

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
INVESTMENT COMMITTEE**

Investment policy related to national security

Notification by Germany

13 February 2019

On 13 February 2019, Germany notified the OECD of a change in its investment policies related to national security pursuant to its obligations under the Codes of Liberalisation and the National Treatment instrument. This document reproduces the notification. It will support discussions of the measure at Freedom of Investment Roundtable 30 on 13 March 2019.

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Modification of investment screening in relation to public order or security

Notification by Germany

On 29 December 2018, the latest revision of the Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung*) came into effect in Germany. This has slightly modified the existing national investment screening procedure. As a result, the German Federal Ministry for Economic Affairs and Energy will be able to screen acquisitions aimed at obtaining a smaller share of voting rights than was previously the case, for example in the field of critical infrastructures. This marks an important step towards a more effective protection of certain areas of the German economy which are sensitive in terms of public order or security. Nevertheless, as the existing system is only slightly modified, the new ordinance will not have any effect on Germany's being one of the world's most open economies for foreign direct investments.

1. Scope

The investment screening procedure, as modified, applies to the following foreign direct investments:

- a direct or indirect acquisition of a domestic defence company by a foreign resident;
- a direct or indirect acquisition of a stake of more than 10 per cent of the voting rights in a domestic defence company by a foreign resident;
- a direct or indirect acquisition of a domestic company by a non-EU resident;
- a direct or indirect acquisition of a stake of more than 25 per cent of the voting rights in a domestic company by a non-EU resident;
- in case a sensitive civil sector (such as critical infrastructures) is concerned, the direct or indirect acquisition of a stake of more than 10 per cent of the voting rights is sufficient for the authority to initiate the investment screening procedure; due to its potential to influence the public, the media sector has been added to the list of sensitive sectors.

Sensitive civil sectors include, but are not limited to, critical infrastructures. A list of sectors considered sensitive can be found in Section 55 paragraph 1 of the ordinance (as reproduced in the annex below).

All other aspects of the procedure remain unchanged. In particular, the German Federal Ministry for Economic Affairs and Energy is responsible for conducting the investment screening procedure and upon a recommendation by the Federal Ministry for Economic Affairs and Energy, the Cabinet of Ministers is entitled to prohibit or condition certain transactions that endanger public order or security. The decision to start a screening procedure as well as the decision to (partially) prohibit an investment is open to judicial redress.

2. Proposed amendment to the entry in the list of measures reported for transparency under the National Treatment instrument

Germany proposes to include a new entry under item A. of the list of measures reported for transparency under the National Treatment instrument as follows:

A. Measures Reported for Transparency at the Level of National Government

a. Investment by established foreign-controlled enterprises

Civil companies relevant for national security:

The Federal Ministry for Economic Affairs and Energy can investigate whether the acquisition of a domestic company by a non-EU resident or the direct or indirect acquisition within the meaning of Section 56 of a stake in a domestic company by a non-EU resident poses a threat to the public order or security of the Federal Republic of Germany. The acquisition of a domestic company may be deemed a threat to public order or security particularly in cases where this company

1. operates critical infrastructure within the meaning of the Act on the Federal Office for Information Security,
2. in particular develops and modifies software that is used for operating critical infrastructure in specific sectors within the meaning of the Act on the Federal Office for Information Security,
3. has been authorised to carry out organisational measures pursuant to Section 110 of the Telecommunications Act or produces or has produced the technical equipment used for implementing statutory measures to monitor telecommunications and has knowledge about this technology,
4. provides cloud computing services and the infrastructure used for this reaches or exceeds the thresholds set out in Annex 4 Part 3 Number 2 of the Ordinance to Determine Critical Infrastructures pursuant to the Act on the Federal Office for Information Security,
5. holds a licence for providing telematics infrastructure components or services pursuant to Section 291b subsection 1a or 1e of Book V of the Social Code, or
6. is a company of the media industry which contributes to the formation of public opinion via broadcasting, telemedia or printed products and is characterised by particular topicality and breadth of impact.

Authority: Foreign Trade and Payments Ordinance, section 55 para. 1 sentences 1-2, as of 29 December 2018

Companies relevant for the defence sector:

The Federal Ministry for Economic Affairs and Energy can examine whether essential security interests of the Federal Republic of Germany are endangered if a foreigner acquires a domestic company or a direct or indirect participation within the meaning of Section 60a in a domestic company if the company:

1. manufactures or develops goods within the meaning of Part B of the War Weapons List,
2. manufactures or develops specially designed engines or gears to drive battle tanks or other armoured military tracked vehicles,
3. manufactures products with IT security functions to process classified state information or components essential to the IT security function of such products or has manufactured such products and still disposes of the technology if the overall product was licensed with the knowledge of the company by the Federal IT Security Agency,
4. manufactures or develops goods listed under item numbers 0005, 0011, 0014, 0015 or 0017 in Part I Section A of the Export List, or
5. manufactures or develops goods listed under item number 0018 in Part I Section A of the Export List, provided that these are intended to be used in the production of goods within the meaning of no. 4.

Acquisitions by German residents shall also be subjected to an investigation if there are indications that an abusive approach or a transaction circumventing the law has been undertaken, not least partly in order to avoid an investigation pursuant to sentence 1. Indications of an abusive approach within the meaning of sentence 2 in particular include cases where the direct acquirer does not maintain any business operations of its own other

than the acquisition pursuant to sentence 1 or does not have any permanent establishment of its own including offices, staff and equipment within Germany.

Authority: Foreign Trade and Payments Ordinance, section 60 para. 1, as of December 2018

ANNEX

Section 55 Scope of application of the cross-sectoral examination

(1) The Federal Ministry for Economic Affairs and Energy can investigate whether the acquisition of a domestic company by a non-EU resident or the direct or indirect acquisition within the meaning of Section 56 of a stake in a domestic company by a non-EU resident poses a threat to the public order or security of the Federal Republic of Germany. The acquisition of a domestic company may be deemed a threat to public order or security particularly in cases where this company

1. operates critical infrastructure within the meaning of the Act on the Federal Office for Information Security,
2. in particular develops and modifies software that is used for operating critical infrastructure in specific sectors within the meaning of the Act on the Federal Office for Information Security,
3. has been authorised to carry out organisational measures pursuant to Section 110 of the Telecommunications Act or produces or has produced the technical equipment used for implementing statutory measures to monitor telecommunications and has knowledge about this technology,
4. provides cloud computing services and the infrastructure used for this reaches or exceeds the thresholds set out in Annex 4 Part 3 Number 2 of the Ordinance to Determine Critical Infrastructures pursuant to the Act on the Federal Office for Information Security,
5. holds a licence for providing telematics infrastructure components or services pursuant to Section 291b subsection 1a or 1e of Book V of the Social Code, or
6. is a company of the media industry which contributes to the formation of public opinion via broadcasting, telemedia or printed products and is characterised by particular topicality and breadth of impact.

In sentence 2 no. 2, sector-specific software means

1. in the energy sector: software for controlling power plants, grids or the operation of facilities or systems used to supply electricity, gas, fuel, fuel oil or district heat,
2. in the water sector: software for managing, controlling and automating freshwater supply or waste water facilities,
3. in the information and telecommunications sector: software for operating facilities or systems used in voice and data transmission or in data storage and processing,
4. in the financial and insurance sector: software for operating facilities or systems used in cash supply, card-based payments, conventional transactions, for settling and managing securities and derivative transactions or for providing insurance services,
5. in the healthcare sector: software for operating hospital information systems, for operating facilities and systems used in the selling of prescription drugs and for operating a laboratory information system,
6. in the transport sector: software for operating facilities or systems used in the transport of passengers or goods by air, rail, maritime or inland waterway vessels, road, public transport or in logistics, and
7. in the food industry: software for operating facilities or systems used in supplying food.

(2) Acquisitions by EU residents shall also be subjected to an investigation pursuant to subsection 1 if there are indications that an abusive approach or a transaction circumventing the law has been undertaken, not least partly in order to avoid an investigation pursuant to subsection 1. Indications of an abusive approach within the meaning of sentence 1 shall in particular include cases where the direct acquirer does not maintain any business operations of its own other than the acquisition pursuant to subsection 1 or does not have any permanent establishment of its own including offices, staff and equipment within the European Union. Subsidiaries and permanent establishments of a non-EU acquirer shall not be considered EU-resident subsidiaries or establishments. Acquirers from the Member States of the European Free Trade Association shall be equivalent to EU residents. Establishments operated by the direct acquirers in a Member State of the European Free Trade Association shall be equivalent to establishments operated within the European Union.

(3) The Federal Ministry for Economic Affairs and Energy can exercise the right of investigation pursuant to subsection 1 only if it notifies the direct acquirer and the domestic company affected by the acquisition pursuant to subsection 1 about the opening of the investigation procedure within three months of acquiring knowledge of the conclusion of the contract governed by the law of obligations regarding the acquisition. The information described in sentence 1 needs to be provided in writing. It must be sent to the direct acquirer and the domestic company affected by the acquisition pursuant to subsection 1. The sole criterion as to whether the deadline pursuant to sentence 1 has been met shall be whether the domestic company affected by the acquisition pursuant to subsection 1 has received the notification in time. In cases where an offer within the meaning of the Securities Acquisition and Takeover Act is made, the deadline pursuant to sentence 1 shall commence when knowledge is acquired of the publication of the decision to submit the offer or when knowledge is acquired of the publication of the change of control. No investigation can be opened if more than five years have passed since the conclusion of the contract governed by the law of obligations.

(4) Information about the conclusion of a contract governed by the law of obligations regarding the acquisition of a domestic company within the meaning of subsection 1 sentence 2 or a direct or indirect acquisition of a stake within the meaning of Section 56 of a domestic company within the meaning of subsection 1 sentence 2 by a non-EU resident shall be provided to the Federal Ministry for Economic Affairs and Energy in writing.

Section 56 Voting rights

(1) Following the acquisition, the voting rights of the acquirer of the domestic company must directly or indirectly amount to or exceed

1. 10 percent of the voting rights of a company cited in Section 55 subsection 1 sentence 2,
2. 25 percent of the voting rights of another company.

(2) The calculation of the voting rights must include the voting rights of third parties in the domestic company

1. in which the acquirer holds

in a case of subsection 1 number 1 at least the share cited there or

- in a case of subsection 1 number 2 at least the share cited there
- of the voting rights or
2. with which the acquirer has concluded an agreement on the joint exercise of voting rights.
- (3) In the case of an indirect investment, the proportion of voting rights of the acquirer in the domestic company shall amount to
1. in a case of subsection 1 number 1 at least the share cited there or
 2. in a case of subsection 1 number 2 at least the share cited there,
- if the acquirer and the respective intermediate shareholder, the attribution principles pursuant to being applied *mutatis mutandis*, possess at least the relevant share of voting rights in the respective subsidiary pursuant to number 1 or number 2.

Section 60

Scope of application of the sector-specific examination

- (1) The Federal Ministry for Economic Affairs and Energy can examine whether essential security interests of the Federal Republic of Germany are endangered if a foreigner acquires a domestic company or a direct or indirect participation within the meaning of Section 60a in a domestic company if the company:
1. manufactures or develops goods within the meaning of Part B of the War Weapons List,
 2. manufactures or develops specially designed engines or gears to drive battle tanks or other armoured military tracked vehicles,
 3. manufactures products with IT security functions to process classified state information or components essential to the IT security function of such products or has manufactured such products and still disposes of the technology if the overall product was licensed with the knowledge of the company by the Federal IT Security Agency,
 4. manufactures or develops goods listed under item numbers 0005, 0011, 0014, 0015 or 0017 in Part I Section A of the Export List, or
 5. manufactures or develops goods listed under item number 0018 in Part I Section A of the Export List, provided that these are intended to be used in the production of goods within the meaning of no. 4.

Acquisitions by German residents shall also be subjected to an investigation if there are indications that an abusive approach or a transaction circumventing the law has been undertaken, not least partly in order to avoid an investigation pursuant to sentence 1. Indications of an abusive approach within the meaning of sentence 2 in particular include cases where the direct acquirer does not maintain any business operations of its own other than the acquisition pursuant to sentence 1 or does not have any permanent establishment of its own including offices, staff and equipment within Germany.

- (2) Branches and permanent establishments of a foreign acquirer shall not be regarded as domestic.
- (3) The acquisition must be reported in writing to the Federal Ministry for Economic Affairs and Energy. Section 58 subsection 1 sentence 2 shall apply *mutatis mutandis*. The report shall cite the acquisition, the

acquirer and the domestic company to be acquired and outline the fields of business in which the acquirer and the domestic company to be acquired are active.

Section 60a
Voting rights

(1) Following the acquisition, the acquirer of the domestic company must directly or indirectly control 10 per cent or more of the voting rights.

(2) As voting rights are being determined, the voting rights of third parties in the domestic company shall be attributed to the acquirer

1. in which the acquirer holds at least 10 percent of these voting rights, or
2. the acquirer has concluded an agreement on the joint exercise of voting rights.

(3) In the case of an indirect investment, the proportion of voting rights of the acquirer in the domestic company shall amount to at least 10 percent if the acquirer and the respective intermediate shareholder, the attribution principles pursuant to being applied mutatis mutandis, possess at least 10 percent of the voting rights in the respective subsidiary.

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