

# Further tightening of investment control in Germany (17th Amendment of the Foreign Trade and Payments Ordinance) – New Thresholds and Changes to Sector-Specific Examination

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The 17<sup>th</sup> Amendment of the Foreign Trade and Payments Ordinance (Außenwirtschaftsverordnung, *AWV*) came into force on 1 May 2021. It forms part of a series of measures, including the Amendments of the Foreign Trade and Payments Act (Außenwirtschaftsgesetz, *AWG*) as well as the 15<sup>th</sup> and 16<sup>th</sup> Amendments of the AWV, aimed at tightening rules on foreign direct investment. As a result, more investment projects may be subject to the reporting obligation, leading to a potential increase in restrictions for or prohibitions of acquisitions. In our first briefing, we summarised the expansion of case groups that may be subject to cross-sectoral examination. This second part of our three-part briefing series on foreign direct investment deals with the increased thresholds relevant for the cross-sectoral review of corporate acquisitions. In addition, this briefing summarises the changes to the sector-specific examination, according to which the entire defence sector (all goods listed in Part I Section A of the Export List) is now subject to the investment control regime.

## 1. Amendments to Thresholds

In addition to the considerable expansion of the case groups that may be subject to cross-sectoral examination, the legislator has also changed the voting rights thresholds applicable to these sectors. The voting rights thresholds specified in Section 56 (1) *AWV* are key to deciding whether an acquisition by a non-EU citizen must be reported (see Section 55a (4) *AWV*), as the reporting obligation of Section 55a (4) *AWV* only applies if these thresholds are met or exceeded. Under the previous regime, there was only a two-part distinction between the acquisition of voting rights in a company listed in the case groups (10% threshold) and the acquisition of voting rights in another company (25% threshold) by a non-EU citizen.

The Amendment has introduced a three-part distinction. The case groups of Section 55a (1) *AWV* are divided into two groups: (i) those encompassing Section 55a (1) *AWV* nos. 1 to 7; and (ii) those in Section 55a (1) *AWV* nos. 8 to 27. For the first group, which are identical to the case groups in the previous version of the legislation, the acquisition of at least 10% of the voting rights triggers the reporting obligation (Section 56 (1) no. 1

AWV). For the second group, the acquisition of at least 20% of the voting rights triggers the reporting obligation (Section 56 (1) no. 2 AWV). In addition, the regulation still stipulates that any acquisition of voting rights of at least 25% in another company not listed in the case group catalogue must be reported (Section 56 (1) no. 3 AWV).

## 2. New Thresholds for Additional Acquisitions of Shares

Furthermore, the new Section 56 (2) AWV contains a section on ‘additional acquisitions’. This section applies when an investor, who already holds shares in the target company, acquires additional voting rights. Such an additional acquisition of shares is now also subject to the reporting obligation. The relevant thresholds for the reporting obligation depend on the respective case groups discussed above. For example, for companies listed in the first group (Section 55a (1) nos. 1 to 7), if an additional acquisition reaches or exceeds total shares of 20%, 25%, 40%, 50% or 75%, the reporting obligation applies. For further thresholds, please see the table below.

Type of company	First Threshold	Thresholds for Additional Acquisitions of Shares
Companies listed in Section 55a (1) nos. 1 to 7	10%	20%, 25%, 40%, 50% or 75%
Companies listed in Section 55a (1) nos. 8 to 27	20%	25%, 40%, 50% or 75%
Others	25%	40%, 50% or 75%

## 3. Sector-Specific Review

The sector-specific review deals with investment projects that are particularly relevant for Germany’s national security. In contrast to the cross-sectoral review, the investor does not have to be a third-country national. It applies to any investor who is not a German national. The sector-specific review is regulated in Sections 60 ff. AWV. This part of the AWV underwent far-reaching changes compared to its draft form. For example, the benchmark for examination now corresponds to that in the cross-sectoral review, which is ‘probable impairment’ of public order or national security. The sector-specific examination applies to the case groups listed in Section 60 (1) no. 1 AWV.

### Inclusion of entire defence sector in Section 60 (1) no. 1 AWV

In comparison to the previous version of the legislation which included five case groups, Section 60 (1) no. 1 AWV now only encompasses four case groups. However, the new wording of this section has resulted in a massive expansion of the scope of application

of the sector-specific review. Whereas previously only certain sub-sectors of the Export List were covered by the sector-specific review, now *all* goods part of Part 1 Section A of the Export List are covered. This expansion has rendered the previous Section's nos. 1, 2, 4 and 5 superfluous. Under the new legal regime, companies that develop and manufacture the relevant goods are subject to the sector-specific review. This Section also includes companies that modify or have control over, or close contact with, the goods listed in Part I Section A of the Export List. This is the case even if the company does not export these goods. Companies that supply – irrespective of any *de minimis* threshold – to defence companies are also captured. The AWV could also capture logistics or surveillance companies.

## **Stronger focus on the protection of State secrets in Section 60 (1) nos. 2-4 AWV**

In addition, through the rewording of Section 60 (1) nos. 2, 3 and 4, the sector-specific review has increased its focus on the protection of State secrets. According to the new Section 60 (1) no. 2, all companies that develop, manufacture, modify or control goods related to defence technology are now subject to the sector-specific review. However, this only applies if the military goods or technologies are covered by a secret patent pursuant to Section 50 of the Patent Act or a secret utility model according to Section 9 of the Utility Model Act. This is because these secret patents or classified utility models are considered State secrets. The aim is to retain confidentiality and protect know-how from third parties.

Importantly, new Section 60 (1) nos. 1 and 2 also applies to target companies that handled the relevant goods in the past, that still possess relevant knowledge or retain access to the relevant technologies.

The amended Section 60 (1) no. 3 covers companies that manufacture goods with IT security functions aimed at processing classified State material, and those manufacturing the components essential to the IT security functions of such products. These goods (including the essential components) must have been approved by the [Federal Office for Information Security \(BSI\)](#).

The new Section 60 (1) no. 4 includes facilities that are key to defence (within the meaning of Section 1 (5) sentence 2 no. 1 of the Security Clearance Act). This captures, for example, the acquisition of companies that are directly involved in the construction of defence-related material, if these companies contribute to or maintain Germany's defence readiness and capacity.

## **Conclusion**

On the one hand, the inclusion of the entire defence sector and further case groups relevant for the protection of State secrets in the sector-specific examination leads to a significantly stricter investment control regime. Due to the expansion of the case

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groups, more investment projects will be subject to the reporting obligation, which results in a greater risk of having more restrictions for or prohibitions of acquisitions.

On the other hand, the adjustment of the voting rights thresholds only partially tightens the rules on foreign direct investment. In fact, the previous version of the legislation did not list many of the companies that now form part of the case group catalogue, which means that the review threshold of 25% applied to acquisitions of such companies. Due to the inclusion in the case group catalogue, the lower threshold of 20% relevant for cross-sectoral examination now applies to them.

Companies that form part of the health sector (Section 55a (1) nos. 8 - 11) were previously subject to a threshold of 10%, and are now subject to a threshold of 20%, which eases the obligations in this sector. The health sector was included in the case group catalogue last year due to the COVID-19 pandemic.

This means that only the case groups listed in Section 55a (1) nos. 1 to 7 (which were already included in the previous legislation), remain subject to the same threshold of 10%.

BLOMSTEIN is constantly monitoring the effects of the new AWV on foreign trade law and its impact on companies. The next briefing will summarise further changes to investment control law, in particular with regard to atypical acquisitions and procedural law. [Roland M. Stein](#) and [Leonard von Rummel](#) are happy to answer your questions at any time.