

CLIENT ALERT

Germany Tightens Foreign Direct Investment Screening: More Deals Notifiable as of May 2021

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The German Federal Government adopted the 17th revision of the Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung*, “**AWV**”), which entered into force earlier this month (“**AWV Amendment**”). The AWV Amendment revises the German Foreign Direct Investments (“**FDI**”) rules, implementing the EU Screening Regulation¹ *inter alia* by extending the scope of scrutiny to acquisitions of German companies / German subsidiaries (“**German Targets**”) active in the tech space.

Summary of the most important changes

- **Expansion of cross-sectoral review.** The AWV Amendment adds another 16 industries to the list of 11 critical industries, for a new total of 27. That means more acquisitions of German Targets by non-EU/EFTA investors will have to be notified to the German Ministry of Economic Affairs and Energy (“**BMWi**”). The additional 16 industries can be summarized as follows:
 - High-quality **remote Earth sensing systems** (satellite technology).
 - **Artificial intelligence (AI) technology** that can be used to automatically (i) carry out cyberattacks, (ii) imitate individuals for targeted misinformation, (iii) assess voice communication or remote biometric identification of individuals or (iv) analyze movement, location, traffic or event data of individuals for purposes of surveillance.

¹ Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

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- **Automated and autonomous driving and flying.**
 - **Special industrial robotics**, including related software, technology or specific IT services.
 - **Micro- and nano-electronics** and components.
 - **Cybersecurity**, in particular the IT security industry and the IT forensics industry.
 - **Air and space carrier operators** with an EU operating license or developers or manufacturers of goods mentioned in subcategories 7A, 7B, 7D, 7E, 9A, 9B, 9D or 9E of Annex I of the EU Dual-Use Regulation² or goods or technology intended for use in space or for use in space infrastructure systems.
 - **Nuclear technology**, developing, manufacturing, modifying or using certain goods covered by the EU Dual-Use Regulation: Category 0 or list items 1B225, 1B226, 1B228, 1B231, 1B232, 1B233 or 1B235 of Annex I.
 - **Quantum technology**, including quantum computing, quantum communications and quantum-based measuring.
 - **Additive manufacturing** for industrial applications, based on metal or ceramic materials as well as main components and powder materials.
 - Wireless or wireline **data network technologies**.
 - **Smart meter gateways**.
 - **Vital facilities** sensitive for the security of the Federal Republic of Germany.
 - Extraction, processing or refining of **critical raw materials or ores** as defined on the European Union's List of Critical Raw Materials.
 - Developing or manufacturing of **goods protected by patents** classified under Section 50 of the German Patent Act (*Patentgesetz*) or a utility model classified under Section 9 of the German Utility Model Act (*Gebrauchsmustergesetz*).
 - **Food security**, i.e., enterprises that directly or indirectly manage an agricultural area of more than 10,000 hectares.
- **Changes in the sector-specific review.** The area of sector-specific review was amended as well. It now applies to the entire Part I Section A of the German Export List (*Ausfuhrliste*) (weaponry, ammunition and defense equipment). The rules also apply to companies that develop, manufacture or modify goods in the field of military technology or which have effective control over such goods within the scope of protection of a patent classified under Section 50 of the German Patent Act (*Patentgesetz*) or a utility model classified under Section 9 of the German Utility Model Act (*Gebrauchsmustergesetz*). Substantively, the threshold for intervention is lowered from a “threat” to a “probable impediment” of essential security interests.
 - **Filing thresholds.** The AWW Amendment introduces changes concerning the filing thresholds and clarifies the filing requirement for so-called staggered acquisitions. The German FDI regime now provides for the following thresholds:

² Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items.

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- For the cross-sectoral critical infrastructure (Section 55a No. 1-7 AWW) and the sector-specific review, a filing is required as of an initial acquisition of at least 10% of the voting rights and respectively for subsequent acquisitions of 20%, 25%, 40%, 50% and 75% of a German Target (each time, the standstill obligation and criminal sanctions for missing the filing apply). The cross-sectoral review applies to acquisitions by non-EU/EFTA investors; the sector-specific review applies to acquisitions by any non-German investors.
- For all other sensitive sectors, including the COVID-19-related activities and the 16 new industries (Section 55a No. 8-27 AWW), a filing is required as of an initial acquisition of at least 20% of the voting rights and respectively for subsequent acquisitions of 25%, 40%, 50% and 75% of a German Target by a non EU/EFTA investor.³
- ***Ex-officio review for acquisitions of atypical control.*** The AWW Amendment further authorizes the BMWi to review investments that aim to acquire “atypical control” of a German Target, i.e., acquisitions of voting rights below 25% that are accompanied by specific rights or powers granted to the foreign investor, such as seats or majorities in supervisory bodies or in the management of the company, the granting of veto rights in strategic business or personnel decisions or the granting of certain information rights.

Impact and Outlook

The extended scope of application of the German FDI regime is part of a continuous process of tightening FDI scrutiny across Europe, creating ever more regulatory hurdles for international M&A.

The AWW Amendment will allow the BMWi to review significantly more acquisitions of German Targets going forward. The growing catalogue of affected industries, the growing number of filing thresholds and the sophisticated procedural rules require dealmakers that are looking to invest in German Targets to consider FDI implications early on in the process to avoid delays or sanctions for missing a filing. This applies to strategic investors as well as to the international private equity and venture capital community that often invests in emerging technology sectors and often with minority shareholdings.

³ For all other transactions that fall within the scope of the German FDI rules (where the initial threshold is 25% of the voting rights) the subsequent thresholds are 40%, 50% and 75%.

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