



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, 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.