

## Investments in Germany: New Restrictions for Foreign Investors Franz-Joerg Semler<sup>1</sup>

### 1. Overview

Traditionally Germany has an open policy on foreign investment. To date there have only been very few limitations concerning undertakings which manufacture certain armaments and weapons or cryptographic systems for conveying national classified matters<sup>2</sup> as well as undertakings that operate high grade remote earth sensing systems<sup>3</sup>.

However, on 24 April 2009 certain amendments to the Aussenwirtschaftsgesetz (AWG) and the Aussenwirtschaftsverordnung (AWV) have come into force.<sup>4</sup> The amendments expand the possibilities of monitoring and potentially prohibiting foreign investments in Germany. In the future it will be possible to prohibit non-resident investors (see details infra no 2) from acquiring directly or indirectly a German enterprise or from acquiring directly or indirectly more than 25% of the voting rights in a German company (hereinafter "relevant participation") if the acquisition could "endanger the public policy or security of the Federal Republic of Germany"<sup>5</sup>.

The term "public policy and security" may seem vague. However, for clarification the act refers to articles 46 and 58 of the Treaty establishing the European Community.<sup>6</sup> Under these provisions it is only permissible for the Member States to limit the rights of free establishment of citizens of another Member State or the free

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<sup>2</sup> The relevant provisions are contained in Sec. 7 (2) no. 5 Aussenwirtschaftsgesetz (AWG) - **Foreign Trade and Payments Act** – and the Aussenwirtschaftsverordnung (AWV) – **Regulation Implementing the Foreign Trade and Payments Act**. The German versions of the act and the regulation are accessible on the website of the Bundesministerium der Justiz - BMJ (Federal Ministry of Justice) - <http://bundesrecht.juris.de/index.html>. Unofficial English translations are accessible on the website of the Bundesamt für Wirtschaft und Ausfuhrkontrolle – BAFA (Federal Office of Economics and Export Control) - [http://www.bafa.de/bafa/en/export\\_control/legislation](http://www.bafa.de/bafa/en/export_control/legislation).

<sup>3</sup> The relevant provisions are contained in the Satellitendatensicherheitsgesetz (SatDSiG) - **Satellite Data Security Act** of 23 November 2007. The German version is available on the website of the Bundesministerium der Justiz, see footnote 2 above. Background information was published by the Bundesministerium für Wirtschaft und Technologie -BMWi (Federal Ministry of Economics and Technology) on 15 April 2008 in English under <http://www.bmwi.de/BMWi/Redaktion/PDF/S-I/satdsig-hintergrund-en,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf>.

<sup>4</sup> Bundesgesetzblatt (Federal Gazette) I 2009, p.770.

<sup>5</sup> Sec.7 (2) no.6 (new) Aussenwirtschaftsgesetz (AWG) - Foreign Trade and Payments Act and almost identically worded Sec. 53 (1) (new) Aussenwirtschaftsverordnung (AWV) - Regulation Implementing the Foreign Trade and Payments Act. The amendments will be incorporated in the sources mentioned supra footnote 2.

<sup>6</sup> Available in all official languages of the European Community under <http://eur-lex.europa.eu>

movement of capital between Member States and between Member States and third states if this is justified "on grounds of public policy or security". The European Court of Justice (ECJ) has defined the term more precisely in numerous decisions. According to the case-law of the European Court of Justice the concept of public policy can only come into play "...where a genuine and sufficiently serious threat affects one of the fundamental interests of society ... (The concept) must ... be narrowly construed"<sup>7</sup>.

The Federal Government states in its explanatory memorandum on the bill that it expects the supervisory power to be utilised in a small number of instances only. It is by no means intended to isolate Germany from foreign investment in a "European Fortress" or even a "German Fortress". The emphasis is on investments in the area of energy supply and strategic telecommunications. However, the act does not contain any explicit limitations with regard to particular business sectors.

## 2. Some relevant details

The changes will affect investors that are not residents of the territory of the European Community or the area of the European Free Trade Association (EFTA)<sup>8</sup>. The new law can thus be of relevance for American, Asian Australian and Russian investors. The terms "residents" and "non-residents" are defined in Sec. 4 (1) no 5 to 8 Aussenwirtschaftsgesetz (AWG).

If a non-resident investor purchases a German enterprise or a relevant participation then the Bundesministerium für Wirtschaft und Technologie - BMWi (Federal Ministry of Economics and Technology - hereinafter "Ministry") can, within three months of the conclusion of the purchase agreement, begin an examination whether the acquisition infringes public policy and security in Germany. It has to notify the investor of its decision to begin the examination. If the Ministry finds that the acquisition infringes public policy and security in Germany, then the Ministry can prohibit the acquisition. However, the Ministry can only render a decision to prohibit the acquisition within two months from the date when it has notified the investor that it will begin the examination. After expiry of that time period the acquisition is deemed cleared. The prohibition requires the consent of the Federal Government<sup>9</sup>. If the acquisition is prohibited the purchase agreement must be

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<sup>7</sup> ECJ 22 December 2008 Case C-161/07 (<http://curia.europa.eu>) par.35.

<sup>8</sup> Sec.7 (2) no. 6 (new) Aussenwirtschaftsgesetz (AWG) – Foreign Trade and Payments Act.

<sup>9</sup> Sec.53 (1); (2) (new) Aussenwirtschaftsverordnung (AWV) – Regulation Implementing the Foreign Trade and Payments Act.

rescinded. Contrary to the procedure in merger control issues, it is not prohibited to put into effect the acquisition before the Ministry has given clearance.

Investors do not have to register the acquisition with the Ministry. The Ministry receives its information from public sources and through notifications from the Bundeskartellamt - BKartA (Federal Cartel Office - FCO) in merger control proceedings. The Bundesanstalt für Finanzdienstleistungsaufsicht - BaFin (Federal Financial Supervisory Authority) also informs the Ministry of knowledge that it gains through reviewing public takeover bids.

Decisions made by the Ministry can be contested before German courts.

The law includes precautionary measures that address circumvention. Under certain conditions several acquisitions of less than 25% held by different investors are attributed to one natural or legal person whereby this person may be deemed to acquire a relevant participation. It would also be fruitless if non-resident investors were to establish an acquisition vehicle with its registered office within the territory of the European Community or the EFTA.

### **3. Clearance and drafting of acquisition agreements**

It is an awkward situation for an investor if his purchase contract is pending for several months before the Ministry makes a decision whether to initiate an examination of the investment, and if it decides to do so, to wait for up to another two months whether the Ministry will in fact prohibit the acquisition. The act therefore allows the investor to apply for an attestation from the Ministry which states that there are no grounds against the investment with regard to public policy<sup>10</sup>. It may be noted that this attestation does not influence the outcome of potential merger control proceedings.

Non-resident investors will be well advised to take into account the uncertainties which result from the new statute when drafting purchase agreements. They will include provisions for reversal of an acquisition in the event that it should be prohibited under the investment control legislation. Similar contractual provisions are common in cases that are subject to merger control where it is possible that the competition authorities will prohibit the acquisition.

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<sup>10</sup> Sec.53 (new) Aussenwirtschaftsverordnung - AWV