

(Even) More control when acquiring companies in the healthcare sector (15th amendment of the Foreign Trade and Payments Ordinance – AWV)

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With the 15th amendment of the Foreign Trade and Payments Ordinance (AWV), the Federal Ministry for Economic Affairs and Energy will soon extend its control over acquisitions of German companies by EU foreign companies. The amendment is perceived as the Federal Government's direct reaction to the COVID-19 crisis, due to its concern in large part to protect the healthcare sector. The case of the Tübingen-based company CureVac, involving a US purchaser and raising the question of the right of prohibition, may have also contributed to this development. The 16th amendment to the AWV is expected to comprehensively expand and adapt investment control in foreign trade law. It is aimed at uniformly implementing Regulation (EU) 2019/452 (*EU Screening Regulation*), which came into force in April 2019, and the amendment to the Foreign Trade and Payments Act (AWG) adopted already by the Cabinet on 8th April 2020. Since the latter remains under discussion in the committees of the Bundestag, the Federal Ministry for Economic Affairs and Energy has brought forward what it considers to be particularly urgent adjustments.

Changes to the healthcare sector due to the new AWV

The key change is the addition of five examples of entrepreneurial activity in the healthcare sector that, in the context of a cross-sectoral review pursuant to Section 55 para. 1 sentence 2 AWV, could pose a threat to public safety and order. This concerns domestic companies that develop, manufacture or distribute

- personal protective equipment (No. 8),
- essential medicines (No. 9),
- medical products used against life-threatening and highly contagious infectious diseases (No. 10) or
- in vitro diagnostics (No. 11).

Affected companies are broadly defined; production facilities and technologies applied for the development and manufacture of the above-mentioned products are also treated in the same way as companies (Section 55 para. 1 sentence 3 AWV). For a risk to be identified, it is sufficient if only a discrete part or essential operating material of the company are part of the implicated contract (Section 55 para. 1a AWV).

Furthermore, the Federal Ministry for Economic Affairs issued guidelines for the investor-related assessment of a risk. In particular, pursuant to Section 55 para. 1b AWW, it takes into account

- whether the government of a third country is involved in the acquisition,
- whether the acquirer has already been involved in activities which have had a negative impact on public safety and order, and
- whether there is a significant risk of certain criminal or administrative offences.

Current practice already takes State influence into consideration, especially in the case of investments from the People's Republic of China. The new regulation leaves the practical problems unaddressed. While State influence may indicate a threat, there must be provision for the company to prove otherwise, taking into account the particularities of each case.

Additional extension to companies in the communication infrastructure and the extraction or processing of raw materials

In addition to the healthcare sector and in the context of implementing the EU Screening Regulation, the Federal Ministry for Economic Affairs will also place two other systemically relevant areas under its control. Firstly, it targets companies that provide necessary services to ensure fault-free and functioning state communication infrastructure (Section 55 para. 1 sentence 2 no. 7 AWW). Secondly, it affects companies that extract or process raw materials or ores (Section 55 para. 1 sentence 2 no. 12 AWW).

Stricter control when acquiring companies under the AWG

For newly listed companies, the extension of the catalogue means that, as of the entry into force of the new AWW, the acquisition of shares in at least 10 percent of these companies by a non-EU acquirer is now subject to notification and comprehensive examination by the Federal Ministry for Economic Affairs. When the amendment to the AWG enters into force – expected in a matter of weeks – certain transactions may be prohibited and sanctioned. In addition, the transaction will be provisionally invalid under civil law until it is approved.

Conclusion

The 15th amendment of the AWW appears to be a direct response to the COVID-19 crisis. It nevertheless coheres with the [Industrial Strategy 2030](#) announced by Federal Minister of Economics Peter Altmaier in November 2019, which envisages further tightening of investment controls. It remains to be seen whether such tightened controls will make Germany (even) less attractive as a liberal investment location (see also our [briefing of 9th April 2020](#)). In practice, these changes mean that investment control under foreign trade law in the context of transactions will continue to grow in importance. The duration of proceedings is expected to increase, which must be taken into account in the transaction schedule.

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BLOMSTEIN will monitor further developments. If you have any questions about the potential impact of these changes to foreign trade law on your company or your industry, [Roland M. Stein](#) and [Leonard von Rumme!](#) will be happy to answer them.