

Tighter Foreign Investment Control: Extended Review Competence and Longer Review Periods for the German Federal Ministry of Economic Affairs and Energy

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The 9th Regulation amending the Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung, AWV*) settles new rules for reviewing acquisitions of companies by foreign investors. The amendment makes it clear that, from now on, the German Federal Ministry of Economic Affairs and Energy (*Bundesministerium für Wirtschaft und Energie, BMWi*) will take its task of controlling corporate acquisitions more seriously. This means that companies have to expect more detailed and prolonged examinations. Although the BMWi had already begun subjecting companies to increased scrutiny, it now has a legal basis to do so.

Foreign Investment Control in Germany

The BMWi can scrutinise whether takeovers of shares of more than 25 per cent of a German undertaking by foreign investors endanger the public order and security of the Federal Republic of Germany. The BMWi distinguishes between cross-sectoral (Art. 55 et seq. AWV) and sector-specific (Art. 60 et seq. AWV) examinations of corporate acquisitions. Whilst the cross-sectoral review only concerns acquisitions by investors not coming from the EU or the European Free Trade Area (*EFTA*), the sector-specific examination applies to any foreign takeover in especially security-sensitive areas. The amendment to the AWV extends the competence and review periods of the BMWi to scrutinise company acquisitions and impose new obligations on the undertakings and investors concerned.

I. Cross-Sectoral Examination, Art. 55 et seq. AWV

Case Examples for Endangerment of Public Order and Security

Until now, there was no statutory determination of “endangerment of public order and security”. With the amendment, Art. 55 sec. 1 sentence 2 AWV lists examples of company acquisitions that may endanger the public order and security. Included are the acquisition of companies that:

- manage so-called “critical infrastructure” (see Art. 2 sec. 10 Act on the Federal Office for Information Security (*BSI Act*) for definition) (no. 1);
- develop software for the operation of those “critical infrastructures” (no. 2);

- are active in the telecommunication surveillance sector (no. 3);
- provide certain cloud computing services (no. 4) or
- are important for IT-security and secure means of communication in the healthcare sector (so-called “telematics infrastructure”) (no. 5).

Even before the amendment, the BMWi could examine and reject acquisitions of companies managing “critical infrastructures”. For instance, the BMWi reviewed the acquisition of *Osrám’s* lamp division *Ledvance* by Chinese investors at the end of last year and revoked the certificate of non-objection for the acquisition of *Aixtron* by Chinese investors, which was initially granted. No. 2 now explicitly codifies this practise. However, acquisitions of companies providing cloud computing services (no. 4) were not clearly regarded as managing “critical infrastructure” prior to the amendment.

By way of listing examples of company acquisitions that may endanger the public order and security, the AWV explicitly requests the BMWi to review acquisitions of undertakings falling within those areas (even more) carefully. At the same time, the approval of acquisitions is likely whenever they fall outside the scope of or are not similar to those areas. This clarification is especially helpful in cases where one used to argue whether or not an acquisition was subject to examination by the BMWi. For this reason, the amendment is a milestone towards legal certainty.

Extended Review Competence

In relation to circumvention transactions, the amendment specifies the review competence of the BMWi. Pursuant to Art. 55 sec. 2 sentence 1 AWV, the BMWi can presume that the parties took an abusive approach or made a circumvention transaction if only one of the reasons for their conduct was to avoid examination by the BMWi. Art. 55 sec. 2 sentence 2 AWV codifies the BMWi’s recent practise: indications of a circumvention transaction are at hand, when the direct purchaser is not engaged in a notable autonomous economic activity or is not established within the EU on a lasting basis in the form of business offices, staff or equipment within the EU.

Time of Examination/Procedure

Extended review periods allow the BMWi more time to conduct closer examinations. Pursuant to Art. 58 sec. 2 AWV, the time limit for the automatic grant of certification of non-objection due to a lack of investigations by the authorities extends from one to two months. If the BMWi initiates investigations, the examination period will now last four instead of two months (Art. 59 sec. 1 sentence 1 AWV). Pursuant to the new legislation, the four-month deadline will be suspended in the event that the BMWi and the parties concerned enter into negotiations on contractual regulations within the framework of the review procedure (Art. 59 sec. 2 AWV).

It is of practical relevance that, from now on, the BMWi can assess investments up to three months after gaining knowledge of the conclusion of the acquisition contract (Art. 55 sec. 3 sentence 1 AWW). Prior to the amendment, the knowledge of the BMWi was not a relevant factor. Until then, the decisive moment was the conclusion of the contract itself. Thus, the “strategy” to “sweep” the conclusion of the contract “under the carpet” in order to avoid an examination by the BMWi is no longer an option.

In addition to the knowledge-dependent beginning of the time period, the amendment introduced a reporting obligation in cases falling within the scope of the examples listed in Art. 55 sec. 1 sentence 2 AWW (Art. 55 sec. 4 AWW). However, a breach of this obligation will not be penalised. Moreover, the applicable body of law suggests that the BMWi may gain knowledge about the conclusion of the contract by any means including but not limited to receiving an obligatory notification from an involved party.

II. Sector-Specific Examination, Art. 60 et seq. AWW

The amendment also targets sector-specific examinations. From now on, the BMWi will have the competence to scrutinise key technology fields in the defence industry regarding the possible endangerment of essential security interests of the Federal Republic of Germany. To this end, the list of concerned goods has been extended (Art. 60 sec. 1 sentence 1 AWW).

The amendment also introduced the prohibition of circumventing transactions for the sector-specific examination (Art. 60 sec. 1 sentence 2 AWW). Prior to the amendment, this prohibition applied only to the sector-crossed examination. From now on, acquisitions by nationals can also fall under circumventing transactions of the sector-specific examination.

Furthermore, the time period for automatic approval due to lack of investigations by the authorities has tripled from one to three months (Art. 61 AWW). The same applies to the examination period pursuant to Art. 62 sec. 1 AWW. The rules concerning the time limit suspension for the sector-crossed examination now also apply to the sector-specific examination (Art. 62 sec. 2 AWW).

Conclusion

The 9th Regulation amending the AWW shall adapt the modalities of the review process to the increased number and complexity of company acquisitions. The extended time limits allow the BMWi to have enough time for careful examinations.

In regard to the sector-crossed examination, the case examples specify the grounds on which an acquisition may be rejected. In addition, a reporting obligation was introduced. As to the sector-specific examination, more security-sensitive areas will face scrutiny as the German lawmaker added new key technologies to the defence area.

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Right now, one can barely assess the consequences of the amendment. However, its deterrent effect on foreign investors cannot be denied: the incentive to acquire German companies diminishes – especially for acquirers outside the EU/EFTA – because of stricter and longer examination. It cannot be ruled out that other countries – especially countries outside the EU/EFTA – interpret this as a form of protectionism. Such an interpretation seems especially likely in light of statements made by the German Federal Government, according to which Germany, France and Italy introduced an initiative regarding the extension of investment control in EU law. Due to the strengthening of the German legislation through longer examination periods and the introduction of a reporting duty, the BMWi may impose more acquisition prohibitions. According to the explanatory statement of the AWV, the German government expects five additional sector-crossed examination procedures and three additional sector-specific examination procedures.

Nonetheless, the amendment is also welcomed. The inclusion of examples of company acquisitions that may endanger the public order and security in the sector-crossed examination increases legal certainty for the German company and foreign investor concerned.

BLOMSTEIN will monitor and inform about further developments. If you have questions regarding the potential impacts on your company or sector, [Roland M. Stein](#) and [Pascal Eriton](#) will be happy to answer them at any time.