

Germany widens the scope of its Foreign Investment Review Regime

Germany has once again strengthened its laws on foreign investment review by (i) introducing a new review threshold; (ii) and adding the media sector to the scope of review.

Main Changes:

End of December 2018 the German Government adopted the 12th regulation amending the German Foreign Trade Regulation (Außenwirtschaftsverordnung, "AWV").

1. New Review Threshold

The amendment lowers the threshold for screening and prohibiting acquisitions of shareholdings in companies that carry out activities that are relevant for the national security and public order of the Federal Republic of Germany. With the reform, the direct and indirect acquisition of 10% of the voting rights of a relevant company can be reviewed by the Federal Ministry of Economy and Energy ("**BMWi**"). Previously, the threshold for an examination by the BMWi was an acquisition of 25 % of the voting rights.

In Germany, the AWV distinguishes between sector-specific and cross-sector reviews. The new threshold will apply to the scope of the sector-specific investment review. This includes investments of non-German investors in the following sectors:

- manufacturing or development of military weapons (as enumerated in Part B of the German list of war weapons);
- manufacturing or development of specially designed gears and engines for military utility vehicles;
- manufacturing of products with IT security functions to process classified state information or components essential to the IT security function of such products or the prior manufacturing of such products with ongoing possession of the technology if the overall product was licensed with the knowledge of the company by the Federal IT Security Agency; and
- certain products listed in Annex I Part I Section A of the AWV (in particular in the fields of sensor systems, electronic warfare and equipment for trainings and operations specially designed for military purposes).



Furthermore, following the reform, the acquisition of 10% of the voting rights by a non-EU/EFTA investor in companies that are operating in one of a number of specifically enumerated fields can be examined as well. The relevant sectors are:

- operators of "critical infrastructure";
- developers of software particularly designed or modified for operating critical infrastructure in specific sectors;
- companies that carry out measures for the monitoring of telecommunications or produce technical equipment used for implementing statutory measures;
- providers of cloud computing services and the infrastructure used for this;
- holders of a license for providing telematics infrastructure components or services; and
- companies in the media industry contributing to the public opinion.

2. Extension of the Investment Review to Media Companies

The BMWi can now also review acquisitions of media companies for national security concerns.

The definition of a media company refers to companies active in the media industry that contribute to the shaping of public opinion by means of broadcasting, telemedia or print products, and which are characterized by providing up-to-date information and of having a widespread impact. So far, it is unclear if the definition also covers social media or other digital communication platforms. It remains to be seen whether the BMWi will specify the criteria for "shaping of public opinion" by media companies.

Background

For quite a while there has been growing skepticism among German policy-makers about acquisitions of high-tech companies and investments in the critical infrastructure sector by primarily state owned investors. Lately, two high-profile acquisitions of German companies by Chinese corporations prompted public backlash:

In August, the German Government for the first time in the history of foreign investment reviews vetoed the planned takeover of Leifeld Metal Spinning AG ("**Leifeld**") by Chinese nuclear equipment manufacturer Yantai Taihai Group ("**Yantai**") on national security grounds. Leifeld is a machine-tool manufacturer. Its products can also be used for nuclear purposes.

Another notable Chinese business foray in Germany has been the attempted purchase of 50 Hertz Transmission GmbH ("**50 Hertz**"), in which the German Government had to take an expensive detour to prevent an acquisition. 50 Hertz is a transmission system operator, supplying electricity to around 18 million inhabitants in Germany. In spring 2018, it became known that the Chinese state-owned State Grid Corporation of China ("**SGCC**") intended to purchase 20 % of the shares in 50 Hertz from the Australian infrastructure fund IFM Investors. To prevent SGCC from buying the shares, the German Government asked the Belgian transmission system operator, Elia, which holds the majority of the shares in 50 Hertz, to exercise its right of first refusal.

This share was then taken over by the KfW Bankengruppe, which is owned by the German Federal Government, for the purchase price of slightly less than EUR 1 billion. In a joint press statement, the Federal Ministry of Finance and the BMWi justified the intervention with the significance of 50 Hertz for the electricity supply in Germany, classifying 50 Hertz as a critical infrastructure within the meaning of the AWW. With the new threshold, this extraordinary step would not have been necessary.

Foreign Direct Investments in the European Union

The Amendment comes shortly after the European Commission, the European Parliament and the Council of the European Union reached a political agreement on a European framework for the screening of foreign investment. The "Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union" is another major development for the screening of foreign direct investment in the European Union for national security or public order reasons.

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