



# Amendment of Germany's Foreign Trade and Payments Act | Further Tightening of Germany's Investment Control



## **AMENDMENT OF GERMANY'S FOREIGN TRADE AND PAYMENTS ACT: FURTHER TIGHTENING OF GERMANY'S INVESTMENT CONTROL**

On 8 April 2020, the German Federal Government adopted an amendment of the German Foreign Trade and Payments Act (AWG) and thus has opened the way for the parliamentary procedure. The purpose of the draft Act is to adapt the German legal framework to the requirements of the European Foreign Direct Investment (FDI) Screening Regulation (Regulation (EU) 2019/452 of 19 March 2019) and to further tighten the investigation and control regime for foreign investments in German target companies.

Since the acquisition of robotics company Kuka by Chinese investor Midea in 2016, the regulations for controlling foreign investments in German companies have been continuously tightened. For example, the number of transactions that must be notified has been increased, case groups of particularly security-relevant areas have been specified in more detail and investigation deadlines have been extended. Most recently - at the end of 2018 - the relevant threshold for state intervention in the area of sector-specific audits (essentially war weapons and cryptosystems) and transactions involving particularly security-relevant areas (e.g. critical infrastructures or media companies with mass appeal) was lowered from 25% to 10% of voting rights.

### **TIGHTENING OF INVESTMENT CONTROL**

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## **MANDATORY ADAPTATIONS OF THE AWG DUE TO THE FDI SCREENING REGULATION: COOPERATION MECHANISMS**

As a Member State of the European Union with investment control provisions in the sense of AWG and the Foreign Trade and Payments Ordinance (AWV), Germany is obliged to adapt its legal framework to the requirements of the FDI Screening Regulation. To this end, Germany is introducing the cooperation mechanism provided for under EU law in order to enable other Member States and the European Commission to submit comments with regard to foreign investments that are subject to investment control in Germany. According to the new regulations, in future it will not only be necessary to examine whether foreign direct investments could impair security or public order in Germany, the situation in and the views of other Member States and the Commission must also be taken into account. The German Federal Ministry of Economics and Energy (BMWi) will be the national contact point in accordance with the FDI Screening Regulation. The main task of such contact point is the administration and management of the planned exchange between the EU Member States regarding their national investment control procedures. Within the scope of investment screening, the BMWi receives requests for information, statements and documents from the Member States and the European Commission, initiates audits, transmits German statements and coordinates departments.

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## STRICTER REVIEW STANDARDS, PENDING INVALIDITY OF NOTIFIABLE TRANSACTIONS, GUN-JUMPING, STRICTER SANCTIONS

In addition to adapting the AWG to the requirements of European law, the new regulations aim to strengthen national investment control law in order to ensure even more effective protection of public safety or order in the Federal Republic of Germany in the event of critical company acquisitions by non-EU citizens or foreigners.

The threshold for the adoption of measures restricting investments will be lowered significantly. The central test criterion of "public safety or order" remains unchanged: the concept of "public safety or order" continues to be assessed - on the basis of the relevant European regulations and their interpretation by the European Court of Justice - with regard to the implications of a transaction for

### LOWERING OF RISK LEVEL

In future, measures restricting investments will be permitted at a lower level of risk. It will suffice that an investment is "likely to affect"

the fundamental interests of civil society, *i.e.* in particular safety, security of supply and the existence of the state. However, until now it was necessary for the issuing of orders or even the prohibition of a transaction that the foreign investment posed an actual and sufficiently serious threat to public order or security. In future it will suffice - in line with the approach of the FDI Screening Regulation - that the investment is "likely to affect" public order or security. This

means that in future, measures restricting investments will be permissible even at a significantly lower degree of risk. An impairment which has not yet occurred but which may occur in future as a result of a critical investment should and can be prevented.

In the context of the sector-specific audit, *i.e.* in the case of investments in companies in the field of war weapons, military equipment and cryptosystems, the type of companies covered is extended. In future, not only investment in companies that produce and develop such goods will be covered, but also investment in companies that "modify or use" such goods. Acquisition constellations in which the production, development, modification or use of corresponding security-relevant goods has occurred in the past but the target company still has knowledge of or access to the security-critical technology are also covered.

A further significant amendment concerns the extension of standstill orders (*i.e.* pending invalidity of transactions) for a wider range of transactions. Until now, only those contracts that concerned investments in the area of sector-specific auditing were (temporarily) invalid until the conclusion of the auditing process. In future, all notifiable legal transactions will (temporarily) be ineffective from the time they are executed until the conclusion of the review proceedings. This also means that transactions in areas of cross-sector review, which concern critical infrastructure, specific software for critical infrastructure and media companies essential for the formation of public opinion will in future only become valid if the transaction is cleared at the conclusion of the auditing process (or deemed cleared). With the entry into force of the yet to be adopted Foreign Trade and Payments Ordinance (AWV), investments in companies of "critical technologies" will also be covered; a broad, yet undefined legal term which still needs to be specified.

The extension of the standstill provisions is accompanied by the introduction of various criminal and regulatory offences, similar to the ban on gun-jumping under cartel law. These are intended to ensure

that the purpose of the investment review is not thwarted by the completion of the transaction prior to clearance or by any premature exchange of security-relevant information. The corresponding regulations have been introduced late in the legislative process; they were not yet included in the initial draft bill. In summary, it is forbidden until clearance (or until deemed cleared because of failure to clear in due time):

- to enable the acquirer to exercise any voting rights;
- to grant any rights to dividends (associated with the investment) or any equivalents to the rights to dividends to the acquirer;
- to provide or otherwise disclose to the acquirer any information relating to the company, which triggers the investment control or which is to be taken into account specifically in the assessment of an impairment of the public order or security; or
- to provide or otherwise disclose company-related information that is designated as significant according to certain criteria in an order issued by the BMWi

The broad formulation of the prohibitions and the severe sanctions for disregarding them will pose considerable challenges for both sellers and buyers in the course of due diligence.

In addition to the above-mentioned regulations, the special investment review provisions currently contained in the Satellite Data Security Act (SatDSiG) concerning the acquisition of domestic operators of high quality remote earth sensing systems by foreign investors will be repealed. In order to establish an equivalent level of protection, in future, such acquisitions will be reviewed in accordance with the general provisions of the AWG and AWV.

From a procedural point of view, the amendment will finally bring greater standardisation of the responsibilities that have so far been structured differently in cross-sectoral and sector-specific examination. In addition, the BMWi will be explicitly assigned competences for the comprehensive monitoring of compliance with obligations on the part of the parties involved in the investment arising from orders or public law contracts.

## **ASSESSMENT AND OUTLOOK**

The changes adopted will undoubtedly lead to a further increase in the number of investment reviews. With this in mind, the German legislator is planning to increase personnel and material resources. Whether this will ultimately be sufficient remains to be seen. In addition, it is to be expected that the duration of examination procedures will be extended, not least because of the cooperation mechanism provided for under EU law, which will have to be taken into account when drafting contracts and planning the timing of M&A transactions. When setting up and carrying out the due diligence process, the parties will also have to take the regulations on gun-



jumping into account in the future. Lastly, it remains to be seen what effect the lowering of the risk threshold for measures restricting investments will have in practice for the screening procedure, also taking into account constitutional considerations.

As things stand, the new law should - in the absence of transitional provisions - in principle also apply to proceedings that will be ongoing at the time of its entry into force, with the exception of the new provisions on criminal and administrative offences, for example. The legislative process is expected to be completed and enter into force in autumn 2020.

It will only be possible to assess the full extent of the new tightening of foreign trade law when the planned amendments to the Foreign Trade and Payments Regulation are available, too. This is already in progress and should be available shortly. In that context it will *i.a.* be interesting to see how the term "critical technology" will be precisely defined.

The process of amending the German foreign trade law will not be completed thereby. In his statement on the present draft Act, Peter Altmaier, Minister of Economics and Energy, stated that he wanted to protect the "economic sovereignty" of the Federal Republic of Germany and has already announced further amendments to foreign trade law. Even though the explanatory memorandum to the amendment Act now adopted once again emphasises the continued investment friendliness of German foreign trade law, it cannot be assumed that any further amendments will deviate from the course of recent years. A further tightening is most likely.

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Dr. Germar Enders focuses his practice on mergers and acquisitions (M&A), private equity and general corporate law. Germar has extensive experience in advising strategic and financial investors as well as management teams on domestic, cross-border and multi-jurisdictional transactions, and on all aspects of corporate law, including corporate structurings.

Prior to joining McDermott, Germar worked at other leading international law firms in the field of corporate/M&A and as assistant professor at the Max-Planck-Institute and the University of Munich. During his legal clerkship, he trained in Cologne and New York. He regularly publishes articles on matters of corporate and civil law, including in legal reference books and commentaries.

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