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Germany Enacts Amendment to Its Foreign Trade and Payments Act

Patricia Nacimiento (Herbert Smith Freehills) · Wednesday, May 13th, 2009 · Herbert Smith Freehills

Germany has introduced an amendment to its Foreign Trade and Payments Act. It is a direct response to increased activities and acquisitions by sovereign wealth funds (SWFs), as they are often perceived to pursue economic as well as political aims. Despite this origin, the legislation does not only apply to SWFs. Instead, it allows the German government to effectively block any acquisitions of stakes in any German businesses if:

? the purchaser is a non-EU person, or 25 per cent or more of the voting rights in the purchaser are owned by a non-EU person,
? following the transaction, the purchaser directly or indirectly holds 25 per cent or more of the target company's voting rights, and
? the transaction poses a threat to public order or public safety in Germany.

Some commentators have wondered whether the broad scope of the Act might not actually prove to be counterproductive. Extending its application to any industry is more likely to be subject to severe scrutiny, particularly in relation to existing laws and regulations for the protection of foreign investment, than a narrowly tailored approach might have been. It also remains unclear whether the amendment may affect obligations assumed by Germany under its Bilateral Investment Treaties.

Under the Act, if the purchaser is a non-EU person, or if one non-EU person controls 25 per cent or more of the voting rights in the purchaser individually, the government's right of review is triggered. Conversely, no right to review is triggered if there are several non-EU shareholders with a combined shareholding of 25 per cent or above, as long as each of them individually remains below 25 per cent. However, any voting rights held indirectly through other entities in which the relevant non-EU person holds 25 per cent or more of the voting rights are attributed to that person (as well as voting trusts). An exception to this general rule applies to EU acquisition vehicles that have "sufficient substance". This means a company that has not been set up exclusively for the purpose of circumventing the review process, in other words, a company with its own business activities, employees and/or assets will not trigger the review process, even if a third country person holds 25 per cent or more of the voting rights in that company.

For the purpose of the Act, persons and companies from the European Free Trade Association (EFTA), namely Iceland, Liechtenstein, Norway and Switzerland are treated like EU persons.

The Review Process

The only ministry that has authority to act under the amended legislation is the Ministry of Economics and Technology (MET). The MET may decide to enter into a formal review process within three months from the conclusion of a sale-and-purchase agreement or the announcement of a public takeover offer. For at least the duration of this review period any transaction remains subject to a condition subsequent of the MET prohibiting such transaction.

If the MET decides to institute a review, the purchaser has to provide the ministry with the relevant documents of the transaction. Upon receipt of all the required documents, the statutory review period of two months begins to run. The only ground upon which the MET can order annulment is a determination of a "threat to public order or safety".

Alternatively, an investor may apply for a certificate of non-objection (Unbedenklichkeitsbescheinigung) from the MET before the conclusion of the acquisition. In this case, it is merely necessary to outline the basic elements of the planned acquisition, the investor and his field of business.

In the event the MET decides to prohibit the transaction, the legal consequence is the invalidity of the underlying sale-and-purchase agreement under German civil law. If shares have already been transferred to the purchaser, the MET can limit or restrain completely the voting rights in the German target or appoint a trustee to unwind the transaction.

Under the Act, an investment can only be denied if it poses a threat to public policy or public order. Any limitation exercised must be within the scope set by the European Court of Justice (ECJ). In very limited circumstances the ECJ has recognized this exception in the areas of Freedom of Establishment and Free Movement of Capital. However, any measure taken must not be a disguised form of protectionism, must be strictly necessary and no less restrictive measure must be available.

Further limitations on restricting investments result from the General Agreement on Trade in Services (GATS). It contains detailed rights that guarantee capital access of investors.

Considering the legal limits resulting from the EC Treaty and GATS, it will be interesting to see what happens if an investment is denied on this basis. A situation is conceivable where an investor successfully raises EC or GATS concerns. It further remains to be seen whether there is an impact with regard to rights under Germany's Bilateral Investment Treaties.

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