

# Further tightening of investment control in Germany (17th Amendment of the Foreign Trade and Payments Ordinance) – Atypical Acquisitions, Intra-Group Exemption and Transitional Provision

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The [17th Amendment of the Foreign Trade and Payments Ordinance](#) ([Außenwirtschaftsverordnung, AWW](#)) came into force on 1 May 2021 and forms part of a series of measures aimed at increasing investment control in Germany. The Amendment introduces changes to the legal regime for foreign direct investment, particularly with regard to atypical forms of acquisitions as well as procedural aspects of the regime. In addition to the expansion of the case groups that may be subject to cross-sectoral examination (see [1st Briefing of the FDI Briefing Series](#)), the adjustment of the thresholds for voting rights and changes to the sector-specific review (see [2nd Briefing of the FDI Briefing Series](#)), the Amendment aligns the law with established practice. It makes changes to atypical forms of acquisitions and introduces an intra-group exemption. Further, it includes a transitional provision aimed at providing clarity on the applicability of the newly amended Sections of the AWW.

## 1. Atypical Acquisitions

The reporting obligation applicable to acquisitions of domestic companies by non-EU citizens is triggered by reaching or exceeding the thresholds set out in Section 56(1) AWW. The new legal framework introduces an additional trigger by means of so-called effective participation in management or control of the domestic company (Section 56(3) AWW). This is the case, for example, when the acquirer obtains certain key positions in supervisory bodies. Access to sensitive information can be treated as identical to the direct acquisition of voting rights. The aim is to avoid any circumvention of the reporting rules. However, it remains to be seen whether this definition will accurately delimitate the types of acquisitions that should be captured by the AWW.

Atypical forms of acquisitions also include the acquisition of voting rights of third parties in the company that may be considered for assessing any relevant thresholds and the reporting obligation. For example, this is the case when the circumstances of the acquisition lead to a presumption of a joint exercise of voting rights (Section 56(4) AWW). This could be the case when the acquirer and at least one third party from the same third country directly or indirectly hold shares in the domestic company. This provision

also applies when the agreement on the joint exercise of voting rights is only concluded after the acquisition.

## 2. Alignment with the EU Screening Regulation

The Amendment aligns the AWW with the EU Screening Regulation. Factors that are taken into account when issuing a certificate of non-objection include whether the foreign direct investment is likely to affect the public order or national security of Germany, of any other EU Member State or has an impact on projects or programmes of Union interest on those grounds (Section 58(1) AWW). The relevant projects and programmes are set out in the Annex to the EU Screening Regulation:

- European GNSS Programmes ([Galileo](#) and [EGNOS](#));
- [Copernicus](#);
- [Horizon 2020](#);
- Trans-European Networks for Transport ([TEN-T](#));
- Trans-European Networks for Energy ([TEN-E](#));
- [Trans-European Networks for Telecommunications](#);
- [European Defence Industrial Development Programme](#); and
- The Permanent Structured Cooperation ([PESCO](#)).

## 3. Facilitation of intra-group restructuring

Despite the new restrictions to the investment regime, the Amendment also facilitates intra-group restructuring. The so-called intra-group exemption precludes the Federal Ministry for Economic Affairs and Energy (*BMWi*) from examining transactions between two fully-controlled subsidiaries from the same parent company. However, this exemption only applies if all parties to the transaction are located in the same country.

## 4. Procedural clarifications

The new Section 58a AWW introduces provisions for the approval of acquisitions that fall within Section 55 AWW and harmonises the sector-specific and cross-sectoral review procedures. If a reporting obligation triggers a preliminary examination of the corporate acquisition, it can be resolved with express approval of the acquisition (Section 58a(1) AWW) or implicit approval (Section 58a(2) AWW). An implicit approval occurs when procedures or powers are not instituted or exercised within the specified time periods in the legislation, for example, the timeframes set out for examinations, the exercise of powers by the authorities or any other relevant deadlines.

In addition, the new Section 58(3) A WV clarifies that an application for a certificate of non-objection cannot be granted if a reporting obligation is triggered. However, in case of doubt, the acquirer may simultaneously report the acquisition and apply for a certificate of non-objection.

Furthermore, the new Section 62a A WV introduces the possibility to change the review procedure during an ongoing examination. If during a sector-specific review the requirements for the cross-sectoral review are met, the BMWi can choose to swap the procedure. The reverse is also possible, i.e. the switch to the sector-specific review during a cross-sectoral review. In case of a change of procedure, it is important to note that the procedural deadlines begin anew.

## **5. Transitional provision**

The new Section 82a A WV clarifies when the new rules apply. The transitional provision stipulates that the amended Sections 55 to 62a A WV apply to transactions on or after 1 May 2021. In the case of offers within the meaning of the Securities and Takeover Act, the relevant date is the publication of the decision to submit the offer.

## **Conclusion**

The newly created transitional provision of Section 82a A WV is of great practical importance as it clarifies when the new provisions apply. In addition, the intra-group exemption creates legal certainty for intra-group acquisitions. Of particular practical relevance are the provisions on atypical acquisitions as well as the procedural clarifications regarding the express or implicit approval and the certificate of non-objection.

However, in light of the limited case law and practical experience, the plethora of changes invoked by the Amendment may lead to uncertainty. It remains to be seen whether the increase in staff and budget at the BMWi, as indicated in the [draft bill](#), will be sufficient to adequately address the more extensive reporting obligation and the potential increase in applications for certificates of non-objection.

BLOMSTEIN is constantly monitoring the effects of the new A WV on foreign trade law and its impact on companies. [Roland M. Stein](#) and [Leonard von Rummel](#) will answer your questions at any time.