

Amended German Investment Controls: Increased Scrutiny and Delays for German Target M&A Deals with Non-EU Buyers

In line with an apparent trend towards tighter trade and investment controls in various countries, the German government last week adopted stricter rules on investments in German companies by non-EU parties (an EFTA-based party is treated like an EU party). Practice points:

Threshold: As in the past, the control process applies to acquisitions of at least 25% of direct or indirect voting rights in a German company by a non-EU buyer.

Review scope: The transaction may be prohibited on grounds of public order or security.

New broad list of critical sectors/fields: Sample critical sectors include critical infrastructures in areas such as energy, information technology and telecommunication, transport and traffic, health, water, food as well as financial institutions and insurance; software for operating such infrastructures (rather broad); cloud computing exceeding certain thresholds (e.g. delivered data content volume > 75,000 tetra byte per year); telecommunications surveillance; and telematics infrastructure (health sector).

Strict filing requirement: An acquisition/investment agreement relating to a German target in a listed critical sector/field must be notified to the authorities (German Federal Ministry for Economic Affairs and Energy; hereafter “**Ministry**”).

New review exposure period leads to broader de facto filing needs: Previously, transactions were on the safe side 3 months after signing of the acquisition/investment agreement. No longer so. The Ministry may now initiate investigations during 3 months after gaining knowledge of a transaction, up to a limitation period of 5 years (!) after signing. Knowledge is triggered by the filing in critical sectors/fields. To trigger and prove knowledge also in non-critical-sector cases, it can be expected that parties will tend to notify and ask for comfort letters on a routine basis in much more cases to escape the new 5 years uncertainty period.

Longer procedural delays for comfort letters and investigations (2+4 months): After

Related Capabilities

- Mergers & Acquisitions
- International Trade

receipt of a request for a comfort letter, the Ministry now has 2 months (previously 1 month) to decide whether to open an in-depth investigation. If it remains inactive, the transaction is deemed cleared after the lapse of the said 2-month period. An in-depth investigation now lasts 4 months (previously 2 months), and this period can be extended for negotiations on potential remedial measures. The new timelines are no longer aligned to the shorter merger control timelines, and transaction planning needs to reflect that change.

Filing in critical sectors/fields triggers knowledge for the 3 month review limitation period after knowledge mentioned above, but it can be expected that such filings will be combined with a request for a comfort letter to trigger the shorter 2 month period for deemed clearance as mentioned above.

Agreement clauses: The transaction documentation should provide for a process for filing and comfort letter requests and for suitable closing conditions regarding clearance of the transaction by the Ministry (either referring to issuance of a formal certificate of non-objection or lapse of the applicable time period for initiating an in-depth investigation).

Final comment: We expect closer scrutiny of transactions, also as circumvention via local EU transaction vehicles without proper operations has been made more difficult. Still, in the end it appears unlikely that the Ministry will take a much more aggressive approach than under current practice. However, perceived increased uncertainty and longer procedural timelines might in fact work against non-EU bidders in auction deals by making their bids appear less attractive (a valid concern voiced particularly by representatives of Chinese companies).