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INVESTMENT COMMITTEE**

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Freedom of Investment Process

Finland's Act on the Monitoring of Foreigners' Corporate Acquisitions

(Notification by Finland)

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Finland has notified the Organisation of the introduction of measures concerning the monitoring of foreign direct investment operations. This notification will support discussions at Freedom of Investment Roundtable 17 on 8 October 2012.

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FINLAND'S "ACT ON THE MONITORING OF FOREIGNERS' CORPORATE ACQUISITIONS"

1. On 1 June 2012, Finland's new "*Act on the Monitoring of Foreigners' Corporate Acquisitions in Finland*" came into effect. The Act repeals the former Act 30.12.1992/1612. The objective of the Act is to monitor, and, should a key national interest so require, restrict the transfer to foreigners and to foreign organisations and foundations of influence over the companies monitored.
2. The Act defines as a *key national interest* (2§:1) securing national defence or safeguarding public order and security in accordance with Articles 52¹ and 65² of the *Treaty on the Functioning of the European Union*, should the fundamental interests of society be under the threat of severe damage.
3. The assessment regarding which organisation and business undertaking is considered critical in terms of securing functions fundamental to society is based on the State Council's security strategy and the strategy to safeguard the essential functions of the society (YETT Strategy). The strategy is a public document (available at <http://www.defmin.fi/?l=en&s=335>).
4. Subject to review are what the law designates as *Monitored entity* (2§:2), that is 1) a defence industry company and 2) any other such organisation and business undertaking considered critical in terms of securing functions fundamental to society on the basis of its field, business or commitments. Compared to the previous Act of 1992, the scope of enterprises subject to potential review has thus been reduced: only two categories of monitored entities are potentially concerned, while the 1992 legislation also covered enterprises in any other sector provided they had a certain size and turnover.

¹ Article 52 of the *Treaty on the Functioning of the European Union* states: "1. The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health. 2. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the coordination of the abovementioned provisions."

² Article 65 of the *Treaty on the Functioning of the European Union* states: "1. The provisions of Article 63 shall be without prejudice to the right of Member States: (a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested; (b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security. 2. The provisions of this Chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with the Treaties. 3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63. 4. In the absence of measures pursuant to Article 64(3), the Commission or, in the absence of a Commission decision within three months from the request of the Member State concerned, the Council, may adopt a decision stating that restrictive tax measures adopted by a Member State concerning one or more third countries are to be considered compatible with the Treaties in so far as they are justified by one of the objectives of the Union and compatible with the proper functioning of the internal market. The Council shall act unanimously on application by a Member State.

5. *Foreign owner* (2§:3) means:

- (a) any foreigner not domiciled in a European Union (*EU*) or European Free Trade Association (*EFTA*) member state;
- (b) any organisation or foundation not domiciled within a EU or EFTA member State;
- (c) any organisation or foundation domiciled within a EU or EFTA member State in which a foreigner referred to in subparagraph a) or an organisation or foundation referred to in subparagraph b) controls at least one tenth of the aggregate number of votes conferred by all shares in a limited liability company, or has a corresponding actual influence over another organisation or business undertaking.

6. The Ministry of Employment and the Economy is in charge of administering the Act. Previously, the Ministry of Defense was responsible for applications of defense industry enterprises. As under the earlier law, the evaluations of the applications will be carried out jointly with different ministries, National Emergency Supply Agency and General Headquarters.

7. *Corporate acquisition* (2§:5) means an acquisition or other corresponding measure due to which a foreign owner gains ownership of a number of shares in a monitored limited liability company, corresponding to at least one tenth of the aggregate number of votes conferred by all shares in the limited liability company, or corresponding to actual authority in a limited liability company or another monitored entity; corporate acquisition also means an organisation other than one referred to foreign ownership, if it has the aforementioned influence in a monitored company. The threshold for monitored influence that triggers a review has been reduced from one third of the votes (Act No. 1992/1612) to ten percent.

8. A foreign owner must apply for advance confirmation by the Ministry of Employment and the Economy for any corporate acquisition involving a defence industry company (4§). The Ministry must confirm the corporate acquisition unless it potentially conflicts with a key national interest. If the application does conflict with a key national interest, the Ministry must refer the matter for consideration at a government plenary session.

9. A foreign owner may notify a corporate acquisition concerning a non-defence industry company for the confirmation of the Ministry of Employment and the Economy (5§). Such a notification may also be made in advance. The Ministry must confirm the corporate acquisition unless it potentially conflicts with a key national interest. If it is the case that the corporate acquisition does conflict with a primary national interest, the Ministry must refer the matter for consideration at a government plenary session.

10. The Government may refuse to confirm a corporate acquisition only if this is necessary due to a key national interest (7§).

Right of appeal

11. Decisions made by the Ministry of Employment and the Economy under section 4(3) or section 5(3) on transferring the matter, or under section 5(4) on undertaking a further examination, are not open to appeal. A decision by the Government, referred to in section 7, or by the Ministry, referred to in section 4(2), is open to appeal in the manner prescribed in the Administrative Judicial Procedure Act (586/1996).

Annex: Unofficial Translation of the Act on the Monitoring of Foreigners' Corporate Acquisitions in Finland³

Section 1

Objectives of the Act

The objective of this Act is to monitor, and, should a key national interest so require, restrict the transfer, to foreigners and foreign organisations and foundations, of influence over the companies monitored.

Section 2

Definitions

For the purposes of this Act,

- 1) *a key national interest* means securing national defence or safeguarding public order and security in accordance with Articles 52 and 65 of the Treaty on the Functioning of the European Union, should the fundamental interests of society be under the threat of severe damage
- 2) *monitored entity* means a defence industry company and any other such organisation and business undertaking considered critical in terms of securing functions fundamental to society on the basis of its field, business or commitments;
- 3) *foreign owner* means
 - a) any foreigner not domiciled in a European Union (EU) or European Free Trade Association (EFTA) member state;
 - b) any organisation or foundation not domiciled within EU or EFTA member states;
 - c) any organisation or foundation domiciled within EU or EFTA member states in which a foreigner referred to in subparagraph a) or an organisation or foundation referred to in subparagraph b) controls at least one tenth of the aggregate number of votes conferred by all shares in a limited liability company, or has a corresponding actual influence over another organisation or business undertaking;
- 4) *defence industry enterprise* means an organisation or business undertaking that produces or supplies defence equipment or other services or goods important to military defence; defence industry enterprise also means an organisation or business undertaking that, in Finland, produces dual-use goods referred to in the Act on the Control of Exports of Dual-Use Goods (562/1996);
- 5) *corporate acquisition* means an acquisition or other corresponding measure due to which a foreign owner gains ownership of a number of shares in a monitored limited liability company, corresponding to at least one tenth of the aggregate number of votes conferred by all shares in the limited liability company, or corresponding to actual authority in a limited liability company or another monitored entity; corporate acquisition also means an organisation other than one referred to in paragraph 3 becoming a foreign owner as referred to in paragraph 3, if it has the aforementioned influence in a monitored company.

Regarding enterprises in subsection 1(4), the provisions laid down in this Act on a foreign owner also apply to any natural person, organisation or foundation that is resident or domiciled in another EU member state, apart from Finland, or in an EFTA member state. The same applies to a Finnish organisation and foundation in which at least one tenth of the aggregate votes of all of a limited liability company's shares, or corresponding actual influence in an organisation or business undertaking, lies with a natural person or organisation or foundation that is resident or domiciled in a EU member state apart from Finland, or in an EFTA member state.

In calculating a foreign owner's proportion of the aggregate votes of a limited liability company's shares, account must also be taken of any shares:

- 1) held by a firm belonging to the same group as the foreign owner;

³ Only the Finnish and Swedish text is legally binding.

- 2) held by a member of the foreign owner's family or by an organisation or foundation over which such a family member exercises authority; or
- 3) entitling the foreign owner or another person referred to in paragraph 1 or 2 to exercise their voting rights by virtue of an agreement or some other transaction.

The provisions of subsection (3) above shall correspondingly apply to calculating the proportion of foreign owner's votes in another organisation and foundation.

To calculate the aggregate number of votes in a monitored entity, votes relating to shares or interests belonging to the monitored company itself or its subsidiary, referred to in section 6, Chapter 1 of the Accounting Act (1336/1997), will be deducted. The numbers of votes held by a person acting in his/her own name but on behalf of another are considered to belong to the party on whose behalf the person is acting.

Provisions on the duty of disclosure, by which the shareholder or a person comparable to a shareholder and the issuer of securities is bound, are laid down in the Securities Markets Act (495/1989).

Section 3

Authorities

The Ministry of Employment and the Economy handles matters concerning the monitoring and confirmation of corporate acquisitions. If it seems possible that a corporate acquisition may conflict with a key national interest, the matter requiring confirmation will be considered in a government plenary session.

When preparing to consider the confirmation of a corporate acquisition, the Ministry of Employment and the Economy must obtain statements from other authorities, to the extent deemed necessary.

Section 4

Corporate acquisitions in the defence sector

A foreign owner must apply for advance confirmation by the Ministry of Employment and the Economy for any corporate acquisition involving a defence industry company. Said application must contain all information, regarding the monitored entity, the foreign owner and the corporate acquisition, necessary to examining said confirmation.

If a foreign owner has not applied for confirmation of a corporate acquisition in accordance with subsection 1, the Ministry of Employment and the Economy may set a deadline for submitting the application. If the foreign owner continues to neglect submitting the application, the Ministry shall decline confirmation of the corporate acquisition.

The Ministry must confirm the corporate acquisition unless it potentially conflicts with a key national interest. If it is the case that the application does conflict with a key national interest, the Ministry must refer the matter for consideration at a government plenary session.

Section 5

Other corporate acquisitions

A foreign owner may notify a corporate acquisition concerning a non-defence industry company for the confirmation of the Ministry of Employment and the Economy. Such a notification may also be made in advance. The notification must contain all information necessary to examining the matter concerning confirmation of the corporate acquisition, regarding the monitored entity, the foreign owner and the corporate acquisition.

Upon the request of the Ministry of Employment and the Economy, the foreign owner is obliged to provide the Ministry with all information necessary to examining the matter concerning the confirmation of the corporate acquisition referred to in subsection 1, with regard to the monitored entity, the foreign owner and the corporate acquisition. The Ministry must request information within three months of being notified of the corporate acquisition.

The Ministry must confirm the corporate acquisition unless it potentially conflicts with a key national interest. If it is the case that the corporate acquisition does conflict with a primary national interest, the Ministry must refer the matter for consideration at a government plenary session.

If, within six weeks, the Ministry of Employment and the Economy does not decide to undertake a further examination of the matter or, within three months of receiving the information, does not submit a proposal to a government plenary session that the corporate acquisition should not be confirmed, the corporate acquisition will be considered confirmed.

Section 6

Exceptions to confirming a corporate acquisition

No confirmation is required for a corporate acquisition if

- 1) in proportion to his or her existing shareholding in a monitored limited company, the foreign owner subscribes shares in that company in connection with an increase in its capital;
- 2) the foreign owner gains possession of property through inheritance, a will or marital right;
- 3) whether by virtue of a procedure under this Act or otherwise, another foreign owner exerts a legally held influence referred to in section 2(1)(5) on the monitored limited liability company, and if the acquisition does not involve a transfer of shares referred to in section 8; or
- 4) a monitored business undertaking is acquired from another foreign owner whose ownership is based on a procedure pursuant to this Act, or has otherwise come about legally.

The provisions laid down in subsection 1(3) and (4) do not apply to a defence industry company.

Section 7

Denial of confirmation

The Government may refuse to confirm a corporate acquisition only if this is necessary due to a key national interest.

Section 8

Consequences of denial of confirmation

Upon denial of confirmation, to a foreign owner, of a corporate acquisition that would transfer influence to a monitored entity which is a limited liability company, the foreign owner shall, within the time specified by the decision, dispose of shares in the limited liability company in question to a degree that diminishes the number of votes to which the shares entitle the owner, to less than one tenth of the aggregate number of votes of all shares in the company. After denial of confirmation, the foreign owner may only use shares that, at a maximum, entitle the holder to the aforementioned number of votes when voting at the general meeting, with no account taken of the foreign owner's other shares whenever the consent or backing of shareholders holding a certain share of company shares is required in order to reach a valid decision. Correspondingly, the same applies to the shares of a foreign owner in a cooperative and the number of votes at general meetings of cooperatives.

Upon denial of confirmation of a corporate acquisition, where said confirmation concerns the transfer of actual authority to a foreign owner in an enterprise other than a limited liability company, or concerns a business acquisition, agreements on the acquisition of influence or of a business undertaking will be dissolved at the time specified in the decision.

Should anyone who has been denied confirmation cease to be a foreign owner before the expiry of the time period referred to in subsection 1 or 2, the aforementioned consequences shall correspondingly expire.

Section 9
Right of appeal

Decisions made by the Ministry of Employment and the Economy under section 4(3) or section 5(3) on transferring the matter, or under section 5(4) on undertaking a further examination, are not open to appeal by presenting a complaint. A decision by the Government, referred to in section 7, or by the Ministry, referred to in section 4(2), is open to appeal in the manner prescribed in the Administrative Judicial Procedure Act (586/1996).

Section 10
Offence against laws concerning corporate acquisitions

Whosoever, whether intentionally or by gross negligence, omits to apply for confirmation under section 4(1), or neglects the duty to disclose under section 5(2), or submits false information to an authority or withholds information deemed significant in terms of handling the matter, shall, unless the criminal act in question is considered minor or a more severe penalty is imposed elsewhere under law, be sentenced to a fine for an *offence in breach of a law concerning corporate acquisitions*.

Section 11
Power to issue decrees

Where appropriate, further provisions on the procedure for monitoring corporate acquisitions under the present Act may be issued by government decree.

Section 12
Entry into force

This Act comes into force on 1 June 2012.

This Act repeals the Act on the Monitoring of Foreigners' Corporate Acquisitions in Finland (1612/1992).

The legal provisions in force at the time of the entry into force of this Act will apply to corporate acquisitions carried out before the Act's entry into force.

Any provisions in the articles of association of limited liability companies and the rules of cooperatives and economic associations, as well as any restrictions included in limited liability company share registers, share certificates and temporary certificates based on the Act on Foreigners' and Certain Organizations' Right to Own and Control Real Property and Shares in Finland (219/1939), shall be void.

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