

# 17th Amendment to the Foreign Trade and Payments Ordinance now in force

## FOURTH AMENDMENT FOR TIGHTENING INVESTMENT SCREENING WITHIN ONE YEAR

### Executive summary

- The 17th Amendment to the Foreign Trade and Payments Ordinance (AWV, in its German abbreviation) entered into force on 1 May 2021. This is already the fourth change to Germany's investment screening under foreign trade law within one year, creating additional hurdles for non-EU parties when it comes to investing in German companies.
- This amendment expands the reporting obligation for investments representing a stake of at least 20%, now covering additional next generation technology sectors, such as artificial intelligence, autonomous driving, semiconductors, optoelectronics, and quantum technology.
- The previous threshold of 10% of shares will continue to apply for the critical infrastructure sectors already defined.
- The 20% threshold now also applies to acquisitions in the health care sector added under the 15th Amendment (known as the "Corona Amendment").
- Increasing an already existing stake will trigger *further* reporting obligations upon meeting certain thresholds.
- Screening procedure deadlines have been aligned in order to facilitate switching between the different procedures.

Against the background that investment projects are increasingly being leveraged for political and strategic interests, there is need for an effective investment audit instrument to protect Germany's security interests. Together with France and Italy, the Federal Republic of Germany has been campaigning since 2017 at the European level for amendments to EU laws dealing with the screening of foreign direct investments. This initiative ultimately resulted in 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<sup>1</sup> (EU Screening Regulation), which entered force on 11 October 2020.

Last year already saw three amendments adopted and implemented to align German investment control under foreign trade law with the EU Screening Regulation:

**AWG Amendment 2020:**<sup>2</sup> On 8 April 2020, the Federal Cabinet passed an amendment to the Foreign Trade and Payments Act (AWG, in its German abbreviation). Pursuant to the Bundestag resolution of 10 July 2020<sup>3</sup>, the 1st AWG Amendment entered force on 17 July 2020. In particular, it broadened the scope of scrutiny wielded by the Federal Ministry for Economic Affairs and Energy (BMWi, in its German abbreviation) and rendered investing in German companies much more difficult for non-EU parties - especially in critical infrastructure and critical technology sectors. Since then, the validity of a stake acquisition in these sectors will remain

<sup>1</sup> Accessible under [EU Screening Regulation](#).

<sup>2</sup> Details on the AWG amendment: GSK Update "Germany amends Foreign Trade Law – On the road to protectionism" of 28 April 2020, available at [GSK Update: Germany amends Foreign Trade Act – On the road to protectionism?](#).

<sup>3</sup> Bundestag resolution on the 1st Amendment to the Foreign Trade and Payments Act of 10 July 2020 and publication in the Federal Law Gazette on 16 July 2020 available at [Bundesgesetzblatt Jahrgang 2020 Teil I Nr. 35, 1637](#).



pending and - under penalty of punishment - prohibited from finalization until having received government approval. Violations of the finalization prohibition may even lead to an acquisition being vetoed.

The Amendment to the Foreign Trade and Payments Ordinance (AWV, in its German abbreviation) was also announced simultaneously. The provisions laid out in the AWV include the specification of which investments will be subject to notification.

**15th AWV Amendment:**<sup>4</sup> On 27 April 2020, the BMWi had already submitted a legislative draft of this kind in response to developments during the Corona crisis. That bill was adopted by the Federal Cabinet on 20 May 2020. With this amendment, investments in companies classified as security-relevant are already subject to notification when an acquisition represents at least 10% of voting rights. Furthermore, the newly introduced term of “danger” (public security and order) introduced by the 1st Amendment was defined in greater detail.

**16th AWV Amendment:**<sup>5</sup> Since the EU Member States are now collaborating more closely with regard to foreign investments by exchanging information about ongoing screening procedures with each other as well as with the EU Commission following the entering into force of the EU Screening Regulation on 11 October 2020 and, Germany’s Federal Cabinet decided on 7 October 2020 to adopt the 16th Amendment to the Foreign Trade and Payments Ordinance in order to finalize the preparations for the new EU-wide cooperation mechanism.

The BMWi had already announced back during the 16th AWV Amendment a further modification to the AWV with a focus on expanding the industry sectors defined as particularly screening-relevant to include manufacturers and developers of advanced and next generation

technologies. The **17th AWV Amendment**<sup>6</sup> came into force on 1 May 2021 and expanded the scope to cover additional high-tech sectors. In the future, reporting obligations will be triggered for these sectors when an acquisition of 20% is going to be made by a non-EU party. Also, for the first time, a stake increase by an investor will become screening-relevant if the additional investment is going to push that investor’s stake over a certain threshold. Outside of critical infrastructure, investment screening will only be triggered in the future once a threshold of 20% is met.

### The most important changes to the AWV in detail:

**Expansion to reporting requirements:** The newly-added § 55a AWV (new version) expands the circumstances in which a reporting obligation can be triggered. The companies covered now include those active in artificial intelligence, autonomous driving, robotics, cyber security, quantum computing, aerospace, critical raw materials, secret patents, agriculture above a certain size. Under § 56 para. 1 no. 2 in the new version, an acquisition of 20% or more of voting rights will trigger a notification obligation within the field of activity of the newly added sectors.

**Threshold increases:** So far, investments representing a stake of at least 10% of the voting rights for the security-relevant sectors newly defined in § 55 para. 1 sentence 2 no. 7 - 11 AWV (old version) under the 15th AWV Amendment with respect to the health care sector, were subject to notification.

However, with this amendment to the AWV, § 56 para. 1 no. 2 AWV (new version) now specifies that no. 8 - 11 of the company groups added by the 15th AWV

<sup>4</sup> For detailed information on the AWV Amendment, see the GSK Update “Amendment to the Foreign Trade and Payments Ordinance (AWV) - Tighter investment screening as a response to the Corona crisis” of 6 May 2020, available at [GSK Update: Amendment to the Foreign Trade and Payments Ordinance](#).

<sup>5</sup> 16th Ordinance to Amend the Foreign Trade and Payments Ordinance of 7 October 2020, available at [16. AWV Novelle - Verordnungsentwurf der Bundesregierung](#).

<sup>6</sup> Accessible at [BAnz AT 30.04.2021 V1](#); BMWi draft bill for Amending the Foreign Trade and Payments Ordinance dated 22 January 2021, accessible at [17. AWV Novelle - Referententwurf vom 22.01.2021](#) and in the Federal Cabinet version dated 27 April 2021, available at [17. AWV Novelle - Kabinettsfassung vom 27.04.2021](#).



Amendment in § 55 para. 1 sentence 2 AWW in the old version (§ 55a para. 1 AWW in the new version) are subject to the 20% notification threshold, having previously been subject to the 10% threshold. That means the notification threshold has been raised for companies in the health care sector.

**Obligation to report a stake increase:** In principle, every acquisition (even under the old version) of a (direct or indirect) stake by a non-EU party in a domestic enterprise falling under the industry groups in § 55a para. 1 AWW must be notified to the BMWi immediately upon reaching or exceeding a threshold (§ 55 para. 4 AWW of the new version, § 55 para. 4 AWW of the old version).

The change in § 56 para. 2 AWW in the new version now clarifies for the first time that the acquisition of additional voting rights may also be subject to notification if the initial acquisition had already triggered a reporting obligation. Additional voting rights acquired by investors who already hold stakes subject to investment screening must be notified if the additional acquisition reaches or exceeds the other thresholds listed in § 56 para. 2 no. 1 - 3 AWW new version, such as 20%, 25%, 40%, 50%, or 75%.

**Deadline adjustment:** In future, it will be possible for the BMWi to switch between procedures. That is why the new § 58a AWW version brings the deadlines for multi-sectoral and sector-specific screenings into alignment (see § 61 AWW new version). In the future, a preliminary procedure triggered via notification will end either via approval or deemed approval. Pursuant to § 14a AWG, deemed approval takes place in both procedures if the BMWi does not initiate a screening procedure within two months after becoming aware of the acquisition; or, if a screening procedure is already ongoing, does not exercise its powers within four months after receiving all relevant documentation. In particularly difficult cases, the BMWi

may extend the deadline by a maximum of four additional months.

#### Other changes:

- When thresholds are reached, the direct acquirer will continue to be subject to notification obligations pursuant to § 55a para. 4, para. 5 AWW, even if the indirect acquirer has already submitted notification in the past. The provision in § 55 para. 4 sentence 4 AWW in the old version under which a direct acquirer was not subject to a notification obligation if the indirect acquirer has performed notification has been deleted without replacement.
- In the future, the existence of a notification obligation and a request for clearance are mutually exclusive pursuant to § 58 para. 3 AWW new version.
- The BMWi's screening authority is furthermore being expanded with respect to sector-specific audits. In particular, the newly formulated no.1 in § 60 para. 1 AWW of the new version pertains to all military equipment pursuant to Part I Section A of the Export List.

The 17th AWW Amendment was published in the Federal Gazette on Friday, 30 April 2021.<sup>7</sup> The Ordinance enters into force on the day following its publication. The Bundestag can still repeal the amendment within four months.

<sup>7</sup> Available under [BAnz AT 30.04.2021 V1](#).



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