



NEWSLETTER

Germany to significantly expand the scope of mandatory FDI filings

On 22 January 2021, the Federal Ministry for Economic Affairs and Energy (Bundesministerium für Wirtschaft und Energie, BMWi) published a draft bill¹ for a further amendment to the Foreign Trade Ordinance (Außenwirtschaftsverordnung, AWV). It will significantly expand the scope of sensitive acquisitions for which a foreign direct investment (FDI) filing is mandatory and FDI clearance a statutory closing condition. It follows several amendments to the AWV and the Foreign Trade Act (Außenwirtschaftsgesetz, AWG) having already tightened FDI screening in recent years (see our newsletters of January 2021, July 2020, March 2020, July 2017). Public consultation is open until 26 February 2021. The proposed amendment will have a substantial impact on cross-border transactions.

Overview

- The draft amendment notably **broadens the scope of mandatory notifications and clearance requirements**, in particular for the acquisition of targets with operations relating to various **critical technologies and inputs** as well as any military and defence goods on the German Export List (*Ausfuhrliste*).
- “Acquisition” will also include attaining **other forms of control or of effective participation in the management of a German company** as well as **circumventions** that formally do not meet the applicable thresholds of 10% or 25% of the voting rights.
- The draft amendment further implements **existing BMWi practices**, including the application of the German FDI screening to additional increases of voting shares above the respective threshold and the option of shifting from the cross-sectoral to the sector-specific (defence and IT encryption) regime or vice versa during pending proceedings.

¹ www.bmw.de/Redaktion/DE/Downloads/P-R/referentenentwurf-siebzehnte-verordnung-zur-aenderung-der-aussenwirtschaftsverordnung.pdf



Cross-sectoral regime

The draft amendment notably extends the **scope of mandatory notifications and clearance requirements** based on the screening factors pursuant to the EU Foreign Investment Screening Regulation (EU) 2019/452 (EUFIS Regulation). The BMWi takes up the broad categories of the EUFIS Regulation (robotics, semiconductors, cybersecurity etc.) and aims to identify specific products and activities of the German target as triggers of notification and clearance requirements. The acquisition of 10% or more of the voting shares in a German entity or of other forms of control (see below) by a non-EU/EFTA investor will also require notification and clearance if the **German target** falls into one of the additional categories of sensitive targets listed in the draft amendment or the listed sensitive areas under the current regime. In any case, clearance by the BMWi qualifies as a statutory closing condition for acquisitions involving German target companies operating in a sensitive area.

The proposed new sensitive categories include companies which

- develop or manufacture **AI-based goods** that can be used to carry out certain listed activities such as **cyber attacks or cyber surveillance**;
- develop or manufacture automated or **autonomous motor vehicles, unmanned aerial vehicles** or essential components or essential software therefor;
- develop or manufacture **industrial robots**, including software and technology, or provide specific IT services therefor;
- develop, manufacture or refine certain **semiconductors** (in particular integrated circuits and discrete semiconductors), or manufacture or process tools for these (in particular crystal growing systems and dotting equipment);
- develop or manufacture for sale **IT products/software with primary cybersecurity functions** or components therefor;
- operate a **licensed air carrier** or develop or manufacture certain goods or technologies for **space or air travel**;
- develop or manufacture certain enumerated **dual use goods** (in particular related to **nuclear technology**);
- develop or manufacture goods by targeted use of the specific effects of **quantum mechanics**;
- develop or manufacture goods for **additive manufacturing** (e.g. 3D printing) or related essential components;
- develop or manufacture goods that specifically serve the operation of **wireless or wire-bound data networks** (in particular signal amplifiers and network control devices);
- manufacture certain **smart meter gateways** and security modules therefor;
- employ **persons working in security-sensitive places of vital institutions** as defined in specific laws;
- extract, treat or refine **critical raw materials** and their ores;
- develop or manufacture goods which are subject to **classified patents or utility models**; or
- are of fundamental importance for **food security** and cultivating agricultural land of more than 10,000 ha.



The amended list will exhaustively enumerate the categories triggering notification and clearance requirements. However, related activities not explicitly covered are likely to be scrutinised closely too during an FDI screening initiated by voluntary filing or at the BMWi's own initiative.

Sector-specific regime

The scope of the sector-specific regime will be expanded to cover acquisitions of German targets that develop, manufacture or modify **any military or defence goods in Part I Chapter A of the German Export List (*Ausfuhrliste*)** (currently only certain list items) as well as further defence technologies subject to classified **patents and utility models** and of German targets that qualify as **security-important institutions**.

Common provisions for both regimes

So far, the **trigger** for the German FDI screening of share deals is a specified threshold of 10% of voting rights in sensitive areas (25% in other areas) in a German entity. The draft bill extends this clear-cut concept (shareholding threshold either met or not) to transaction structures in which the foreign investor obtains **comparable control of the German company or its management by other means**. Pursuant to the draft bill, this may include transactions in which the investor obtains **additional board seats/majorities or veto rights** that grant the investor **influence equivalent to 10% of voting shares in sensitive sectors (25% in other areas)**. This amendment would blur the line between reviewable and non-reviewable investments.

Under existing law, voting shares are already cumulated with a view to the applicable thresholds in case of agreements on the **joint exercise of voting rights**. The draft amendment extends this **accumulation** to other forms of joint exercise, such as the fact that two investors in a German entity are controlled by the same third country. In addition, under the draft amendment **also post-closing voting rights agreements** independent from an acquisition of voting shares may be a relevant acquisition.

Any additional acquisition above the applicable threshold of voting rights qualifies, in line with the current BMWi practice, as a relevant acquisition that triggers notification and clearance requirements.

Regarding the screening proceedings, the draft bill provides for the option to **shift from the cross-sectoral to the sector-specific regime or vice versa** during pending proceedings without resetting the clock. The BMWi can require certain reporting on the implementation of mitigation agreements and restrictions, and the draft specifies who can be appointed as monitor.

So far, the draft amendment does **not include any grandfathering clauses**. Discussions on grandfathering rules are ongoing, including for transactions that will have been signed but not yet closed when the amendment enters into force.



European context and outlook

The BMWi draft does not come as a surprise. The government had previously envisaged to expand the sensitive categories requiring notification and clearance. Other EU member states have implemented the screening factors of the EUFIS Regulation into their national laws too.

The BMWi implements these factors at the entry level, i.e. as formal trigger provisions for mandatory notification and clearance. Such formal trigger provisions must be defined clearly. The draft bill fails to do so, inter alia by referring to the broad notion of quantum mechanics, by frequently including the supply of components and by using the indeterminate terms treating and refining critical raw materials. Such legal uncertainties and ambiguities raise even more concerns in light of gun-jumping prohibitions, administrative and criminal fines as well as risk of void transactions without a required FDI clearance. The pending consultation provides opportunities for some readjustment, though major changes, e.g. on included categories of critical technologies, are rather unlikely.

The amendment is currently expected to enter into force in Q2 2021.

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