



NEWSLETTER

Germany Tightens Foreign Investment Screening

On the occasion of the Covid-19 pandemic and in expedited legislative procedures, Germany intensifies the screening of foreign investments under the Foreign Trade Act (*Außenwirtschaftsgesetz – AWG*) and the Foreign Trade Ordinance (*Außenwirtschaftsverordnung – AWV*). The scope of mandatory notifications shall be extended particularly to critical technologies. The screening criterion is lowered to a likely effect on the public order or security and extended to concerns of EU member states and the EU. Under the cross-sectoral regime, clearance becomes a statutory closing condition for sensitive acquisitions. Until clearance, any factual closing steps, including the disclosure of sensitive information, are prohibited and subject to criminal penalties. The envisaged tightening of the investment screening applies equally to large companies, SMEs and start-ups. The number and intensity of screenings will substantially increase. The effects on transactions in practice are significant and will also depend on how the federal government will amend the new regulations in another AWV reform that has already been announced.



AWG Amendments

The amendments to the AWG encompass the regulatory leeway provided by the **EU Screening Regulation (EU) 2019/452**.

- The screening criterion of a “likely effect” on the public order or security substitutes the “actual and serious threat” that has been required thus far. The **margin of discretion** of the Federal Ministry for Economic Affairs and Energy (*Bundesministeriums für Wirtschaft und Energie* – **BMWi**) thereby **increases significantly**.
- The scope of the screening is extended to security interests of other EU member states and particular EU projects and programmes; the **protected interest “public order or security”** is **no longer limited to the German perspective**.
- As in other EU member states, a **national contact point** is established at the BMWi for the **EU-wide cooperation mechanism** under the EU Screening Regulation.

In the future, **all acquisitions subject to a mandatory notification under the cross-sectoral regime are provisionally suspended** until conclusion of the investment screening. **Closing is statutorily prohibited** and clearance is required. This applies, in particular, to acquisitions of companies in the area of **critical infrastructures** (energy, water, nutrition, IT/TC, finance and insurance, health, transport and traffic), certain sector-specific software and media outlets with broad impact. The AWV amendments broaden the scope of the statutory closing prohibition even further (see AWV Amendments).

The statutory closing prohibition applied so far only under the sector-specific regime, i. e., particularly to manufacturing and developing **military equipment** and certain certified IT products for **classified information**. In addition, the AWG amendments broaden the scope of application of the sector-specific regime to companies which (merely) “modify” or have “factual control” over such goods. This equally applies to companies which have done so in the past and still have the corresponding knowledge.

For acquisitions subject to the mandatory notification obligation, the AWG amendments introduce **prohibitions on gun jumping with corresponding criminal and administrative penalties**. As long as the investment screening has not been concluded, the seller must neither grant the acquirer voting rights or profit entitlements nor disclose sensitive information of the target company. The wording and grounds for the AWG amendments do not provide much practical guidance on the substantive and temporal scope of this prohibition on exchange of information.

The screening periods will be fixed for the first time in the parliamentary act itself (now sec. 14a AWG):

- The screening periods are now set uniformly for all cross-sectoral and sector-specific procedures at **two months** for the **preliminary review** and, in general, a further **four months** for the **in-depth review** starting from submission of the information requested at the opening of the in-depth review. The periods start anew in case of the BMWi setting aside or amending a screening decision and in case of a judicial decision.



- The BMWi may **extend** the four-month period for the in-depth review **by three months in case of special factual or legal difficulties**. The review period may be **extended by another month** if the Federal Ministry of Defense claims that the transaction **specifically affects German defense interests**.
- The review period for the in-depth review is **suspended** if the BMWi, after opening of the in-depth review, **requests further information** or **negotiates a mitigation agreement** with the parties to the transaction. Thus far, a new information request triggered a restart of the period.
- The new regulation of the review periods applies to transactions of which the BMWi has gained knowledge after the AWG amendments have entered into force (**Transitional Arrangement for Review Periods**).

The new AWG has entered into force on 17 July 2020.

AWV Amendments

The amendments to the AWV, adopted by the federal government, broaden the scope of **mandatory notifications** to include **critical services for public communication infrastructures** and, on the occasion of the Covid-19 pandemic, further **health and research** areas. This applies, in particular, to developing and manufacturing:

- **personal protective equipment**,
- **“essential pharmaceuticals”** for healthcare as well as their raw and active substances (in addition, this covers not only the pharmaceutical license holder, but also companies which place the aforementioned pharmaceuticals and substances on the market), and
- **medical products** and **in vitro diagnostics** for use in connection with life-threatening and highly contagious infectious diseases.

Extending the notification obligation to acquisitions of companies with further **marketing activities** as well as **upstream products and services**, as originally proposed by the BMWi, was eventually **omitted** in the course of the federal government’s deliberations.

Moreover, the AWV amendments clarify that **asset deals** are **covered** by the investment screening. When examining the risks for the public order or security, the BMWi may in the future also take into consideration certain **investor-specific review factors**, such as whether the **acquirer is controlled by a foreign government** (e. g., due to state funding “beyond a marginal extent”) as well as the **“serious risk” of criminal or administrative offenses** by the acquirer.

Apart from the Transitional Arrangement for Review Periods, the AWG and AWV amendments – like prior amendments – **do not contain transitional arrangements for already concluded or ongoing** transactions or pending review proceedings.



Further AWG Amendments already announced

Further amendments to the AWV will implement further tightenings already arranged for in the new AWG. A draft will likely enter the hearings within the next months. It is expected that the mandatory notification and the closing prohibition will be extended to transactions in the area of high technology (**artificial intelligence, robotics, semiconductors, bio and quantum technologies**).

Trend towards more thorough Investment Screenings

The intensifications in Germany follow a **global trend towards more vigorous investment screenings**. Recently, amendments to the review procedures have been adopted or initiated, e. g., in China, Canada, New Zealand and South Africa as well in the United Kingdom, France Italy, Spain, Netherlands, Poland and Hungary. Within the EU, the German screening mechanism – together with the French and Italian – may be considered one of the most far-reaching and vigorous.

The European Commission, in light of the Covid-19 pandemic, has called upon EU member states in its **Guidance on the EU Screening Regulation** of 25 March 2020 to make full use of established national investment screening mechanisms to strategically protect critical infrastructures, assets and technologies. Where screening mechanisms are not yet in place, EU member states shall set up fully-fledged screening mechanisms and in the meantime use all other available options of intervention. Further, the European Commission already encouraged the **establishment of informal information and cooperation mechanisms** for pending review proceedings even prior to the entrance into force in October 2020 of the cooperation mechanism of the EU Screening Regulation.

Outlook

Investment screenings have already **intensified** in recent years. At the same time, **transaction uncertainty**, criminal offences which have been introduced for the first time and **long review periods prejudice** the investment climate and attractiveness of Germany also for acquisitions that are not critical from a national security perspective. It is even more important to diligently prepare investment screenings and to potentially coordinate parallel proceedings in several countries. Giving **adequate consideration** to investment screening aspects in **transaction agreements** remains a central component of transactions and will likely become even more important.



Contact



Jan Bonhage

Partner

T +49 30 20374 173

jan.bonhage@hengeler.com



Vera Jungkind

Partner

T +49 211 8304 405

vera.jungkind@hengeler.com



Erasmus Hoffmann

Senior Associate

T +49 30 20374 515

erasmus.hoffmann@hengeler.com



Anton O. Petrov

Associate

T +49 30 20374 538

anton.petrov@hengeler.com

Our offices

Germany

BERLIN | Behrenstr. 42, 10117 Berlin

DÜSSELDORF | Benrather Str. 18-20, 40213 Düsseldorf

FRANKFURT A.M. | Bockenheimer Landstr. 24, 60323 Frankfurt am Main

MÜNCHEN | Leopoldstr. 8-10, 80802 München

Belgium

BRUSSELS | Square de Meeûs 40, 1000 Bruxelles

United Kingdom

LONDON | 30 Cannon Street, London EC4M 6XH

> www.hengeler.com