

German Government Expands Authority Over Takeovers by Investors from Outside the EU

GERMANY

IN SHORT

The Situation: Rules designed to protect Germany's national security interests have been extended to non-EU investments in "critical infrastructure," such as energy, water, food, IT/telecom, health, banking and insurance, and transportation.

The Result: Transactions by non-EU investors involving such critical infrastructure are now subject to additional rules and potential scrutiny by the German government.

The Outlook: Transactions caught by the new rules may face additional uncertainty and a prolonged period between signing and closing. Applying for a certificate of non-objection can speed the approval procedure but will not fully remove the uncertainties if a legally binding state approval for the transaction must be obtained.

On July 18, 2017, the German government enacted changes to the Foreign Trade and Payments Ordinance ("AWV") that significantly expand the scope of the law. The German Federal Ministry of Economic Affairs and Energy ("BMWi") now has the right to investigate and potentially block deals in the areas of energy, water, food, information technology and telecommunication, health, banking and insurance ("B&I"), and transportation that are classified as "critical infrastructure," provided that certain thresholds are met. Companies affected by the AMV changes include those that work with technical equipment for (legal) telecommunication surveillance, cloud-computing services, and components and services for electronic health files also subject to the AWV.

Following a discretionary investigation, the BMWi can block non-EU investors from directly or indirectly acquiring 25 percent or more of a German entity active in these areas if the deal endangers public or national security. Investments in targets operating in sensitive security-related areas, such as military equipment and cryptotechnology, always must be notified to and cleared by the BMWi.



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Companies Providing "Critical Infrastructure"

Facilities in the following seven areas are defined as critical infrastructure if they reach certain thresholds:

- **Energy:** Production and distribution of electricity, natural gas, gas, heating oil, and district heating;
- **Water:** Supply/disposal of fresh water and sewage;
- **Food:** Production, processing, and distribution of food;
- **IT/Telecom:** Transmission, processing, and storage of voice and data;
- **Health:** Inpatient medical care, manufacturing of life-sustaining medicinal products, prescription drugs, supply of plasma and human blood, distribution and transport of such products, and provision of health services such as laboratories;
- **B&I:** Supply of cash, card-based money transfer, conventional money transfer, settlement of securities, and derivatives; and
- **Transportation:** Transport of people and goods on the road, by rail, by boat, and in the air; public transport; and weather forecast and satellite navigation systems.

For example, companies producing, processing, storing, or selling food equaling or exceeding a volume of 434,500 tons or 350 million liters per year qualify as critical infrastructure. For hospitals, the threshold is 30,000 stationary treatments per year. Logistic centers qualify if they process 17 million tons of goods per year. In the financial industry, clearing and settlement services providers handling 18 million transactions per year are deemed critical infrastructure, as are clearing and settlement services providers for securities and derivatives with a volume of 850,000 transactions per year.

Companies developing or adapting software designed to run such infrastructure are also subject to these rules, irrespective of their size or the number of their customers. Thus, the acquisition of a software company active in, for instance, hospital information or core banking systems by a non-EU investor also may be investigated and blocked.

Investment Approval Procedure

The BMWi may assess any direct or indirect acquisition of 25 percent or more of the voting rights in a German company (including German subsidiaries or branches of foreign companies) by a non-EU investor that falls under the extended AWV. The parties to such a transaction are obliged to inform the BMWi about the signing to allow the BMWi to catch relevant transactions early. The BMWi may initiate a formal investigation of the transaction within five years after signing, but only three months after it has been informed about the transaction. The acquirer may ask for a certificate of non-objection. Such certificate is deemed to have been issued if the BMWi does not open a formal investigation within two months after receipt of the application.

If the BMWi formally opens the investigation, it must make a decision within four months after receipt of all relevant information. The BMWi may also ask for changes to the transaction to protect Germany's interest in public or national security. While the law does not empower the BMWi to prohibit the close of a transaction, the BMWi has ample powers to unwind a deal.

Preliminary Comments and Guidance

Parties contemplating a transaction that is likely to fall under the extended law on investment approval should take its effects into consideration, particularly where the parties are required to inform the BMWi about the transaction. While a request for a certificate of non-objection will not always provide the desired level of legal certainty, it is likely to be a tool of choice that will be seen more often in the future.

THREE KEY TAKEAWAYS

1. Changes to Germany's Foreign Trade and Payments Ordinance dictate that the acquisition of a 25 percent stake in a German company by investors from outside the EU can be reviewed by Germany's Ministry of Economic Affairs and Energy.
2. Seven areas defined as providing "critical infrastructure" are subject to the new provisions.
3. Business entities considering a transaction that could fall under the new law should consider its possible implications for their plans.

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