Developments

Aussenwirtschaftsrecht and corporate investments in Germany – new hurdles for foreign investors

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American Private Equity Funds, Russian Oligarchs or Arabian Sheiks – of late, many German Board Members negotiate with foreign investors about entering as new shareholders. The German Foreign Economy Act ("Aussenwirtschaftsrecht") could become more relevant in this context, having led a quiet existence thus far. Having come into force 24 April 2009, Aussenwirtschaftsrecht enables the Federal Ministry of Economy ("Bundeswirtschaftsministerium" / BMWi) to prohibit purchases of German enterprises by non-EU residents under certain circumstances. This article shows the contents and relevance of the new law as well as its consequences for foreign investors involved in Mergers and Acquisitions re German companies.

A. Introduction

Public takeovers of German enterprises currently play an incremental role due to decreased share prices and to the financial crisis. Recently, the takeover of the German roof manufacturer Monier by three American Private Equity Funds in July 2009 caused quite a stir. More than one billion Euros of former Bank Debt were changed into a stake in Monier by a Debt Equity Swap. Moreover, foreign investors have repeatedly been involved in negotiations with several German Original Equipment Manufacturers within the automotive industry (Opel, Porsche) about entering as new shareholders. Although some economists are predicting an end to the recession, they foresee a slight upward beginning only in 2010. Hence, there is a likelihood for more acquisitions of distressed enterprises in several industries.

However, the former Aussenwirtschaftsrecht contained restrictions for foreign investors on purchases of German enterprises. The BMWi could prohibit the purchase of a direct or indirect stake leading to more than 25 percent of the voting rights in a German based enterprise. Prerequisites were that targets had a) either to produce or develop military arms, b) to produce or develop specially constructed engines or gears for tanks or other armored military tracked vehicles, c) to produce cryptographic systems approved for transmission of confidential matters of the state or d) to run high-class terrestrial remote sensing (i.e. satellites). These restrictions were introduced in 2003, as a result of several

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prominent acquisitions by American Private Equity Funds[1] of German defence technology manufacturers. The German government introduced the defence technology clause (*"Ruestungsklausel"*) and a right of veto to the German government, should domestic enterprises of the defence industry be sold to investors from outside the EU or EFTA. Some experts regarded these measure as an attempt by the German government to wield a "political instrument" in order to have a say in the realignment of the remaining domestic defence technology manufacturers[2]. Because of this narrow scope the former Aussenwirtschaftsrecht was of little practical importance. Meanwhile, however, the abilities of the BMWi have been extended tremendously following the introduction of the new law (especially § 7 para. 1 No. 4 *Aussenwirtschaftsgesetz*, *"AWG"* and § 53 *Aussenwirtschaftsverordnung*, *"AWV"*). In particular there are no remaining limitations on certain industries such as the mentioned defense technology industry.

B. Prerequisites of the new *Aussenwirtschaftsrecht*

The BMWi is entitled to check and restrict acquisitions if a domestic target is purchased directly or indirectly by an investor from outside the EU or EFTA or by a domestic investor owned by a non-EU shareholder with a stake of at least 25 percent. The purchase must be based on a certain legal act and lead to a total takeover or to a stake of at least 25 percent (§ 53 para. 1 AWV). Additionally, a factual and serious threat to the public order or to public safety has to result from the purchase. The new law contains the following framework.

I. Targets – requirements

According to § 4 para. 1 no. 5 AWG a domestic enterprise located or with management located in the Federal Republic of Germany must be subject to the purchase. Foreign enterprises whose statutory location is outside of, but steered from within Germany are also included. Further criteria to classify subsidiaries of foreign enterprises as domestic could be the German location of the enterprise´s administration and its management or separate accounting for German purposes. The target´s legal form is irrelevant[2].

[1] Purchase of a stake in *Howaldtswerke Deutsche Werft AG* (submarines) by One Equity Partner and disposal of *MTU Aero Engines* (engine manufacturer) by DaimlerChrysler to KKR; see also Marc-Philippe Weller, Zeitschrift fuer Wirtschaftsrecht (ZIP) 857, 861 (2008).

[2] Heinz Schulte, MARINE-FORUM 12, 2 (2003) .

[2] Christoph Seibt, Bernward Wollenschlaeger, *Unternehmenstransaktionen mit Auslandsbezug,* ZIP 833, 835 (2009)

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One of the most important aspects of the new law is the fact that the purchased enterprise need not belong to any particular industry. The BMWi is entitled to assess transactions irrespective of the target´s sector and the volume of sales according to § 53 AWV[3]. Although the German government remarked that the new rule shall apply only in cases assessing problematic investments with regard to the public order or safety[4] a formal containment does not exist. Acquisitions of enterprises in any industry can therefore be prohibited in principle. The legal scope of § 53 para. 1 AWV is limited only by an overriding right of the BMWi with regard to defence technology, cryptographic systems or terrestrial remote sensing – i.e. targets that have already been subject to assessments by the BMWi according to the former law. Hence, a *lex specialis* has been introduced insofar as the former legal scope and the safety interests of the Federal Republic of Germany are concerned. Other industries may also be covered in case of a presumed threat to the public order or safety as criteria being explaned further below.

II. Foreign investors – required aspects

Acquisitions can be assessed and prohibited by the BMWi if the "external investor" is located neither in the EU nor in a member state of the EFTA (*i.e.* Iceland, Norway, Liechtenstein, Switzerland). With regard to legal entities the statutory location or the location of the management is relevant, whereas the residence or the usual domicile are criteria for individual persons[5]. The Channel Islands (*e.g.* Jersey, Guernsey), being popular for Private Equity Investors, also belong to the territory of the community, i.e. investors located in Channel Islands are not subject to the BMWi´s assessments. In contrast, the Cayman Islands, Bermuda and other islands situated overseas, are not part of the territory of the community[6].

A domestic investor may also be subject to assessments or prohibitions of the BMWi even if he is located in the EU or in a member state of the EFTA. This requires a) that an external investor owns at least 25 percent of the voting rights in the domestic investor and b) that there is evidence of an improper design or of an evasive transaction, conducted in order to avoid an assessment by the BMWi. This means that the external investor uses a domestic investment vehicle (stake of at least 25 percent) as a "Trojan horse" to purchase a

[3] Hartmut Krause, *Die Novellierung des Aussenwirtschaftsgesetzes und ihre Auswirkungen auf M&A-Transaktionen mit auslaendischen Investoren,* Betriebs-Berater (BB) 1082, 1083 (2009).

[4] BT-Drucks. 16/10730, 15, 6.

[5] Seibt, Wollenschlaeger, (note 3) 833, 835.

[6] Oliver von Rosenberg, Juliane Hilf, Martin Kleppe, *Protektion statt offener Maerkte?,* Betriebs-Berater, BB 831, 832 (2009); Rainer Traugott, Philipp Struempell, *Die Novelle des AWG: Neue Regeln fuer den Unternehmenskauf durch auslaendische Investoren,* Aktiengesellschaft (AG) 186, 190 (2009).

domestic target. In this respect, a prohibition requires an "improper design" respectively artificial structures, having a wide definition and giving some leeway for the external investor if he could demonstrate commercial reasons (e.g. taxation issues) for the indirect purchase. Using an intermediate holding company should also be no improper design as regards the *Aussenwirtschaftsrecht*, if the company is fully operational. In contrast, it should be an artificial structure if the same external investor purchases the target via several domestic acquisition vehicles, invested in each for less than 25 percent, and the accumulated stake reaching or exceeding 25 percent. An exemption may be given if the investor can provide commercial arguments for the splitting of shares.

III. Purchase transaction and threshold

Assessments by the BMWi require a purchase transaction, *i.e.* share deals or asset deals, but gifts, barter deals or securities lendings are also comprised – irrespective of the jurisdiction. Moreover, the type of transaction (e.g. public takeover of a listed company or purchase of a privately-owned enterprise without capital market access) is of no relevance.

The transaction has to lead to the purchase of a stake that implies voting rights, *i.e.* after closing, the investor must have a say as far as commercial matters of the target are concerned. With regards to German corporations, ordinary shares provide voting rights for shareholders whereas preferred shares (e.g. of a KGaA[7]) do not lead to such rights. Thus, the latter type of shares cannot be subject to a prohibition of the BMWi. The same applies to other types of equity-like instruments, for example silent partnerships, profit participation rights (*"Genussrechte"*) or derivative financial instruments (*e.g.* Total Return Swaps) which do not lead to voting rights. In contrast, bilateral agreements between the target and the investor cannot exclude a prohibition according to § 53 AWV. This is understandable as regards the government´s intention, given that such agreements may be cancelled and are furthermore effective only between the parties involved. Hence, the new law´s protection could be evaded easily.

Finally, the investor has to reach a threshold of 25 percent (blocking minority) after closing as a result of the purchase. Stakes below this can therefore not be subject to any assessments by the BMWi. But if the 25 percent threshold is subsequently reached or exceeded in any further transaction, the BMWi comes into play. In contrast, no repeated assessment is triggered if the investor has already reached the threshold and further increases his stake afterwards, due to the lack of causation between purchase and achievement of the blocking minority[8]. However, voting rights of third parties would be

[7] Ruediger Theiselmann, *Family Corporations Focus on International Capital Markets: The German KGaA and Its implications for Entrepreneurs and Investors,* Deutsch Amerikanische Juristen Vereinigung-Newsletter 23 (2009).

[8] Traugott, Struempell, (note 6), 186, 191.

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attributed to the investor if the they have agreed a joint exercise of these voting rights (§ 53 Para. 1 S. 4 AWV). Therefore, the third party´s and the investor´s stakes would be added together, similar to an "Acting in Concert" – which is known from the German capital markets law – if the investor has a stake of less than 25 percent in the target but agrees with another shareholder that they will exercise their voting rights in a joint manner.

IV. Threat for public order or safety

Any prohibition on purchase of stakes in a German enterprise needs to be required in order to safeguard the public order or safety of the Federal Republic of Germany according to § 7 para. 2 No. 6 s. 1 clause 1 AWG and § 53 para. 2 S. 4 AWV. The German legislator aimed to interpret the term "public order or safety" in accordance with former decisions of the Court of Justice of the European Communities (CJEC). For this reason a factual and serious threat to the public order or safety must exist and affect a basic interest of the German community (§ 7 para. 2 No. 6 S. 1 Hs 2 AWG). The government noted that limitations should meet high standards and that prohibitions should rarely be the case[9]. This does not comprise general interests of the state regarding economy, labour market policy or finance[10].

The government refers to former decisions by the CJEC, which regarded safeguarding the supply of electricity or services of general interest (telecommunications, postal services) as reasons which could under certain circumstances justify a limitation of the free movement of capital (Art. 56 EC)[11]. But the above-mentioned industries have not been qualified as security-relevant in general, *i.e.* state intervention has not been regarded as justified in these industries, but the individual case is ultimately what matters[12].

Consequently, there is a risk for prohibitions with regards to corporate transactions within industries of strategic relevance and of importance for the public supply: Railway companies, harbour services or companies supplying oil and natural gas are sensitive industries. In contrast, enterprises from the automotive industry (including suppliers), from the capital goods and steel industries, from the chemicals industry or banks (except central banks) are not included[13]. However, the financial crisis has shown that single commercial

[9] Begr. RegE, BT-Drucks. 16/10730, 12 f.

[10] EuGH, 4 June 2002 – Rs. C-367/98, Slg. 2002, I-4731 fn 52.

[11] EuGH, 2 June 2005 – Rs. C-174/04, Slg. 2005, I-4933 fn 40; EuGH, 13 May 2003 – Rs. C-463/00, Slg. 2003, I-4581 fn 71; EuGH, 4 June 2002 – Rs. C-503/99, Slg. 2002, I-4809 fn 46.

[12] Krause, (note 4) BB 1082, 1084 .

[13] Seibt,Wollenschlaeger, (note 3) AG, 833, 839.

banks may be relevant for the economy if they have a prominent market position regarding credit supply for German enterprises. Moreover, huge pharmaceutical or chemical companies could qualify as relevant in terms of the public supply *e.g.* with medicines in times of crisis (pandemics, biological assaults). But this also depends on the size of the enterprise and on its relevance to the supply with strategically relevant goods and services.

B. Practical aspects

Purchases of a stake fulfilling the mentioned prerequisites are subject to the BMWi´s assessment. In this context, some of the following specifics should be taken into consideration if M&A transactions are realized.

I. Declaration on the purchase

If enterprises from defence technology, cryptographic systems or terrestrial remote sensing are targets of an acquisition by a foreign investor, the BMWi must be informed about this transaction. In contrast, there is no need to inform the BMWi about transactions in companies from other industries being subject to the new law. In these cases the BMWi can inform itself or can be informed about relevant purchase transactions (e.g. by Federal Financial Supervisory Authority / *"Bundesanstalt fuer Finanzdienstleistungsaufsicht", BaFin* or by Federal Cartel Office / *"Bundeskartellamt"*) and then decide about intervention.

However, in cases of significant transactions, it is recommended that external investors take active steps to communicate these transactions to the BMWi, to ensure a high level of transaction safety at an early stage. This can be done if the application to the *Bundeskartellamt* or to the EC Commission is done to initiate the merger control process. Within auctions the selling party should demand a document of compliance (*"Unbedenklichkeitsbescheinigung"*) from every potential external investor, during the binding offer at the latest. Domestic investors should also declare that none of their main shareholders (with a stake of 25 percent or more) stem from outside the EU or EFTA. Furthermore an *Unbedenklichkeitsbescheinigung* by the BMWi could be contractually agreed between vendor and investor as a precedent condition. Alternatively, the parties involved could agree to undo the contract in case of a prohibition of the purchase by the ministry[14]. From the investor´s perspective it is recommended either to apply for an *Unbedenklichkeitsbescheinigung* at an early stage or to have a contractual agreement regarding this approval as a preceding condition as well as a condition for payment of the purchase price with regard to large and potentially jeopardized transactions.

[14] Traugott, Struempell, (note 6), 186, 192.

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II. Process of the ministry´s assessment

Regarding the assessment by the BMWi the following scenarios must be considered:

1. No announcement by the investor

If the investor does not inform the BMWi about its interest in purchasing a domestic enterprise the BMWi must decide within three months after closing respectively after publication of the investor having gained control over a listed company whether to assess the transaction or not (§ 53 para. 1 s. 1 AWV). This is not contingent on positive or potential knowledge by the BMWi regarding the purchase. Additionally, neither the investor nor the vendor is obliged to inform the BMWi about the purchase[15]. If the ministry decides to enter into a formal assessment process it must inform the investor about its' intention and request that the complete files regarding the purchase be provided, according to § 51 para. 2 s. 1 AWV. The required types of files have yet to be specified by the BMWi by publication in the German Feneral Gacette (*"Bundesanzeiger"*, § 53 para. 2 s. 2 AWV). After receipt of the complete files, the BMWi must decide within two months if the purchase is prohibited or if further obligations have to be fulfilled by the investor. Both decisions need final approval by the German government (§ 53 para. 2 s. 5 AWV). If the transaction is not prohibited within the two months, purchase becomes irrevocably effective. Henceforth, prohibitions or instructions cease to be possible[16].

2. Announcements by the investor

Investors intending to voluntarily announce the planned thereby safeguarding the transaction at an early stage, face the following two possibilities: On the one hand the investor may apply for an *Unbedenklichkeitsbescheinigung*; on the other hand he could send the complete files voluntarily to the BMWi. Both options may be combined which should be taken into consideration in case of time pressure and increased risk of prohibition.

a) Application for *Unbedenklichkeitsbescheinigung*

[15] Seibt, Wollenschlaeger, (note 3), 833, 834.

[16] Rolf Mueller, Hermann Hempel, *Aenderungen des Aussenwirtschaftsrechts zur Kontrolle auslaendischer Investoren,* Neue Juristische Wochenschrift 1638, 1639 (2009) .

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If the investor strives for an *Unbedenklichkeitsbescheinigung* he must address the BMWi. The application has to include the general information regarding a) the planned purchase, b) the investor and c) his business segment[17]. After receipt of this application the BMWi must decide within one month whether to enter a formal assessment process (§ 53 para. 3 s. 2 AWV). After this deadline the *Unbedenklichkeitsbescheinigung* is considered granted, provided no assessment process has been initiated. This legal fiction offers significant advantages: it leads to transaction safety at an early stage in uncomplicated cases; moreover, it implies a similar timing with regards to the merger control by the *Bundeskartellamt*, which must decide within one month (§ 41 para. 1 S. 1 GWB) whether to enter the control process. However, if the BMWi decides to initiate an assessment it can decide within one additional month if there exist concerns regarding the planned purchase insofar as the public order or safety are concerned. The purchase will be effective in this case provided it is not prohibited within this additional month.

b) Voluntary handover of the complete files

Alternatively, or combined with an application for an *Unbedenklichkeitsbescheinigung*, the investor may voluntarily hand over the complete files regarding the planned purchase to the BMWi and apply for an assessment (§ 53 para. 2 AWV). The ministry cannot refuse to receive such an application but must decide if and when it will enter into a formal administrative procedure. From an investor´s perspective it may be preferable to refer to possible disadvantages in an auction or to economic disadvantages if the ministry would not decide. In this case the leeway for the BMWi´s decision is reduced to nil, i.*e.* it is forced to decide. After receipt of the complete files the BMWi must reach a decision within two months.

3. Decision of the BMWi and immediate legal protection

Prohibitions or instructions are made by the BMWi via administrative act (*"Verwaltungsakt"*) which can be appealed by the investor as well as by the vendor[18] (§ 7 para. 2 no. 6 AWG and § 53 para. 2 s. 4 AWV). Legal action must be taken against the Federal Republic of Germany as the responsible body for the BMWi within one month following announcement of the *Verwaltungsakt*. The administrative court (*"Verwaltungsgericht"*) in Berlin is the responsible court. Legal actions suspend enforcement of the *Verwaltungsakt* (§ 80 para. 1 VwGO), *i.e.* the purchase remains effective until the final decision of the courts. But the BMWi is able to instruct an immediate execution of the prohibition (§ 80 para. 2 s. 1 no. 4 VwGO). If the

[17] Ruediger Theiselmann, CORPORATE FINANCE RECHT FUER FINANZMANAGER 10 (2009).

[18] Mueller, Hempel, (note 18), 1638, 1641.

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argumentation is formally or materially insufficient or if the prerequisites for a prohibition are not fulfilled, the investor as the prosecutor could successfully claim for recovery of the suspending effect according to § 80 para. 5 VwGO judged by the *Verwaltungsgericht* Berlin.

C. Summary

The new *Aussenwirtschaftsrecht* generates new insecurity with regards to M&A transactions: On the one hand every industry may be affected by a prohibition, whereas certain sectors (telecommunications, energy incl. oil or natural gas, universal postal services, railway nets, banks, pharmaceutical industry or chemicals industry) are presumably of special importance. On the other hand, vendors should preventively ask any potential buyers from abroad but also German based prospects (given the fact that external investors could be one of their main shareholders) for a written declaration that they comply with the new law or that they have received an *Unbedenklichkeitsbescheinigung* from the BMWi. Additionally, investors from outside the EU or EFTA seeking to purchase of at least 25 percent of a German enterprise should consider an *Unbedenklichkeitsbescheinigung* at an early stage, ideally in combination with passing on the complete transaction files to the BMWi. Only in this way is a high level of legal and transaction safety possibly achieved. Conversely, investors prepared to risk of prohibtion and considering the intended purchase as unproblematic should desist from an announcement to the BMWi but bear in mind that the *BaFin* or the *Bundeskartellamt* could inform the BMWi, thereby triggering an assessment.

Due to the new law, the BMWi will get an improved overview of planned or ongoing M&A transactions in Germany, given that many investors or vendors will apply for an *Unbedenklichkeitsbescheinigung* as a precaution. But the German state gains this increased level of regulation only through significant administrative efforts.

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