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Article — Digitized Version

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Intereconomics

Suggested Citation: Lefeldt, Mathias (1973) : Foreign trade act in transition, Intereconomics, ISSN 0020-5346, Verlag Weltarchiv, Hamburg, Vol. 08, Iss. 5, pp. 160-162, <https://doi.org/10.1007/BF02927633>

This Version is available at:

<https://hdl.handle.net/10419/138834>

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Foreign Trade Act in Transition

by Mathias Lefeldt, Hamburg *

"The flow of goods, services, capital, current payments and other transactions of trade across frontiers ... is fundamentally free ..." — with these words begins the German Außenwirtschafts-Gesetz — AWG (Foreign Trade Act), Article Number One. After this Law had been passed in 1961, many interpreted its introduction as a sign that it represented a new Magna Charta of foreign trade.

The Foreign Trade Act was the signal that the Federal Republic of Germany had thrown overboard the principle that trade was forbidden if it was not specifically permitted (according to Law No. 33 on Foreign Currency Control of the Council of the Allied High Commission) and had embraced the exact opposite guideline of permitting everything that was not specifically prohibited. This fundamental principle, enshrined in Article One of the new Law, was followed by another 51 Articles describing the special circumstances and the manner and degree of permissible government interference with the, otherwise, untrammelled and free foreign trade, in the interest of protecting the community against harm. The Foreign Trade Act's governing principle is that of free trade in a free market. With the exception of limiting certain imports, there is no other barrier which this Law places in the path of foreign trade relations.

Possibilities to restrict trade under the Foreign Trade Act by government decree are twofold: outright prohibition of certain imports and/or the mandatory duty of importers to apply for import licences. These, however, under Article Two of the same statute, have to be limited both in quantity and in quality, which means that licensing decrees must, at the time of their imposition, clearly define their purpose and state their terms in time and scope of their intended validity, and moreover, the measures decreed must obey the legal principle of "proportionality". This is in pursuance of Article 80 of the Grundgesetz (constitution) which permits the issue and enforcement of enabling acts authorising the government to proclaim decree laws, but only on condition that the enabling act itself limits the purpose, the contents, and the scope of such decrees. In other words, all limitations of trade permissible under the Foreign Trade Act are characterised unmis-

takeably as exceptions from the general rule, which have no other purpose than:

- ☐ to meet obligations arising from international agreements;
- ☐ to avoid effectively harmful influences invading the Federal Republic from other territories; and
- ☐ to suppress dangers for the security of the Federal Republic, and for peaceful companionship of all nations¹.

Though the Foreign Trade Act offers a fairly wide scope for possibilities of limiting completely free trade, one kind of physical control has been wholly excluded by it: the enactment of foreign exchange controls — and to reintroduce those would only be possible by passing a completely new law.

International Treaties

The Federal Republic of Germany has underwritten numerous international obligations, and these may, naturally, set up conflicts of interest between national needs and international duties. In this respect, Article One, Paragraph Two, however, specifically states that international obligations will always enjoy priority over local law. They are not affected by the rules and regulations under the Act. With this, it is therefore only consistent that the Außenwirtschaftsverordnung — AWV (Decree on Foreign Trade enacted by the Federal Government) rules that international treaties will not be affected by the material contents of the Foreign Trade Act. GATT, for example, contains agreements about the gradual dismantling of physical import quotas. Since the Federal Republic is affiliated to GATT, it has pledged itself, on principle, to do away with quota regulations gradually.

The most important obligations adopted by the Federal Republic in the field of international trade are those flowing from its EEC membership. There

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¹ Cf. Articles 5–7 AWG.

is, above all other things, the fact that, already in the past, a number of powers regulating international trade have passed from the hands of local governments to the authorities of the EEC, and more powers will be handed over to them in the future. That is why the Act had to pay special heed to the Federal Republic's duties under the Treaty of Rome, and consequently, the AWV-Decree contains a number of stated exceptions to the general rules proclaimed by the Act.

An Enabling Act for the Government

As has already been stated, the Foreign Trade Act contains hardly any limitations of its scope, but it is the foundation upon which restrictive measures may be built by decree law. The power to proclaim such decrees rests with the Federal Government, and it is not subject to parliamentary control. In other words, it is indeed a typical enabling act which provides the framework within which the executive may enact decrees. On the other hand, the contents of any decree thus enacted must be made known, without delay, to the legislative assembly, and the Federal Diet is empowered to demand the annulment of such decrees within four months.

The advantages of this kind of authorisation for the government is clear: it empowers the executive to act swiftly and incisively, and its position during international negotiations — within GATT, OECD, EEC, etc., — is greatly strengthened thereby. On the other hand, because of the natural fear lest the principle of general freedom of trade be harmed, a compromise was made and Parliament given the authority to revise decrees after the act².

Liberalised Traffic in Goods

Under the Foreign Trade Act, the international traffic in goods and services has been progressively and almost wholly liberalised. Amendments made to the text of the Act have referred, almost exclusively, to the lifting or mitigation of physical import controls. Also import restrictions contained within the body of the AWV-Decree, incorporated in the mandatory obligation of importers to seek licences, have been greatly liberalised and/or abolished by placing more and more imports on the "import list" (enumerating goods and services not subject to licensing). Imports which still attract licensing regulations, for the greatest part, are subject to other international treaties and agreements — e.g. the embargo against Rhodesia, the regulated food market of the EEC, etc.

Exports are subject to similar rules. On the whole, export permits are subject only to quality controls or to material constraints on certain kinds of them, e.g. export licensing for firearms, ammunition, and other armaments. Much the same is true of exports and imports of services. They are liberalised within very wide limits; only some services, e.g. of the merchant marine, the film industry, and brewing, are still subject to licensing and/or the obligation to report transactions to the authorities.

It may thus be stated that, on the whole, the underlying desire of the lawmakers to establish freedom of trade in goods and services, based on the principle of free markets and expressed through the enactment of the Foreign Trade Act, has been carried out.

Self-Abnegation on Capital Flow

A different trend has become visible in the field of money and capital movements. True, up to a few years ago, the Federal Republic remained faithful to the principles of the Act in this sector of the economy, and the degree of its liberalisation seemed second to none, internationally. However, now a turnaround in the opposite direction has appeared in the treatment of capital inflow. Article 23 AWG permits restrictions on:

- ☐ the acquisition of real estate, ships, companies, German stocks and shares, bills of exchange by non-residents of the Federal Republic;
- ☐ borrowing and taking-up of credits, the extension of time lags for due payments by residents of the Federal Republic;
- ☐ the acceptance of foreign accounts and deposits, and the paying of interest on them, by German-based credit institutes;
- ☐ the forming of companies on the territory of the Federal Republic by non-residents.

In mid-1964, the Government for the first time considered a stricter application of Article 23, in order to enable the Federal Bank to take more effective measures for limiting the inflow of foreign money. In the end, nothing of the kind was done because the authorities were afraid that such interference with the free flow of capital would prove too drastic.

But later, in November 1968, payment of interest on foreign bank balances was made subject to official permission. In 1969, similar restrictions were imposed on the investment of money and/or capital in the Federal Republic by non-residents. After the DM had been revalued in the autumn of 1969, these restrictions on the flow of money and capital could again be withdrawn.

² See *Freiheit im Außenhandel* (Freedom in Foreign Trade), in: IK, No. 28, Feb. 21, 1961.

But when a new dollar crisis broke out in the spring of 1971, Articles 52, 53, and 54 AWW³ were at once re-applied and, in part, amended to make them even stricter. After that, dirigisme — as many experts had foretold — started to engulf more and more, formerly free, territory. The first step was an addition to the regulations provided by Article 6a of the Act. This was the new Cash Deposit Act, intended to contain the inflow of undesirable liquid funds from abroad. It adds to the tools available to the Federal Bank for managing credit. Under the new act, all "non-banks" are forced to deposit a major part of foreign credit balances with central banks, where they do not bear interest. How high the share of these deposits in the total of new foreign credits is to be is subject to Federal Bank decree. The monies which are to be immobilised in this way in the coffers of the Länder central banks were originally limited to 50 p.c. of all credits received, but from February 1973 they have increased to a full 100 p.c.

Total Isolation of the Capital Market

In the course of 1972, it became progressively clearer that even the Washington realignment of December, 1971, was not able to calm the raging floods of currency disruption. Some possibilities of entry into Germany had, of course, been blocked by existing limitations under the Act and consequent Decrees and through a highly restrictive licensing practise of the Federal Bank, but the masses of dollars fleeing for new homes were squeezing through all the remaining gaps in Germany's currency defences.

In order to ward off this undermining effect on its own policy of containment, Germany felt constrained to pile new limitations upon existing ones and to interpret valid regulations with steadily mounting harshness. In other words, the AWW-amendments made in 1971 have been leading West Germany inexorably further and further on the dirigiste path against capital imports. The ultimate weapon had been a new step towards sharpening the prohibitions under the Foreign Trade Act; it concerned mandatory deposits — which had only recently been introduced. After only one year of their use, it was found that deposits of 50 p.c. were not enough for warding off continued growth of foreign credit balances. Especially on the market for Euro-dollars, interest rates asked for by potential foreign creditors reacted so sharply that foreign credits — even if 50 p.c. had to be immobilised without bearing interest — remained still cheaper than those offered by inland creditors.

Raising mandatory deposits to 100 p.c. has the purpose to extinguish all differentials between

money and capital markets at home and abroad — at least as far as they are rate-of-interest-related — in their effects on money and capital circulation at home.

It is true that the Act permits a 100 p.c. deposit obligation only in periods of massive intrushes of foreign currencies — but this has, in fact, now become a permanent state.

Emergency Measures or Institutionalisation?

To sum up, present limitations affecting free circulation of money and capital under Articles 23 and 6a are:

☐ purchase of DM treasury bills, treasury drafts, other bills of exchange, and all stocks and shares, by non-residents have become subject to licensing;

Equally subject to licensing are:

☐ taking up of loans or other credits, claiming unusually long periods for current account debts falling due, as far as the amounts involved are higher than DM 50,000, by residents from non-residents;

☐ paying of interest on all kinds of foreign credit balances, including savings accounts of more than DM 50,000;

☐ the supply of German-based companies, their branches and production plants, with assets deriving from non-residents.

Full 100 p.c. deposits must be made with central banks of the equivalent of:

☐ all kinds of debts due to non-residents, repayment obligations extending over commercially unusual length, and forward bills of exchange owed to non-residents⁴.

Exempt from these restrictions are only current-account payments and debts connected with the sale and purchase of goods and services. However, to make a clear-cut distinction between these and non-commercial payments and obligations, voluminous and clumsy bureaucratic controls will be needed⁵.

The question must be posed whether the Foreign Trade Act and its tools are suitable for overcoming existing problems — which derive mainly from currency disruption. This will depend to a large extent on whether the use of these tools will be limited in time.

³ Articles 52, 53, and 54 AWW contain the practical applications of the authority to limit money and capital flows contained in Article 23 AWW.

⁴ Amendment Order No. 25 to amend AWW, in: Bundesgesetzblatt (Federal Gazette), No. 13, Part I, v.

⁵ This also means that this part of foreign trade has now been almost completely de-liberalised.