On July 18, 2017, Germany passed an amendment to its foreign investment regime that will make acquisitions of German companies by foreign acquirers considerably more time consuming and potentially more complex. Chinese takeovers of German companies have increasingly come under scrutiny, after Chinese electrical appliance manufacturer Midea acquired German robotics producer KUKA. While the Minister of Economic Affairs insists that Germany remains one of the most open economies in the world, German investment control had already grown more restrictive in practice over the past months. The proposed takeover of German technology company Aixtron by Chinese investor FGC fell through, after the Minister of Economic Affairs revoked a clearance certificate. And in February 2017, Germany, together with France and Italy, called for more effective defense instruments at the European level to review politically motivated acquisitions of European tech companies by foreign investors. The new rules reflect this increasingly cautious approach to foreign investment.

I. The German investment control regime

In Germany, foreign investment is regulated by the German Foreign Trade Act (AWG) and by the Foreign Trade Ordinance (AWV), a ministerial ordinance of the German Federal Ministry of Economic Affairs and Energy (the Ministry).

Under these rules, the Ministry can review whether the acquisition of a 25% stake or more in a domestic company by foreign investors jeopardizes the public order or security of the Federal Republic of Germany. The rules distinguish between sector-specific reviews and cross-sector reviews.

The cross-sector review applies to any acquisition of a company by investors located outside the territory of the EU or the EFTA region. The review considers whether the acquisition represents a sufficiently serious and present threat which affects fundamental interests of society.

The sector-specific rules apply only to certain sensitive industries, and they apply even if the acquirer is located within the territory of the EU or EFTA. Sensitive industries are, for example, manufacturers and developers of war weapons and products with IT security features.

The recent amendment expands the competences of the Ministry and extends the periods for review.

II. New developments in the cross-sector review

The new rules introduce to some extent more legal certainty. The old regime did not define what is meant by a ‘threat to the public order or security’. The new rules now list examples of targets whose acquisition can, as a rule, constitute such a threat.
• Operators of so-called ‘critical infrastructures’
• Developers of software for the operation of such ‘critical Infrastructures’
• Companies involved in the field of telecommunications
• Providers of certain cloud computing service or
• Companies that have important functions in the area of IT security and telematics.

The new rules give a clear mandate to the Ministry to review acquisitions that fall under this list.

Procedurally, the amendment introduces an obligation to report any proposed acquisition of companies that fall under the abovementioned list to the Ministry. Such an obligation previously only existed for the sector-specific review.

### III. New developments in the sector-specific review

The list of sensitive industries has been expanded, widening the scope of the Ministry’s powers of review. The new rules focus in greater detail military technology, e.g. simulators and specialized imaging equipment.

The amendment also introduces an anti-circumvention provision for the sector-specific review.

### IV. Expansion of review periods

Under the old regime, a clearance certificate was deemed to have been granted if the Ministry did not open an examination procedure within one month after receipt of the application. For the cross-sector review, the new rules extend this period to two months. For the sector-specific review, the new rules triple this period; it went from one month to three months. Additionally, the period for the review procedure itself has been extended from two to four months for the cross-sector review and from one month to three months for the sector-specific review.

Two more changes extend the de facto review period: First, the period for the review procedure is suspended if the Ministry negotiates with the parties. And second, the Ministry may now enter the review procedure within three months of becoming aware of the transaction (under the old regime, the time limit for entering the review procedure was three months from the conclusion of the deal).

### V. Forecast

In the past, very few formal review procedures have been conducted. With the new rules this can be expected to change. The longer review periods also mean that the Ministry will now be able to examine a deal more closely. And the criteria for the Ministry’s decision have become more formalized. It is thus vital for the parties to have experienced counsel to help them navigate the amended investment control regime and in particular the formal review procedures.

### Your Key Contacts

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