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## 德国政府对中德并购交易的审查日趋严格-永久转折点还是暂时举措？

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截止至今年，中国企业在德国的并购交易额达到了 110 亿美元，创历史新高。然而，德国联邦经济与技术部（“FMET”）对近期中国投资者并购德国企业的两起并购案进行了更深层的审查，使得中德并购日渐良好的势头蒙上了一层阴影。与此同时，近期将访华的德国经济部部长加布里尔（Sigmar Gabriel）大力倡导欧盟加强对外国投资的限制。限制措施针对以下情形：收购方为国有企业；收购方的收购是遵循政府要求或收购资金来自国家财政补贴；收购方的母国对外资投资设限；或者该投资受产业政策影响。

鉴于上述的情况变化，关于德国一直以来对于外资投资，特别是来自中国的投资，施行的宽松政策是否将有所改变，成为了近期大家讨论的焦点。为了寻求答案，我们有必要首先了解目前德国对于来自非欧盟国的外资投资适用的法律情况。

### 依据 FTA 对外资投资的审查

根据德国外贸法 (Außenwirtschaftsgesetz) (“FTA”), FMET 有权对涉及德国企业的直接或间接的外资投资进行审查，在投资威胁公共秩序以及安全的情况下，FMET 有权禁止。满足以下条件的投资交易需要接受审查：投资者来自非欧盟国家，或投资者超过 25% 的投票权被来自非欧盟国家的股东持有；且投资交易之后投资者直接或间接持有德国被收购公司超过 25% 的股权。

除了涉及国防或加密软件制造商的并购，FTA 不要求交易方对并购交易进行正式登记或正式公告。FMET 需通过媒体或与德国联邦卡特尔办公室、联邦金融监管局合作自行获取外资在德国投资的信息。

在知晓外资对德国企业投资的情况后，FMET 将在签署并购合同或并购出价公告之日起三个月内对相关交易进行初步审查。若 FMET 没有在上述三个月期限内采取任何行动，则相关交易被认作已通过审查，即无须额外审查。若 FMET 启动正式审查，投资者必须向 FMET 递交所有关于拟定交易的材料，包括其自身的股权构架以及交易战略意图。在收到上述材料之日起，FMET 有两个月的时间来禁止交易，或对交易设限、设条件，以保证公共秩序及安全。

为了避免法律上的不确定性，也为了缩短审查时间，外国投资者可以在交易进行之前主动将交易向 FMET 披露，以获取一份具有法律效力的无异议函（清洗程序），在上述情况下，FMET 在收到主动披露之日起一个月内需启动正式审查程序，逾期的话，相关交易被认作已通过审查。并购交易双方经常以在交易文件中约定主动向 FMET 披露交易的方式，将清洗程序加以利用。

根据 FTA 的解释性备忘录，只有在少数以及特殊情况下才会使得交易被限制或禁止。由于交易仅能在“威胁到德意志联邦共和国的公共秩序和安全”的情况下才能受限或被禁止，FMET 的任何类似决定都可能使其在法庭上面临挑战。根据欧盟运作条约（“TFEU”）第 52 条以及第 65 条第一款规定，任何关于在欧洲境内资金自由流动的限制，仅可以在考量了公共秩序和安

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全的情况下作出。根据欧洲法院对“公共秩序和安全的威胁”的考量，至今仅在极有限、极极端的情况下才会对资金的自由流动设限。因此，尽管法条规定地比较宽泛，解释、适用起来却是相当狭义的。

### 永久转折点还是暂时举措？——未来对中德并购交易的限制

根据 TFEU 第 52 条以及第 65 条第一款规定，显然，任何对来自非欧盟国的外资对德投资的障碍需要在欧盟层面设置。不然的话，只要利用非欧盟国投资者在欧盟设立的公司来对德国进行投资，规避上述法律并不困难。至于其他欧盟国是否会站在德国一边，支持对外资投资引入新的限制规定，也是一个未知数。

我们也可以从 FMET 的动机来看。有德国媒体报道说，FMET 撤销之前的通过审查决定，并对两起中德并购案重新审查，其中至少有一项并购案涉及美国情报机构的干预继而触及了军事安全问题。但 FMET 此次行为的主要动机看起来是截然不同的：根据德国经济科技部部长加布里尔（Sigmar Gabriel）最近的公开言论，他希望中国与德国保持一致性，敦促中国进一步开放自己的外国投资市场，并消除其现有的投资障碍，例如在对合资企业在汽车行业投资的要求。一方面中国公司近期对收购德国科技的兴趣激增，另一方面中国政府在汽车行业对外资投资设限，这样的状况形成了典型的贸易冲突。因此，德国目前辩论的焦点不是或在很小程度上是出于维护自身国家安全利益，而是为了使欧盟国在中国的现有和将来的投资创造一个公平竞争的环境。在这种意义上，FMET 的监管行动可以被视为触发与中国监管机构进行政治讨论的杠杆，其目标是进一步减少外资对中国贸易和投资的壁垒。到目前为止，中国没有表示重新考虑其立场，并指出中国在德国的投资额甚至没有达到德国在中国投资额的 10%。

回到我们关于此次事件到底是一个转折点或只是暂时举措的问题，我们相信欧洲和中国能找到目前的贸易冲突的解决方案。这样说来，欧盟对非欧盟投资者的并购交易的进一步限制是不太可能的，FMET 对中德并购交易的限制，不论从交易数量上还是从审查程度上都将回到正常状态。

德国政府对中德并购交易的审查日趋严格 - 永久转折点还是暂时举措？

## German Government's Enhanced Scrutiny of Recent Chinese-German M&A Transactions – A Turning Point or Just a Temporary Resentment?

So far this year, Chinese companies have announced a record-breaking US\$11 billion of M&A transactions in Germany. However, the decision of the German Federal Ministry of Economics and Technology ("FMET") to have a more in-depth review of two recent acquisitions of German companies by Chinese acquirers is casting a shadow over this recent trend. At the same time (and just ahead to his official visit to China), German Minister Economics and Technology, Sigmar Gabriel, has been advocating enhanced foreign investment restrictions by the EU. Such restrictions could potentially apply if the acquirer is a state-owned company, if the acquirer's government has ordered or funded the acquisition, if the acquirer's home country restricts foreign investments, or if the acquisition is influenced by industrial policies.

Against the background of these developments, there have been numerous public discussions whether Germany has now reached the turning point of its very liberal policy towards foreign investments, in particular, those from China. To give an answer to this question, it is necessary to first take a closer look at the current legal situation in Germany in respect to foreign investments by non-EU acquirers.

### Review of Foreign Investment Transactions Under the FTA

Under the German Foreign Trade Act (*Außenwirtschaftsgesetz*) ("FTA"), the FMET has the right to review certain direct or indirect investments in businesses based in Germany and impose restrictions or even prohibit such investments if they threaten the public order or security. An investment is subject to such review if the investor is from outside the EU or 25% or more of the voting rights in the investor are owned by a shareholder from outside the EU and, following the transaction, the investor directly or indirectly holds 25 % or more of a German company's voting rights.

Except for the acquisition of any defense contractor or encryption software provider, the FTA does not require a formal registration or notice of a transaction. The FMET must obtain its information on foreign investments in German companies from press releases or through cooperation with the German Federal Cartel Office or the Federal Financial Supervisory Authority.

After having learned about a foreign investment in a German company, the FMET may initiate a review of such investment within three months from the signing of an acquisition agreement or the announcement of a takeover bid. If the FMET does not take any action within such three-month period, the transaction is deemed to be cleared and, therefore, no longer subject to further review. Should the FMET initiate a formal review process, the investor must submit to the FMET all necessary information concerning the contemplated transaction, including information about its ownership structure and the transaction's strategic intentions. The FMET then has a further two months from the receipt of the complete information to prohibit the transaction or to impose restrictions or conditions on the grounds of maintaining public order or safety.

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To avoid legal uncertainty, however, and to shorten the review period, the foreign investor may request a legally binding no-objection letter prior to the transaction (whitewash procedure) by voluntarily giving notice of the transaction to the FMET. In this case, the FMET has one month from the receipt of such notice to initiate a formal review of the transaction, which is otherwise deemed to be cleared. The parties to an acquisition agreement often take advantage of this concept by incorporating into the deal documentation a covenant to notify the transaction to the FMET.

As stated in the explanatory memorandum to the FTA, the restriction or prohibition of a transaction is only possible in rare and exceptional cases. A transaction may only be restricted or prohibited if it “threatens the public order or safety of the Federal Republic of Germany,” and any such decision of the FMET may be challenged before German courts. This is because Articles 52 and 65 para. 1 of the Treaty on the Functioning of the European Union (“TFEU”) provide that any restrictions of the free movement of capital within the EU can only be justified by public order and safety. When interpreting the phrase “threat to the public order or safety,” the European Court of Justice has, to date, upheld restrictions on the free movement of capital only in a few cases and under extremely limited circumstances. Consequently, despite its broadness, the phrase will have to be fairly narrowly construed.

## Turning Point or Just a Temporary Resentment? – Future Restrictions on M&A Chinese-German Transactions

Against the background of the limitations under Articles 52 and 65 para. 1 of the TFEU, it becomes clear why any new impediments of foreign non-EU investments into Germany would need to be implemented on a European level. Otherwise, it would not be very difficult to circumnavigate any such unilateral restrictions by just using another EU company of the non-EU acquirer to make the acquisition in Germany. Whether or not the other EU countries will take the same position as Germany and support the introduction of new investment restrictions remains to be seen.

Also, we should take a look at the motives of the FMET as far as they have been made known to the public. While there were reports in the German press that in at least one of the above referred two M&A cases the revocation of the FMET’s prior approval of the transaction and its reopened review was the result of an intervention by U.S. intelligence agencies that raised military security concerns, it seems that FMET’s primary motive was a completely different one: according to the latest public statements of the German Minister for Economics and Technology, Sigmar Gabriel, he wants to encounter China on an eye-to-eye level, urging it to further open its own market for foreign investments and to remove its existing investment hurdles, such as the requirement of joint ventures for investments in the automotive industry.

The recent interest of Chinese companies in acquiring German technology on the one hand and the latest plans of the Chinese government to introduce further restrictions on foreign investments in the automotive industry on the other hand provided the ingredients for what now looks like a classic trade conflict. Thus, the current debate in Germany is only to a small extent focused on safeguarding national security interests and instead focused on the creation of a level playing field for existing and further EU investments in China. In that sense, the FMET’s regulatory actions can be seen as a lever to trigger a political discussion with China’s regulators with the wider objective of further reducing trade and investment barriers in China. So far, China has not indicated a reconsideration of its position and points

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to the fact that the volume of Chinese investments in Germany has not even reached 10% of German investments in China.

Returning to the question of a turning point or just a temporary resentment, we believe Europe and China will find a solution for their current trade conflict. If that is the case, further EU restrictions on M&A transactions by non-EU investors are unlikely and the number and level of the FMET's regulatory actions against Chinese-German M&A transactions will go back to normal.

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