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Further tightening of investment control in Germany is to be expected - BMWi presents new ministerial draft bill -.

The German Federal Ministry for Economic Affairs and Energy ("BMWi") published a new draft bill for the Foreign Trade and Payments Ordinance ("AWV") on January 22, 2021, proposing further stricter German investment control.
With this new draft bill, on which business associations can further comment, the regulation will be adapted to the provisions of the Foreign Trade and Payments Act ("AWG"), which was also recently amended. Moreover, further contents of the EU Screening Regulation (Regulation (EU) 2019/452 of March 19, 2019) will be implemented in German law.

The following is planned:
The draft introduces additional case groups for affected TEs (sections 4(1)(4), 5(2) AWG, sections 55 to 59 AWV). Currently, there are 11, in the future, there shall be 27 case groups. The focus of the new case groups is on future and key technologies such as artificial intelligence, autonomous driving, robotics, or cybersecurity. If a transaction falls under one of these case groups, this triggers a reporting obligation for investments from third countries, lowers the applicable threshold from 25% to 10%, entails a comprehensive enforcement ban, and creates a presumption in favor of public safety and order being affected. This may lead to a restriction on acquisition. In any case, the number of acquisitions subject to reporting will increase sharply.

The sector-specific test is to be extended to all acquisitions by companies that develop, manufacture, modify or have actual control over listed military equipment. (Sections 4(1)(1), 5(3) AWG, Sections 60 to 62 AWV). Moreover, there is a reporting obligation - in this area - for every foreign investment, regardless of whether the buyer comes from the EU or from third countries. Particularly with regard to the defense supply industry, this is likely to greatly increase the number of acquisitions subject to notification.

Special attention should be paid to a regulation that also applies below the thresholds (10% in the area of reportable acquisitions or 25% for all other acquisitions) if this is accompanied by the "assurance of additional seats or majorities in supervisory bodies or in the management", the "granting of veto rights for strategic business or personnel decisions" or even just the "granting of information rights" and thereby an influence on the domestic company is conveyed that is equivalent to a 10% or 25% share of voting rights.

Similar to German merger control (Section 37 (2) no. GWB), a catch-all definition of "acquisition of competitively significant influence" is now introduced, which also imposes a reporting obligation below the formal shareholding thresholds and thus

also supervision with possible prohibitive consequences. As in cartel law, wherein practice it is often only possible to clarify whether or not there is a reporting obligation by means of consultations with the authorities, something similar is to be expected for the AWV procedure.

Finally, the amendment contains the clarification of the previous audit practice of the BMWi, in which the share increase above the relevant thresholds (10% or 25%) is subject to the investment audit. This is to apply even if the acquirer has received a clearance certificate or release from the BMWi for its previous share acquisitions.

The advisor's tip for foreign investors must be to increasingly consult the BMWi as a precautionary measure or to submit notifications - with corresponding effects on the closing/completion of the transaction. Finally, it is to be expected that the acquisition control will be significantly extended and tightened.

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