

Governmental Screening of the Acquisitions of German Companies

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The German government plans to amend the current version of the Foreign Trade and Payment Act (Außenwirtschaftsgesetz) so that any acquisition of a company by a foreign investor can be reviewed, restricted and prohibited by the German Federal Ministry of Economics and Technology (Ministry). The legislator's intent is to prevent foreign state influences on German companies. By ensuring that the buyer is not a foreign investor owned by a foreign government, political influence by investors from certain countries will be prevented. It is likely that the new law will come into effect in the first half of 2008.

Based on concerns regarding public policy or security, under the new legislation, the Ministry would be authorized to prohibit any kind of acquisition by a foreign investor via share or asset deal regardless whether or not the whole company is acquired or only parts of it. Additionally, not only will a direct acquisition of a German company by a foreign investor give the Ministry authority to intervene but also in the case of an indirect acquisition by a foreign investor. Such indirect acquisition could take place if an investor acquires a German company which in turn owns shares in a company that fulfills the conditions of being a danger to the public order or security under the new legislation. The term foreign investor does not only include foreign companies but it also applies

to German companies if a foreign investor holds more than 25% of its voting power. The Foreign Trade and Payment Act in its current version already includes a comparable regulation according to which certain acquisitions can be banned by the Ministry. However, this regulation only relates to the acquisition of armament manufacturers and certain developers of cryptography systems. The draft bill, though, extends the Ministry's authorization to prohibit a company's acquisition to any kind of business.

According to the draft bill, in the case of an acquisition of a German company the Ministry has the right to review the transaction. The Ministry must decide whether or not it wishes to review the acquisition within three months. This limitation starts at the time of the conclusion of the purchase agreement or at the time of the announcement of a takeover bid. During this three months period, the purchase agreement is suspended. After the expiration of the three months period the purchase agreement becomes effective. In order to obtain legal certainty in regard to the effectiveness of the purchase agreement, the purchaser may request a review by the Ministry. This can be accomplished by filing the acquisition documents to the Ministry after signing the purchase agreement. If the Ministry does not prohibit the acquisition within one month after the receipt of the required documents, the

purchase agreement becomes effective. However, there is no notification requirement, i.e. the parties to the acquisition are not obligated to notify the Ministry of the transaction.

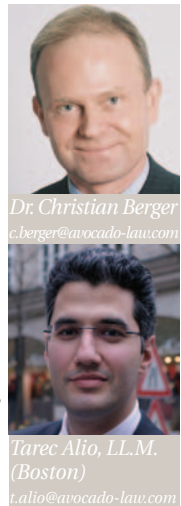
If the Ministry should decide to review the purchase, the acquirer is obligated to provide the Ministry with completed documents relating to the acquisition. However, there are no clarifications in the draft bill about what documents should be provided to the Ministry. After the receipt of the complete set of documents, the Ministry is authorized to prohibit or restrict the acquisition of the company if the acquisition jeopardizes Germany's public order or security. If the Ministry does not ban the acquisition within this time limitation, the acquisition becomes valid.

Based on the judicature of the European Court of Justice, only significant threats constitute a danger to the public order or security. However high the bar is set for the Ministry to assume that there is such danger to the public order or security, the term is still very broad. Therefore, the scope of the term "public order or security" could cause considerable uncertainties that might cause significant disturbances of ongoing acquisitions. If the Ministry should decide that there is a considerable danger, it can ban or restrict the acquisition. Such prohibition, however, must be declared within a time frame of one month which begins when

the Ministry receives the required documents from the purchaser.

After serious concerns voiced by the European Commission, it is likely that European investors will be excluded from the new regulations. Furthermore, it is likely that there will be further considerable modifications of the current version of the draft bill, such as an introduction of a notification requirement. ■

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