



New restrictions on foreign direct investments in Germany expected

The German government plans to extend the existing restrictions on foreign direct investments. It aims to cover investments by sovereign wealth funds in certain strategic sectors. However, the proposal recently introduced by the Federal Ministry of Economics is drafted very broadly and would allow the Ministry to prohibit or restrict any transaction in any sector involving a non-resident company as a purchaser for reasons of public policy or public security of Germany.

Governments all over Europe are increasingly discussing the issue of sovereign wealth funds investing in key strategic European companies. In the absence of an integrated European approach, the German government plans to extend the existing rules on foreign direct investments.

The current legal situation

The existing provisions of the Foreign Trade and Payments Act and its Implementing Regulation allow the Federal Ministry of Economics (the Ministry) to prohibit foreign acquisitions of resident companies in the armaments or encryption sectors if the acquisition interferes with vital security interests, the peaceful co-existence of nations or Germany's foreign relations.

The new restrictions

Should the draft bill be passed as planned, the Ministry would be able to prohibit or restrict any acquisition by way of asset or share deal of a company of any sector residing in Germany if: (i) the purchaser is either a non-resident or is a resident in which a non-resident company has at least 25 per cent of the voting rights; and (ii) this measure is necessary for reasons of public policy or public security. The notion of 'public policy or public security' is extremely wide. It is therefore difficult to predict its interpretation by the Ministry and the German courts.

The envisaged procedure

The Ministry would have the right to initiate a formal investigation within three months of the signing of the transaction or the publication of a takeover bid. In such cases, it has one month after receiving the complete documents relating to the transaction to restrict the transaction. During both stages of the examination procedure, the entry into force of the sales and purchase agreement would remain pending. According to the proposal, the purchaser is not obligated to notify the transaction but may apply for a formal investigation. Such an application has the advantage that the Ministry may only restrict the transaction within one month following receipt of the complete documentation relating to the transaction.

Status of the legislative procedure

The project must still pass a vote in the college of ministers and in parliament. It may therefore still be considerably amended. Among the most debated issues are the time period within which the Ministry would have to act, the introduction of a notification requirement and the grounds for a restriction or a prohibition. According to the current plan of the Ministry, the project would enter into force in the first half of the year 2008.

As for the severe consequences of a prohibition or a restriction, we assume that the Ministry would only

exercise its future rights in high-profile and exceptional cases. Should the current proposal be adopted as planned, we would advise filing an application with the Ministry in cases where doubt exists. Anyone planning a transaction, in particular in sectors like infrastructure, energy or telecommunications, should follow closely the legislative procedure.

For further information please contact Dr. Hans-Joachim Priess
T +49 30 20 28 38 59
E hans-joachim.priess@freshfields.com