

COVID-19 crisis inspires global tightening of Foreign Investment Screening

Germany

The German Government has been tightening the German law on review of foreign direct investments (FDI). A draft bill to align the law to the EU FDI Regulation is presently in the parliamentary procedure. In addition, to take account of the COVID-19 crisis, the German Government proposed an amendment to the legal framework on April 28, 2020.

FDI review in Germany is governed by the Foreign Trade and Payments Act. Reviews are carried out by the Ministry for Economic Affairs and Energy, which consults the Ministry for Foreign Affairs, the Ministry of Defense and the Ministry of the Interior. On April 8, 2020, the German government adopted a draft bill, which is currently going through the parliamentary procedure, to align the act with the new EU FDI Regulation. The changes will have significant procedural and substantive implications; in particular, the amendment will apply a stand-still obligation to investments in German companies operating critical infrastructure.

The German law on FDI review distinguishes between cross-sector and sector-specific reviews. The industry sector concerned by the acquisition determines which procedure will be applied. Currently, any acquisition of a German company by investors located outside the territory of the EU or EFTA whereby investors acquire at least 25 percent of the company's voting rights (or 10 percent in the case of companies operating critical infrastructure) can be subject to a cross-sector review. Thus, application of the law depends only on the acquired voting rights, not the transaction value or turnover of the parties.

Except in cases involving companies operating critical infrastructure, filing is voluntary, but parties can request a certificate of non-objection to obtain legal certainty. Critical infrastructure comprises, for example, infrastructure in the energy, transport and financial sectors. If the buyer is resident in the territory of the EU, or, in the case of sector-specific reviews in Germany, the authority may investigate if there are indications of an abusive approach or a circumvention transaction.

The defense and cryptotechnology sectors are subject to the stricter regime of sector-specific review. In such cases, any acquisition by a non-German investor involving at least 10 percent of the target's voting rights is subject to a mandatory filing obligation. This procedure applies, for example, to acquisitions involving German companies involved in the manufacture and development of weapons of war, ammunition, military equipment and technology for processing classified government information.

Under the amendment proposed on April 28, 2020, the acquisition of companies providing infrastructures for governmental communication or critical resources and companies in the healthcare sector providing, for example, personal protective equipment or medical devices for the treatment of infectious diseases, will also be subject to a notification obligation if at least 10 percent of voting rights are acquired. The amendment will also allow the authority to take into account the control exercised by foreign governments/public authorities over the acquirer; previous activities by the acquirer that damaged the public order or security of Germany or other EU Member States; and risks that the acquirer might be involved in specific criminal activities.

The timeline for reviews depends on the applicable review procedure. In a cross-sector review, the authority has two months after a voluntary notification to either approve the transaction or open a second phase investigation. A second-phase investigation must be completed within four months after the receipt of the complete documentation. A sector-specific review follows a similar procedure, with the difference that the law foresees three months for each phase. Importantly, the procedural deadlines are suspended during any negotiations on possible commitments by the parties to obtain approval.

Currently, in a cross-sector review, the parties to a transaction may close without waiting for approval, though transactions can be unwound or subject to conditions retroactively. In a sector-specific review, a transaction is provisionally invalid until approval has been obtained. Under the amended law, any transaction subject to mandatory filing will be subject to a stand-still obligation until clearance is granted.

The draft bill will also affect the standard for substantive assessment. In a cross-sector review, the authorities examine

whether the acquisition poses a threat to the *public order or security* of Germany. In a sector-specific review, the test is whether *essential security interests* of Germany are endangered. After the change in legislation, the test will be whether a transaction is likely to affect public order or security (without the need to show a genuine threat). It will also become possible to take account of transactions' effects on other EU Member States and EU programmes and projects.

By **Jürgen Werner**