

Client Update

Germany Tightens Control over Foreign Corporate Investments

On 12 July 2017, the German government adopted an amendment to its foreign trade rules, increasing the government's authority to intercede in acquisitions of German companies by foreign investors. The amendment is expected to take effect in a few weeks.

Under current rules, the Federal Minister of Economics and Technology ("MET") performs sector-specific examinations where the essential security interests of Germany may be endangered as the result of an acquisition by a non-German resident of a Germany company (or 25% or more of its voting rights) active in sectors such as weaponry, armored military vehicles and certain security-related IT products, etc.

The MET also can carry out cross-sectorial examinations to protect German security and public order concerns if a non-EU resident acquires a German company (or 25% or more of its voting rights) active in other sectors, or industries, such as energy, telecommunications, water, etc.

If the MET considers that German security and public order or essential security interests are at stake, it may prohibit the exercise of voting rights acquired by the non-German or non-EU buyer, respectively, or appoint a trustee who shall reverse the transaction if it has already been completed. The MET may also impose conditions upon the transaction.

The main changes to the existing rules are (i) the expansion of the sectors subject to sector-specific and cross-sectorial examinations, (ii) the introduction of a mandatory reporting obligation in respect of sectors subject to cross-sectorial examinations, and (iii) the extension of review deadlines that can be critical in M&A transactions.

The amendment is a reaction to an increased number of acquisitions of German companies that offer key technologies and critical know-how by foreign investors. Recent examples include the successful takeover of Kuka, Germany's largest maker of industrial robotics, and the attempted takeover of Aixtron, a German chip equipment maker, in both cases by Chinese investors. The Aixtron transaction was abandoned by the intended buyer after it had been prohibited by the United States and the German government withdrew its original clearance. The tighter controls

also reflect the increased vigilance of the German government and the EU Commission against non-EU state-owned investors receiving state capital.

MATERIAL CHANGES

1. Sectors Subject to MET Review

The amended foreign trade rules will expand and more clearly define the industries subject to cross-sectorial examinations. The rules will list certain industries and sectors that are considered critical to the German public order and national safety and of such vital importance to the nation's society and economy that their failure or degradation would result in sustained supply shortages, significant disruption of security and public order, or other dramatic consequences. The list includes:

- businesses that pursue critical infrastructures pursuant to the German Security and IT Act, i.e., businesses active in the fields of energy production, critical IT, telecommunication, traffic control and transportation services, healthcare, water supply, food supply, finance and insurance administration;
- companies that develop or modify software for critical infrastructure, in particular software used for power plants, networks and control systems for electricity and water, fuel and water supply technology, telecommunication technology, finance and insurance administration, health care, traffic control and food supply;
- certain cloud computing services; and
- components or services for telematics infrastructure, mainly in respect of electronic health insurance cards.

The amendment also expands the sectors subject to a sector-specific examination. The list will include not only weapons, military tracked vehicles or security-related IT products, but also additional products in the military and defense sector, including drones, military flight simulators, cameras, certain robots or construction equipment for military purposes.

2. Obligation to Report

While acquisitions of German companies subject to a sector-specific examination will continue to require a mandatory report to the MET, the reporting of an acquisition subject to a cross-sectorial examination will also become mandatory. However, such mandatory reporting will only be necessary in respect of the newly introduced list of sectors and industries.

In addition, the MET continues to have the authority to initiate on its own proceedings in respect of transactions that do not fall under this list, but that could still have an impact on German security and public order and in respect of which voluntary filings should have been made. In order to avoid this situation, as is the case under the current rules, the acquiring party can report on a voluntary basis in order to obtain a clearance certificate (“certificate of non-objection”) and thereby avoid governmental interference at a later time.

Another material change allows the MET to open a review regarding cross-sectorial acquisitions three months after it has received knowledge of the transaction and not, as previously, upon conclusion of the contract. The MET cannot commence a cross-sectorial examination if at least five years have passed after the conclusion of the contract.

3. Extension of Time Limits for Prohibition or Instructions

The amendment also extends the time permitted for the MET’s review. For a sector-specific examination, the time limit has been extended from one to three months, while the time limit for a cross-sectorial examination has been extended from two months to four months, in each case running from the time that MET receives the complete documentation. Further, such time limits are paused for as long as the MET and the parties negotiate contractual provisions to ensure security and public order or essential security interests of Germany.

As previously, the rules continue to provide that a certificate of non-objection is deemed to have been granted if the MET has not initiated a review within a specified time after receipt of the complete written application. This implied clearance, however, will now only apply after two months, rather than one month, after the receipt of the complete written application.

EFFECTS ON FOREIGN M&A TRANSACTIONS

- The extended time limits will prolong the required administrative procedures and thus may affect transaction deadlines and deal certainty in general. For this reason, foreign investors may be in a weaker position in a bidding situation.
- The increased list of sectors subject to cross-sectorial examinations provides more guidance as to the broad criterion of “security and public order”, but a case-by-case analysis is still required. A buyer should carefully consider whether the acquisition must be reported to the MET.
- As more industries and sectors will become subject to the cross-sectorial examination, we expect to see an increased number of applications for certificates of non-objection. Such applications are fairly simple to prepare and similar to merger control filings. Typically, the antitrust adviser makes both the application to MET as well as the necessary merger control filing(s), which can be cost- and time-efficient due to the very similar set of information required.

- Due to the new obligation to report acquisitions by foreign investors, more inbound transactions may receive publicity and become subject to debate.

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Please do not hesitate to contact us with any questions.

FRANKFURT

Dr. Thomas Schürle
tschuerrle@debevoise.com

Philipp von Holst
pvonholst@debevoise.com

Johanna Marniok
jmarniok@debevoise.com

Dr. Andrea Pomana
apomana@debevoise.com