

# German Government Further Tightens Foreign Investment Control

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Corporate

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On December 19, 2018, the German Government decided to further tighten the rules for the control of foreign investments in German companies under the German Foreign Trade Regulation (*Außenwirtschaftsverordnung*, “**AWV**” - the “**Amendment**”). Already in July 2017, the German Government adopted stricter rules for the control of foreign investments.

## I. Current Law

Pursuant to the German Foreign Trade Regulation, the following control procedures apply for so called sector-specific and cross-sectoral investments of at least 25% of the voting rights in German companies:

- (i) Within the sector-specific investment control which even applies to investors from other EU countries (and non-EU/non-EFTA countries), investments in German target companies are subject to a review procedure if they are active in a particularly security-relevant industrial sector, such as military goods as well as IT security functions. Such investments require a clearance from the Federal Ministry of Economics and Energy Germany (“**BMWi**”).
- (ii) Within the cross-sectoral investment control, which only applies to investors from non-EU/non-EFTA countries, the BMWi has the right to review regardless of the sector to which the domestic target company belongs. However, such investments are subject to notification to the BMWi if the target company belongs to the critical infrastructures that include companies in the energy, IT and telecommunications, transport, health, water, food, finance and insurance sector. Although (apart from possible notification requirements) no clearance requirements apply to cross-sectoral investments, acquisitions can, however, become subject to retroactive prohibition, demerger order or remedies issued by the BMWi. The main focus of the review is whether the acquisition endangers the public order or security of the Federal Republic of Germany.

## II. New Tightened Rules

With the new Amendment, the threshold for foreign investments in critical infrastructures and companies subject to sector-specific investment control will be lowered from 25% to 10% of the voting rights in such companies. As a consequence, as soon as a foreign investor reaches 10% of the voting rights in such companies, there is an obligation to notify such transactions to the BMWi. In addition to lowering the threshold to 10%, the Amendment extends the catalogue of critical infrastructures to certain media companies which are critical for building public opinion.

The Amendment is a further reaction of the increased concerns of the German Government about targeted acquisitions in particular by foreign investors of key German technology which

could not be blocked under the old AWV in case of investments below the 25% threshold. That was the reason why the German Government could only block the intended acquisition by a Chinese investor of 20% of the shares in "50Hertz" - one of the four German electricity transmission grid operators - by way of instructing KfW, a German state-owned bank, to acquire the respective shareholding.

### III. Outlook

It is clear that a significant larger number of cross border transactions with German targets will be subject to notification requirements, review and potential prohibition by the BMWi, and that the transaction security of investments will suffer as a result of the new tightened rules. Therefore, it is crucial to identify potential foreign trade issues at the earliest possible stage and to get a sense whether the BMWi might oppose the envisaged transaction.

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