

# Federal Ministry for Economic Affairs and Climate Action fends off urgent application for Siltronic takeover thanks to successful advice from BLOMSTEIN

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The German Federal Ministry for Economic Affairs and Climate Action was able to fend off an attempt by Taiwanese chip supplier GlobalWafers to have the foreign trade law condition for the Siltronic takeover established by means of an urgent appeal. The Higher Administrative Court of Berlin-Brandenburg dismissed GlobalWafers' appeal against the ruling of the Berlin Administrative Court passed shortly before (OVG 1 S 10/22).

GlobalWafers filed an urgent application seeking a declaration that a clearance certificate under foreign trade law was deemed to have been granted. The Ministry provides such a clearance certificate upon application if the acquisition of a German company by a non-EU person does not raise any concerns with regard to public order or security. If the Ministry does not decide on an application for such a certificate within a specified period of time, the certificate is deemed to have been provided.

The parties involved in the Siltronic takeover had agreed that the provision of such a certificate or its *de facto* provision constituted a condition for the takeover. In contrast, there was no statutory closing prohibition in this case, as provided for in the 2021 amendment to the Foreign Trade and Payments Act with its stricter investment control for acquisition agreements concluded after 1 May 2021. In the opinion of GlobalWafers, the application was particularly urgent because the so-called "long stop date" - the deadline under capital market law for the takeover bid - would expire on 31 January 2022 and the takeover bid would therefore fail.

A clearance certificate had already been applied for at the end of 2020. In the main review process subsequently opened by the Ministry, negotiations and several queries impeded the expiry of the investment control procedure's deadline. In particular, the Chinese antitrust authority's approval of the takeover was not granted until 21 January 2022 and provided to the Ministry at a later date. Without having examined the requirements of the approval in detail for their possible implications for public safety and order, the Ministry did not feel able to complete the review process.

The Administrative Court of Berlin, 4th Chamber, dismissed the urgent application (VG 4 L 111/22). In doing so, the court left the question open whether the conditions for the

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fiction of approval were met. The case raised difficult legal questions which could, in the view of the court, not be clarified in the short time available. Instead, the court weighed the consequences that arise either from allowing or from dismissing the application. This was to the detriment of GlobalWafers. The court pointed out that the Taiwanese company was not legally prevented from initiating a new takeover procedure. On the other hand, there was a concern that public safety and order protected under German and European foreign trade law could be affected in a way that could no longer be reversed if the takeover were to be completed, even if only provisionally.

The Higher Administrative Court of Berlin-Brandenburg dismissed the appeal filed against this decision with its ruling of 31 January 2022 (OVG 1 S 10/22). On the one hand, it considered the examination period to be delayed due to a demand for additional information by the Ministry with respect to the Chinese competition authority's decision, which raised a variety of questions. On the other hand, weighing the consequences of the court's decision did not lead to a different result. In its view, the court could not make a sufficiently reliable assessment of the open legal questions in the time available to it. This included the problematic applicability of the provisions relied upon by Global-Wafers by way of analogy as well as the questionable possibility of applying for the requested declaration at all by means of an interim injunction. According to the court, it remained the case that the public interests involved outweighed the financial interests of Global-Wafers. The company was not legally prevented from attempting a new takeover, even if this may be less lucrative. On the other hand, the company had not provided any details on the economic impact of the potential failure of the takeover in light of its financial potential. Moreover, the terms of the acquisition were a voluntary and self-created risk. In contrast, there was a justified concern that know-how could be diverted to the detriment of public order and security.