

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

**NOTIFICATION UNDER ARTICLE 3
OF THE OECD CODE OF LIBERALISATION OF CAPITAL MOVEMENTS**

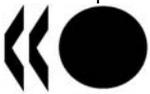
Note from the German Federal Ministry of Economics and Technology

This document reproduces a letter from the German Federal Ministry of Economics and Technology together with a copy of the Act amending the German Foreign Trade and Payments Act, the explanatory memorandum and answers to frequently asked questions.

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Federal Ministry
of Economics
and Technology



Liberty
Unity
Democracy

Federal Ministry of Economics and Technology • D-11019 Berlin • Germany

To
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SUBJECT Notification under Article 3 of the OECD Code of Liberalisation of Capital Movements
ENCL - 8 -

Dear Mr. Poret,

referring to Germany's obligations under Article 3 of the Codes I hereby would like to notify the entry into force of the Act amending the German Foreign Trade and Payments Act by 24 April 2009. The amendment introduces the possibility to examine certain foreign investments if they pose a threat to public policy or public security in terms of Articles 46 and 58(1) of the EC Treaty.

For your information I have attached the text of the Act, the explanatory memorandum plus key points and FAQ in German and English. Please note that only the German version of the Act is officially binding.

If you have any further questions please do not hesitate to contact me.

Best regards


Joachim Steffens

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**THIRTEENTH ACT AMENDING THE FOREIGN TRADE AND PAYMENTS ACT
AND THE FOREIGN TRADE AND PAYMENTS REGULATION
OF 18 APRIL 2009**

The Bundestag has adopted the following Act:

Article I
Amendment of the Foreign Trade and Payments Act

The Foreign Trade and Payments Act in the version published on 26 June 2006 (BGBl. I, p. 1386), as most recently amended by Article 10 of the Act of 13 December 2007 (BGBl. I, p. 2897), is amended as follows:

1. In Section 4 paragraph 2 no. 11 the phrase "paragraph 8" shall be replaced by the phrase "paragraph 10".
2. Section 4a paragraph 2 is amended as follows:
 - a) The words "or enforceable orders in accordance with Section 2 paragraph 2 first sentence," shall be inserted after the words "Statutory orders".
 - b) In no. 3 the phrase "nos. 3 and 4" shall be replaced by the phrase "nos. 5 and 7" and a comma shall be inserted after the word "non-resident" [in the German text].
 - c) The following no. 4 shall be inserted after no. 3:

"4. branches and permanent establishments are not considered to be Community residents or Community-non-residents, notwithstanding Section 4 paragraph 1 nos. 6 and 8."
3. Section 7 is amended as follows:
 - a) Paragraph 1 is amended as follows:
 - aa) In no. 2 the word "or" shall be deleted.
 - bb) In no. 3 the full-stop at the end shall be replaced by a comma and the word "or".
 - cc) The following no. 4 shall be inserted after no. 3:

"4. guarantee the public policy or public security of the Federal Republic of Germany in terms of Articles 46 and 58(1) of the EC Treaty."
 - b) Paragraph 2 is amended as follows:
 - aa) In no. 5 the full stop at the end shall be replaced by a semicolon.
 - bb) The following no. 6 shall be added after no. 5:

"6. legal transactions on the purchase of resident companies or on the acquisition of shares in such companies by a Community-non-resident purchaser where such a purchase or acquisition jeopardises the public policy or public security of the Federal Republic of

Germany referred to in Section 7 paragraph 1 no. 4 above; this requires a genuine and sufficiently serious threat, affecting one of the fundamental interests of society. Non-Community purchasers from Member States of the European Free Trade Association (Iceland, Liechtenstein, Norway, Switzerland) shall be afforded the same treatment as Community-resident purchasers."

4. Section 28 is hereby amended as follows:

a) The title shall be reworded as follows:

"Section 28 Issue of administrative acts"

b) In Section 28 paragraph 1 the words "the granting of licenses" shall be replaced by the words "the issuing of administrative acts and the receipt of reports".

c) Section 28 paragraph 2 is amended as follows:

aa) In no. 1 the phrase "unless provided otherwise below" shall be inserted after the phrase "Sections 5 to 7".

bb) In no. 2 the full stop at the end shall be replaced by a semicolon.

cc) The following no. 3 shall be added after no. 2:

"3. the Federal Ministry of Economics and Technology in the case referred to in Section 7 paragraph 2 no. 6; in the case of a prohibition or the issuing of specific orders in relation to a purchase within the meaning of Section 7 paragraph 2 no. 6, the Federal Ministry of Economics and Technology shall decide after the Federal Government has consented."

5. The following paragraph 3 is added after Section 31 paragraph 2:

"(3) A legal transaction governed by the law of obligations on the purchase of a resident company which is subject to scrutiny under Section 7 paragraph 1 and paragraph 2 no. 6 in conjunction with an authorization of the Federal Ministry of Economics and Technology to prohibit, after obtaining the consent of the Federal Government, the purchase within a specified period, shall be subject until the entire examination procedure has been completed to the condition subsequent that the Federal Ministry of Economics and Technology prohibits the purchase within the specified period."

6. Section 34 is amended as follows:

a) Paragraph 1 sentence 2 is amended as follows:

The word "exports" is replaced by the word "delivers".

b) Paragraph 4 is amended as follows:

aa) In no. 1 the word "or" at the end shall be deleted.

bb) In no. 2 the words "import, transit, transfer" shall be inserted after the word "export" and the full stop at the end shall be replaced by the word "or".

cc) The following new no. 3 shall be added:

„3. “acts in contravention of a directly applicable provision, published in the Federal Gazette, of a legal instrument of the European Communities, providing for a licence requirement for an export, import, transit, transfer, sale, delivery, provision, passing on, service performance, investment or assistance and which serves to enforce an economic sanction imposed by the Council of the European Union in the area of the Common Foreign and Security Policy.”

7. Section 38 paragraph 5 is repealed.

Article 2

Amendment of the Foreign Trade and Payments Regulation

The Foreign Trade and Payments Regulation in the version published on 22 November 1993 (Federal Gazette I, pp. 1934, 2493), as last amended by the Regulation of 4 March 2009 (Federal Gazette p. 823), is amended as follows:

1. Section 52 is amended as follows:

a) Paragraph 1 is amended as follows:

aa) The words "not less than" in the third sentence shall be deleted in sentence 3.

bb) The following fourth sentence shall be added to the paragraph:

"The voting rights of third parties with which the non-resident purchaser has concluded an agreement on the joint exercise of voting rights shall also be accorded to the purchaser."

b) Paragraph 2 is hereby amended as follows:

aa) The words "or issue orders" shall be inserted after the word "prohibit."

bb) The following second sentence shall be added: "The documents to be communicated shall be determined by the Federal Ministry of Economics and Technology by means of an announcement in the Federal Gazette."

2. The following Section 53 shall be inserted after Section 52:

"Section 53

Restrictions under Section 7 paragraph 1 and Section 7 paragraph 2 no. 6 of the Foreign Trade and Payments Act

(1) The Federal Ministry of Economics and Technology may, within a period of three months following the conclusion of the contract governed by the law of obligations on the acquisition of voting rights, examine the purchase of a resident company or a direct or indirect acquisition of shares of such a company by a non-Community resident in order to determine whether the purchase will jeopardise the public policy or public security of the Federal Republic of Germany; in cases involving a public offer, the period begins with the publication of the decision to make the offer or with the publication of the fact that control of the company has been attained. This shall not apply if the direct or indirect share of voting rights held by the non-Community purchaser in the company in question after the purchase is less than 25%. When the share of voting rights held by the non-Community purchaser is being calculated, any voting rights held by other companies in the company to be purchased shall be allocated to the non-Community purchaser where the

non-Community purchaser holds 25% or more of the voting rights of the other company. The voting rights of third parties with which the non-Community purchaser has concluded an agreement on the joint exercise of voting rights shall also be accorded to the purchaser. Branches and permanent establishments belonging to the purchaser shall not be considered as Community-resident. The Federal Ministry of Economics and Technology may under the preconditions of sentences 1 and 2 also examine the purchase of a Community-resident company or a direct or indirect participation in such a company by a Community-resident company in which a non-Community resident holds at least 25% of the voting rights if there are indications that an abusive arrangement or circumvention transaction has taken place in order to circumvent an examination pursuant to sentences 1 and 2. Non-Community purchasers from Member States of the European Free Trade Association (Iceland, Liechtenstein, Norway, Switzerland) shall be afforded the same treatment as Community-resident purchasers. The Federal Ministry of Economics and Technology shall notify the purchaser of its decision to examine an acquisition pursuant to the first sentence.

(2) If the Federal Ministry of Economics and Technology has informed the purchaser of its decision to examine an acquisition in accordance with the first sentence of Section 53 paragraph 1, the purchaser shall be required to communicate to the Federal Ministry of Economics and Technology all documents relating to the purchase pursuant to sentence 2. The documents to be communicated shall be determined by the Federal Ministry of Economics and Technology by means of an announcement in the Federal Gazette. The Federal Ministry of Economics and Technology shall inform the Federal Government of the results of the examination. The Federal Ministry of Economics and Technology may, within a period of two months following receipt of the complete documents, prohibit or issue orders where necessary in order to safeguard the public policy or public security of the Federal Republic of Germany. Prior consent has to be obtained from the Federal Government before a purchase is prohibited or orders are issued.

(3) At the written request of a purchaser, in which the outlines of the planned purchase, the purchaser and his field of business must be presented, the Federal Ministry of Economics and Technology shall issue a certificate stating that there is no objection to the acquisition (certificate of non-objection), if the purchase raises no concerns concerning the public policy or public security of the Federal Republic of Germany. The certificate of non-objection shall be deemed to have been issued if the Federal Ministry of Economics and Technology does not open an examination procedure pursuant to Section 53 paragraph 1 sentence 1 within one month of receipt of the application.

(4) In order to implement a prohibition the Federal Ministry of Economics and Technology may take the necessary measures. In particular it may:

1. prohibit or limit the exercise of voting rights in the purchased company where they belong to or are to be allocated to a non-Community purchaser,

or

2. appoint a trustee to reverse a purchase that has already taken place."

3. Section 70 paragraph 1 is amended as follows:

- a) In no. 10 the word "or" at the end shall be deleted.
- b) In no. 11 the phrase "or Section 53 paragraph 2 fourth sentence," shall be inserted after the phrase "Section 52 paragraph 2".
- c) After no. 11 the following no. 11a shall be inserted:
"11a. contrary to Section 53 paragraph 2 first sentence sends an incorrect or incomplete document, or".

Article 3
Amendment of the Securities Purchase and Takeover Act

The Securities Purchase and Takeover Act of 20 December 2001 (Federal Gazette I p. 3822), as amended by Article 70 of the Act of 17 December 2008 (Federal Gazette I p. 2586), is amended as follows:

1. Section 7 paragraph 1 is amended as follows:
 - a) The following second sentence shall be inserted after the first sentence:

"The Federal Agency shall communicate to the Federal Ministry of Economics and Technology the information that it received under no. 3 of the first sentence of Section 10 paragraph 2 and the fourth sentence of Section 35 paragraph 1 and, at the request of that authority, the document relating to the offer communicated to the Agency under the first sentence of Section 14 paragraph 1 or the first sentence of Section 35 paragraph 2."
 - b) The current second sentence shall become the third sentence.
2. The following new no. 3 shall be added after no. 2 of Section 9 paragraph 1:

"3. the Federal Ministry of Economics and Technology,".

Article 4
Amendment of the Act against Restraints of Competition

The Act against Restraints of Competition in the version published on 15 July 2005 (Federal Gazette I, p. 2114), as last amended by Article 2c of the Act of 15 December 2008 (Federal Gazette I, p. 2426), is amended as follows:

In Section 50c, the following paragraph 3 shall be inserted:

"(3) The Federal Cartel Office may communicate to other public bodies information on a company involved in a merger which it has received under Section 39 paragraph 3 where this is necessary to pursue the aims referred to in Section 7 paragraph 1 no. 1 and Section 7 paragraph 2 no. 6 of the Foreign Trade and Payments Act. In the case of mergers with a Community dimension within the meaning of Article 1(1) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings in the currently valid version, the Federal Cartel Office shall be authorised to do so only with regard to information which has been published by the European Commission pursuant Article 4(3) of that Regulation."

Article 5
Authorisation to publish

The Federal Ministry of Economics and Technology may publish in the Federal Gazette the text of the Foreign Trade and Payments Act in the version valid as of the entry into force of this Act.

Article 6
Entry into force

This Act shall enter into force on the day following its promulgation.

EXPLANATORY MEMORANDUM

A. General

The amendment of the Foreign Trade and Payments Act [*Außenwirtschaftsgesetz — AWG*] and the Foreign Trade and Payments Regulation [*Außenwirtschaftsverordnung — AWV*] seeks to ensure that acquisitions of companies established in the economic territory to which the AWG applies by purchasers from outside of the European Community can be examined in individual cases and prohibited if this is essential to safeguard the public policy or public security of the Federal Republic of Germany. The examinations which are already carried out of certain foreign acquisitions of companies which manufacture or develop war weapons, particular types of defence equipment or cryptosystems, or which operate high-grade remote sensing systems, are thus extended in such a way that the acquisition of a domestic company in Germany by an investor from a country outside of the European Community or the European Free Trade Association can be submitted to an examination.

Germany's open investment regime is one of the cornerstones of its economic development. A clear and open legal framework for foreign investment and shareholding is key to ensuring the continued integration of the German economy into the global division of labour. Freedom of establishment and freedom of capital movements are also guaranteed at EU level. The amendment is merely designed to ensure that, in individual cases and in accordance with the principles of proportionality, the Federal Ministry of Economics and Technology [Bundesministerium für Wirtschaft und Technologie] has measures at its disposal which allow it to examine investments which could pose problems with regard to Germany's public security. This amendment does not signal any abandonment of the country's open investment strategy. In order to ensure that the companies concerned are placed under as light a burden as possible, there is no obligation to notify the authorities of the acquisition of a company. Instead, a procedure is introduced which allows the relevance of the acquisition to national security to be examined *ex officio* and the acquisition to be prohibited, if necessary.

In accordance with the Joint Rules of Procedure of the Federal Ministries [*Gemeinsame Geschäftsordnung der Bundesministerien — GGO*] the Federal Ministry of Economics and Technology may, with the involvement of the ministries concerned, examine the planned acquisition of a company, as stipulated in Section 53 paragraph 1 first sentence AWV within three months from the conclusion of the transaction on the acquisition or of publication of the decision to submit a bid or the publication of the fact that the purchaser has acquired control of the company. If the Federal Ministry of Economics and Technology decides to examine the acquisition of the company within the stipulated period, it issues an administrative act informing the purchaser accordingly. In this case the purchaser is required to send all the documentation concerning the acquisition to the Federal Ministry of Economics and Technology. After receiving the documentation, the Federal Ministry of Economics and Technology has two months within which to prohibit the acquisition or to issue orders, following the Federal Government's consent. The contract remains valid throughout the examination procedure — i.e. from the time of signing the contract on the acquisition or the publishing of the decision to submit the bid or from the time when the purchaser has acquired control of the company until the end of the three-month period, if the Federal Ministry of Economics and Technology does not examine the acquisition, or, if an examination is considered necessary, until the end of the two-month period after the documentation is received — subject to the condition subsequent that the Federal Ministry of Economics and Technology can prohibit the acquisition with the Federal Government's consent.

For Article 1 no. 1, legislative authority is derived from Article 73 paragraph 1 no. 5 of the Basic Law [*Grundgesetz*] (exchange of goods and payments with foreign countries). For Article 1 nos. 2 and 3,

Article 2 no. 1, Article 3 and Article 4, the Federal Government holds concurrent legislative powers under Article 74 paragraph 1 no. 11 of the Basic Law (law relating to economic affairs). For Article 1 no. 4 and Article 2 no. 2, the Federal Government holds concurrent legislative powers under Article 74 paragraph 1 no. 1 of the Basic Law (civil law and criminal law).

The provisions of Article 2 no. 1, Article 3 and Article 4 are necessary within the meaning of Article 72 paragraph 2 of the Basic Law. Federal legislation on the examination and possible prohibition of acquisitions from outside the EU which pose a threat to public policy or public security in Germany is necessary in order to preserve Germany's legal and economic unity. If corresponding legislation were adopted at *Land* level, this would not ensure that any threat to public policy or public security in Germany would be assessed in a uniform manner throughout the country. This would make Germany less attractive as a location for investment. There would also be the risk that non-Community-residents who intended to acquire companies which were critical to public policy or public security in Germany would take advantage of the different levels of protection in the *Länder* in order to invest in companies in those *Länder* offering the lowest level of protection. However, any race between the *Länder* to adopt rules providing the lowest level of protection would defeat the statutory objective of ensuring that acquisitions which are critical to public and public security in Germany can be examined and, in individual cases, prohibited, or that corresponding orders can be issued concerning such acquisitions. Any lack of action on the part of certain *Länder* would also have extremely negative repercussions on the economy as a whole. It is therefore in the interest of the country as a whole for acquisitions of resident companies by non-Community-residents to be examined in a uniform manner across Germany by the Federal Ministry of Economics and Technology and, with the Federal Government's consent, for these acquisitions to be prohibited or for orders to be issued, where necessary, in order to safeguard public policy or public security in Germany. This nationally applicable legislation will ensure that, in the case of direct investments which are relevant to national security, the economic area functions as a single unit.

The legislation is based on the requirements of EU law. The expressions 'public policy or public security' are used in Community law. The Member States are free to interpret these terms within the scope laid down by the Treaties. The interpretation of 'public policy or public security' can differ from one Member State to another and can change over time. The amendments of the AWG and AWV make use of the scope available for interpreting these expressions.

The acquisition of a company may be prohibited only if it is essential to do so on the grounds of public policy or public security in the Federal Republic of Germany. The criterion of public policy or public security complies with the requirements of Articles 46 (1) and 58 (1) of the EC Treaty. Under the case law of the European Court of Justice (ECJ), reference may be made to public policy and public security only if a genuine and sufficiently serious threat exists which affects one of the fundamental interests of society. Public security concerns the functioning of the State and its institutions, i.e. safeguarding a Member State's existence in the face of internal and external influences. Whether or not the acquisition of companies established in the territory defined in the AWG by non-Community purchasers can be examined on the grounds of public policy or public security must be determined according to the criteria established by the ECJ in each specific case. The ECJ has expressly recognised the relevance of public security to safeguarding telecommunications and electricity services at times of crisis or safeguarding services which are of strategic importance.

Any decision to limit the right of establishment or capital movements and money transfers can only be justified on the grounds of public policy or public security if it is proportionate. The procedure laid down in Section 7 paragraph 1 no. 4 and paragraph 2 no. 6 AWG in conjunction with Section 53 AWV complies with these requirements. The legislation ensures that the bureaucratic burden on the companies concerned is as light as possible. An investigation is carried out only in isolated cases and on the basis of a decision by the Federal Ministry of Economics and Technology. The acquisition of a company does not require

prior approval. In implementing the investigation procedure, the Federal Ministry of Economics and Technology is also required to adhere to short time limits in order to give the companies and purchasers concerned legal certainty as quickly as possible. Ultimately, the decisions taken by the Federal Ministry of Economics and Technology are subject to effective judicial control. A less burdensome procedure for safeguarding public policy or public security in Germany cannot be identified.

The legislation is also in accordance with WTO law. Where the General Agreement on Trade in Services (GATS) lays down requirements in individual cases to keep the market open for investments from non-EU countries (mode 3) and where no general exceptions exist under Article XIV GATS on the grounds of public policy or public security, these requirements must be adhered to.

B. Detailed points

Article 1

Amendment of the Foreign Trade and Payments Act

No. 1

The new numbering results from the changes made to Section 4 paragraph 2 AWG by the Twelfth Act amending the Foreign Trade and Payments Act.

No. 2

Letter a

The amendment ensures that, even where enforceable orders are issued in accordance with Section 2 paragraph 2 sentence 1 AWG, branches owned by individuals not established in the territory defined in the AWG may, by way of derogation from Section 4 paragraph 1 no. 5 AWG, be regarded as not established in the territory defined in the AWG if this is necessary in order to achieve the purpose defined in the delegated power. Section 4 paragraph 1 no. 5 AWG lays down that resident branches of non-resident companies are to be regarded as resident provided that their management is located here and they keep separate accounts for those branches. Therefore enforceable orders in accordance with Section 2 paragraph 2 sentence 1 AWG can only prohibit dispositions relating to foreign assets and transactions with foreign countries. More extensive restrictions - such as the prohibition of domestic transactions - can therefore be issued in relation to these branches under Section 4a paragraph 2 no. 2 AWG only by means of a regulation. In order to ensure the performance of obligations arising from international law in a timely manner, it must also be possible to prohibit domestic transactions by means of enforceable orders under Section 2 paragraph 2 sentence 1 AWG, should this be necessary in order to meet the obligations arising from international law, e.g. under Section 2 paragraph 2 sentence 1, in conjunction with Section 7 paragraph 1 nos. 2 and 3 AWG.

Letter b

The new version of Section 4a paragraph 2 no. 3 AWG makes it clear that Section 4a paragraph 2 no. 3 AWG allows derogations from the definitions of '*Gebietsansässige*' [resident] and '*Gebietsfremde*' [non-resident] within the meaning of Section 4 paragraph 1 nos. 5 and 7 AWG.

Letter c

Under the new Section 4a paragraph 2 no. 4 AWG, the Federal Government is authorised to define the branches and permanent establishments of persons established outside the Community by way of derogation from Section 4 paragraph 1 nos. 6 and 8 AWG.

No. 3

The new provisions Section 7 paragraph 1 no. 4 and paragraph 2 no. 6 AWG extend the existing provisions of the AWG on the examination of company acquisitions to include cases in which a restriction needs to be imposed on the grounds of public policy or public security in Germany. This ensures that the State can examine matters pertaining to public policy or public security which could be affected by the acquisition of companies or company shares by individuals established outside the Community. Purchasers of this kind from the Member States of the European Free Trade Association (Iceland, Liechtenstein, Norway and Switzerland) have the same status as purchasers established within the Community.

Investments by foreign investors are already examined where these investments relate to domestic companies which manufacture or develop weapons of war, particular types of defence equipment or crypto systems. In such cases, the acquisition must be notified to the authorities under Section 52 AWV on the basis of Section 7 paragraph 1 no. 2 and paragraph 2 no. 5 AWG. The Federal Ministry of Economics and Technology can prohibit acquisitions if it is essential to do so in order to safeguard the vital security interests of the Federal Republic of Germany.

Under Section 10 paragraph 1 second sentence of the Act on the protection of the security of the Federal Republic of Germany from threats posed by the spread of high-grade remote sensing data [*Satellitendatensicherheitsgesetz* (Satellite Data Security Act) – SDatG], the acquisition by foreign purchasers of 25% or more of the voting rights of a company which operates a high-grade remote sensing system must be notified to the authorities. Under Section 10 paragraph 1 fourth sentence SatDatG in conjunction with Section 24 paragraph 3 SatDatG, the Federal Ministry of Economics and Technology can prohibit acquisitions in order to safeguard the vital security interests of the Federal Republic of Germany.

The examination of foreign acquisitions pursuant to Section 7 paragraph 1 no. 1 and paragraph 2 no. 5 AWG in conjunction with Section 52 AWV is tailored to those sectors which are of particular relevance to the vital security interests of the Federal Republic of Germany. It is *lex specialis* with respect to the provision laid down in Section 53 AWV, which is based on Section 7 paragraph 1 no. 4 and paragraph 2 no. 6 AWG. Section 53 AWV relates to cases in which an examination of the acquisition of a company in other sectors is essential on the grounds of public policy or public security in the Federal Republic of Germany.

When applying Section 53 AWV, the strict conditions derived from Articles 43, 46(1), 56 and 58(1) of the EC Treaty to which the possible prohibition of an acquisition is subject must be observed. Section 7 paragraph 1 no. 4 and paragraph 2 no. 6 AWG cannot be interpreted to provide a legal basis for a routine government examination of foreign acquisitions. These provisions can be applied only in rare and isolated cases in order to examine investments which might pose a problem with regard to public policy or public security of the Federal Republic of Germany.

No. 4

Section 28 paragraph 1 AWG is amended in order to make it clearer. The previous version related only to licences. The amendment makes it clear that the provisions concerning the competent authorities in Section 28 AWG also cover the issuing of administrative acts in the procedures laid down in Section 52 and Section 53 AWV and the receipt of notifications under Section 52 AWV.

Under Section 28 paragraph 2 no. 1 AWG, the Deutsche Bundesbank has sole responsibility in the field of capital and payment transactions for authorisations on the basis of Section 5 to Section 7 AWG, except as otherwise provided in the AWG. Section 28 paragraph 2 no. 3 AWG stipulates that, with respect to Section 7 paragraph 2 no. 6 AWG, the Federal Ministry of Economics and Technology is the competent authority.

The prohibition of an acquisition or the issuing of orders concerning an acquisition pursuant to Section 53 paragraph 2 fourth sentence AWV is subject to the prior consent of the Federal Government. In accordance with Section 19 GGO, the Federal Ministry of Economics and Technology involves other ministries both in the decision as to whether the examination procedure should be instituted and during the examination procedure itself. Individual ministries can propose to the Federal Ministry of Economics and Technology that acquisitions which fall within their areas of responsibility be examined.

No. 5

Section 31 paragraph 3 AWG regulates the effects of the examination procedure under Section 53 AWV on the contracts which underpin the acquisition. The legal effects of the contract remain valid throughout the entire procedure under Section 53 AWV by analogy with Section 158 paragraph 2 Civil Code [*Bürgerliches Gesetzbuch* — BGB] subject to the condition subsequent that the Federal Ministry of Economics and Technology can prohibit the acquisition with the consent of the Federal Government within the time limits by which the examination must have been carried out. The legal transaction is therefore valid; its legal effects lose their validity only if the condition subsequent is met, i.e. if an acquisition is prohibited. As acquisitions are prohibited only in very rare and isolated cases, the vast majority of the contracts which fall within the scope of Section 53 AWV will remain legally valid. If the Federal Ministry of Economics and Technology prohibits an acquisition which was completed before expiry of the time limit within which an examination must be conducted, the provisions of Section 812 paragraph 2 second sentence 1st Alt. BGB apply to the rescission of the transaction *in rem*.

No. 6

The economic sanctions which the Council of the European Union can adopt in the field of the Common Foreign and Security Policy can also cover import, transit and transfer bans as well as authorisation requirements. This is taken into account in the text of the legislation.

No. 7

The provision is being revoked as it no longer has any practical significance.

Article 2

Amendment of the Foreign Trade and Payments Regulation

No. 1

The amendment of Section 52 paragraph 1 third sentence AWV is for the purpose of clarification. In order to prevent transactions circumventing the law, a provision which corresponds to Section 53 paragraph 1 fourth sentence AWV is incorporated into Section 52 paragraph 1 fourth sentence AWV. As a result of the amendment, the shares of voting rights belonging to third parties will be attributed to the shares of voting rights belonging to the purchaser if the purchaser and a third party have concluded an agreement on voting rights.

The amendment of paragraph 2 makes it clear that the Federal Ministry of Economics and Technology can also issue orders with regard to the acquisition of a company. An order is an independent administrative act and not a regulatory requirement within the meaning of Section 36 of the Administrative Procedures Act [*Verwaltungsverfahrensgesetz*], as there is no obligation *per se* to obtain authorisation to acquire a company. Issuing an order is a more lenient alternative to prohibiting an acquisition, which is also possible under Section 52 paragraph 2 AWV, and is therefore in line with the principle of proportionality.

No. 2

Section 53 AWW regulates the review procedure for foreign acquisitions of German companies. Certain acquisitions of resident companies by a purchaser established outside the Community are subject to an examination, as a result of which the acquisition may be prohibited or orders may be issued. In accordance with Section 52 AWW an examination is conducted, provided that the transaction results in the non-Community purchaser obtaining at least 25% of the voting rights in the company and thus potentially holding a blocking minority. The threshold value which makes authorisation mandatory is exceeded if the non-Community purchaser were to acquire at least 25% of voting shares by acquiring the company. These provisions relate to all contracts resulting in the acquisition of at least 25% of voting shares, and therefore also to barter agreements.

Like Section 52 AWW, Section 53 AWW not only covers the direct acquisition of voting shares in resident companies but also stipulates that indirect acquisitions may under certain conditions be subjected to an examination (Section 53 paragraph 1 first sentence AWW). An indirect holding in a company exists, for example, when a non-Community purchaser acquires shares in a resident company which, in turn, holds shares in another resident company that is relevant under Section 7 paragraph 2 no. 6 AWG.

In order to prevent transactions circumventing the law, a Community-resident company is considered to be Community-non-resident if a Community-non-resident owns at least 25% of the voting shares in that company. Under Section 4 paragraph 1 no. 6 AWG, the definition of Community-resident also covers companies based in Germany. The voting shares held by third parties are also added to the voting shares held by the purchaser, provided that the third parties' voting shares are subject of a voting rights agreement intended to bring about the joint exercise of 25% of voting shares or more.

Branches and permanent establishments owned by the purchaser are not considered to be Community-resident. By limiting the definition of Community-resident laid down in Section 4 paragraph 1 no. 6 AWG, use is made of the delegated power set out in Section 4a paragraph 2 no. 4 AWG. This limitation of the definition ensures that, where relevant, cases involving the acquisition of companies by individuals from countries outside the territory of the EU and the European Free Trade Association, which may fall within the scope of Section 7 paragraph 1 no. 4 and paragraph 2 no. 6 AWG, are actually covered by Section 53 AWW. Otherwise, purchasers from countries outside the territory of the EU and EFTA who owned a branch in an EU Member State would not be considered to be Community-non-resident and would therefore not be covered by Section 53 AWW. A person who is considered to be Community-non-resident under Section 4 paragraph 1 no. 8 AWG is someone who is not Community-resident under Section 4 paragraph 1 no. 6 AWG. Who is considered Community-non-resident is therefore identified *argumentum e contrario* on the basis of Section 4 paragraph 1 no. 6 AWG; double residency is excluded (see Friedrich in Hocke/Berwald/Maurer/Friedrich, *Außenwirtschaftsrecht*, Vol. 1, August 2007, Section 4, point 29). Section 4 paragraph 1 no. 6 AWG has a wide scope. It follows from the reference in Section 4 paragraph 1 no. 6 AWG to Council Regulation (EEC) no. 2913/92 of 12 October 1992 establishing the Community-Customs Code (OJ EU L 302, p. 1) that legal persons or associations of persons which have their registered office, central headquarters or a permanent business establishment in the Community are established in the Community. As companies which operate internationally — irrespective of where they have their registered office — usually have a permanent base in Community territory, practically all the world's major companies can be considered to be established in the Community (cf. Friedrich *loc cit* for a critical view of this). This definition would not be compatible with an examination under Section 7 paragraph 1 no. 4 and paragraph 2 no. 6 AWG in conjunction with Section 53 AWW.

Non-Community purchasers from the EFTA Member States (Iceland, Liechtenstein, Norway, Switzerland) are treated like Community-resident purchasers.

The Federal Ministry of Economics and Technology informs the companies concerned by means of an administrative act if it intends to exercise its right to conduct an examination under Section 53 paragraph 1 first sentence AWV (Section 53 paragraph 1 seventh sentence AWV). If the Ministry fails to exercise its right of examination within three months of the conclusion of the contract or of the publication of the takeover bid, the acquisition cannot be prohibited subsequently or have conditions imposed upon it.

The examination takes place in two stages. The first stage is as follows: the Federal Ministry of Economics and Technology decides whether it wishes to examine the acquisition. Where the investment falls within the scope of the Securities Purchase and Takeover Act [*Wertpapiererwerbs- und Übernahmegesetz — WpÜG*], the examination period begins when the decision is taken to submit a bid under Section 10 paragraph 1 first sentence WpÜG or when control is gained over the company under Section 35 paragraph 1 first sentence WpÜG. The main reason why the beginning of the examination deadline is linked to either a) the publication of the decision to submit a bid or b) the obtaining of control over the company is that a) the purchaser is bound by his bid from that point onwards or b) that the fact that the purchaser has taken control of the company has been made public. If the Federal Ministry of Economics and Technology is in favour of instituting an examination procedure under Section 53 paragraph 1 seventh sentence AWV, it will ensure, in accordance with Section 19 GGO, that those federal ministries whose areas of responsibility are affected by the decision to conduct a formal examination are involved in the procedure. If the Federal Ministry of Economics and Technology decides within the time limit that the acquisition should be examined, it issues an administrative act informing the purchaser accordingly; the purchaser is required to send to the Federal Ministry of Economics and Technology all the documentation relating to the acquisition. As has already been done regarding the scope of the notification requirement in accordance with Section 52 paragraph 2 AWV, (see Foreign Trade Circular [*Runderlass Aussenwirtschaft*] No. 13/2004, Federal Gazette p. 19565), the Federal Ministry of Economics and Technology will specify in general in advance what documentation is required in accordance with Section 53 paragraph 2 AWV by publishing a notice in the Federal Gazette. After receiving all the documentation, the Federal Ministry of Economics and Technology proceeds to the second stage of the process: in accordance with Section 19 GGO, it checks whether the acquisition should be prohibited or whether orders should be issued on the grounds of public policy or public security. If the Federal Ministry of Economics and Technology does not consider it necessary to prohibit the acquisition or issue orders, it informs the Federal Government in good time within the two-month time limit about the result of its investigation.

If the Federal Ministry of Economics and Technology considers it necessary to prohibit the acquisition or issue orders, it seeks the prior consent of the Federal Government; the prohibition of an acquisition or the issuing of orders in connection with an acquisition can only take place within two months of receipt of all the documentation on the acquisition. During the procedure, the legal effects of the contract are subject to the condition subsequent that the Federal Ministry of Economics and Technology may, with the Federal Government's consent, prohibit the acquisition (Section 31 paragraph 3 AWG). If the Federal Ministry of Economics and Technology prohibits the acquisition, the legal effects of the contract are no longer valid.

An acquisition may be prohibited or orders may be issued only if this is essential on the grounds of public policy or public security of the Federal Republic of Germany. The Federal Ministry of Economics and Technology and the Federal Government take into account the fact that freedom of establishment and freedom of capital movements may be restricted only in rare and isolated cases in order to safeguard public policy or public security. It is also possible for orders to be issued, as a more lenient alternative to prohibiting the acquisition of a company.

If, on the basis of the documentation submitted, there appear to be no objections with regard to public policy or public security of the Federal Republic of Germany, the Federal Ministry of Economics and Technology upon request issues a certificate of non-objection to the purchaser [*Unbedenklichkeitsbescheinigung*]. A request of this kind may be made before the start of the examination

deadline under Section 53 paragraph 1 first sentence AWW. It enables the purchaser to obtain legal certainty about the non-objectionability of his investment before the time limits for the examination expire.

Such a request does not rule out the possibility that the Federal Ministry of Economics and Technology will launch an examination procedure under Section 53 paragraph 1 first sentence AWW if it considers that the acquisition might pose a threat to public policy or public security. In such cases, the purchaser is required to send the Federal Ministry of Economics and Technology all the documentation concerning the acquisition.

In accordance with Section 41 paragraph 1 of the Act against Restraints of Competition [*Gesetz gegen Wettbewerbsbeschränkungen*], Section 53 paragraph 4 AWW stipulates that the Federal Ministry of Economics and Technology may, where necessary, require that measures be taken in order to reverse an acquisition which has already taken place. In particular, it can prohibit the purchaser from exercising voting rights or can appoint a trustee to reverse the acquisition. This does not affect the restitution obligation between the contracting parties under Section 812 paragraph 1 second sentence 1st alternative BGB. If the parties reverse a completed acquisition in accordance with the provisions on unjust enrichment shortly after the acquisition has been prohibited, no measures need be taken by the Federal Ministry of Economics and Technology.

No. 3

Breaches of prohibitions or orders to Section 53 paragraph 2 fourth sentence AWW are punishable as administrative offences under Section 33 paragraph 1 AWG. The submission under Section 53 paragraph 2 first sentence AWW of documentation concerning an acquisition which is incorrect or incomplete is also punishable as an administrative offence under Section 33 paragraph 1 AWG. Any attempt to breach the rules in either of these ways is subject to a fine under Section 33 paragraph 7 AWG. In accordance with Section 14 of the Administrative Offences Act [*Ordnungswidrigkeitengesetz*], the seller can also be considered culpable.

Article 3 Amendment of the Securities Purchase and Takeover Act

No. 1

The amendment of the Securities Purchase and Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz - WpÜG*) takes account of the special characteristics of the examination procedure under Section 53 AWW. As Section 53 AWW does not stipulate that foreign acquisitions of companies must be notified to the authorities, the Federal Financial Supervisory Authority [*Bundesanstalt für Finanzdienstleistungsaufsicht — BaFin*] sends the Federal Ministry of Economics and Technology the information which it has available about takeovers of companies which are subject to the WpÜG. With a view to ensuring that examinations are carried out efficiently, the Federal Financial Supervisory Authority is required, under the amended Section 7 WpÜG, to notify the Federal Ministry of Economics and Technology if a person has reached the control threshold laid down in the WpÜG for a company of this kind or has submitted a bid for the acquisition or takeover of a company of this kind. As the responsible authority, the Federal Ministry of Economics and Technology can act on the notification from the Authority by requesting further information and, in particular, by asking the Federal Financial Supervisory Authority to send it the documentation relating to the bid required under the WpÜG.

Section 7 paragraph 1 third sentence WpÜG stipulates that Section 15 of the Federal Data Protection Act [*Bundesdatenschutzgesetz — BDSG*] must be taken into account when transmitting personal data.

No. 2

Section 9 WpÜG, which relates to the duty of confidentiality by which employees of the Federal Financial Supervisory Authority are bound, needs to be amended to take account of the new requirements laid down in Section 7 paragraph 1 second sentence WpÜG governing the transmission of information by the Federal Financial Supervisory Authority.

Article 4
Amendment of the Act against Restraints of Competition

Under Section 50c of the Act against Restraints of Competition [*Gesetz gegen Wettbewerbsbeschränkungen — GWB*] the Federal Cartel Office [*Bundeskartellamt*] is authorised to cooperate with other public authorities. The provisions are extended in order to take account of the procedure under Section 7 paragraph 1 no. 4 and paragraph 2 no. 6 AWG (new) in conjunction with Section 53 AWW (new). The requirements of Section 15 BDSG must also be taken into account. Section 50c paragraph 3 GWB does not affect the existing legislation on the transmission of data by the Federal Cartel Office to the criminal prosecution authorities and the police.

Article 5
Permission to publish

Article 5 lays down rules governing the publication of the consolidated version.

Article 6
Entry into force

Article 6 governs the entry into force of the legislation.



Frequently asked questions about the legislation concerning the acquisition of German enterprises by foreign investors (Amendment of the German Foreign Trade and Payments Act and the implementing regulation)

1. Which investments may be subject to a review according to the amendment of the Foreign Trade and Payments Act?

The legislation is applicable to **investors from outside the EU** who wish to **acquire 25% or more voting rights** of a German company. In order to avoid circumvention of the legislation, investors from within the EU may be subject to an examination if a shareholder from a third country holds 25 % or more of the voting rights of the EU company. Investors from member states of the European Free Trade Association (EFTA) are treated like investors from within the EU.

2. Is the legislation limited to specific sectors or enterprises of a certain size?

No. The legislation is applicable to all sectors and enterprises. The reason for this approach is that public security concerns are not limited to particular branches of industry or enterprises of a certain size. Furthermore, in the modern constantly evolving economy – especially in the field of technology – any limitation to sectors would risk omitting sensitive sectors.

3. When can an investment be restricted or regulated?

An acquisition may only be restricted or prohibited if it threatens Germany's **public policy or public security**. A genuine and sufficiently serious threat affecting one of the fundamental interests of society must exist. The legislation refers explicitly to the EC Treaty and the case law of the European Court of Justice. Only if it fulfils these conditions will a review of an investment be in accordance with EC law. In existing rulings, the European Court of Justice has expressly recognized that public security is affected when it comes to safeguarding the provision of services in the event of a crisis in the fields of telecommunications, electricity or strategic services.

4. Can an investment be restricted or prohibited on the grounds of industrial policy?

No. According to the strict requirements established by the EC Treaty, a restriction or prohibition is only permitted in case of a **threat affecting public policy or public security**. This is only applicable in rare and exceptional cases.

5. Do foreign investments need to be registered?

No. The act **does not establish a requirement of authorisation or registration.**

6. Within which period of time may a review be initiated and a possible restriction or prohibition be ordered?

The Federal Ministry of Economics and Technology may decide to initiate a review of the investment within **three months** of the signing of the purchase contract. When a review is initiated, the purchaser must submit all required information concerning the acquisition. The Federal Ministry of Economics and Technology may subject the acquisition to certain conditions or order a prohibition within **two months** of receipt of the information. If the Ministry does not take any action within this period of time, the acquisition may not be examined thereafter.

7. Can an investor ensure that his investment is not subject to restriction or prohibition before signing the purchase contract?

Yes. In order to attain legal certainty promptly, the investor may apply for a **certificate of non-objection** from the Federal Ministry of Economics and Technology before the conclusion of the acquisition. This legally binding certificate confirms that the investment does not endanger public policy or public security. The application merely needs to outline the basic elements of the planned acquisition, the investor and his field of business. There is no need to submit full documentation on the acquisition unless a formal review is initiated. If the Economics Ministry does not launch a formal review within one month of receiving the investor's application in writing for a certificate of non-objection, the certificate is deemed to have been issued.

8. Which documents does an investor have to submit if a review of the investment is initiated?

The list of documents required for the review was published in the Federal Gazette on 24 April 2009.

9. What legal effects does the review process have on the purchase contract?

The purchase contract remains valid throughout the entire examination procedure. However, the acquisition is subject to the "condition subsequent" of prohibition: i.e. should the Federal Ministry of Economics and Technology prohibit the investment, the purchase contract becomes void.

10. Which authority is responsible for the review of foreign investments?

The Federal Ministry of Economics and Technology is responsible for initiating a review process. Other ministries whose responsibilities are concerned in the concrete case may be involved in the process. If the examination of a foreign acquisition is initiated, the Federal Ministry of Economics and Technology informs the Federal Government about the result of the examination. If restrictions or a prohibition are considered necessary, the Federal Ministry of Economics and Technology must obtain approval of the Federal Government, i.e. a decision of the Federal Cabinet is required.. This procedural provision stresses the exceptional character of restrictions or prohibitions of foreign investments.

11. Is the restriction or prohibition of an investment subject to judicial review?

Yes. All decisions of the Federal Ministry of Economics and Technology can be challenged in the Administrative Courts. The basis for appeals may include not only possible restrictions on and prohibitions of the investment but also the Ministry's decision to initiate a review.

12. Will the new law compromise the open investment climate in Germany?

No. As the legislation allows the examination of foreign investments **only in rare and exceptional cases**, Germany will continue to be open for foreign investments. The German Federal Government is dedicated to an open investment regime and continues to welcome foreign investors.

13. Might the amendment not send out the wrong signal in a time of financial and economic crisis?

No. The Federal Government will only resort to the possibility which exists under the EC Treaty to examine foreign investments if they pose a threat to public policy or public security. Also, an examination is possible only in rare exceptional cases, so that the amendment does not introduce a barrier to foreign investment. Foreign investment remains most welcome in Germany, particularly against the background of the difficult global economic climate.

14. Was the legislation created as a protection against sovereign wealth funds?

No. The Act is not directed against sovereign wealth funds. In practice, large sovereign wealth funds' investments in individual enterprises usually fall well below the threshold of 25% ownership, so that they will not generally be affected by the legislation.

15. Are there provisions in other countries to examine foreign investments?

Yes. Provisions for the examination of foreign investments exist in many other countries. These include Australia, Canada, China, France, India, Japan, Netherlands, Russia, United Arab Emirates, United Kingdom, and the United States of America.

16. Is the formation of new company subject to an examination?

No. According to the legislation only the acquisition of voting rights of an existing company may be subject to an examination. The formation of a new company is not affected by the legislation.

17. When did the amendment enter into force?

The amendment to the Foreign Trade and Payments Act entered into force on 24 April 2009.

18. Is the amendment applicable to investments agreed upon before its entry into force?

No. There is no retroactive application. Only acquisitions agreed upon **after** the entry into force of the amendment can be reviewed.