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Foreign Investment Control and COVID-19 in Germany

By Dr. Regina Engelstädter & Sebastian Ens

I. Introduction

In June 2020, the German government tightened again the rules of screening of foreign direct investments by revising the Foreign Trade and Payments Ordinance ("AWV"). The initiative is a response to the COVID-19 pandemic emphasizing the importance of protecting critical technology and assets in the current crisis and extends the ability of the German Ministry for Economic Affairs and Energy to scrutinize, intervene in, and prohibit the acquisition of companies in critical sectors—with an emphasis on the health care sector—by non-EU investors.

Moreover, the German Parliament is currently revising the Foreign Trade and Payments Act ("AWG") to streamline the screening of foreign direct investments and to implement the EU Regulation on the Screening of Foreign Direct Investments ("EU Screening Regulation").

II. Key Takeaways

The new law:

- Significantly extends the scope of the mandatory foreign investment-screening regime, in particular in the health care sector. In response to the COVID-19 pandemic, the catalogue of industries that are given special protection is significantly broadened and now includes certain areas of the healthcare sector, for instance, the supply of protective personal equipment (e.g., gloves, masks), medical devices, pharmaceuticals that are critical to ensure health of the population or in vitro diagnostics for therapeutic measures against highly infectious diseases;

- Defines additional criteria that can be taken into account when assessing whether the acquisition of a domestic company by the foreign investor poses a threat to the public order or security of the Federal Republic of Germany. The Ministry is entitled to take into account the identity and the investment history of the foreign investor, including whether the investor is controlled by the government of a third country, has been engaged in activities with a detrimental impact on public order or security in Germany, or has been (itself or the persons acting on its behalf) involved in certain criminal activities including money laundering, corruption, fraud, and many more; and

- Includes also asset deals in the scope of foreign direct investment review.

Additional changes are expected to be enacted and enter into force this summer. The key amendments are the following:

- The existing review standard for governmental intervention to protect public order or safety is tightened. A "probable negative effect" to the public order or safety will suffice for the government to impose restrictions (previously: "actual and serious risk");
- The scope of application of the foreign investment review is further extended. Not only the impact of foreign investments on the public safety and order in Germany, but also in other EU member states, EU projects and programs, shall be taken into account under the new rules;
- 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. In addition, prior to the government's decision on the transaction under scrutiny, numerous types of actions such as allowing the acquirer to exercise shareholder rights, including profit participation rights, or granting the acquirer access to sensitive information are prohibited for the parties involved in the transaction. It is intended to prevent the parties from creating a *fait accompli* during the ongoing scrutiny; and
- The applicable deadlines for the sector-specific (e.g., with respect to companies active production of war weapons, other military equipment, or certain IT security products) and the cross-sector foreign investments control are streamlined. As a rule, the screening of a transaction must be completed within four months after the receipt, by the Ministry, of the complete transaction documents. However, such period can be extended by the Ministry in case of particularly complex proceedings or with the consent of the acquisition parties.

III. Outlook and Practical Implications

The Federal government is planning another reform of the AWV before the EU Screening Regulation becomes fully applicable in October 2020. This will include, *inter alia*, a further extension of the catalogue of so-called critical technologies. The focus will be on artificial intelligence, robotics, semiconductors, biotechnology, and quantum technology.

It is fair to expect that the number of transactions to be reviewed under German foreign trade law and the complexity of the reviews will increase. In many cases, involvement of the EU and other member states will also be required in the future. This will affect the time planning of the transaction. Overall, the reforms make the implementation of numerous foreign direct investments more complex and time consuming.

IV. European Background

The EU Screening Regulation, which is the background to the reform, was adopted in 2019 on the initiative of Germany, France, and Italy to improve the coordination of foreign investments screenings between the EU member states. It will be fully applicable as of October 11, 2020. The core feature of the EU Screening Regulation is a cooperation mechanism, based on an obligation of the EU member states to exchange information between themselves and the European Commission. Whilst the last word in any investment screening remains with each EU member state, the respective other member states and the European Commission will be allowed to issue opinions and comments on specific transactions.

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If you have any questions concerning these developing issues, please do not hesitate to contact either of the following Paul Hastings Frankfurt lawyers:

Dr. Regina Engelstaedter
49.69.907485.110
reginaengelstaedter@paulhastings.com

Sebastian Ens
49.69.907485.120
sebastianens@paulhastings.com