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RECHTSANWALT & NOTAR

GERMAN LAW NEWSFLASH – December 2018

Dear Reader,

Below please find our latest German law NewsFlash. We hope it meets your interest.
We wish you Happy Holidays with your loved ones and a great New Year.

Best regards,
Thomas & Team

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Federal Government prohibits inbound M&A transactions

How it used to be

We are living in times of growing uncertainty with numerous challenges to both the rule of law and our democratic principles as a whole. As one response the German Government last year extended its possibilities to review and prohibit the sale of national companies to non-European investors. This was largely done through a change in the Foreign Trade Regulation (Außenwirtschaftsverordnung AWV). By adding "critical infrastructure" to the "Public order and safety" test, the Economics Minister now has increased possibilities to control M&A transactions, if at least 25 percent of the shares or voting rights of the target company are concerned (see our NewsFlash from September 2017). This has to be seen against the continued interest of Chinese investors in German industry, particular in such high tech areas such as robotics, automotive and energy. In the first half 2018 Chinese investment in Germany accounted for some € 10 billion.

What is new

For the first time the new rules have now been applied. On 1 August 2018 it was prohibited for Leifeld Metall Spinning AG in North Rhine Westphalia to be sold to state owned Chinese

Yantai Taihai Corporation in the province of Shandong. With 200 employees and an annual turnover of € 40 million Leifeld is a technology leader in materials for air and space as well as in nuclear power. Its know-how is also used for the European Ariane 5 rocket. The investment would have negatively impacted "public order and safety" in Germany, the decision was reasoned.

Only days later an example was given, of what the Economics Ministry considers as "critical infrastructure". State Grid Corporation of China (SGCC) wanted to acquire 20 percent of the Berlin based 50Herz Transmission GmbH, which provides the grid for Berlin and the New German Länder. SGCC had already earlier failed to acquire a share in 50Herz, when Belgian Elia used its right of first refusal to acquire 20 percent in 50Herz from its Australian Joint venture partner IFM. This time Elia did not purchase the last 20 percent of IFM on its own account, but passed the shares on to the German state owned *Kreditanstalt für Wiederaufbau (KfW),* where the participation has now been parked for an interim period. This was necessary, because the prohibition rules under the AWV only apply to participations equal or more than 25 percent. The Economics Ministry has in that contact, however, already indicated its intension to lower the AWV threshold to 15 Percent.

What does it mean for the future

In addition to merger control by *Bundeskanzleramt* and further competent authorities, M&A transactions in Germany have to be carefully reviewed also in respect of the extended "public safety and order" rules. This does not only apply to large deals but also to mid-size transactions – as the Leifeld example has shown-, depending on the sensitivity of the case. Other Chinese investments in Germany have subsequently been consented, like the purchase of 36 percent of the shares of listed Bavarian Grammer AG – that provides headrests for the car industry – to the Jifeng manufacturer of automotive parts.

Despite quite some criticism the new rules are not in opposition to foreign investment in Germany as such. They only show that issues of national interest are taken into account more diligently as may be in the past. This is in line with developments in other European and non-European countries, and also recent efforts on EU level.

The prohibition of M&A deals in critical infrastructure also matches the now taken decision of the Economics Ministry to keep its 30 percent remaining share of listed Telekom AG, while the sale of its remaining shares in Deutsche Post AG is said to go ahead as planned.

By limiting the relevant percentage of shares to 25 percent this may also affect small and medium sized companies as seen through the example of Leifeld.
Still the current issue is not only the dominant presence of foreign investment but also of digital market companies such as Apple, Google or Facebook. On a related note Economics Minister Peter Altmeier therefore announed to use merger control in order to somehow tame those digital giants. As these companies became viral in different sectors such as healthcare, sales, or traffic their market power got truly visible. Still in 2014 the European Commission accepted the merger of Facebook and WhatsApp in the communication sector which is just one example.
Therefore, Altmaier presented the idea of not only looking on the dominant but the potential dominant position when it comes to efficient merger control.
This somehow matches statements of the current U.S. president Trump paying equal attention to the unequal growth of tech companies. What we may eventually see is a cross Atlantic collaboration to finally get a hold on the tech giants.