Acquisitions of German companies subject to government screening

After controversial and lengthy discussions, new rules on foreign investments under the German Foreign Trade Act (Aussenwirtschaftsgesetz, "FTA") came into effect on April 24th, 2009 which authorise the German Federal Ministry of Economics and Technologies ("Ministry") to control the acquisition of German companies in any field.

Suzlon Energy Limited, Pune, completes the acquisition of Martifer stake in REpower in the beginning of June. With the conclusion of this transaction, Suzlon holds 90.72% stake in REpower. So this company is one of the biggest Indian investors in Germany.

Photo:Suzlon

Background

Prior to the amendment of the FTA, the control of the Ministry over the acquisition of German companies was confined to transactions involving companies producing or developing military goods such as arms, ammunitions or cryptographic systems. The new FTA rules allow the Ministry to review, restrict, and also prohibit an acquisition where the Foreign Investor acquires more than 25% of the voting rights in a German company irrespective of the field in which the target is active.

The changes are the result of a political debate which ensued following the acquisition of substantial interests in various large European companies by state-owned funds particularly from the Middle East and China. The new legislation is designed to enable the German government to prevent foreign state-owned funds or other foreign financial investors such as hedge funds from acquiring control of German companies where such an acquisition is perceived to be a threat to public policy. It follows on the heels of similar (and in some cases more restrictive) legislation recently introduced in other European countries, such as in France.

New rules apply to companies of all industries and sizes

A Foreign Investor is any investor who is not a resident of the EU, Iceland, Liechtenstein, Norway or Switzerland. The new rules will apply both to direct and indirect acquisitions of a German company by a Foreign Investor. Furthermore, Foreign Investors are not only foreign companies, but also German companies in which a Foreign Investor holds more than 25% of the voting rights. Thus, the authority of the Ministry to review an acquisition is completely independent of the industry and the turnover of the target company, but depends solely on the level of voting power achieved by the Foreign Investor. However, the new rules do not apply where the Foreign Investor already holds 25% or more of the voting rights in the German company and merely increases its shareholding.

Transactions may be reviewed and prohibited

The FTA authorises the Ministry to prohibit or restrict the acquisition of a German company if such acquisition jeopardises Germany's public order or security.

According to the European Court of Justice, only significant threats may constitute a danger to public order or security. Therefore, a restriction or even prohibition of an acquisition would only be possible in very exceptional cases. The Ministry is thus required to apply a very strict standard in examining any each individual case. However, it must be noted that even though the standard is intended to be a very substantial threshold, the term "public order or security" is very broad and vague and leaves a lot of political discretion to the government.

The screening process

It is important to note that there is no obligation of the parties to notify a particular transaction to the Ministry. Thus, it is up to the Ministry to learn about relevant transactions before deciding which cases should be reviewed. The Ministry may request information about such transactions from for example the German Federal Financial Supervisory Authority (BaFin) and the German Federal Cartel Office (Bundeskartellamt), which handles all national merger control cases. However, the parties to a transaction which is potentially subject to screening may also inform the Ministry about the transaction in order to obtain the approval of the Ministry beforehand and can thus avoid the risk of having the transaction delayed or even prohibited at a later stage.

The screening process is divided into two steps: First, the Ministry must decide whether or not it wishes to review an acquisition. This decision must be made within three months of the signing date of the purchase agreement or the date on which a public takeover bid is announced. If the Ministry decides to review the transaction, the acquirer is obliged to provide the Ministry with complete documents relating to the acquisition. The Ministry will publish a list of the documents to be provided by the parties in the German Federal Gazette (Bundesanzeiger). In a second step, the Ministry will decide whether to prohibit the transaction or make it subject to certain conditions. The consequences of a prohibition are substantial, since in this case the validity of the purchase agreement depends on the approval by the Ministry. If the transaction is already executed the parties would be forced to undo the transaction. Since such a reversal bears substantial risks for the parties, it is essential to have appropriate provisions in the purchase agreement which define the rights and obligations of the parties in case of a prohibition. In any case, it is recommendable to seek an advance ruling from the Ministry in all cases which are likely to be "sensitive" by applying for an approval certificate (Unbedenklichkeitsbescheinigung). Such application must include information about the intended transaction, the buyer and the buyer's field of business. If the acquisition does not jeopardise Germany's public order or security, the Ministry must issue an approval certificate, which is deemed to have been issued if the Ministry does not start the screening process within one month after receiving the application.

Outlook

Even though the new rules provide the Ministry with considerable powers in theory, it is likely that their practical effect will be rather limited. In transactions where there is a risk of being subject to the new rules, it is advisable to apply for an advance ruling from the Ministry. In those cases where the Ministry sees no problem, it will not initiate the review procedure so that the parties can achieve certainty in this regard within a period of one month.

Dr. Johannes Weisser, LL.M. (USA)

Contact
j.weisser@avocado-law.com

NASSCOM Aims to Increase German-Indian Cooperation in ICT

Experts highlight German location advantages

Indian investments in Germany are skyrocketing. In 2008 alone, Indian companies invested almost 2 billion euro in Germany, doubling 2007 figures. ICT continues to be the sector best represented in terms of investments. As a result of this booming demand, representatives of leading Indian companies will receive an introduction to Germany's robust ICT market. At the NASSCOM session "Business Opportunities in Germany" on June 26 in Mumbai, representatives from BITKOM, Germany Trade & Invest, and the German federal state of North Rhine-Westphalia discussed the wide range of business advantages Germany offers potential partners.

Due in part to Germany's robust economy, Indian investors are looking beyond the traditional markets of the United States and the UK. Companies such as Megasoft, NIIT, and Samtel have chosen Germany as a business location due to its large market and proximity to other major European markets. In addition to doubling direct investment figures, Indian FDI flows into Germany - measured in terms of equity capital - between 2004 and 2007 leapt from 3 million euro to 18 million euro, according to the Bundesbank. Indian FDI stocks in Germany in the same period climbed from below 1 million euro to 242 million euro. The Indo-German Chamber of Commerce listed some 120 Indian firms active in the country just three years ago. Today that figure has doubled to 240.

Germany's ICT industry has a number of unique advantages. As is the case for Megasoft, NIIT, and Samtel, one of the main reasons for the increased investment in recent years is Germany's strategic location at the heart of Europe. This factor makes it a gateway to accessing the entire European market for Indian companies looking to expand overseas. Locating in Germany allows them to be closer to customers and suppliers and to build a central base for Europe. In addition, Germany offers political stability, legal transparency, low inflation and a high quality of life.

Germany is one of Europe's leading players in the ICT sector, making up approximately 20 percent of the European market, and has the fifth largest market for ICT worldwide. With a volume of over 130 billion euro, it leads Europe in sales, growth potential, and personnel. The industry is on the rise, closing in on the peak position among Europe's most populated nations. In the recent Monitoring Information and Communication Economics study, Germany took the number one position in Europe in terms of total market performance and was the global market leader in per capita revenue in business to consumer ecommerce, coming in ahead of the USA.

While estimates show that the ICT industry as a whole is suffering due to the economic crisis, Germany's sector is well positioned to withstand the downturn and even continue growing. A number of industry sub-segments are expected to expand, which include some of Germany's innovation leaders: Greentech, Embedded Systems, RFID technology, Internet services, mobile applications, and business process outsourcing. Germany also leads Europe in patent applications, further driving sector innovation.

Along with event partners, Asha-Maria Sharma, Senior Manager of IT-Services & Software at Germany Trade & Invest, presented Germany's business location advantages in Mumbai to potential partners.

Germany Trade & Invest is the foreign trade and inward investment promotion agency of the Federal Republic of Germany. The organisation advises foreign companies looking to expand their business activities in the German market. It provides information on foreign trade to German companies that seek to enter foreign markets.

Contact
Germany Trade & Invest Agency, Berlin, Friedrichstraße 60
phone: +49/30/200 099-0
www.gtai.com