

# The new year begins with a further tightening and expansion of the German investment screening regime

"Further tightening?" Yes, and probably not for the last time. Last year, the German government had already adjusted the regulations of the Foreign Trade and Payments Act (AWG)/ Foreign Trade and Payments Ordinance (AWV) investment screening regime. At the same time, there was a significant increase in screening cases at the responsible Ministry for Economic Affairs and Energy ("BMWi"). Last year, however, only two of three planned reform projects were implemented (please see [article from November](#)). The full implementation of Regulation (EU) 2019/452 ("EU Screening Regulation") for foreign investment screening with further case groups of reportable acquisitions into German law will now take place in the final step with the so-called 17th AWV amendment. As a result of this reform, which is currently in the consultation phase and may be already adopted at the end of the first quarter, the number of filings will increase further compared to 2020.

Germany has an established regime for controlling foreign investments in the form of cross-sector and sector-specific investment reviews. The review regime includes – depending on the business operations of the German target company, the identity of the foreign acquirer and the percentage of shares/voting rights to be acquired – a notification requirement. The transaction is then subject to an execution prohibition until it is approved by the BMWi. The BMWi can prohibit a transaction or approve it subject to conditions in order to ensure the public order or security of the Federal Republic of Germany. The 17<sup>th</sup> AWV amendment extends the notification requirements. The draft also contains clarifications of the procedural rules.

## 1

### New regulatory examples in the cross-sector review regime

Within the scope of the cross-sector review regime, the reportable facts (so-called regulatory examples) will be increased from 11 to 27. A large number of so-called emerging technologies are thus subject to the reporting obligation. In doing so, the German legislator partly concretises the terminology of the EU Screening Regulation, either by referring to specific German or EU laws such as the Satellite Data Security Act or certain item numbers of Regulation 428/2009 ("**Dual-Use-Regulation**"). This approach is to be welcomed as it leads to a much clearer delimitation of the relevant activities than the EU rules. Other countries have adopted the terminology of the EU regulation one-to-one. Nevertheless, some of the new German reporting requirements are also unclear.

**The draft bill contains the following additional reporting requirements:**

1. High-quality Earth remote sensing systems (from the Satellite Data Security Act);
2. artificial intelligence that could be misused;
3. autonomous motor vehicles or unmanned aircrafts (incl. drones) and essential components or software;
4. industrial robots, including software, technology or specific IT services;
5. certain semiconductors such as integrated circuits on a substrate and discrete semi-conductors as well as optoelectronics;
6. IT products and components for the protection of IT systems, the defence against cyber attacks and IT technology for the investigation of criminal offences and the preservation of evidence by law enforcement agencies;
7. air carriers within the meaning of Regulation (EC) No 1008/2008 and aerospace companies that develop or manufacture certain dual-use goods or goods or technologies intended for aerospace use or for use in space infrastructure systems;
8. nuclear technology;
9. quantum technology;
10. additive manufacturing (3D printing);
11. network technologies, especially in the area of 5G networks;
12. smart meter gateways and security modules for them;
13. important services for the Federal Republic of Germany in the field of information and communication technology, e.g. in the field of digital radio;
14. raw material producers, processors and refiners as detailed on the EU list of critical raw materials;
15. goods that are legally protected as secret patents and
16. food security, i.e. enterprises that directly or indirectly manage an agricultural area of more than 10,000 hectares.

The "sharpening" of some existing regulatory examples is to be welcomed. Thus, the legislator clarifies with regard to **"cloud computing services"** (Section 55a (1) no. 4 AWV) that the server capacities used for the respective cloud computing service and not the total capacity of the server infrastructure used (e.g. Amazon Web Services), which may for the most part have no relation to the cloud computing service, are decisive for reaching the threshold value. The old version of the regulatory example had led to considerable legal uncertainty in cases where the target company offers services via "software as a service".

## 2

### **Changes in the sector-specific review regime**

In the area of sector-specific review, reference will in future be made to all military equipment within the meaning of Part I Section A of the Export List. So far, only individual list items in the area of the defence industry were covered. A newly introduced second group of cases covers investments in companies that develop, manufacture, modify or own certain defence technology to which secret patents or certain secret utility models relate. These patents and utility models are classified as state secrets on the basis of an examination. For reasons of secrecy protection, such companies must ensure that the patents and technologies are not published and that there is no outflow of know-how abroad. While the third case group of the sector-specific regulation (products with IT security functions for processing classified information of the public sector) remains largely unchanged, the draft bill provides for a fourth category of "defence-critical" facilities within the meaning of the Security Clearance Act, i.e. Facilities outside the jurisdiction of the Federal Ministry of Defence that serve to establish or maintain defence readiness and whose impairment, due to a lack of short-term substitutability, poses a significant threat to the ability to function, in particular to equip, command and support the Bundeswehr and allied armed forces as well as civil defence.

## 3

### **Atypical acquisition of control as a new element of seizure and control**

According to the wording of Section 56 (1) AWV (old version), investment control applies if an investor acquires 10% or 25% of the voting rights of a German target company. The 17th AWV amendment now clarifies that, in accordance with the previous practice of the BMWi, "additional acquisitions" above these thresholds also fall within the scope of investment control. What is new is that control rights outside the formal voting rights can trigger an audit by the BMWi. In the draft bill, the German government refers to the appointment of supervisory bodies or management as well as to veto rights in strategic business decisions or extensive information rights. Several investors can also be considered jointly if there is no express voting agreement, but other circumstances lead to the conclusion that the voting rights are to be exercised jointly. This is presumed in particular if all investors are from the same country and each of the investors is controlled by the state.

## 4

### **Changes in procedural law**

The existence of a notification obligation in the area of cross-sector review, i.e. according to one of the specifically regulated case groups of the new Section 55a (1) AWV, and a parallel application for the issuance of a clearance certificate for activities that are not specifically mentioned are mutually exclusive in the future. The new provision serves to clarify that an application for a clearance certificate is excluded in the case of a reportable acquisition and in the case of an examination procedure that has already been initiated ex officio. In addition, the draft bill now explicitly regulates that the BMWi can switch from the cross-sector to the sector-specific review and vice versa. The practice of the last years shows that many cases are at the interface of the application areas of the two investment screening regimes. Often, it can only be determined in the further course of the procedure, after receipt and examination of detailed information, which screening procedure is actually relevant in the specific case.

## 5 Important implications for investors

The new reform will have far-reaching effects on foreign investments in Germany. The number of notifiable transactions will more than double, according to estimates by the German government. Investors making acquisitions in the critical sectors now added will have to undergo the AWW investment screening, which may significantly extend the timeframe for the transaction. In view of the severe sanctions for violations of the execution of transaction ban (up to five years' imprisonment for intentional violations), it is to be welcomed that the draft bill in part offers more legal certainty than the undefined terms in the EU Screening Regulation. At the same time, a number of the reporting criteria are unclear, which will lead to investors notifying the transaction in case of doubt for reasons of attaining legal certainty.

### Ihre Ansprechpartner



**Dr. Michael Brüggemann**

Partner, Düsseldorf  
Tel +49 211 8387 108  
[m.brueggemann@taylorwessing.com](mailto:m.brueggemann@taylorwessing.com)



**Dr. Melanie Moser**

Associate, Düsseldorf  
Tel +49 211 8387 145  
[m.moser@taylorwessing.com](mailto:m.moser@taylorwessing.com)