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German Government Extends Foreign Investment Control To Certain 10% Minority Investments

Changes to the German Foreign Trade and Payments Ordinance will impact investments by non-EEA investors.

Key Points:

- The changes will allow the German government to scrutinize direct and indirect acquisitions of at least 10% of the voting rights of German companies that operate in the area of critical infrastructure or manufacture or develop certain military-related products. For all other sectors, the current 25% threshold will remain in place.
- The definition of what constitutes critical infrastructure is extended to certain media companies.

Foreign Direct Investment Control in Germany

The Foreign Trade and Payments Ordinance (Außenwirtschaftsverordnung or FTPO) governs Foreign Direct Investment (FDI) control in Germany. Currently, acquisitions of 25% or more of the voting rights of a German company by non-European Economic Area investors are subject to foreign investment control by the Federal Ministry for Economic Affairs and Energy (BMWi). Under the revised regime, this threshold will be lowered to include minority acquisitions of at least 10% if the target company operates in the area of critical infrastructure and related technology or manufactures certain military-related products or technology. The changes will enter into effect on the day after publication in the Federal Gazette, which is expected to happen before the end of the month. The revised regime will significantly broaden the scope of FDI control in Germany.

The process can be summarized as follows: BMWi may open formal review proceedings within three months of notice of the acquisition, but only up to five years after the transaction has been signed, if it finds that an acquisition may threaten German public order or security (cross-sectoral review). If the target company is active in the area of critical infrastructure, the acquirer has an obligation to notify the acquisition with BMWi. Besides the newly added media sector, critical infrastructure includes energy, water, nutrition, information technology, healthcare, financial services and insurance, transport and traffic, as well as related software and technology. In addition, the parties also have an obligation to notify the transaction if the target manufactures certain military goods or develops related technology (sector-specific review).

If an obligation to notify does not exist, investors may voluntarily notify an acquisition in order to gain legal certainty. In this case, BMWi has two months to decide whether to open formal review proceedings. If BMWi opens formal review proceedings, it may clear, or clear under conditions, a transaction within four

months; otherwise, the transaction is deemed to have been cleared. In case of additional questions from BMWi, the four-month period only starts to run once an acquirer has answered all of these questions.

Background

The changes to the FTPO occur against the background of increased FDI controls in Europe and in other jurisdictions around the globe. In August, the Committee on Foreign Investment in the United States (CFIUS) significantly tightened FDI scrutiny under the Foreign Investment Risk Review Modernization Act (FIRRMA). Like the FTPO, FIRRMA also extends FDI control to non-controlling investments. Furthermore, the UK and France are currently contemplating amendments to their respective FDI control regimes. In November, EU Member States agreed on a European framework for the coordination of national FDI control proceedings. The European Parliament is expected to pass its final vote on the proposal in February 2019.

The German government already broadened the scope of FDI control in July 2017 when it introduced a filing obligation for investments in the area of critical infrastructure and doubled the applicable review period. Despite these amendments, certain cases raised national security concerns, but were outside the scope of German FDI control because the investor did not reach the 25% threshold. One such notable case was a recent attempt by a Chinese investor to acquire a minority stake in German power transmission network operator 50Hertz. Against this background, lowering the jurisdictional threshold to 10% may be the government's reaction to a hike in foreign acquisitions in certain sensitive sectors in Germany that are perceived as a potential threat.

Outlook

The most recent amendments to the FTPO will increase the number of transactions subject to FDI control in Germany. In conjunction with tighter FDI controls around the world, cross-border transactions may require separate FDI reviews in more than one jurisdiction. With regard to transaction-planning, investors should allow for additional time in their closing schedules and for sufficiently flexible closing conditions taking into account potential parallel FDI reviews.

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