

Screening of foreign investments: Federal Cabinet approves the 17th AWV amendment (in a slightly softer version)

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The German Federal Cabinet approved the 17th Ordinance amending the German Foreign Trade and Payments Ordinance (AWV) on 27 April 2021. True to the German saying “Alles neu macht der Mai” (which loosely translates to “everything is new in May”), the Ordinance in the meantime entered into force on 1 May 2021 after its publication in the Federal Gazette on 30 April 2021.

1. Background information

German foreign trade law regulations safeguard the security and political interests of the Federal Republic of Germany (see: [Cabinet Draft](#), p. 19 [all citations in German]). According to the reasoning of the draft, a core objective of the new regulations is to identify – based on the provisions of the EU-Screening Regulation – further critical technologies which are of particular relevance for national investment review and therefore found reporting obligations.

2. Expansion of the catalogue of regulatory case examples in the cross-sector review regime

A key feature of the draft is the introduction of the new section 55a (1) AWV (formerly the second sentence of section 55 (1) AWV), which legally defines the “likelihood of a threat to public order or security” and adds further regulatory case examples of particular relevance with regard to being subject to review.

In comparison to the previous version of the AWV, the number of relevant regulatory case examples increases from 11 to 27. An affiliation with a regulatory case group is an indication for a particular security relevance of the target company and corresponding review relevance of the acquisition (see: [Cabinet draft](#), p. 28).

Examples of the regulatory case groups are:

- Areas of artificial intelligence, robotics, semiconductors, cybersecurity, aircraft and aerospace, quantum and nuclear technology;
- Areas of autonomous driving or flying, optoelectronics and additive manufacturing.

These areas are now regarded as sectors that are of growing significance for the future sustainability and resilience of the German economy. If an acquisition falls into one of these regulatory case groups, a specific chain of legal consequences will follow, for example an acquisition-related reporting obligation and limitations to implementation according to sections 15 (3) and (4) of the Foreign Trade and Payments Act (AWG).

3. Expansion of the sector-specific review regime

Another important change is that from now on, all military equipment as defined in Part I section A of the Export List will be relevant to the sector-specific review regime in section 60 AWV, which – in contrast to the cross-sector review – examines probable impairments of essential security interests of Germany.

4. Original Ministry draft softened; limitations of review scope

The original [Ministry draft](#) issued by the German Federal Ministry for Economic Affairs and Technology (BMWi) dates back to 22 January 2021 and encountered strong headwinds from business representatives and experts. Due to these objections, the Ordinance now contains the following restrictions in comparison to the former Ministry draft and the previously applicable regulations:

First, the initial review or reporting threshold for cases of direct investments from outside the EU resulting in the acquisition of voting rights has been set to (the

acquisition of) 20 % of the voting rights, provided that the acquisition falls under the new regulatory case examples (section 55a (1) nos. 12-27 AWW) or the regulatory case examples regarding business active ties, especially within the health sector (section 55a (1) nos. 8-11 AWW), that have been added as a result of the 15th amendment of the AWW.

Secondly, specific materiality thresholds have been included for cases of “additional acquisitions”. Previously, the BMWi already had the right to review “additional acquisitions”, meaning the acquisition of voting rights above the review thresholds. A right to review (and possibly a duty to report) is now imposed only where certain thresholds (20 %, 25 %, 40 %, 50 % or 75 % of the voting rights) are exceeded.

Finally, some of the regulatory case examples in the new section 55a AWW have been restrictively substantiated and defined, for example with regard to industrial robots (see: section 55a (1) no. 15 AWW).

5. Implications of these legal activities in foreign trade law for businesses

The constant strengthening of the AWG and the AWW have led to a growing number of foreign trade law review cases regarding business acquisitions in the last few years. According to public records, the number of cases under investment review nearly doubled from 2017 to 2019 and the number of cases under review rose from 78 in 2018 to 106 in 2019 (see: [BT-Drs. 19/18700](#), p. 3). For the year 2020, the BMWi registered 159 cases under review, for the year 2021 there are already 142 (see: [Cabinet draft](#), p. 23). With respect to the extensive expansion of the catalogue of regulatory case examples, the BMWi estimates a further increase to this trend (see: [Cabinet draft](#), p. 23).

These numbers clearly show the increased importance of foreign trade law for transactions with purchasers outside the EU.

As a result of Brexit, investors from the United Kingdom now also have to meet the additional requirements of the AWG and the AWW.

6. Foreign trade law and cartel law – same, same, but different?

Heightened compliance efforts already resulted from the 1st AWG amendment in 2020 and now, with the inception of the 17th amendment of the AWW, there will be additional efforts needed based on the interaction between reporting obligations under foreign trade law on the one hand and merger control under cartel law on the other hand. These obligations exist parallel to one another and each set imposes individual requirements.

The 1st amendment of the AWG introduced a “gun-jumping” prohibition inspired by cartel law, meaning a prohibition of the legal or factual implementation of an acquisition while investment review is still underway; it now seems more likely than not that acquisitions will be reported, especially in ambiguous cases, and especially in order to avoid the sanctions introduced by the 1st AWG amendment for the person in charge – prison sentence or monetary fine – or monetary fines for the business.

7. Commencement and Ministry Circular

The full text of the original Ministry draft can be accessed [here](#). The Cabinet draft of the 17th Ordinance amending the AWW was passed on 27 April 2021 (and published in the Federal Gazette on 30 April 2021, accessible [here](#)). It entered into force on 1 May 2021

The BMWi also approved Ministry Circular Foreign Trade no. 2/2021 concerning the 17th Ordinance amending the German Foreign Trade Ordinance on 27 April 2021 – this Circular provides explanatory notes to the ordinance. The Circular was also published in the Federal Gazette on 30 April 2021 and can be accessed [here](#).

The English version of the AWG can be accessed [here](#). The English version of the new AWW after the 17th amendment is still being revised; the previous version can be found [here](#).

Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Dr. Christian Bürger on +49 221 33660-606 or by email to CBuerger@GOERG.de. For further information about the author visit our website www.goerg.com.

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