



## German Government extends Veto Rights against Foreign Investors

### I. Background

In our December 2016 client memo (read [here](#)) we discussed that the acquisition of the German machinery manufacturer Aixtron by a Chinese investor failed due to a prohibition order issued by then-president Barack Obama. Obama had followed a recommendation of the US Committee on Foreign Investments in the United States (CFIUS) which had raised security concerns, based on the potential military use of one of the target's products. Although only the US business and assets of the target were directly concerned, the Chinese investor decided not to pursue the transaction further. We concluded that potential CFIUS issues should be taken into account in each cross-border transaction, even if, at first sight, there are neither obvious US-relations nor potential national security concerns. As a reaction to the US practice, in December 2016 the German government announced to make more extensive use of the existing German foreign trade laws to prevent German companies from being taken over by foreign investors and to further tighten such rules. It is common currency that the German government regretted its inability to prevent Chinese Midea group from acquiring German robotics specialist Kuka in summer 2016.

### II. Previous German Foreign Trade Regulation

The previous German foreign trade regulation (AWV) distinguishes between "cross-sectoral" (i.e. general) provisions and "sector-specific" provisions on the review of acquisitions of (at least 25% of) German companies by non-EU/non-EFTA purchasers as follows:

- The cross-sectoral provisions are applicable to companies of all kinds of industries. It is optional for any purchaser to notify the envisaged acquisition to the Federal Ministry of Economics (the Ministry). The Ministry may further investigate transactions which potentially "endanger the public order or security of the Federal Republic of Germany" within three months after the signing; within further two months from receipt of all necessary information, the Ministry can prohibit the transaction. Upon request, the Ministry has to decide within one month whether it requires further investigations or grants a clearance certificate. In practice, such request is often sought before signing in order to achieve transaction security in advance.
- The sector-specific provisions, so far, apply only to certain specific industries which are of relevance for the national security, e.g. producers of weapons or IT hard- or software which is used for the encryption of classified governmental data. Acquisitions which are subject to such sector-specific provisions must be notified to the Ministry.

### III. Extended German Foreign Trade Regulation

Half a year after "Aixtron" and roughly a year after "Kuka", despite continuously criticizing the new US president for his protectionism and only days after hosting the G20 Summit which cumulated in a solemn commitment to free trade\*, the German government has delivered on its December 2016 promise and adopted a new tightened Foreign Trade Regulation. It maintains the principal distinction between "cross-sectoral" and "sector-specific" provisions. However, the cross-sectoral provisions have been supplemented by an additional catalogue of industries in which acquisitions by non-EU/non-EFTA investors potentially constitute a danger to the public order or security. In these industries, notification to the Ministry is now mandatory. The industries which now fall within the notification requirement comprise the following "critical infrastructures", i.e.

- Energy,
- IT networks,
- Telecommunication,
- Transport,
- Health,
- Water supply,
- Nutrition,
- Banking or insurance businesses,

in each case as further specified in the "Regulation on the Determination of Critical Infrastructure". In addition, sectors like specific "cloud computing" or software for critical infrastructure (e.g. hospital software) also fall under the tightened notification rules.

The Ministry decides within three months from becoming aware of the transaction (at the latest within five years from the signing) on further investigations; it can prohibit transactions within a period of further four months (instead of two months as previously). The parties may still apply for a clearance certificate, however, the period within which the Ministry has to decide to initiate further investigations or to grant the clearance has now been extended to two months.

### IV. 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 German Ministry of Economics. As transactions are time-sensitive, there is usually no benefit in taking legal action against a decision by the Ministry. Therefore, it is crucial to identify potential foreign trade issues in advance and to get a sense whether the Ministry might oppose the envisaged transaction at the earliest possible stage.

**In case you have any questions, please do not hesitate to contact:**

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\* **Quotation from the 2017 G20 Leaders' Declaration:** *We will keep markets open noting the importance of reciprocal and mutually advantageous trade and investment frameworks and the principle of non-discrimination, and continue to fight protectionism including all unfair trade practices and recognise the role of legitimate trade defence instruments in this regard.*