

Amendment of the Foreign Trade and Payments Ordinance (AWV)

TIGHTER INVESTMENT SCREENINGS AS A REACTION TO THE CORONA CRISIS

Executive Summary

- Expansion of the security-relevant areas: In response to the developments of the Corona crisis, the Federal Ministry for Economic Affairs and Energy (BMWi) presented a draft bill for the amendment of the Foreign Trade and Payments Ordinance (AWV) on 27 April 2020, according to which the acquisition of at least 10 % of the voting rights in companies in the healthcare sector will in the future be subject to reporting requirements, and an investment screening by the BMWi.
- Clarification of the meaning of "Threat": In addition, the AWV amendment, for the first time, contains a more specific definition of when an acquisition endangers public safety and order and can, therefore, be prohibited.

On 08 April 2020, the Federal Ministry for Economic Affairs and Energy (BMWi) published a draft bill to amend the Foreign Trade and Payments Act (AWG). According to this, investments by foreigners (outside the EU) in German companies will be subject to significantly higher hurdles in the future than in the past. Among the planned amendments to the AWG, the prohibition of the acquisition of shares and the lowering of the barrier for state intervention and prohibition of foreign investments are particularly notable.¹

¹ For details on the amendment to the Foreign Trade and Payments Act, see GSK Update "Germany amends Foreign Trade Law – On the road to protectionism?" dated 28 April 2020, available under <https://www.gsk.de/en/germany-amends-foreign-trade-act-on-the-road-to-protectionism/#gref>

With the draft bill to amend the Foreign Trade and Payments Act (AWG), the BMWi announced at the same time that it would present a draft on the amendment of the Foreign Trade and Payments Ordinance (AWV). The AWV stipulates which investments are subject to reporting requirements. The BMWi announced that the amendment of the AWV should in particular include the extension of "security-relevant areas" in accordance with Article 4 of the EU-Screening-Regulation (Regulation (EU) 2019/452).

On 27 April 2020, the BMWi has now published a draft bill to amend the AWV. The BMWi's justification states that "*the current development triggered by SARS-CoV-2 (COVID-19 pandemic) makes it clear that the range of companies that have so far been given special consideration in the foreign trade screening of company acquisitions is insufficient*"². For this reason, the security-relevant areas defined in the AWV are to be expanded as quickly as possible in the health sector, comprehensively and without time limit.

In addition, the draft bill which has now been published contains an exemplary specification of when a threat to public security or order exists as a result of an investment and the acquisition of shares is, therefore, to be prohibited. This indicates that, in Germany, it is mainly share acquisitions by companies with state participation from third countries (outside the EU) that should be examined and, if necessary, prevented.

² Federal Ministry for Economic Affairs and Technology (BMWi) draft amendment of the Foreign Trade and Payments Ordinance of 27 April 2020, available in German under https://www.bmwi.de/Redaktion/DE/Downloads/F/fuenfzehnte-verordnung-zur-aenderung-der-aussenwirtschaftsverordnung-referententwurf.pdf?__blob=publicationFile&v=4



The comprehensive amendment to the AWV initially announced with the amendment to the AWG has not yet been included in the current draft of the AWV amendment; however, it is expected that another amendment to the AWV will follow shortly, which will further expand the circle of security-relevant areas (in particular critical technologies) and subject further acquisitions to investment screening.

The most important changes of the AWV in detail:

Extension of the security-relevant areas

In principle, all investments can be examined by the BMWi to determine whether they endanger public security and order. Investments in companies that are part of a security-relevant sector are already subject to an explicit reporting requirement in the case of an acquisition of at least 10 % of the voting rights and are, thus, a potential object of investment screening. The security-relevant areas primarily include companies which are operators of critical infrastructures (e.g. energy, nutrition, information technology, health, transport).

The security-relevant sectors newly defined in the course of the AWV amendment in Section 55 Subsection 1 Sentence 2 Nos. 7 to 11 of the new version of the AWV concern target companies from the health sector which, according to the justification of the BMWi, “*are indispensable for maintaining a functioning health system in the Federal Republic of Germany*”³. Specifically, investments of at least 10 % of the voting rights in companies should, therefore, in future be subject to an immediate notification requirement, and be the subject of an investment screening, which are

- developers and manufacturers of **personal protective equipment** and their suppliers,

- developers and manufacturers of **essential medicines** within the meaning of Section 2 Subsection 1 of the German Medicines Act and their suppliers,
- developers, manufacturers and suppliers of **medical devices** intended for use in connection with life-threatening and highly contagious infectious diseases,
- developers, manufacturers and suppliers of **in vitro diagnostic medical devices** intended for use in connection with life-threatening and highly contagious infectious diseases,
- service providers in the context of public **communications infrastructure**, or
- producers and processing companies of **critical raw materials** or their ores.

Furthermore, according to Section 55 Subsection 1 Sentences 3 and 4 AWV, as amended, the producers of production facilities or technologies for the development or manufacture of the products just mentioned (Section 55 Subsection 1 Sentence 2 Nos. 8 - 11 AWV, as amended) and their suppliers are also to be subject to investment screenings.

Clarification of the meaning of “Threat”

The BMWi examines whether an acquisition of shares would pose a threat to public security or order. So far, no standard has been set as to when exactly this is the case. Section 55 Subsection 1b of the new version of the AWV now states by way of example that the examination of a threat can take into account in particular whether

- the acquirer is directly or indirectly controlled by the government, including other governmental bodies or armed forces of a third country, in particular on the basis of ownership structure or in the form of government funding,

³ loc. cit. fn. 2



- the acquirer has already been involved in activities which have had an adverse effect on public security or order, or
- there is a significant risk that the acquirer or persons acting on behalf of the acquirer were or are involved in activities that are related to criminal offences (such as money laundering, fraud, bribery or corruption) or violations of the AWG.

The specification of the definition of “Threat” in the first point makes it clear that the acquisition of German companies that are active in a security-relevant sector such as the health sector by foreign state companies will, in future, be *de facto* considerably more difficult, if not almost impossible.

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