

May 13, 2021

GERMANY FURTHER STRENGTHENS FOREIGN DIRECT INVESTMENT (FDI) REGIME

To Our Clients and Friends:

The 17th amendment of the Foreign Trade and Payments Ordinance (“AWV amendment”) came into effect in the first week of May 2021. It marks the third fundamental revision of the German FDI regime since April 2020. FDI scrutiny in Germany therefore continues to witness a significant amount of attention.

Summary

- Almost 20 new business sectors, for which a mandatory cross-sector filing may be required, are added to the existing regime. These include: satellite systems, artificial intelligence, robots, autonomous driving/unmanned aircrafts, quantum mechanics, and critical raw materials.
- In these newly covered business sectors, a mandatory filing is triggered if 20% or more of the voting rights in the German target are to be acquired by a non-EU/EFTA investor. This is higher than the 10% threshold that applies to the business sectors covered by the regime before the most recent changes.
- One of the main goals of the reform is to mirror in national law the protection of the specific sectors mentioned in Art. 4(1) Regulation (EU) 2019/452 (“EU Screening Regulation”) and to further clarify the delineation of these sectors.
- Investments in the defence sector also face a broader range of mandatory sector-specific filing obligations.
- In addition, an *ex officio* review can now also be triggered if certain control rights are acquired.

Background

On 30 April 2021, the AWV amendment was published in the Federal Gazette and came into effect the day after. The German Ministry of Economic Affairs and Energy (“**BMWi**”) had published a draft of the amendment in January 2021, which was open for public consultation. The AWV amendment follows two earlier revisions to the German FDI regime in 2020 which were triggered by the COVID-19 pandemic as well as the EU Screening Regulation. FDI regimes across the globe, in particular in EU Member States, such as Austria, France, Italy, and Spain have seen substantial expansion in recent months.

Overview

The AWW amendment is mainly driven by the aim of reflecting in national law the categories of critical technologies and activities mentioned in Art. 4(1) of the EU Screening Regulation. By its nature, the EU Screening Regulation has a directly binding effect so that a transposition into national law is not formally required. However, the EU Member States are not obliged to consider these categories as a ground for a mandatory filing and have some discretion with respect to their implementation. The German regulator has added almost twenty critical sectors to the list.

In more detail:

Cross-sector review increased significantly

The AWW amendment expands the cross-sector review significantly and introduces a new investment threshold. A mandatory filing in the newly covered business sectors is only triggered if a non-EU/EFTA investor acquires 20% or more of the voting rights in a German target. The 10% threshold remains the applicable threshold for the business sectors previously covered. The “new” business sectors include:

- developers or manufacturers of filter materials that are suitable as a starting material for respirators or medical face masks;
- operators of a high-quality earth remote sensing system (e. satellites);
- developers or manufacturers of goods which solve specific application problems by means of artificial intelligence and are capable of independently optimizing their algorithm, and which can be used *inter alia* to carry out cyber-attacks or imitate individuals in order to distribute targeted disinformation;
- developers or manufacturers of motor vehicles or unmanned aircrafts;
- developers or manufacturers of specific industrial robots;
- developers, manufacturers or refiners of micro- or nanoelectronics, including their components;
- developers or manufacturers of specific security-relevant IT products or components of such products;
- operators of an air carrier with an EU operating license or developers or manufacturers of goods mentioned in subcategories 7A, 7B, 7D, 7E, 9A, 9B, 9D, or 9E of Annex I of Regulation (EC) No 428/2009 (“**Dual-Use Regulation**”) or goods or technology intended for use in space or for use in space infrastructure systems;
- developers, manufacturers, modifiers or users of goods of category 0 or of list headings 1B225, 1B226, 1B228, 1B231, 1B232, 1B233 or 1B235 of Annex I to Dual-Use Regulation;

- developers or manufacturers of specific goods or components for such goods using quantum mechanics;
- developers or manufacturers of goods with which components of metallic or ceramic materials are produced by means of additive manufacturing processes;
- developers or manufacturers of goods specifically for the operation of wireless or wireline data networks;
- manufacturers of (components of) smart meter gateways;
- employers of persons who work in vital facilities at safety-sensitive locations;
- processors or refiners of raw materials or ores that have been defined in the list of critical raw materials;
- developers or manufacturers of goods within the scope of protection of a patent classified or a utility model classified; and
- a German undertaking which is of fundamental importance for food safety and directly or indirectly manages an agricultural area of more than 10,000 hectares.

Scope of sector-specific review also broadened

In addition, Section 60 of the AWV amendment expands the sector-specific review and now includes a reference to the entire part 1, section A of the export list [*Ausfuhrliste*]. It also captures developers or manufacturers or modifiers of goods in the field of defence technology, and those who have actual control over such goods which are within the scope of protection of a patent classified or a utility model classified. Both cases also apply to undertakings which have developed, produced or modified or had actual control over the respective goods in the past and which still have knowledge or other access to the underlying technology.

The acquisition of certain control rights opens the scope for ex officio investigations

The scope of the FDI review now also extends to acquisitions of control rights. Section 56(3) of the AWV amendment provides that the regime also applies to acquisitions of effective control over a German target, even if the voting rights threshold of 25% is not exceeded. This is particularly the case if an acquisition of voting rights is accompanied by (i) the guarantee of additional seats or majorities in supervisory bodies or in the management; (ii) the granting of veto rights in strategic business or personnel decisions; or (iii) the granting of information rights. Such rights must go beyond the influence which would ordinarily result from a 25% stake.

Increasing shareholding may trigger another filing obligation

The AWP amendment also clarified that share increases may lead to new filing obligations. If, for example, a non-EU/EFTA investor initially acquired 10% in a German target which operates a critical infrastructure and intends to increase its stake to 25%, 40%, 50%, or 75% (25%, 40%, 50%, or 75% in case of the 20% threshold for “new” business sectors, respectively) a mandatory filing is triggered.

Conclusion

The decision of the German regulator to introduce specific business sectors instead of referring to the broad categories mentioned in the EU Screening Regulation promotes legal certainty. However, it also significantly increases the regulatory burden for inbound M&A. First, the business sectors now covered by the German FDI regime will often require a sophisticated qualitative filing assessment. Secondly, since the categories of control are rather vague, a voluntary filing (to obtain a certificate of non-objection) will more often be considered as the only prudent course.

In light of this, investors should analyse potential FDI filing requirements at an early stage to avoid any time constraints impeding the completion of the transaction.



Gibson Dunn’s lawyers are available to assist in addressing any questions you may have regarding the issues discussed in this update. For further information, please feel free to contact the Gibson Dunn lawyer with whom you usually work, any member of the team in Frankfurt or Munich, or the following authors:

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