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Investments by Foreign Enterprises in Germany – Stricter Scrutiny in 2020?

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Drawing from cases such as *50Hertz* and *Kuka*, the German Minister of Economic Affairs and Energy Peter Altmaier reveals plans to tighten the German Foreign Trade and Payments Ordinance (*Außenwirtschaftsordnung*, "AWV").

Heightened regulation of sensitive or security-relevant technologies

With the presentation of the final draft of the "Industrial Strategy 2030" in December 2019, the German Minister of Economic Affairs and Energy announced that the foreign direct investment ("FDI") regime would again be tightened. In addition to the planned involvement of other EU member states and the European Commission in the FDI review process, the strategy paper includes approaches for better protection of "*sensitive or security-relevant technologies*" with respect to non-EU-investors in order to "*secure Germany's technological sovereignty*".

With regard to FDI reviews, the threshold for prohibiting transactions will be lowered. Pursuant to amendments under the AWV, any perceived "**detriment to national security and public order**" alone will be sufficient to prohibit a transaction. The prior standard required authorities to prove that a "threat to national security and public order" existed.

Moreover, in individual cases, under the current version of the AWV, the state shall be entitled to temporary participation in enterprises via KfW, the German state-owned development bank. In the case of *50Hertz*, the State Grid Corporation of China ("**SGCC**") sought to acquire 20% of the shares in an East German power grid operator. Instead, KfW intervened to purchase the 20% shareholding to prevent the SGCC from owning the shares. In such instances, the state plans to retain its option to purchase company shares that would otherwise be sold to a non-EU-investor. To allow for a quicker and more efficient decision-making process, the amended AWV will create a **Permanent Committee** at the level of state secretaries

for implementation of the "National Recourse Option", through which the Federal Cabinet may make any necessary decisions. According to Peter Altmaier, this recourse option should remain a last resort.

Extension of the 10% acquisition threshold to sensitive technologies

A paper from the Ministry of Economic Affairs and Energy (*Bundesministerium für Wirtschaft und Energie*, "**BMWi**") titled "*Strengthening the FDI Review Laws*" contains details of the changes planned. The catalogue of companies subject to a 10% acquisition threshold will be extended to include companies that concern "**sensitive or security-relevant technologies**". The amendment to the AWV is intended to better protect companies in the fields of **artificial intelligence, robotics, semi-conductors, biotechnology, dual-use-technology and quantum technology**. Altmaier seeks to effect a more robust FDI review regime and ensure that the German government is able to prevent cases like *Kuka* from recurring.

Background information: FDI review under the current AWV

In general, there are 2 examination procedures:

- 1) The **sector-specific examination procedure** applies to acquisitions by foreign entities (including persons domiciled in the EU) of more than 10% of the voting rights in a German company, where the target company carries out an activity listed under § 60 of the AWV, namely activities relating to weapons of war and military goods. Any such acquisition must be reported.
- 2) The **cross-sectorial examination procedure** only applies to acquisitions by foreign entities from outside the EU/EFTA. This distinguishes between critical infrastructures (§ 55(1)2. AWV) and other areas. In the case of critical infrastructures, there is an obli-

gation to notify if a non-EU acquirer will hold at least 10% of the voting rights in the German entity (§ 55(4), 56(1)1. AWW).

In all **other sectors**, the BMWi has right to review the transaction only if at least 25% of the voting rights in a German company are to be acquired (§ 56(1)2. AWW). Although there is no obligation to notify, the BMWi may initiate a review procedure within 5 years following the conclusion of the contract for acquisition of shares in the relevant German company (§ 55(3) AWW). In practice, a clearance certificate is nevertheless usually applied for, to achieve legal certainty (§ 58 AWW).

FDI review of the acquisition by foreign entities of domestic companies has become a standard closing condition for such transactions. Our experience shows that the procedure takes a long time, in particular when foreign entities acquire critical infrastructure and/or future-relevant technologies of a German company, which almost certainly leads to an in-depth review by the BMWi. In our experience, foreign investors from the People's Republic of China tend to be most affected by the BMWi's review procedure.

Disclaimer

This newsletter was created according to the best of our knowledge and belief, however it is intended as a general guideline and cannot replace consultation for individual cases. For this reason, no liability can be assumed. If you have any questions, please contact your usual contact person at GÖRG or the authors Dr. Christian Buerger or Miroslav Georgiev at +49 221 3366-0-608 or cbuerger@goerg.de and mgeorgiev@goerg.de. Information about the authors can be found on our homepage www.goerg.de.

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