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

INVESTMENT MEASURE RELATING TO NATIONAL SECURITY

Notification by Japan

17 October 2017

Japan has notified the Organisation about an investment measure related to national security.

This notification will support discussions of the measure at Freedom of Investment Roundtable 27 on 17 October 2017 under item 9 of agenda DAF/INV/A(2017)4.

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INVESTMENT MEASURE RELATING TO NATIONAL SECURITY – NOTIFICATION BY JAPAN

Japan, in pursuant to its obligations of notification under Article 11 of the OECD Code of Liberalisation of Capital Movements and Article 1 of the Third Revised Decision on National Treatment, has the pleasure to notify the OECD that the Japanese Diet has adopted the bill regarding amendments to the Foreign Exchange and Foreign Trade Law (Law No.228 of 1949, hereinafter referred to as “Law”), including the introduction of Article 28.

Under the current globalized business environment, spread of critical technologies, including dual-use ones, presents serious challenges to national security as well as international security. Those technologies are held not only by major scale listed companies but also by small and medium sized enterprises which are often non-listed companies. However, the previous legal system did not cover the transaction of the non-listed companies’ shares between foreign investors. In addition, when it comes to the protection of Japan’s essential security, it was necessary to improve the enforcement mechanism, since the administrative authority could not take fully effective action under the previous legal system.

In order to protect Japan’s essential security by improving the coverage and strengthening the enforcement mechanism, the Japanese Diet has adopted the bill of the Act for the Amendment of the Law, including a new provision of §26 (3), §28, §29 and §70 (1) (xxii) to (xxvi), Annex 1 to this notification provides a provisional English translation.

The amendment act was officially made public on 25 May, 2017 and entered into force on 1 October, 2017.

In particular, amendments include the following changes:

(1) Expansion of the coverage of the prior notification requirement and screening procedures under the Law; A foreign investor who intends to make acquisition through transfer of shares issued by non-listed companies from a foreign investor in the following sectors, which were selected from the perspective of their impact on the essential national security, is required to give a prior notification and receive an examination from the viewpoint of national security.

The aforesaid sectors include:

1. manufacture, machine repairing and software service industries on weapons, aircraft, artificial satellites, nuclear power generators and nuclear source material
2. metal mining; limited to nuclear source material
3. production, transmission and distribution of electricity; limited to those holding nuclear power plant
4. manufacture of the dual-use goods(e.g. machine tools, semiconductor) based on the international export control regimes, including, the List of Dual-Use Goods and Technologies and the Munitions List of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies
5. the industry holding the dual-use technologies based on the international export control regimes, including the List of Dual-Use Goods and Technologies and the

Munitions List of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies

(2) Introduction of the post-investment administrative measures, including orders to dispose shares, by government authority against foreign investors who have breached requirements pertaining to inward direct investment (e.g., prior notification) where the investment is deemed as harmful to national security.

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

Japan requests to amend its entry concerning Foreign Exchange and Foreign Trade Law under item I/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

I. Measures based on public order and essential security considerations

a. Investment by established foreign controlled enterprises

Trans-sectoral: Specific investment plans of foreign controlled enterprises could be altered or suspended when national security, public order or public safety is deemed threatened in such industrial sectors as aircraft, arms, dual-use technologies, nuclear energy, space, electricity utility, gas utility, vaccine, security guard and telecommunications and broadcasting services.

Authority: Articles 27 and 28 of Foreign Exchange and Foreign Trade Law (Law No.228 of 1949), as amended in October 2017.”

Annex: The Foreign Exchange and Foreign Trade Law (Extract, tentative translation)¹

Chapter 5 Inward Direct Investment, etc.

(Definition)

Article 26 (3) The term “specified acquisition” shall mean an acquisition through transfer of shares issued by non-listed companies from a foreign investor.

(Notification of Specified Acquisition and Recommendation of a Change, etc.)

Article 28 (1) When a foreign investor intends to make a specified acquisition (excluding those specified by Cabinet Order by taking into consideration inheritance, testamentary gift, merger of juridical persons or other circumstances; hereinafter the same shall apply in this article) specified by Cabinet Order as being likely to fall under specified acquisition, which requires examination pursuant to paragraph 3, he/she shall notify in advance, pursuant to the provisions of Cabinet Order, the Minister of Finance and the

¹ Unofficial translation provided by the Government of Japan.

minister having jurisdiction over the business of the business purpose, amount, time of making the investment and other matters specified by Cabinet Order in regard to the specified acquisition.

(2) A foreign investor who has given notification pursuant to the provision of the preceding paragraph in regard to specified acquisition shall not make a specified acquisition pertaining to the notification until the expiration of 30 days from the day of acceptance of the notification by the Minister of Finance and the minister having jurisdiction over the business; provided, however, that when the Minister of Finance and the minister having jurisdiction over the business find, before the expiration of the period, based on the business purpose or other matters, that specified acquisition pertaining to the notification does not fall under specified acquisition that requires examination pursuant to the provision of the next paragraph, he/she may shorten the period.

(3) Where the Minister of Finance and the minister having jurisdiction over the business have received a notification pursuant to the provision of paragraph 1, when he/she finds it necessary to examine whether or not specified acquisition pertaining to the notification falls under specified acquisition which is highly likely to cause that national security is impaired (limited to specified acquisition which is made by a foreign investor of a member state of a multilateral treaty or other international agreement on specified acquisition which is specified by Cabinet Order and to which Japan has acceded (hereinafter referred to as "Treaty, etc." in this paragraph), and which is free from the obligations pursuant to the Treaty, etc. in regard to removal of restrictions on specified acquisition, and specified acquisition made by a foreign investor of a state other than the member states of the Treaty, etc., which would be free from the said obligations if the state was a member state of the Treaty, etc. (referred to as "Specified Acquisition Pertaining to National Security" in paragraphs 4, 5, and paragraph 1 and 2 of the next article)), he/she may extend the period in which specified acquisition pertaining to the notification is prohibited up to four months from the acceptance of the notification.

(4) Where the Minister of Finance and the minister having jurisdiction over the business have extended the period in which specified acquisition is prohibited pursuant to the provision of the preceding paragraph, when he/she finds, before the expiration of the extended period, through examination pursuant to the provision of the said paragraph that specified acquisition pertaining to a notification pursuant to the provision of paragraph 1 will not fall under the Specified Acquisition Pertaining to National Security, he/she may shorten the extended period.

(5) Where the Minister of Finance and the minister having jurisdiction over the business have extended the period in which specified acquisition is prohibited pursuant to the provision of paragraph 3, when he/she finds through examination pursuant to the said provision that specified acquisition pertaining to a notification pursuant to the provision of paragraph 1 falls under Specified Acquisition Pertaining to National Security, he/she may recommend a person who has given notification of the specified acquisition to change the content pertaining to specified acquisition or discontinue the specified acquisition pursuant to the provisions of Cabinet Order after hearing opinions of the Council on Customs, Tariff, Foreign Exchange and other Transactions; provided, however, the period for making the recommendation of the change or discontinuance shall be up to the expiration date of the period extended pursuant to the provision of paragraph 3 or 6, counting from the day of acceptance of the notification.

(6) Where the Minister of Finance and the minister having jurisdiction over the business hear the opinions of the Council on Customs, Tariff, Foreign Exchange and

other Transactions pursuant to the provision of the preceding paragraph, if the Council on Customs, Tariff, Foreign Exchange and other Transactions replied that it was difficult to state its opinions within a period of four months prescribed in paragraph 3 by taking into consideration the character of the case, the period in which specified acquisition is prohibited prescribed in the said paragraph shall be five months, notwithstanding the provision of the said paragraph.

(7) The provisions of paragraphs 7 to 12 inclusive of the preceding article shall apply mutatis mutandis to cases where a recommendation pursuant to the provision of paragraph 5 has been made. In this case, necessary technical replacements shall be specified by Cabinet Order.

(8) With regard to those equivalent to specified acquisition made by a person who is not a foreign investor (including juridical persons and other organizations) on behalf of a foreign investor not under the name of the foreign investor, the provisions of the preceding respective paragraphs and the next article shall apply, deeming the person who is not a foreign investor as a foreign investor.

(Order for Measures)

Article 29 (1) In the following cases, when the Minister of Finance and the minister having jurisdiction over the business finds that the inward direct investment, etc. or the specified acquisition falls under inward direct investment, etc. listed in Article 27, paragraph 3, item 1 (limited to specified acquisition which is likely to cause that national security is impaired (hereinafter referred to as the " Inward Direct Investment, etc. Pertaining to National Security" in this article),) or Specified Acquisition Pertaining to National Security, he/she may order the foreign investor who has made the inward direct investment, etc. or the specified acquisition to dispose of all or some of shares or equity acquired by the inward direct investment, etc. or the specified acquisition or to take other necessary measures pursuant to the provisions of Cabinet Order after hearing opinions of the Council on Customs, Tariff, Foreign Exchange and other Transactions.

- (i) Cases where a foreign investor who shall give notification pursuant to the provision of paragraph 1 of Article 27, or paragraph 1 of the preceding article has made an inward direct investment, etc. or a specified acquisition without giving notification.
- (ii) Cases where a foreign investor who has given notification pursuant to the provision of paragraph 1 of Article 27, or paragraph 1 of the preceding article has made an inward direct investment, etc. or a specified acquisition pertaining to the notification before the expiration of the prohibition period.

(2) Where a foreign investor who has given notification pursuant to the provision of paragraph 1 of Article 27, or paragraph 1 of the preceding article has given a false notification, when the Minister of Finance and the minister having jurisdiction over the business finds that an inward direct investment, etc. or a specified acquisition pertaining to the notification falls under Inward Direct Investment, etc. Pertaining to National Security or Specified Acquisition Pertaining to National Security, he/she may order the foreign investor who has made the inward direct investment, etc. or the specified acquisition to take necessary measures pursuant to the provisions of Cabinet Order after hearing opinions of the Council on Customs, Tariff, Foreign Exchange and other Transactions.

(3) When a foreign investor who has given notification pursuant to the provision of paragraph 1 of Article 27, or paragraph 1 of the preceding article has not complied with a recommendation for changes the contents pertaining to an inward direct investment, etc. or a specified acquisition which has been noticed to comply pursuant to the provision of paragraph 7 of Article 27 (including the cases where it is applied mutatis mutandis pursuant to paragraph 7 of the preceding article), or has violated an order to change the contents pertaining to an inward direct investment, etc. or a specified acquisition pursuant to the provision of paragraph 10 of Article 27 (including the cases where it is applied mutatis mutandis pursuant to paragraph 7 of the preceding article) (for an inward direct investment, limited to the cases that the Minister of Finance and the minister having jurisdiction over the business finds that the inward direct investment, etc. falls under Inward Direct Investment, etc. Pertaining to National Security), he/she may order the foreign investor who has made the inward direct investment, etc. or the specified acquisition to dispose of all or some of shares or equity acquired by the inward direct investment, etc. or the specified acquisition (limited to the part pertaining to the change in the case of recommending change in the number or the amount of shares or equity pertaining to the inward direct investment, etc. or the specified acquisition pursuant to the provision of paragraph 5 of Article 27 or paragraph 5 of the preceding article, or the change in the case of ordering change in the number or the amount of shares or equity pertaining to the inward direct investment, etc. or the specified acquisition pursuant to the provision of paragraph 10 of Article 27 (including the cases where it is applied mutatis mutandis pursuant to paragraph 7 of the preceding article)) or to take other necessary measures pursuant to the provisions of Cabinet Order.

(4) When a foreign investor who has given notification pursuant to the provision of paragraph 1 of Article 27, or paragraph 1 of the preceding article has not complied with a recommendation for discontinuance of an inward direct investment, etc. or a specified acquisition which has been noticed to comply pursuant to the provision of paragraph 7 of Article 27 (including the cases where it is applied mutatis mutandis pursuant to paragraph 7 of the preceding article), or has violated an order to discontinue an inward direct investment, etc. or a specified acquisition pursuant to the provision of paragraph 10 of Article 27 (including the cases where it is applied mutatis mutandis pursuant to paragraph 7 of the preceding article) (for an inward direct investment, limited to the cases that the Minister of Finance and the minister having jurisdiction over the business finds that the inward direct investment, etc. falls under Inward Direct Investment, etc. Pertaining to National Security), he/she may order the foreign investor who has made the inward direct investment, etc. or the specified acquisition to dispose of all or some of shares or equity acquired by the inward direct investment, etc. or the specified acquisition or to take other necessary measures pursuant to the provisions of Cabinet Order.

(5) The “prohibition period” set forth in paragraph 1, item 2 shall mean a period prescribed in the main clause of paragraph 2 of Article 27 (where the period was extended pursuant to the provision of paragraph 3 or 6 of the said article or shortened pursuant to the provision of the proviso of paragraph 2 or paragraph 4 of the said article, the period extended or shortened) or a period prescribed in the main clause of paragraph 2 of the preceding article (where the period was extended pursuant to the provision of paragraph 3 or 6 of the said article or shortened pursuant to the provision of the proviso of paragraph 2 or paragraph 4 of the said article, the period extended or shortened).

Chapter 9 Penal Provisions

Article 70 (1) Any person who falls under any of the following items shall be punished by imprisonment with work for not more than three years or a fine of not more than one million yen, or both; provided, however, that three times the price of the subject matter of the violation exceeds one million yen, a fine shall be not more than three times the price.

(xxii) Any person who has made an inward direct investment, etc. or a specified acquisition failing to give notification pursuant to the provision of Article 27, paragraph 1 or Article 28, paragraph 1 or giving a false notification (including those deemed to be a foreign investor pursuant to the provision of Article 27, paragraph 13 or Article 28, paragraph 8)

(xxiii) Any person who has made an inward direct investment, etc. or a specified acquisition within the prohibition period prescribed in Article 29, paragraph 5 in violation of Article 27, paragraph 2 or Article 28, paragraph 2 (including those deemed to be a foreign investor pursuant to the provision of Article 27, paragraph 13 or Article 28, paragraph 8)

(xxiv) Any person who has made an inward direct investment, etc. or a specified acquisition in violation of Article 27, paragraph 8 (including the cases where it is applied mutatis mutandis pursuant to Article 28, paragraph 7) (including those deemed to be a foreign investor pursuant to the provision of Article 27, paragraph 13 or Article 28, paragraph 8)

(xxv) Any person who has made an inward direct investment, etc. or a specified acquisition in violation of an order of change or discontinuance pursuant to the provision of Article 27, paragraph 10 (including the cases where it is applied mutatis mutandis pursuant to Article 28, paragraph 7) (including those deemed to be a foreign investor pursuant to the provision of Article 27, paragraph 13 or Article 28, paragraph 8)

(xxvi) Any person who has violated an order pursuant to the provision of paragraph 1 to 4 inclusive of Article 29 (including those deemed to be a foreign investor pursuant to the provision of Article 27, paragraph 13 or Article 28, paragraph 8)

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