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Further Tightening of Foreign Investment Control in Germany

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I. Introduction

After a series of revisions of the German rules of screening of foreign direct investments in 2020 (see our *Stay Current* "[Foreign Investment Control and COVID-19 in Germany](#)" on the reform of June 2020), the German Federal Ministry for Economic Affairs and Energy has introduced a draft of further amendments to the Foreign Trade and Payments Ordinance ("AWV") on January 22, 2021. The draft provides for a further additional considerable extension of the scope of German foreign direct investment screening. It also contains certain clarifications regarding the screening procedures, especially concerning a harmonization with the EU Screening Regulation (Regulation (EU) 2019/452).

II. Key Takeaways

If enacted in its current form, the amendment will strengthen the Ministry's ability to scrutinize and intervene in the acquisition of companies by foreign investors, both with respect to critical industries and infrastructures (so-called "cross-sectoral screening") and with respect to the security sector (so-called "sector specific-screening").

In particular, the draft:

- Provides for 16 additional areas to be added to the catalogue of industries (there are currently 11) that are given special protection under the cross-sectoral screening in case of an intended acquisition by a non-EU/non-EFTA resident. The additional areas include, for instance, systems of artificial intelligence (including for launching automatic cyber-attacks, generating targeted false information or analyzing movement, positioning or traffic data for surveillance or retaliation measures), automated driving and aviation, industrial robotics, semiconductors (micro- or nano-electronic circuits, as well as production and processing equipment), cybersecurity (IT products or components with a primary function to serve for IT security or IT forensics services), certain aviation or aerospace activities, nuclear technology, quantum technology (including quantum computers, sensors, metrics, crypto-technology, communication and simulation), additive manufacturing (e.g., 3D-printing), networks technology (in particular, for operating cable or wireless data networks), smart-metering, critical raw materials and products based on patents or utility models that are state secrets.
- Broadens the scope of the sector specific screening of acquisitions by any foreigner. All products listed in Part I, Section A (military goods) of the Export List will be included and, further to the development and manufacturing, the modification or handling of relevant products will suffice for the sector-specific review to apply. Moreover, military

goods or technologies based on patents or utility models that are state secrets will be included in the scope of the sector specific screening. The same applies to defense-critical facilities used to establish or maintain defense readiness if they cannot readily be replaced.

- Applies a tightened review standard to the sector-specific screening. A “probable negative effect” to essential security interests will suffice for the government to intervene (previously, the review was considered in the event of an “actual threat”; such lowered assessment criterion was already implemented in the cross-sectoral screening rules in 2020).

With respect to the cross-sectoral screening, a mandatory notification requirement will apply in any of the 16 additional areas (as well as in any of the 11 areas already defined as critical sectors under the current AWW). Any direct or indirect acquisition of 10% or more of a German company by a non-EU/non-EFTA resident must be notified to the Ministry by the direct acquirer (the applicable threshold outside the catalogue of critical sectors remains at 25%).

The draft:

- Provides that a subsequent acquisition of any additional shareholding will be subject to foreign direct investment screening. Though this is in line with the Ministry’s practice, it is an important clarification, as it was contested by the prevailing opinion in German legal literature. According to the draft, any acquisition of additional shares must be notified to the Ministry.
- Provides that, where the notification requirement applies (or if an investigation procedure has already been opened ex officio by the Ministry), it will no longer be possible for the acquirer to request the Ministry to issue a so-called “certificate of non-objection”. Any acquisition of a target company that must be notified to the government for foreign investment screening will be provisionally ineffective (*schwebend unwirksam*) for the duration of the review.
- Broadens the scope of foreign investment screening beyond the acquisition of voting rights. Granting of additional board seats, veto rights, access to information, etc. will suffice, under certain circumstances, to allow the Ministry to open screening proceedings.
- Introduces the concept of “parallel acquisitions” as a standard example of circumvention. The splitting of acquisitions into several coordinated acquisitions will become subject to investment screening.

III. Practical Implications

The significant further extension of the catalogue of critical areas and the changes to capture acquisitions of any additional shareholding, as well as “parallel acquisitions” and atypical cases, continue last year’s reforms to broaden and strengthen the German foreign direct investments screening mechanism.

Some ambiguities remain. For instance, the draft amendment does not provide for a *de minimis* threshold for acquisitions of additional shares, which would mean that any immaterial additional acquisition must be notified to the Ministry. In addition, the draft does not clarify whether the inclusion of asset deals in 2020, in the scope of foreign direct investment review, is intended to grasp a licensing of technology or other cases where the target company retains assets (e.g., know-how) and continues to use them.

In any case, the number of transactions to be reviewed under German foreign trade law and the complexity of the reviews will continue to increase. It will be crucial under the revised AWV to clarify the target company's activities early in the transaction. Overall, the reforms make the implementation of numerous foreign direct investments more complex.

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