

## **ENHANCED CONTROL OF FOREIGN INVESTMENTS IN GERMANY – LESS DEAL CERTAINTY FOR FOREIGN INVESTORS**

Due to the increasing number of foreign investments, in particular by Chinese investors, Germany's federal government intends to significantly extend the scope of application of foreign investment control and the respective review periods.

### **CURRENT LEGISLATIVE BASIS**

The German Foreign Trade Act (*Außenwirtschaftsgesetz*, "**AWG**") and the respective implementation regulation (*Außenwirtschaftsverordnung*, "**AWV**") are meant to enable the Federal Ministry of Economic Affairs and Energy (*Bundeswirtschaftsministerium*, "**BMWi**") to restrict foreign investments in Germany deemed to endanger the public order or security of the Federal Republic of Germany. In this respect, two different categories exist: (i) one involving any non-German acquirers concerning sector-specific transactions in the field of weaponry or certain security-related IT products and (ii) another involving non-EU acquirers in relation to general (cross-sectoral) transactions irrespective of the particular industry.

### **REASONS FOR AMENDMENT**

In light of an increasing number of foreign acquisitions of German-based companies, in particular by Chinese investors, the German federal government considered it necessary to adapt its existing assessment procedures in an attempt to better protect domestic industries. It is not yet clear when the respective draft bill will enter into force. However, it can be expected that the legislative hurdles should be cleared in the coming weeks.

### **EXTENDED SCOPE**

The amendment extends the scope of application of not only sector-specific but also cross-sectoral examinations and further prevents its circumvention.

Whilst the sector-specific examination was previously limited to those domestic sectors in the fields of weaponry and certain security-related IT products, the amendment now extends the scope of application to include fire control, target surveillance and tracking systems, electronic equipment for military purposes, specialised equipment for military training and simulation, imaging equipment for retaliatory actions, and materials, robots as well as databases, among others. Moreover, the amended regulation shall also encompass those materials required for such products.

The former version of provisions relating to cross-sectoral scrutiny provided for an assessment in more general terms as to whether or not the acquisition of a domestic company by a non-EU resident endangers the public order or security of the Federal Republic of Germany.

Now, the amendment specifies, based on the relevant decision practice, what exactly constitutes such danger, particularly by providing a non-exhaustive list of examples. This includes target companies active in the operation of critical infrastructure, corresponding industry-specific software, measures for the surveillance of telecommunication, cloud computing services, and components or services for telematics. The 'critical infrastructure' is defined as any institution, asset or part of it belonging to the energy, IT and telecommunications, traffic and transport, healthcare, water, nutrition as well as finance and insurance sectors, or those which are of major significance for the functioning of the community in Germany.

The regulation also attempts to capture all forms of abusive or circumventing transactions. In this context, all transactions carried out by EU residents are indicative of such behaviour if the entities concerned do not pursue significant independent business activities other than the acquisition of the domestic company or do not have a permanent presence within the EU or EFTA.

## REPORTING REQUIREMENT AND REVIEW PERIODS

Besides the extended scope of application, a further important change concerns the introduction of a reporting requirement according to which the conclusion of the agreement which falls under the cross-sectoral scrutiny now needs to be reported to the BMWi in writing. In line with this amendment, the BMWi's three-month period for opening the examination procedure (Phase I) would commence upon the BMWi's knowledge of the transaction, and not – as previously – upon the conclusion of the agreement, thus placing the BMWi in a better position to review.

In addition, the regulation sets out that a certificate of non-objection for cross-sectoral transactions (Phase I), which is a way to avoid the three-months period mentioned above, shall now be deemed to have been issued within two months of receipt of the application, instead of one month as under the current legal framework. The respective review period for sector-specific scrutiny in Phase I shall be extended from one to three months.

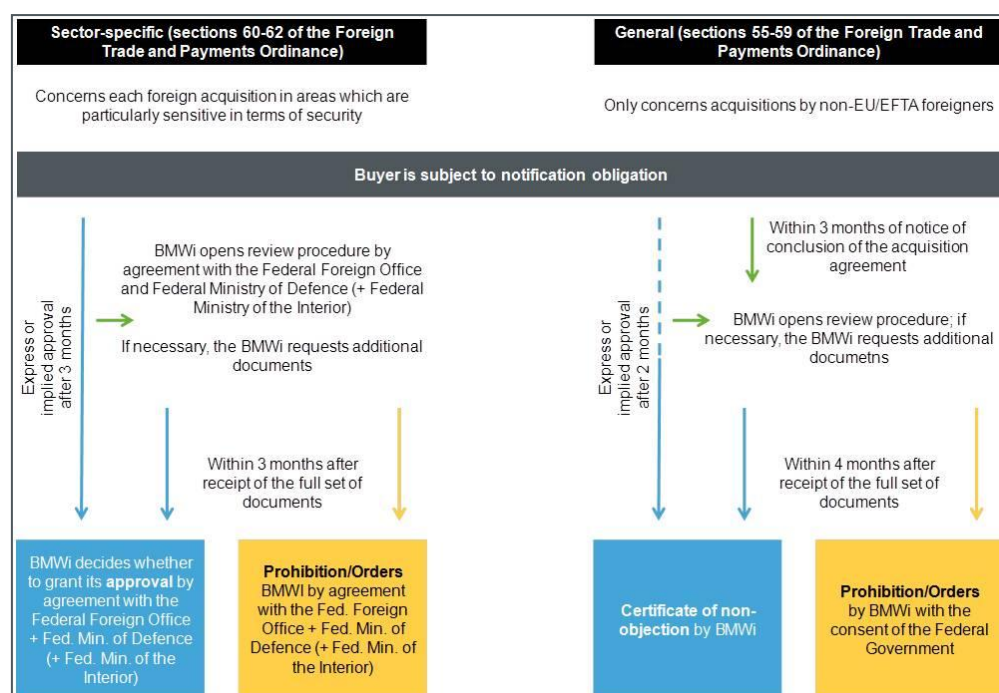
Furthermore, in case of an in-depth review of cross-sectoral transactions (Phase II), the BMWi would have four additional months (instead of two) to prohibit the acquisition or impose remedies. The respective in-depth review period (Phase II) for sector-specific transactions would be extended under the new framework from one to three months.

## CONCLUSION AND OUTLOOK

The announced amendments to the current legal framework are not surprising given the rather intensive political discussions in the last couple of months.

The future legal framework will lead to an increased number of transactions would fall under the scope of application of AWG/AWV. This will certainly extend the route to closing and would have to be reflected in the underlying transaction agreements.

However, it remains to be seen how the German federal government will use the new legal framework in practice without crossing the border to national protectionism which, in turn, could have a negative impact on the volume of investments in Germany.



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