

In control

Non-EU/EFTA buyers of German targets need to be aware of new notification obligations regarding certain foreign investment transactions in the member state

In July 2017, the German government amended the German Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung* or AWV), with a view to tightening its foreign investment regime for acquisitions of 25% or more of the voting rights in a German target by investors not resident in an EU member state or part of the European Free Trade Association (EFTA). Though such acquisitions had already been subject to review by the German government since 2009 to assess whether they pose a threat to the public order or security, the debate on a potential sellout of German know-how and key industries to foreign – in particular Chinese – purchasers with governmental background continued. This discussion led the government to further sharpen the rules to control such foreign investment into German targets. In this regard, the amended AWV now identifies specific industry sectors of the German economy in which foreign investments may raise a threat to national public order or security, and thereby provides additional clarity regarding the specific industry sectors where investment will in particular be scrutinised for national security-related concerns. In addition, the AWV for the first time introduces a notification obligation for transactions relating to these industry sectors. Therefore, non-EU/EFTA investors making such investments must notify the German government, ie the Federal Ministry for Economic Affairs and Energy (BMWi), about entering into a respective acquisition agreement.

Threats to public order or security

Under the amended AWV, the relevant acquisitions or investments by non-EU/EFTA investors involving certain specific industry sectors will be scrutinised by the BMWi for threats to public order or security. In this regard, the AWV now includes a non-exhaustive list of industries of particular concern:

- the operation of facilities, plants, or parts thereof, of critical infrastructure in the meaning of the German Act regarding the Federal Office for Information Security Technology (*Gesetz über das*

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Germany tightened its foreign investment regime for German assets targeted by investors not resident in an EU member state or part of the EFTA. It did so by listing specific industry sectors where an investment in so-called critical infrastructure will in particular be scrutinised for national security concerns.

Furthermore, investors making such investments are obliged to notify the government about the conclusion of the agreement. Therefore, as investments raising such national security-related concerns can be prohibited, non-EU/EFTA buyers have to pay increased attention to German foreign investment control rules and align their transaction schedules in accordance with them.

Bundesamt für Sicherheit in der Informationstechnik – Act on the Federal Bureau of Security in the Information Technology or BSIG;

- the development or alteration of industry-specific software involved in the operation of such critical infrastructure;
- the execution of organisational and/or supervision measures according to the German Telecommunications Act;
- the rendering of cloud computing services; and
- activities in telematics infrastructure in the public health sector.

With respect to (i) and (ii) of this list, the German government is particularly concerned about the operation and supply of software to operators of so-called critical infrastructure, should non-EU/EFTA investors make an investment into such entities. BSIG defines the term critical infrastructure to include facilities, plants and parts thereof in the industry sectors energy, information technology, telecommunications, transportation and traffic, health, water, nutrition, finance and insurance, which – also constitute businesses of high importance to the proper functioning of society, as their outage or impairment would cause substantial supply shortfalls or jeopardise public security. Additional BSIG regulations further determine what constitutes critical infrastructure. The Ordinance on the Determination of Critical Infrastructures (*Verordnung zur Bestimmung Kritischer Infrastrukturen nach dem BSIG* or BSI-KritisV) identifies for each of the seven critical industry sectors the plants (or parts thereof) to be considered critical infrastructure by listing the exact types of plants, and stipulating the minimum supply thresholds required to be considered critical. For example, the BSI-KritisV defines a power generation plant with an installed electricity net supply of 420MW per year and a hospital with 30,000 patients per year as examples of critical infrastructure.

As a result, acquisitions or investments in the seven industry sectors listed previously for which a certain size of supply is reached will certainly raise concerns of a threat to German public security and order. However, while these amended regulations provide insight into the industry sectors that the German government will scrutinise, investors also have to be aware that this list is not exhaustive. Non-EU/EFTA buyers should not assume that investments in other sectors of the Germany economy or of smaller investments

in these industry sectors will not also be viewed as a threat to German public order or security. In particular, acquisitions in the defense sector, which the amendment to the AWW has extended to include additional key technologies crucial for defense applications (for example encryption and sensor technology) are also subject to specific governmental review.

execution of an agreement governed by the law of obligations (*schuldrechtlicher Vertrag*), i.e. the agreement by which the acquirer agrees to acquire the entity or the voting rights, and not with respect to the execution of the agreement in rem by which the acquirer in fact acquires the entity or the voting rights at issue. Therefore, the acquirer must notify the BMWi upon the execution of final and

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Consequently, the authority to determine that a potential transaction poses a threat to public order or security still lies with the German government, though any determination in this regard can be fully reviewed by German courts. As the German government can ultimately prohibit the transaction, non-EU/EFTA investors should review the foregoing criteria to assess whether potential acquisitions or investments in Germany might raise national security concerns – in particular whether the German target is active in one of the industries of particular concern listed above including critical infrastructure.

Notification obligation vis-a-vis the BMWi

In the event an acquisition or investment in Germany by a non-EU/EFTA investor relates to an industry of particular concern, such acquisition or investment agreement has to be notified to the German government. The amended AWW includes an affirmative obligation to notify the BMWi about the agreement regarding the acquisition or investment by any non-EU/EFTA person of a German entity or a direct or indirect holding of at least 25% of the voting shares of a German entity active in the specific industries mentioned above.

The notification to the BMWi must be submitted by the direct acquirer party to the acquisition or investment agreement. The notification obligation applies upon the

binding agreements which provide the acquirer with a claim to obtain legal title of the entity or the shares, which may include, but are not limited to, share purchase agreements, asset purchase agreements and agreements for the subscription of shares. The law governing the respective agreement (German law or otherwise) is irrelevant, however. The acquirer must evaluate which agreement in connection with the acquisition is considered the agreement governed by the law of obligations. To the contrary, non-binding arrangements, letters of intent or memoranda of understanding do not trigger the notification obligation. Such notifications to the BMWi and thus the German government will not be disclosed to the public and, unlike merger filings to the German antitrust office, will not be made public on governmental websites or other public sources.

The obligation to notify the BMWi only applies to transactions involving target entities active in the specific industry sectors of particular interest, as identified in the AWW, in particular critical infrastructure entities. Therefore, the acquirer must assess whether the notification obligation is triggered with respect to the transaction in question. This places the burden on the acquirer to examine whether the requirements of the notification obligation are met or not. However, if the acquirer erroneously omits to notify the BMWi, this does not trigger any payment of a fine by the acquirer or its acting persons.

Should a notification be required, the acquirer has to submit the notification to the

BMW in writing. The AWV does not stipulate the details of information to be contained in the notification or whether supporting documents must be attached. It is assumed that the notification must identify the parties to the applicable agreement and the business operations in which the acquirer and the German target entity engage. However, the acquisition agreement itself does

without undue delay to start the three months review period. Otherwise, in the event the BMWI obtains knowledge through other means, the acquirer faces the risk that the BMWI may initiate a review of a transaction that occurred up to five years prior to it gaining knowledge of the transaction. Given that industries of particular concern with respect to public security and order are

provides security to all parties that the German government will not prohibit the transaction.

In any case, tightened rules regarding acquisitions of or investments in German target companies regarding a possible threat to public security and order as well as extended review periods with respect to such transactions will affect the structuring of transactions envisaged by non-EU/EFTA investors and will in particular tend to delay their completion.

Therefore, transaction schedules may have to observe that transactions are deemed to be approved, in the event the BMWI has not initiated an in-depth review three months after the notification or two months after the application for a clearance order. Though the transactions can be implemented without having received approval from the German government, no acquirer would want to run the risk of being required to unwind the transaction. As a result, non-EU/EFTA investors have to pay increased attention to the foreign investment control rules set by the AWV. This includes, prior to commencing the acquisition process, a detailed analysis whether the relevant acquisition regarding a German target may impose a threat to public order or security as well as, with respect to transaction documents, appropriate stipulations regarding conditions for completion of the relevant transaction.

The BMWI can initiate an in-depth review within three months of learning of the signing of the agreement irrespective of whether the transaction has been completed or not

not need to be disclosed.

The AWV does not set a time period for the notification to be made. The notification refers to the execution of the acquisition agreement, the notification can only be made after the execution of the agreement. However, it's worth noting the BMWI is entitled to initiate an in-depth review within three months following the time it learns of the signing of the agreement irrespective of whether the transaction has been completed or not. The AWV in this regard does not define what constitutes knowledge of a transaction by the BMWI for these purposes, but, based on German administrative law, it will most likely be interpreted narrowly in the meaning of actual, positive knowledge of the execution of the relevant transaction agreement. Consequently, any acquirer should be interested in submitting the notification

affected, leaving the German government without notification causes a serious risk for a maximum of five years that the transaction, even after completion, may be made subject to scrutiny and ultimately be prohibited by the German government.

Implications for non-EU/EFTA investors

Non-EU/EFTA investors have to be aware that acquisitions of German businesses in certain industry sectors may be subject to an in-depth national security review by the BMWI. Consequently, prudent non-EU/EFTA investors will in case of any doubt not only submit the required notification, but will, like in the past, apply voluntarily for a clearance certificate, which, if obtained,



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