

GERMANY IMPLEMENTS EXTENDED FOREIGN INVESTMENT CONTROL MECHANISMS

02 August 2017 | Germany
Firm news

The German government has amended crucial provisions of the German Foreign Trade Ordinance (Außenwirtschaftsverordnung "AWV") on foreign investments in German enterprises with immediate effect. These amendments result in additional obligations of foreign investors and grant the German Federal Ministry of Economics and Technology (Bundeswirtschaftsministerium "BMW") extended rights of control.

KEY AMENDMENTS

As a consequence, investors from outside the EU and EFTA will be obliged to report acquisitions of German enterprises to the BMW more substantially. This correlates with an expansion of the examination and control rights of the BMW.

German foreign investment control is triggered, if (i) a foreign investor acquires a German enterprise (i.e. at least 25 % of the voting rights) and (ii) such acquisition may endanger the public order or security of the Federal Republic of Germany. This applies regardless of the industry sector in which the target operates (so called cross-sectoral proceeding). In addition, investment control proceedings apply in case the target operates in specific industries, especially in the defense sector (so called sector-specific proceeding). The amendments have impact on both the sector-specific and the cross-sectoral proceeding. In addition, the BMW gains more time to initiate foreign trade proceedings to assess such acquisitions.

THE CROSS-SECTORAL PROCEEDING

In most foreign investment examination cases the cross-sectoral proceedings apply. The key question in this context is if an acquisition of a German company by a non-EU/non-EFTA investor may endanger the public order or security of the Federal Republic of Germany. Before the amendments of the AWV, there were only a few and abstract explanations, however, with the current amendment, a detailed but non-conclusive list of examples was added in Sec. 55 AWV, to specify the term *public order or security*.

This list includes companies that operate critical infrastructures in sectors such as energy, information technology and telecommunication, finance, insurance, health and transport. Furthermore, the list comprises companies which manufacture industry-specific software for these critical infrastructures as well as providers of cloud-computing. The list of notifiable cases is very comprehensive and includes not only self-explanatory aspects such as the acquisition of transmission network grid operators, satellite navigation systems or air traffic control operators but also less obvious targets such as facilities to retrieve and treat blood donations, hospitals or meteorological stations. As this list is not conclusive, other cases may qualify to endanger the public order or security.

Technically speaking, the list in Sec. 55 AWV has not broadened but simply clarified the term public order and security. However, as the examples above show, the term also includes cases one may not necessarily have considered as relevant for a cross-sectoral proceeding.

The amendments introduce further reporting duties of foreign investors vis-à-vis the BMWi. In the past, foreign investors were not obliged to report acquisitions to the BMWi and the BMWi was only entitled to initiate proceedings with respect to an acquisition within three months following the execution of the transaction documents. Under the previous regime, the BMWi relied on voluntary notifications from foreign investors (e.g., in the context of an application for a certificate of non-objection), information on the transaction through other authorities (such as the Federal Cartel Office) or unrelated knowledge of such acquisitions, e.g. through newspaper articles. Due to the amendments of the AWV, foreign investors are now obliged to report any acquisition which falls within the scope of the list in Sec. 55 AWV to the BMWi.

THE SECTOR-SPECIFIC PROCEEDING

The sector-specific proceeding applies to acquisitions of German companies which operate in security-related industry sectors by a foreigner (in this case including EU and EFTA foreigners). This includes in particular defense industries and IT-security sectors as well as further sectors explicitly mentioned in the AWV. An additional prerequisite for a sector-specific proceeding is whether essential security interests of the Federal Republic of Germany are endangered by such acquisition. The legislator broadened the list of relevant industry sectors to include not only companies which develop and manufacture specific weapons, ammunition and military equipment but also reconnaissance/sensor technology and support/protection technology. Should an acquisition fall within the scope of the sector-specific proceeding, the purchaser continues to be obliged to report such acquisition to the BMWi.

EXTENSION OF LEGAL DEADLINES

Furthermore, the relevant deadlines have been extended in favour of the BMWi, providing the BMWi with more time to decide whether a formal review process shall be initiated. The relevant three-month period starts with the BMWi obtaining knowledge of the relevant acquisition (either by notification or through other sources). If an acquisition has not been reported in a cross-sectoral proceeding, the BMWi is entitled to review the acquisition and to intervene for a time period of up to five years following the execution of the transaction documents.

In case the BMWi opens formal foreign investment proceedings, the BMWi now has a time period of up to four months in cross-sectoral proceedings and up to three months in sector-specific proceedings to decide on whether it clears the acquisition, issues instructions in order to secure the public order or security or prohibits the acquisition. Should a purchaser apply for a certificate of non-objection, the BMWi has now two (instead of one) months to decide whether it issues such certificate or initiates formal proceedings.

FORECAST AND POTENTIAL EFFECT ON CROSS BORDER M&A PRACTICE INVOLVING GERMANY

The amendments of the AWV will result in foreign trade control issues becoming more important for foreign investments in Germany. The amendments of the cross sectoral proceeding apply only to non-EU/non-EFTA investors, whereas the amendments of the sector specific proceeding apply to all non-German investors. Professional preparation of foreign investments should ensure that the amendments of the AWV do not adversely affect foreign investments in Germany.

On the one hand, the amendments do not widen the scope of the cross sectoral proceeding. On the other hand, foreign investors are now obliged to report any acquisition relating to industry sectors explicitly mentioned in Sec. 55 AWV. These reporting duties will result in additional efforts of foreign investors and their advisors. This applies for all acquisitions relating to companies that have a certain proximity to the infrastructures explicitly named in the AWV. In case of such proximity, foreign investors should thoroughly assess whether they should report the acquisition to the BMWi. Otherwise, the BMWi can open foreign trade proceedings and take actions with respect to such acquisition for a period of five years following the transaction if the public order or security could be endangered.

The extended scope of the sector specific proceeding applies to all foreign investors, including EU-members. These amendments will also require additional efforts from foreign investors and their advisors when assessing their foreign trade reporting duties.

Consequently, a higher number of sector specific cases will probably be reviewed by the BMWi in a formal proceeding.

The extension of the relevant legal deadlines should not result in investments in Germany becoming subject to an uncertain timeline. The extensions should rather require closer cooperation between foreign investors and the BMWi, already in very early stages of a transaction. This will also lead to additional efforts for foreign investors and their advisors. However, in order to facilitate the transaction process, it might even be advisable to contact the BMWi and to provide information, even though not strictly required by law. This could enable the BMWi to decide at a relatively early stage of the transaction that foreign trade proceedings shall not be opened. In this respect, one could consider to apply for a certificate of non-objection to avoid possible insecurities resulting from the five year review period of the BMWi in relation to foreign investments in Germany.

For more information on the nature of the extended control mechanisms and what they mean for foreign investors please contact [Dr Marius Boewe](#) or [Dr Christian Johnen](#) in our Düsseldorf office.

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