uniform framework for screening foreign direct investments from non-EU countries. The FDI Screening Regulation will be fully applicable on 11 October 2020. In this context, the European Commission had also published guidance for the screening of foreign direct investments due to the COVID-19 related emergency on 25 March 2020. In its guidance, the Commission urges Member States to be particularly vigilant to avoid that the current health crisis does not result in a sell-off of Europe's business and industrial players, including SMEs.

The upcoming amendment was triggered by the attempted investment of a Chinese state-owned enterprise in the German electricity network operator 50Hertz in 2018, which the German government was only able to prevent by acquiring a stake in the company. The allegedly envisaged takeover of the German vaccine manufacturer CureVac by the USA at the initiative of US President Donald Trump, which hit the headlines in mid-March 2020, has further accelerated the development.

Dr. Christoph Schork, LL.M.

Dr. Bodo Dehne

German government intends to increase hurdles for acquiring German companies in strategically important business sectors

Motivation and objective of the amendment

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The planned amendment shall enable the government to screen investments in a "more comprehensive and forward-looking" way. The new provisions focus on investments of at least 10 percent of the voting rights in particularly security-relevant companies, for example in the field of so-called critical infrastructure. These include companies that are essential for maintaining the healthcare system or energy supply.

Although legislative work began before the corona crisis, the initiative gets a new dimension against the background of the current need for vaccines, protective masks and other medical equipment. In addition, the share prices of many German companies have fallen sharply and many companies could therefore be taken over at a favourable price at present. As a result, these companies are also becoming a potential target of foreign investors. The German Minister for Economic Affairs, Peter Altmaier, therefore made the following statement on the occasion of the presentation of the draft bill: *"Especially the current situation shows that we in Germany and Europe need our own competences and technologies in certain areas. In this way, we can better protect German and European security interests."*

Up to now, German investment control provisions only allow the government to intervene in transactions if an "actual threat" to security or public order has been identified as a result of the transaction. This high screening standard is now to be reduced in two aspects. Instead of a "threat" to security or public order, their potential "impairment" and, thus, a lower threat level shall suffice to restrict transactions. In addition, an "expected impairment" shall suffice, which allows the government to take a more forward-looking approach. In addition, the Ministry for Economic Affairs can in future also take into account the security interests of other EU member states and whether the investment is likely to affect projects or programmes of Union interest when screening foreign investments.

During investment control proceedings, acquisition agreements have already been subject to the condition subsequent of the transaction being blocked by the Ministry for Economic Affairs.

Planned adjustment of the benchmark for investment screenings

Standstill obligation pending investment control clearance

In the future, all legal transactions serving to implement a notifiable transaction before foreign investment control proceedings are completed are provisionally ineffective until the proceedings are completed. This will be the first time that a standstill obligation is introduced regarding acquisitions of particularly security-relevant companies. The German government believes that without a standstill obligation pending investment control clearance there is a risk that security-relevant information could be transferred abroad or that security-relevant technologies are accessed while the screening process is still ongoing. However, the new standstill obligation only refers to transactions that have to be reported to the German government. Parties may continue to implement transactions before clearance if the transaction is not subject to reporting requirements. Thus, the assessment whether transactions are subject to reporting requirements will be even more important in the future and must be considered also at an early stage when planning an M&A transaction.

In order to prevent that notifiable transactions are factually implemented before clearance, new restrictions will be introduced to accompany the standstill obligation. The restrictions relate in particular to the exercise of voting rights, the distribution of profits and the disclosure or transfer of security-relevant information of the national target company. The potential acquirer must adhere to these restrictions until the investment screening process has been completed. Violations are punishable by law and can be punished with imprisonment for up to five years or monetary fines. In the future, sellers have to assess also from an investment control perspective what information they may disclose to potential investors, for example in the course of a due diligence. Similar to information relevant to competition, it is likely that only a limited number of selected advisors (so-called clean teams) may be allowed to review security-relevant information rather than the foreign investors themselves.

In future, the Ministry for Economic Affairs will be provided with additional powers to monitor compliance with orders or obligations arising from mitigation agreements that were imposed or entered into in the course of foreign investment screenings. Due to the increasing number of mitigation agreements, the Ministry for Economic Affairs will also be allowed to retain third parties to monitor compliance with the

Further changes

obligations. In general, public procurement law will be applicable in this regard.

To implement the FDI Screening Regulation, a "National Contact Point" for the new EU-wide cooperation mechanism shall be established in the Ministry for Economic Affairs. The contact point will, for example, inform the European Commission and the other EU member states about investment screenings and receive their requests for information and comments.

The Ministry for Economic Affairs intends to present additional proposals for tightening the Foreign Trade and Payments Regulation (Außenwirtschaftsverordnung, AWV) in the near future. In future, companies active in business areas like artificial intelligence, robotics, semiconductors, biotechnology or quantum technology shall also be included in the list of particularly security-relevant companies whose acquisition is subject to reporting requirements and, therefore, the new standstill obligation. In addition, the investment screening shall take the individual investors and their background more into the focus.

As a result of the planned amendments, FDI screening will become a much more important factor for the M&A industry. It will influence transaction security and transaction speed. Transactions involving non-EU investors will have to be planned even more carefully in the future. Investors from EU member states may get a competitive advantage in bidding processes.

Impact on M&A practice



Lawyer, Partner
Dr. Christoph Schork, LL.M.
T +49 221 20 52-507
F +49 221 20 52-1
c.schork@heuking.de



Lawyer, Salaried Partner
Dr. Bodo Dehne
T +49 211 600 55-259
F +49 211 600 55-278
b.dehne@heuking.de

Your contact

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Fax-response to: +49 221-2052-1

E-Mail-response to : c.schork@heuking.de

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