

Germany

Foreign Trade and Payments Ordinance (Außenwirtschaftsverordnung - AWV) (2013)

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Foreign Trade and Payments Ordinance (Außenwirtschaftsverordnung - AWW)

Foreign Trade and Payments Ordinance of 2 August 2013 (Federal Law Gazette [BGBl.] Part I p. 2865), as last amended by Article 1 of the Ordinance of 19 December 2018 (BAnz AT 28.12.2018 V1)

The following Ordinance is enacted on the basis

- of Section 12 subsection 1 sentence 1 in conjunction with Section 3 subsection 3, Section 4 subsection 1 and 3, Section 5, Section 9 sentence 1, Section 11, Section 19 subsection 4 sentence 2 and Section 27 subsection 4 sentence 2 and 3 of the Foreign Trade and Payments Act of 6 June 2013 (Federal Law Gazette I p. 1482), by the Federal Government and

- of Section 12 subsection 1 sentence 2 in conjunction with Section 4 subsection 2 and 3 of the Foreign Trade and Payments Act of 6 June 2013 (Federal Law Gazette I p. 1482) by the Federal Ministry for Economic Affairs and Energy in agreement with the Federal Foreign Office and the Federal Ministry of Finance:

[...]

Chapter 6 Restrictions on movements of capital

[...]

Division 2 Examination of corporate acquisitions

Subdivision 1 Cross-sectoral examination of corporate acquisitions

Section 55 Scope of application of the cross-sectoral examination

(1) The Federal Ministry for Economic Affairs and Energy can investigate whether the acquisition of a domestic company by a non-EU resident or the direct or indirect acquisition within the meaning of Section 56 of a stake in a domestic company by a non-EU resident poses a threat to the public order or security of the Federal Republic of Germany. The acquisition of a domestic company may be deemed a threat to public order or security particularly in cases where this company

1. operates critical infrastructure within the meaning of the Act on the Federal Office for Information Security,

2. in particular develops and modifies software that is used for operating critical infrastructure in specific sectors within the meaning of the Act on the Federal Office for Information Security,

3. has been authorised to carry out organisational measures pursuant to Section 110 of the Telecommunications Act or produces or has produced the technical equipment used for implementing statutory measures to monitor telecommunications and has knowledge about this technology,

4. provides cloud computing services and the infrastructure used for this reaches or exceeds the thresholds set out in Annex 4 Part 3 Number 2 of the Ordinance to Determine Critical Infrastructures pursuant to the Act on the Federal Office for Information Security,
5. holds a licence for providing telematics infrastructure components or services pursuant to Section 291b subsection 1a or 1e of Book V of the Social Code, or
6. is a company of the media industry which contributes to the formation of public opinion via broadcasting, telemedia or printed products and is characterised by particular topicality and breadth of impact.

In sentence 2 no. 2, sector-specific software means

1. in the energy sector: software for controlling power plants, grids or the operation of facilities or systems used to supply electricity, gas, fuel, fuel oil or district heat,
2. in the water sector: software for managing, controlling and automating freshwater supply or waste water facilities,
3. in the information and telecommunications sector: software for operating facilities or systems used in voice and data transmission or in data storage and processing,
4. in the financial and insurance sector: software for operating facilities or systems used in cash supply, card-based payments, conventional transactions, for settling and managing securities and derivative transactions or for providing insurance services,
5. in the healthcare sector: software for operating hospital information systems, for operating facilities and systems used in the selling of prescription drugs and for operating a laboratory information system,
6. in the transport sector: software for operating facilities or systems used in the transport of passengers or goods by air, rail, maritime or inland waterway vessels, road, public transport or in logistics, and
7. in the food industry: software for operating facilities or systems used in supplying food.

(2) Acquisitions by EU residents shall also be subjected to an investigation pursuant to subsection 1 if there are indications that an abusive approach or a transaction circumventing the law has been undertaken, not least partly in order to avoid an investigation pursuant to subsection 1. Indications of an abusive approach within the meaning of sentence 1 shall in particular include cases where the direct acquirer does not maintain any business operations of its own other than the acquisition pursuant to subsection 1 or does not have any permanent establishment of its own including offices, staff and equipment within the European Union. Subsidiaries and permanent establishments of a non-EU acquirer shall not be considered EU-resident subsidiaries or establishments. Acquirers from the Member States of the European Free Trade Association shall be equivalent to EU residents. Establishments operated by the direct acquirers in a Member State of the European Free Trade Association shall be equivalent to establishments operated within the European Union.

(3) The Federal Ministry for Economic Affairs and Energy can exercise the right of investigation pursuant to subsection 1 only if it notifies the direct acquirer and the domestic company affected by the acquisition pursuant to subsection 1 about the opening of the investigation procedure within three months of acquiring knowledge of the conclusion of the contract governed by the law of obligations regarding the acquisition. The information described in sentence 1 needs to be provided in writing. It must be sent to the direct acquirer and the domestic company affected by the acquisition pursuant to subsection 1. The sole criterion as to whether the deadline pursuant to sentence 1 has been met shall be whether the domestic company affected by the acquisition pursuant to subsection 1 has received the notification in time. In cases where an offer within the meaning of the Securities Acquisition and Takeover Act is made, the deadline pursuant to sentence 1 shall commence when knowledge is acquired of the publication of the decision to submit the offer or when knowledge is acquired of the publication of the change of control. No investigation can be opened if more than five years have passed since the conclusion of the contract governed by the law of obligations.

(4) Information about the conclusion of a contract governed by the law of obligations regarding the acquisition of a domestic company within the meaning of subsection 1 sentence 2 or a direct or indirect acquisition of a stake within the meaning of Section 56 of a domestic company within the meaning of subsection 1 sentence 2 by a non-EU resident shall be provided to the Federal Ministry for Economic Affairs and Energy in writing.

Section 56 Voting rights

(1) Following the acquisition, the voting rights of the acquirer of the domestic company must directly or indirectly amount to or exceed

1. 10 percent of the voting rights of a company cited in Section 55 subsection 1 sentence 2,
2. 25 percent of the voting rights of another company.

(2) The calculation of the voting rights must include the voting rights of third parties in the domestic company

1. in which the acquirer holds

a) in a case of subsection 1 number 1 at least the share cited there or

b) in a case of subsection 1 number 2 at least the share cited there

of the voting rights or

2. with which the acquirer has concluded an agreement on the joint exercise of voting rights.

(3) In the case of an indirect investment, the proportion of voting rights of the acquirer in the domestic company shall amount to

1. in a case of subsection 1 number 1 at least the share cited there or

2. in a case of subsection 1 number 2 at least the share cited there,

if the acquirer and the respective intermediate shareholder, the attribution principles pursuant to subsection 2 being applied mutatis mutandis, possess at least the relevant share of voting rights in the respective subsidiary pursuant to number 1 or number 2.

Section 57 Documentation on the acquisition

The direct acquirer shall be required to submit documentation to the Federal Ministry for Economic Affairs and Energy in cases where an investigation pursuant to Section 55 is carried out. The documentation to be submitted shall be determined by the Federal Ministry for Economic Affairs and Energy by way of a general instruction to be published in the Federal Gazette. The Federal Ministry for Economic Affairs and Energy may request all entities directly or indirectly involved in the acquisition pursuant to Section 55 subsection 1 to submit additional documentation needed for carrying out the investigation.

Section 58 Certificate of non-objection

(1) In response to a request in writing, the Federal Ministry for Economic Affairs and Energy shall issue a certificate of non-objection to an acquisition within the meaning of Section 55 if there is no objection to the acquisition in terms of public order or security of the Federal Republic of Germany (certificate of non-objection). The application shall cite the acquisition, the acquirer and the domestic company to be acquired and outline the fields of business in which the acquirer and the domestic company to be acquired are active.

(2) The certificate of non-objection shall be deemed to have been issued if the Federal Ministry for Economic Affairs and Energy does not open an investigation procedure pursuant to Section 55 within two months of receipt of the application. Section 55 subsection 3 sentence 1 and 3 shall be applied to the implementation of the investigation procedure with the proviso that only the applicant pursuant to subsection 1 sentence 1 has to be informed about and served with its opening; Section 55 subsection 3 sentence 4 shall not be applied.

Section 59 Prohibition or instructions

(1) The Federal Ministry for Economic Affairs and Energy can prohibit the direct acquirer from making an acquisition within the meaning of Section 55 until the end of four months after the receipt of the complete set of documents pursuant to Section 57 or issue instructions in order to ensure the public order or security of the Federal Republic of Germany. Approval by the Federal Government shall be necessary for the issuing of prohibitions or orders.

(2) In cases where the Federal Ministry for Economic Affairs and Energy carries out an investigation and for this purpose engages in negotiations with the entities involved in the acquisition about a contractual arrangement meant to guarantee public order and security in the Federal Republic of Germany, the deadline set out in subsection 1 sentence 1 shall be extended by the duration of these negotiations.

(3) In order to enforce a prohibition, the Federal Ministry for Economic Affairs and Energy can in particular

1. prohibit or restrict the exercise of voting rights in the acquired company which belong to a non-EU acquirer or are attributed to him, or
2. appoint a trustee to bring about the unwinding of a completed acquisition at the expense of the acquirer.

Subdivision 2 Sector-specific examination of corporate acquisitions

Section 60 Scope of application of the sector-specific examination

(1) The Federal Ministry for Economic Affairs and Energy can examine whether essential security interests of the Federal Republic of Germany are endangered if a foreigner acquires a domestic company or a direct or indirect participation within the meaning of Section 60a in a domestic company if the company:

1. manufactures or develops goods within the meaning of Part B of the War Weapons List,
2. manufactures or develops specially designed engines or gears to drive battle tanks or other armoured military tracked vehicles,
3. manufactures products with IT security functions to process classified state information or components essential to the IT security function of such products or has manufactured such products and still disposes of the technology if the overall product was licensed with the knowledge of the company by the Federal IT Security Agency,
4. manufactures or develops goods listed under item numbers 0005, 0011, 0014, 0015 or 0017 in Part I Section A of the Export List, or
5. manufactures or develops goods listed under item number 0018 in Part I Section A of the Export List, provided that these are intended to be used in the production of goods within the meaning of no. 4.

Acquisitions by German residents shall also be subjected to an investigation if there are indications that an abusive approach or a transaction circumventing the law has been undertaken, not least partly in order to avoid an investigation pursuant to sentence 1. Indications of an abusive approach within the meaning of sentence 2 in particular include cases where the direct acquirer does not maintain any business operations of its own other than the acquisition pursuant to sentence 1 or does not have any permanent establishment of its own including offices, staff and equipment within Germany.

(2) Branches and permanent establishments of a foreign acquirer shall not be regarded as domestic.

(3) The acquisition must be reported in writing to the Federal Ministry for Economic Affairs and Energy. Section 58 subsection 1 sentence 2 shall apply mutatis mutandis. The report shall cite the acquisition, the acquirer and the domestic company to be acquired and outline the fields of business in which the acquirer and the domestic company to be acquired are active.

Section 60a Voting rights

(1) Following the acquisition, the acquirer of the domestic company must directly or indirectly control 10 per cent or more of the voting rights.

(2) As voting rights are being determined, the voting rights of third parties in the domestic company shall be attributed to the acquirer

1. in which the acquirer holds at least 10 percent of these voting rights, or
2. the acquirer has concluded an agreement on the joint exercise of voting rights.

(3) In the case of an indirect investment, the proportion of voting rights of the acquirer in the domestic company shall amount to at least 10 percent if the acquirer and the respective intermediate shareholder, the attribution principles pursuant to subsection 2 being applied mutatis mutandis, possess at least 10 percent of the voting rights in the respective subsidiary.

Section 61 Clearance of an acquisition pursuant to Section 60

The Federal Ministry for Economic Affairs and Energy shall issue a clearance in writing to the person required to report the acquisition pursuant to Section 60 subsection 3 sentence 3 if there are no objections to the acquisition in terms of essential security interests of the Federal Republic of Germany. The clearance shall be deemed to have been issued if the Federal Ministry for Economic Affairs and Energy does not launch an examination procedure in accordance with Section 60 subsection 1 with regard to the person required to report the acquisition within three months of receipt of the report pursuant to Section 60 subsection 3. In the case of the launch of an examination procedure, Section 57 shall apply mutatis mutandis to the person required to report the acquisition.

Section 62 Prohibition or instructions

(1) The Federal Ministry for Economic Affairs and Energy can prohibit the person required to report the acquisition from making an acquisition within the meaning of Section 60 subsection 1 within three months after the receipt of the complete documents pursuant to Section 57 or issue instructions in order to ensure essential security interests of the Federal Republic of Germany.

(2) In cases where the Federal Ministry for Economic Affairs and Energy carries out an investigation and for this purpose engages in negotiations with the entities involved in the acquisition about a contractual arrangement to guarantee the essential security interests of the Federal Republic of Germany, the deadline set out in subsection 1 sentence 1 shall be extended by the duration of these negotiations.

[...]

Chapter 9 Criminal and administrative offences

[...]

Division 2 Administrative offences

Section 81 Administrative offences - violations of provisions of the Foreign Trade and Payments Ordinance

(1) An administrative offence as defined by Section 19 subsection 3 no. 1 letter a of the Foreign Trade and Payments Act is committed by anyone who intentionally or negligently

(...)

6. violates an enforceable order pursuant to Section 44 subsection 3, Section 59 subsection 1 sentence 1 or subsection 3 no. 1 or Section 62

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