

## Chinese walls? Germany reinforces the control of foreign investments

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On 12 July 2017, the German Federal Government significantly reinforced the barriers for the acquisition of German companies by non-EU companies. The new Regulation for the Amendment of the Foreign Trade and Payments Regulation ("AWV") will impose new reporting obligations for M&A transactions. There are now concerns about the openness of Germany to foreign investment and the additional burden that the new rules will impose on companies.

### **More uncertainty in M&A transactions**

As the case has been until now, the procedure for the control of investment concerns the acquisition of a direct or indirect participation of 25% of voting rights in a German company. Under the new rules, buyers and sellers should foresee a longer period for the review by the Federal Ministry of Economy ("MoE"). The three month deadline to initiate the review procedure now starts running upon *knowledge* of the transaction by the MoE. Under the new rules, the MoE now has a maximum of five years to initiate the review of the transaction.

The Regulation does not define *knowledge* of the signing of the SPA. According to German administrative law, the relevant point in time is that of positive knowledge by the MoE of a transaction, not that of when the MoE could have known about it. For example, when a newspaper reports on a deal, the deadline for the review would commence when the MoE was informed about the transaction by internal press clippings. However, how should companies prove this? The new rules lead to more uncertainty, because they replace an objective method of defining the date of signing with a subjective one.

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