

# Further tightening of investment control in Germany (17<sup>th</sup> Amendment of the Foreign Trade and Payments Ordinance) – Expansion of case groups

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The 17<sup>th</sup> Amendment of the Foreign Trade and Payments Ordinance (Außenwirtschaftsverordnung, **AWV**) has recently come into force and forms part of a series of measures, including the Amendments to 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.

The Federal Cabinet adopted the 17<sup>th</sup> Amendment of the AWV on 27 April 2021; it was published in the Federal Gazette a few days later and came into force on 1 May 2021. The Cabinet's version largely corresponds with the draft bill, but also contains some amendments. In a three-part briefing series on foreign direct investment, BLOMSTEIN will summarise the most important changes and will provide an initial analysis of the new legal framework.

This first briefing deals with the increase of case groups that may be subject to cross-sectoral examination and with the corresponding reporting obligation for acquisitions as part of investment projects. As a result of the 17<sup>th</sup> Amendment of the AWV, the case group catalogue has quadrupled in size, significantly expanding its original scope. Further, compared to the draft bill, the AWV contains additional specifications for certain sectors. A large number of so-called 'emerging technologies', such as artificial intelligence, robotics, nanotechnology and quantum technology, are subject to the reporting obligation. Other areas include cyber security, semiconductors, 3D printing technologies as well as automated vehicles and aerial systems. The AWV now also captures companies that are relevant for security reasons, which are, for example, those in sectors such as food security, aviation and commodities. In the following, we will outline the new catalogue of case groups (Section 55a AWV):

## **I. New case groups in cross-sectoral review – the new Section 55a AWV**

For the sake of clarity, the new Section 55a AWV includes the sectors and technologies previously listed in Section 55 (1) AWV (now Section 55a (1) nos. 1-11 AWV) as well as the newly added (now Section 55a (1) nos. 12-27 AWV).

Section 55a AWV contains sectors in which target companies may be 'of special relevance' as they are deemed a potential threat to public order or national security. An acquisition by non-EU nationals would trigger a reporting obligation of the transaction

and may be subject to restrictions, ranging from the obligation to conclude a contract under public law to a prohibition of the transaction.

The new areas introduced by the German legislator in Section 55a (1) nos. 12 - 27 AWW are largely based on the list in Article 4 (1) of the EU Screening Regulation and can be divided into different categories:

## **1. Artificial intelligence, robotics, semiconductors (Section 55a (1) nos. 13, 15, 16 AWW)**

Companies in the categories of artificial intelligence and robotics as well as in the semiconductor industry have been included in the new catalogue because of their potential risk to public order and national security. This means that goods using artificial intelligence for concrete problem-solving, which are capable of independently optimising their own algorithms, and which could be misused, are subject to the investment protection regime. Misuse is defined as:

- carrying out cyber-attacks,
- impersonating in order to disseminate targeted disinformation,
- interpreting voice communications or facilitating biometric remote identification for the purpose of surveillance, which could be used for internal repression, or
- analysing movement, location, traffic or event data of persons for the purpose of surveillance, which could be used for internal repression.

Limiting the scope of this Section's application to cover the risk of misuse is sensible in light of the large number of companies using artificial intelligence in their software programmes. No *actual* intention of misuse needs to be shown, but the new Section's scope remains broad as it extends to technologies, which, taking the circumstances of the case into account, make misuse *seem possible* (see explanation in [draft bill](#), p. 27).

**Section 55a (1) no. 15 AWW** has been modified by the Cabinet. The [draft bill](#) provided for the inclusion of developers and manufacturers of industrial robots in the case group catalogue, but the Cabinet added further technical specifications. As a result, all developers or manufacturers of robots, including automated or autonomous robots, are included in the scope of the new legislation, if they are specifically designed for:

- handling highly explosive substances,
- being radiation-hardened and being able to withstand, without deterioration in performance, a radiation dose exceeding 5 x 10<sup>3</sup> Gy (silicon),
- operating at altitudes above 30,000 metres; or

- operating in water depths of 200 metres or more.

From a political point of view, it is understandable that this sector has been included following the controversy surrounding the purchase of the industrial robot manufacturer KUKA.

**Section 55a (1) no. 16 AWW** deals with integrated circuits. In the context of the AWW, the legislator defines ‘semiconductor’ as both an integrated circuit with substrate, and as a discrete semiconductor, meaning an indivisible circuit element with its own external connections. The legislator defines circuit element as ‘a single active or passive functional unit of an electronic circuit, for example, a diode, a transistor, a resistor or a capacitor’ ([draft bill](#), p. 27). It remains to be seen whether this definition will accurately delimitate the companies that should be captured by the AWW.

## **2. Cyber security, aerospace, quantum and nuclear technology (Section 55a (1) nos. 17-20 AWW)**

Companies in the IT security or forensic sector that manufacture or develop IT security products may now also be covered by the AWW. The legislation transposes and refines Germany’s obligations under the EU Screening Regulation, which includes generic references to ‘cyber security’. In terms of scope, the Federal Ministry for Economic Affairs and Energy has clarified that products for the physical protection of IT systems (such as server room doors or protection films) are not covered. Equally not included are those products which have another main purpose and only have IT security functions related to those. However, virus protection programmes or firewalls, for example, are encompassed.

**Section 55a (1) nos. 18-20 AWW** contains dual-use goods in the aerospace industry as well as those related to nuclear and quantum technology. With regard to the aerospace sector, not only aviation companies are included, but also companies with a product portfolio that has dual-use goods from the field of avionics and navigation ([subcategory 7A, 7B, 7D or 7E of Annex I to the EU Dual-Use Regulation](#)) or aviation, space and propulsion ([subcategory 9A, 9B, 9D or 9E of Annex I to the EU Dual-Use Regulation](#)). The legislator captures nanotechnology with goods that are listed in [category 0](#) or [1B225, 1B226, 1B228, 1B231, 1B232, 1B233 or 1B235](#) of Annex I to the EU Dual-Use Regulation. For quantum technology, the developers or manufacturers of the following goods or of essential components thereof are included:

- quantum informatics, in particular quantum computing and quantum simulation,
- quantum communication, in particular quantum cryptography, or
- quantum-based measurement technology, in particular quantum sensors and goods for quantum metrology.

### **3. Automated vehicles and aerial systems, optoelectronics and additive manufacturing (Section 55a (1) nos. 14, 16, 21 AWW)**

Although automated vehicles and aerial systems are not explicitly mentioned in the EU Screening Regulation, they are included in the new case groups. The German legislator perceives a considerable risk to public safety because of the highly dynamic technological progress in that area. In the past, the Federal Ministry for Economic Affairs and Energy had already focused on products that could be used for automated and autonomous driving.

In a similar vein, additive manufacturing (commonly known as 3D printing) has undergone rapid progress, and has particularly caught the legislator's attention because of its potential use for military purposes or for the production of spare parts for sensitive goods. This is why the legislator has included developers and manufacturers of goods that produce components from metallic or ceramic materials for industrial use by means of additive manufacturing. The legislation focuses on powder-based manufacturing processes that have an inert gas atmosphere and that use laser or electron beams as source of energy. Furthermore, developers or manufacturers of essential components of the aforementioned goods as well as the powder materials, if produced as described above, are also included in the case groups.

### **4. Critical infrastructure (Section 55a (1) nos. 22-24 AWW)**

**Section 55a (1) no. 22 AWW** covers network technologies aimed at protecting the security and defence industry. This case group implements [the German government's strategy paper on strengthening the security and defence industry](#) from February 2020 as well as the [EU Commission's '5G Toolbox'](#), which has explicitly pointed out that investment control is one of the means to ensure a safer 5G roll-out in Europe. Network technologies include security-relevant IT and communication technologies, for example those that can be used for the expansion of 5G technology. Section 55a (1) no. 23 AWW now captures intelligent metering systems ('smart meters'). This is because smart meters could threaten data security and the energy supply as a whole.

**Section 55a (1) no. 24 AWW** also includes companies providing services in the field of information and communication technology in Germany. This is against the background of the creation and operation of '*Digitalfunk*' (the infrastructure allowing for secure communication between German authorities and agencies entrusted with security-related tasks).

### **5. Critical raw materials, confidential patents or utility models, agriculture and food industry (Section 55a (1) nos. 25-27 AWW)**

In addition, the catalogue also covers companies that extract or produce goods or substances which are of particular importance. Therefore, companies extracting critical raw

materials or ores as well as companies that directly or indirectly cultivate an agricultural area of more than 10,000 hectares are included in the catalogue. The aim is to protect critical resources and strategic assets to ensure a secure food supply. In addition, certain patents or utility models are captured to protect confidential information and state secrets.

## **II. Extended reporting obligations**

The legal obligations applicable to the new case groups remain, which includes the reporting requirement. The reporting obligation for a relevant acquisition of a domestic company is now stipulated in Section 55a (4) AWV. As a result of the increase in case groups, the reporting obligation evidently applies to more companies. In terms of procedure, a notification must be made immediately. Until the Federal Ministry for Economic Affairs and Energy issues a clearance, execution of an acquisition agreement is prohibited (Section 15 (4) AWG). An intentional violation of this provision constitutes a criminal offence; violation arising out of negligence can constitute an administrative offence.

## **III. Conclusion**

The draft bill was expanded by the Cabinet and has entered into force. The far-reaching changes to the case group catalogue and the corresponding reporting obligation are a clear manifestation of stricter foreign direct investment rules. The key consequence of the 17<sup>th</sup> Amendment of the AWV is that more acquisitions will need to be reported. The Federal Ministry for Economic Affairs and Energy has recognised this and, as a result, is planning to increase its personnel.

Overall, the new AWV indicates a distrust towards foreign direct investment in critical sectors of the economy. However, for Germany to remain attractive to investors, it is important that the application of the new AWV does not lead to excessive restriction of free trade. Restrictions or prohibitions should remain the exception. For companies considering future acquisitions, it is important to be aware of the wider reporting obligation and to refrain from exercising voting rights and other actions until clearance or provisional clearance has been granted, in order to avoid committing an administrative or even a criminal offence.

BLOMSTEIN is constantly monitoring the effects of the new AWV on foreign trade law and its impact on companies. The next briefing will summarise the new thresholds relevant for cross-sectoral examination as well as the changes to the sector-specific review of corporate acquisitions. [Roland M. Stein](#) and [Leonard von Rummel](#) are happy to answer your questions at any time.