Update Corporate/M&A

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Foreign investment control becoming key factor in M&A deals

German government decides to block acquisition of German tech company

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The German government has decided to block the proposed acquisition of IMST GmbH, a German company active in satellite and radar technology, by China Aerospace Science and Industry Corporation (CASIC). Foreign investment control regulations have been tightened by various amendments in 2020. The German government has expanded the list of security-relevant companies, introduced a standstill obligation, restricted the disclosure of information during due diligence proceedings, lowered the benchmark for investment screenings and extended review periods. When planning M&A transactions, it has to be clarified at a very early stage whether FDI proceedings will influence the timing of the transactions and whether clean teams have to be used.

In the wake of the COVID-19 pandemic, the German government has considerably tightened foreign investment control regulations (we reported). It has acted on the European Commission's call to the member states to be vigilant and avoid that the current health crisis results in a sell-off of Europe's business and industrial players.

Standstill obligation for all acquisitions that are subject to reporting requirements

The biggest impact of the recent amendments on the M&A practice is likely to be the introduction of a standstill obligation. While a standstill obligation was previously only applicable to transactions in the military sector, it now applies to all transaction that are subject to reporting requirements. Such transactions may no longer be closed until foreign investment control proceedings with the German Ministry for Economic Affairs have been completed. Violations can be punished with imprisonment of up to five years or a monetary fine. Therefore, transaction advisors must sort out at an early stage with all

parties involved whether the envisaged transaction is subject to FDI proceedings and reporting requirements.

List of companies relevant for national security significantly expanded

A reporting requirement exists if a non-EU investor acquires (directly or indirectly) at least 10% of the voting rights in a German company that is operating in a business area considered relevant for national security. In 2020, the catalogue of security-relevant business areas was expanded to include companies in the pharmaceutical, medical and healthcare sectors. For example, the acquisition of manufacturers of certain medical devices and drugs such as vaccines are now subject to reporting requirements. Companies in the fields of AI, robotics, semiconductors and bio and quantum technology are to be included in the catalogue soon. The government is currently preparing respective amendments. More and more acquisitions will have to be reported. Also, acquisitions by UK investors (as non-EU investors) will also be subject to FDI control after Brexit.

Disclosure of certain information during due diligence processes prohibited

If a transaction is subject to reporting requirements, the disclosure of information during the due diligence process is now also restricted. Company-related information relating to security-relevant areas may no longer be disclosed to the potential acquirer. One solution can be using a limited number of selected consultants (so-called clean team) who review the relevant information instead of the acquirer.

Review periods may be extended

In practice, transaction advisors will have to push the parties to apply for a clearance certificate as soon as reasonably possible after or even before signing and collect the necessary information. If the clearance certificate is not granted within the regular two months, the Ministry for Economic Affairs can now extend the review period of four months by a further three months in justified cases - and by a further month if defense interests are affected. Therefore, the FDI proceedings can become a stress test both financially and time wise.

Impact on the M&A practice

Hence, transactions involving non-EU investors must be planned with even greater foresight in future. In competitive bidding processes, EU investors can gain relevant advantages over non-EU investors due to the obstacles that non-EU investors are facing.

The intended acquisition of IMST GmbH by CASIC is the second transaction to be blocked by the German government according to publicly known information. In the IMST case, the Ministry for Economic Affairs intends to prevent the drainage of special know-how to China and to secure Germany's technological sovereignty in the field of future mobile communications systems. According to the German government, IMST GmbH has special expertise in satellite and radar communication as well as 5G millimeter wave technology. The Federal Cabinet approved the intended veto of the acquisition on 2 December 2020. It remains to be seen whether CASIC pulls out of the transaction before the transaction is officially vetoed – or if it will challenge the government's decision.

Second transaction blocked by the German government

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