

The draft bill of the 17th Amendment Ordinance of the AWV (Foreign Trade and Payments Ordinance) – a first analysis

In the past, investment control law has been continuously tightened (see the [Amendments to the Foreign Trade and Payments Act \(AWG-Novelle\)](#) as well as the [15th and 16th Amendment Ordinance of the AWV](#)). The draft of the [17th Amendment Ordinance to the AWV](#) has been eagerly awaited, as publication has been repeatedly postponed due to the intensive and lengthy process of interdepartmental coordination.

The 17th Amendment Ordinance to the AWV, which is now available in draft form, completes the adaptation to the amendment made to the AWG (Foreign Trade and Payments Act) and the [EU Screening Regulation 2019/452](#) (EU Screening Regulation), which was adopted in March 2019. The amendment particularly massively expands the catalogue of critical sectors and technologies. Further amendments are derived from the inspection practice of the authorities and serve to strengthen the effectiveness of the investment inspection. In the following, the amendments are presented in more detail, as well as where ambiguities exist and what further effects on practice are to be expected.

Highlights of the changes:

- The catalogue of audit-relevant sectors has **quadrupled**. A large number of so-called emerging technologies such as artificial intelligence, robotics, nanotechnology and quantum technology are subject to the reporting obligation. The areas of cyber security, semiconductors, 3D printing and autonomous driving/flying are also included. Other security-relevant companies are included as well, such as those in food safety, aviation or the raw materials industry.
- In addition, the **entire defence sector** (all goods in Part I Section A of the Export List) is now also subject to investment control law.
- The Federal Ministry for Economic Affairs and Technology expects a **fourfold increase in the number of cases** due to the expansion of the scope of application of investment control. Almost 30 new positions are to handle the increased volume across all ministries.

The new Section 55a AWW-E

For the sake of clarity, the sectors and technologies previously listed in Section 55 (1) sentence 2 AWW and the newly added sectors and technologies relevant to the audit are now presented in a new Section 55a AWW-E (Section 55a (1) nos. 1-27 AWW-E). If the activity of a target company is listed there, an impairment of public order or security is particularly obvious. In such cases, the draft bill speaks of an "indication of special security relevance of the target company". For the listed areas, restrictive orders (conclusion of a contract under public law up to a prohibition) can be considered.

Expansion of audit-relevant companies - Section 55a (1) No. 13 - 27 AWW-E

The new areas introduced by the German legislator, which are largely based on the list in Art. 4(1) of the EU Screening Regulation, can be divided into different categories.

Artificial intelligence, robotics, semiconductors (Section 55a (1) nos. 13, 15, 16 lit. a AWW-E)

As a new category of companies with special relevance for public security or order, the areas of "artificial intelligence", "robotics" and "semiconductors" find their way into the new catalogue. Thus, goods are to be subject to the investment protection regime that solve concrete application problems by means of artificial intelligence processes and are capable of independently optimising their algorithms and can be used for certain abusive purposes. The abusive purposes are:

- To carry out cyber-attacks,
- imitate persons in order to generate targeted disinformation,
- analyse voice communications or remote biometric identification of persons for the purpose of surveillance or internal repression,
- analyse movement, location, traffic or event data for the purpose of surveillance or internal repression.

It should be emphasised that the Federal Ministry for Economic Affairs and Energy has restricted the scope of application of the use of AI to the extent that it must be possible to use AI for misuse purposes. Against the background that a large number of companies use AI in their software programmes, the restriction makes sense. Nevertheless, the possibility of misuse for the purposes mentioned above is sufficient. According to the Federal Ministry for Economic Affairs and Energy, an obligation to report already applies "if the overall circumstances make misuse as a result of the acquisition appear possible" ([draft bill](#), p. 27).

Nos. 15 and 16 lit. a) serve to particularly protect industrial robots and integrated circuits. Not only since the purchase of the industrial robot manufacturer Kuka has this field been one of the key technologies worth protecting. In addition to the developers and manufacturers of such robots, there is a particular audit relevance with regard to the companies that provide specific IT services for the aforementioned companies.

The legislator understands the generic term "semiconductor" to mean integrated circuits on a substrate as well as discrete semiconductors, i.e. circuit elements located in their own housing with their own external connections. The circuit element "is a single active or passive functional unit of an electronic circuit, e.g. a diode, a transistor, a resistor or a capacitor ([draft bill](#), p. 27). Practice will show whether the companies that are particularly relevant to the audit can be sufficiently delimited on the basis of the definition given.

Cyber security, aerospace, quantum and nuclear technology (Section 55a (1) Nos. 17-20 AWW-E)

Explicit protection is also afforded to the IT security and forensics sector if companies manufacture or develop IT security products. This serves to concretise the "cyber security" mentioned in the EU Screening Regulation. The Federal Ministry for Economic Affairs and Energy points out that products for the physical protection of IT systems (such as server room doors or on-board protection foils) are not covered. Applications that have IT security functions in addition to their main purpose are also not covered. However, virus protection programmes or firewalls, for example, are covered.

Furthermore, Nos. 18 to 20 protect dual-use goods from aerospace and nuclear and quantum technology. With regard to aerospace, in addition to aviation companies, companies whose product portfolio includes dual-use goods from the field of aviation electronics and navigation ([subcategory 7A, 7B, 7D or 7E of Annex I to the Dual-Use Regulation](#)) or aviation, space and propulsion ([subcategory 9A, 9B, 9D or 9E of the Dual-Use Regulation](#)) are also covered. The Federal Ministry for Economic Affairs and Energy defines nanotechnology as goods of [category 0](#) or of list items [1B225, 1B226, 1B228, 1B231, 1B232, 1B233 or 1B235](#) of Annex I to the Dual-Use Regulation. Quantum technology includes quantum computing, quantum computer, quantum sensing, quantum metrology, quantum cryptography, quantum communication and quantum simulation.

Automated driving or flying, optoelectronics and additive manufacturing (Section 55a (1) No. 14, 16 lit. b), 21 AWW)

The areas of automated driving and flying are not explicitly mentioned in the EU screening regulation's catalogue of examples. However, in view of the highly dynamic

technical progress, the German legislator sees a considerable risk to public safety in these areas. The Federal Ministry for Economic Affairs and Energy has already focused on products that can be used for autonomous driving in the past. The protection of additive manufacturing must also be understood in the context of technological progress.

Colloquially, this area is known as 3D printing. The possibilities offered by the 3D printing process can also be used for military product development or for the production of spare parts for sensitive goods. In this respect, the legislator has deemed this area worthy of protection.

Supply-relevant key infrastructures (Section 55a (1) Nos. 22-24 AWV-E)

The new case group number 22 is intended to protect network technologies to strengthen the security and defence industry. The case group serves to implement [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 are security-relevant IT and communication technologies that are to be used, for example, in the expansion of 5G technology. Intelligent metering systems ("smart meters") are also protected in number 23. In the wrong hands, control over smart meters could endanger data security and the energy supply as a whole.

In No. 24, the legislator also provides special protection for companies that provide services in the field of information and communication technology for the Federal Republic of Germany. The inclusion of the regulation is to be seen against the background of the establishment and operation of digital radio.

Critical raw materials, secret patents or utility models and agriculture and food industry (Section 55a (1) Nos. 25-27 AWV-E)

In addition, the catalogue also covers companies that extract or produce goods or substances of particular relevance. Therefore, companies that extract critical raw materials or ores as well as companies that are of fundamental importance for food security and cultivate an agricultural area of more than 10,000 hectares were included in the catalogue. Critical resources and strategic assets are thus to receive special protection and the food supply is to be ensured. Also, the protection of goods to which the scope of protection of a secret patent or utility model extends is to be included in order to protect sensitive information.

Legal consequences for the acquisition of shareholdings in target companies

The legal consequences remain essentially unchanged if the target company is named in the catalogue of Section 55a (1) AWV-E. The obligation to report the conclusion of

a contract under the law of obligations for the acquisition of a domestic enterprise specified in the catalogue is now found in Section 55a (4) AWW-E. The report must be made immediately. Until the Federal Ministry for Economic Affairs and Energy issues the release, enforcement is prohibited (section 15 (4) sentence 1 AWG). A violation constitutes a criminal offence or, in the case of negligence, a administrative offence.

Clarifications from the practice of the authorities

The Federal Ministry for Economic Affairs and Energy is using the amendment to include clarifications for partial questions that have arisen in the practice of the authorities in recent years.

- Circumvention transactions and additional purchases of shares

The circumvention transactions regulated in Section 55 (2) AWW are expanded in the new Section 55 (2) AWW-E. Such transactions now also explicitly include acquisitions of shareholdings in the same domestic company that are coordinated in such a way that, when considered separately, none of the acquisitions constitute a reportable shareholding.

Notifiable voting rights are specified in the new paragraphs 2 and 3 of section 56 AWW-E. Any further acquisition of shareholdings above the limit of 10 per cent of the voting rights in an enterprise within the meaning of Section 55a (1) AWW-E or 25 per cent of the voting rights of another enterprise are also subject to the notification requirement. This was already the practice of the authorities and has now been clarified by the inclusion in the AWW.

The acquisition of an effective participation in any other way in the management or control of the domestic company also triggers the reporting obligation under the new Section 56 (3) AWW-E. Since the filling of strategic positions in companies can go hand in hand with rights to information with regard to knowledge worthy of protection, such constellations are equated with an acquisition of voting rights. With this adjustment, the legislator is rounding off the reporting obligation and wants to exclude circumvention constellations as far as possible.

The addition of the voting rights of third parties can now be found in section 56 (4) AWW-E. The obligation to report is already triggered if it can be assumed that voting rights are exercised jointly due to the other circumstances of the acquisition. This also applies if the agreement on the joint exercise of voting rights is only concluded after the acquisition of the shareholding. Other circumstances are presumed if the acquirer and at least one third party from the same third country directly or indirectly hold an interest in the domestic company.

- Release of acquisition

The Federal Ministry for Economic Affairs and Energy has clarified that in the case of the existence of a notification obligation pursuant to Section 55a (1), an application for clearance is excluded (Section 58 (3) AWV-E). In cases of doubt regarding the obligation to report, the acquirer may combine the report with an alternative application for a clearance certificate.

Extension of the sector-specific examination to all military equipment within the meaning of Part I Section A of the Export List

For the sector-specific assessment, the previous notion of risk is replaced by the assessment criterion of "probable impairment" in accordance with the new legal situation for the cross-sectoral investment assessment. However, the essential security interests remain the criterion for assessment. According to the newly formulated case group number 1, such interests are already probably impaired if the enterprise develops, manufactures or modifies **goods within the meaning of Part I Section A of the Export List** or has actual control over such goods. A company that at least also has contact points with goods from Part I Section A of the Export List is therefore to be covered by the new Section 60 (1) No. 1 AWV-E. Previously, only certain sub-sectors of the Export List were covered by the sector-specific examination. Its scope of application is thus considerably expanded.

Control of orders and the obligations regulated in a public law contract

Within the framework of the amendment to the AWG, the possibility has been introduced to commission third parties to monitor the obligations assumed by a public law contract or imposed by orders (Section 23 (6b) AWG). This procedure allows the Federal Ministry for Economic Affairs and Energy to use personnel resources for inspection activities and to outsource monitoring. The ordinance regulates who may perform this monitoring activity as a third party. These are persons who are competent, reliable and independent of the obligated parties and the other parties involved in the acquisition (Section 59 (4) AWV-E).

Change of procedure in the examination procedure pursuant to Section 62a AWV-E

Section 62a AWV-E is to be inserted in a new subsection. If it becomes apparent in a cross-sectoral review procedure or a sector-specific review procedure that the requirements for a prohibition or the issuing of orders via the respective other procedure are met, the Federal Ministry for Economic Affairs and Energy may continue the respective review procedure on the basis of the requirements of the provisions of the other procedure. Consequently, the Federal Ministry for Economic Affairs and Energy can react flexibly to new findings in the ongoing procedure.

Conclusion

The Federal Ministry for Economic Affairs and Energy's attempt to concretise the scope of application of companies relevant to public order or security is to be welcomed in principle. However, the new Section 55a AWV-E leaves many questions of detail open. It must therefore be assumed that in practice, in case of doubt, a report must be made in order to avoid committing an administrative offence or even a criminal offence. The amendment of the AWV will therefore lead to a considerable expansion of the number of cases subject to reporting and auditing. This will be accompanied by a significant increase in the workload for the Federal Ministry for Economic Affairs and Energy. The expanded sector-specific audit will also contribute to an increase in audit cases. Furthermore, the additional workload caused by the EU cooperation mechanism is hardly foreseeable. According to the explanatory memorandum, Germany's previous practice of only reporting cases for which an in-depth examination was carried out is no longer valid. Within the framework of the cooperation mechanism, cases that are to be decided within the two-month period must therefore also be reported. Due to the new extension of the scope of application of investment control, the Federal Ministry for Economic Affairs and Energy assumes at least 180 new reportable acquisitions per year. These would be in addition to the 159 cases examined by the Federal Ministry for Economic Affairs and Energy in 2020. Furthermore, the EU cooperation mechanism will conservatively estimate that a further 140 cases will have to be examined. Overall, the Federal Ministry for Economic Affairs and Energy therefore expects about 500 cases next year. Consequently, 30 additional civil servants are to be recruited across departments.

On the whole, however, the new AWV shows a distrust of foreign direct investment. It is therefore likely to be of considerable importance that the application of the new AWV does not lead to an excessive restriction of free trade in order to keep Germany attractive as an investment location. Restrictions or prohibitions should therefore remain the exception and not degenerate into a political instrument.

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