

German Foreign Investment Controls

A role model?

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Foreign Investment Control – some basics

- **Increased attention** over the recent years
- EU is considering to introduce this type of controls as well. The German controls may function as a „role model“ (as they did in other areas). You will find such controls in other jurisdictions – namely the U.S. (CFIUS) and France.
- Observation: We see a substantial increase in the number of cases
 - Became almost a **standard in M&A** transactions
 - Comparable to merger control
- In particular with regard to investments from **Chinese investors**
 - Prominent cases included Aixtron, Kuka - but also Stada
- **Recent amendment** brought some **substantial changes in July 2017**
- German government can either approve of an acquisition, approve under certain conditions or prohibit an acquisition

Two types of controls

Sector related controls

include

- All combat weapons
- Certain military items (in particular ML5, ML11, ML14, ML15, ML17)
- Engines and drives for tanks and other military vehicles
- Specific IT security (for the operation of state security classified data)

Cross - Sector controls

- If the acquisition has a negative impact on the **public order and safety** of the Federal Republic of Germany
- Since **July 2017**: in particular in areas of „critical infrastructure“;
- and practically all developers of **software** for the operation of such critical infrastructure

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Cross sector controls

Critical infrastructure includes

- Energy;
- Water;
- IT/Telecommunication;
- Health; (this includes manufacturers of pharmaceuticals)
- Transport;
- Food and nutrition
- + developers of software to operate entities in a critical infrastructure

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Cross sector controls – procedural aspects

Ministry of Economics has the right to control an acquisition

- if a foreign investor (not EU investors)
- Acquires directly or indirectly **25%** (or more) of the shares of a domestic company
- Within **3 months** after the ministry became aware of the acquisition
 - the initiation of the investment control proceedings have to be announced to the acquirer in writing
- **5 years** after signing of the acquisition agreement the control proceedings cannot be initiated anymore.
- If a **critical infrastructure** is involved the acquirer has an **obligation to notify** the ministry of the acquisition

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Statement of „non-objection“ / approval

In order to avoid the uncertainty, whether the proceedings may be initiated or the acquisition may or may not be approved by the Ministry,

the acquirer can be **proactive** and file an application for an **official statement of non-objection**.

The Ministry has provided **guidance** for the set of **documents and information** that should be presented together with the application.

In case of a complete application the approval is deemed to be granted, if the Ministry does not enter into an official approval process within **2 months** (previously one month) after filing of the application.

Therefore, it is highly advisable to file for such a statement, if the controls could apply (e.g. critical infrastructure).

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Documents and information

The most important documents and information refer to

- discription of the **present and future business activities** of target and acquirer
 - This typically involves disclosure of major **suppliers and customers**
- acquirer's **future strategy** for the target
- **purchase agreement**

Sensitive information can be **black lined**

The documents have to be filed in the **German language**

Providing the documents/information is in fact a **joint effort** for target and acquirer

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Ministry's decision

- **Approval**

Within **4 months** after presentation of the complete documents and information

- **Approval under conditions**

- These conditions can vary a lot
 - Reporting obligations
 - Right to decide on board membership
 - „golden share“ for the Ministry
 - etc.

- **Prohibition**

Has not happend so far (however, mainly because acquirer will not pursue a transaction, if Ministry signals dissaproval)

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Sector related controls

Quite similar to the cross sector controls

Main differences:

- A notification of the Ministry has to be made in any event
- The approval is deemed to be granted, if the Ministry does not take a decision within 3 months after notification
- There is also guidance with regard to the documents and information to be presented.
- The Ministry can take the decision within 3 months after presentation of the complete set of documents/information
- Statement of non-objection can be issued here as well

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Effects

- Transaction security is extremely important to seller and buyer
Therefore proceedings are initiated almost as a standard
- The proceedings are not very transparent from the outside
- More administration / prolongation / costs with regard to M&A transactions
- On the other hand: Improved controls?

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Take aways

- Speak to your M&A departments – if they intend to make acquisitions in Germany, Foreign Investment Controls may apply
- These can/will expand the duration of M&A transactions
- There is no de minimis
 - Important for acquisitions with a minor German footprint
- Prepare in good time for the proceedings
- Consider alternative acquisition structures
 - Carve out of critical businesses
- Co-operate with you counterpart in the transaction
- Identify unacceptable conditions for approval and communicate in good time

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