

GERMAN LAW NEWSFLASH – September 2017

Dear Reader,

Below please find our latest NewsFlash, this time dealing with the extended powers of the German Government to veto the sale of certain German companies to foreign investors.

We hope that our NewsFlash meets your interest. Any remarks and feedback are always welcome.

Best regards,

Thomas & Team

New governmental regulation on foreign M&A in Germany

How it used to be

Our globalized world supports global companies and exchanges across borders. However, in order to maintain prosperity and sovereignty of countries, globalization also needs regulation on a national level.

For these purposes, Germany introduced in 1961 the Foreign Trade Ordinance (*Außenwirtschaftsverordnung, AWV*), regulating especially the export of goods, but also the sale of key companies to foreign, non-EU investors. According to the regulation, some acquisitions of companies will have a stronger impact on Germany's economy, sovereignty and safety.

The key words here are "public safety and order". If the acquisition appears to oppose these criteria, the *AWV* applies. The *AWV* then obliges the purchaser to report an imminent acquisition to the Federal Ministry for Economic Affairs and Energy. The Ministry will verify the intended transaction within two consecutive phases in order to assess the national consequences in view of the general principle "public safety and order". In a final step, the Ministry has an active and legally binding veto right with respect to the transaction. This veto can be enforced e.g. by arranging a



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reverse transaction.

Principally, this process concerns the acquisition by foreign investors of German companies in sensitive sectors, such as military, energy or nutrition. After its entering into force, not many transactions were covered: In every case, the relation to an alleged violation of the “public safety and order” through the acquisition had to be evidenced. Also, only a small part of the *AWV* is dedicated to the sale of companies, as the ordinance mainly regulates the export of products.

In the past, the scope of application of the *AWV* has therefore been low and M&A transactions in Germany by foreign investors were not particularly affected.

What is new

On 12 July 2017, the German Federal Government passed the 9th Amendment to the *AWV*, focusing on Sections 55 and following regarding the sale of national companies. The amendment provides for two principal changes: An illustration of “public order and safety” relevant transactions through examples and the modification of time limits and terms.

Whereas *de lege lata*, relevant companies were those with concrete businesses in the military, nutrition or energy sector, the amendment now also includes providers of so-called “critical infrastructure” and related supplementary activities. The term of “critical infrastructures” includes all essential activities necessary for the preservation of public interests. An exemplary list has been added, containing activities in the telecommunications, cloud computing and software sector. Further, supplementary activities in the military sector, such as the production of certain processing machines, have been introduced into the catalogue of “public order and safety” relevant businesses. The scope of “public order and safety” has thus been significantly extended, particularly to companies in the IT sector.

Equally, the second main modification may have an important impact in practice. The new regulation provides for a prolongation of deadlines and terms. Before the 12 July, the Federal Ministry for Economic Affairs and Energy had

three months after signing of the purchase agreement to instruct the screening of an acquisition. *De lege ferenda*, this term does not start before the Ministry has gained knowledge about the transaction. In addition, the Ministry has now four instead of two months to examine the transaction.

The new Amendment to the German *AWV* regulation thus extends the possibilities to monitor and even to control international M&A transactions by broadening the relevant company sectors and by deepening the examination.

What does it mean for the future

The amendment may significantly affect M&A transactions in Germany. The expansion of reporting obligations to more sectors will probably cause more transactions to be examined, especially with regard to IT companies. At the same time, more transactions may be subject of a veto from the Federal Ministry for Economic Affairs and Energy. The extended terms and examination periods, dependent on the Ministry's knowledge, may lead to longer screening procedures and uncertainty regarding the entering into force of the transaction as, in case of doubt, the exercise of the veto remains possible up to five years after the signing of each agreement. However, certainty could be restored in advance through the prospective purchaser's request of a clearance certificate at the Ministry.

In practice, a lot will depend on the concrete implementation of the new regulation by the German Ministry of Economic Affairs and Energy. In this respect, it will be of extra interest, which party under the presently traded "Jamaica-Coalition" will eventually nominate the new German Minister of Economics.

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