

**Unclassified****English text only****15 October 2019****DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
INVESTMENT COMMITTEE****Investment policy related to national security****Notification by Korea**

24 October 2019

On 25 September 2019, Korea notified the OECD of an investment policy related to national security pursuant to its obligations under the Codes of Liberalisation and the National Treatment instrument. This document reproduces the notification.

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## *Investment policy related to national security Notification by the Republic of Korea*

### **Background and substance**

On 26 January 2012, Article 11.2 of the Act on Prevention of Divulgence and Protection of Industrial Technology entered into force.

The Act on Prevention of Divulgence and Protection of Industrial Technology was enacted to safeguard the national security of the Republic of Korea by protecting its national core technologies, which may have serious consequences for national security when transferred to another country.

Article 11.2 was included to introduce a minimal degree of legal procedures for national security by requiring a prior report made to the Ministry of Trade, Industry and Energy when a foreigner makes an investment into a Korean institution possessing national core technology.

According to this Article, when a foreigner makes an investment, including overseas acquisitions, mergers or joint ventures, into a Korean institution possessing national core technology developed using government subsidies for research and development, the institution shall report in advance to the Minister of Trade, Industry and Energy. The Minister may then conduct a review as to the potential impact that such foreign investment will have on Korea's national security and take measures to safeguard its national security.

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

#### **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:* When a foreigner makes an investment, including overseas acquisitions, mergers or joint ventures, into a Korean institution possessing national core technology, the institution shall report in advance to the Minister of Trade, Industry and Energy. The Minister may take measures to safeguard Korea's national security, such as suspension, prohibition, or restoration to the original state.

*Authority:* Act on Prevention of Divulgence and Protection of Industrial Technology, Article 11.2.

## Annex 1: Article 11.2 of the Act on Prevention of Divulgence and Protection of Industrial Technology

*(unofficial translation)*

### **Article 11-2 (Overseas Acquisition, Merger, etc. of Institutions Possessing Industrial Technology which Possess National Core Technology)**

- (1) Where an institution possessing industrial technology which holds national core technology developed with government subsidies for research and development intends to proceed foreign investment (hereinafter referred to as “overseas acquisition, merger, joint venture, etc.”) of “overseas acquisition, merger, joint venture, etc.” which is determined by Presidential Decree, it shall report in advance to the Minister of Trade, Industry and Energy.
- (2) Where an institution possessing industrial technology under paragraph (1) has noticed that overseas acquisition, merger, etc. is proceeding by foreigners determined by Presidential Decree, it shall immediately report such fact to the Minister of Trade, Industry and Energy.
- (3) Where the Minister of Trade, Industry and Energy deems that the divulgence of national core technology under paragraphs (1) and (2) may seriously affect national security, he/she may, after consulting with the head of the relevant central governmental administrative agency, order institutions possessing industrial technology to take measures, such as suspension, prohibition, restoration to original state, etc. with respect to overseas acquisition, merger, etc. through the deliberation by the Committee.
- (4) When a person who intends to proceed overseas acquisition, merger, etc. under paragraphs (1) and (2) has a question about matters of the following subparagraphs with respect to appropriate overseas acquisition, merger, etc., he/she may request to the Minister of Trade, Industry and Energy to examine in advance, as prescribed by Presidential Decree:
1. Whether the national core technology in question is related to national security;
  2. Whether the overseas acquisition, merger, etc. in question is subject to the reporting of paragraphs (1) and (2);
  3. Other questionable matters with regard to relevant overseas acquisition, merger, etc.
- (5) Where an institution possessing industrial technology which holds national core technology fails to file a report under paragraphs (1) and (2), submits a false or unlawful means of report, and proceed overseas acquisition, merger, etc., the Minister of Trade, Industry and Energy may request an examination to the head of the intelligence and investigation agency, after reporting the outcome of examination to the Committee, order the institution possessing industrial technology to take necessary measures, such as suspension, prohibition, restoration to original state, etc. with respect to overseas acquisition, merger, etc. through the deliberation by the Committee.
- (6) In any of the following cases, the Committee may listen to the opinions of an institution possessing industrial technology:
1. Deliberation on the reporting under paragraphs (1) and (2);
  2. Deliberation on suspension, prohibition, restoration to original state, etc. with respect to overseas acquisition, merger, etc. which seriously affect national security pursuant to paragraph (3);
  3. Deliberation on damage of an institution possessing industrial technology according to measures of paragraph (3);
  4. Deliberation on suspension, prohibition, restoration to original state, etc. of overseas acquisition, merger, etc. with respect to failing to report or false report under paragraph (5).
- (7) The Minister of Trade, Industry and Energy may require specialized committees by area to examine with regard to the reporting pursuant to paragraphs (1) and (2), request necessary cooperation of materials submitted, etc. to the head of a relevant central administrative agency or the head of an institution possessing industrial technology. In such cases, the head of a relative central administrative agency or the head of an institution possessing industrial technology shall cooperate therewith, unless any extenuating circumstances exist. <Amended by Act No. 11690, Mar. 23, 2013>
- (8) Detailed matters on measures, procedures, etc. of the reporting under paragraphs (1) and (2), and suspension, prohibition, restoration to original state, etc. shall be prescribed by Presidential Decree.

## Annex 2: Article 18.2 of the Enforcement Decree of the Act on Prevention of Divulgence and Protection of Industrial Technology

*(unofficial translation)*

**Article 18-2 (Reporting, etc. of Overseas Merger and Acquisition, etc.)** (1) “Foreign investment such as overseas merger and acquisition, joint venture, etc. which is determined by Presidential Decree” referred to in Article 11-2 (1) of the Act means any of the following cases:

1. Where a foreigner, alone or with any of the following persons, holds 50/100 of the stocks or share (including a right to convert into stocks or share or to subscribe for stocks in the future; hereinafter referred to as "stocks, etc.") of an institution possessing industrial technology in possession of any national core technology (hereafter referred to an "institution in possession" in this Article) under Article 11-2 (1) of the Act (including cases of being in possession of less than 50/100 of stocks, etc., but, as a largest holder of stocks, etc., coming to be able to exercise controlling influence over either the appointment of executive officers or management of an institution in possession):
    - (a) The spouse, a blood relative within 8th degree of kinship, or a relative by marriage within 4th degree of kinship of the foreigner;
    - (b) A company in which the foreigner, either unilaterally or by a contract or agreement with a major stockholder or major right holder of share, can exercise controlling influence over major decision-making or business performance, such as organizational transformation or investment in new business;
    - (c) A company in which the foreigner, either unilaterally or by a contract or agreement with a major stockholder or major right holder of share, can appoint and dismiss its representative or appoint at least 50/100 of executive officers;
  2. Where the foreigner intends to manage the institution in possession in a manner of taking over, taking on lease, or being entrusted with the management of, the whole or major part of the business of the institution in possession;
  3. Where the foreigner becomes able to exercise controlling influence over the appointment of a majority or more of executive officers by renting or contributing fund to the institution in possession.
- (2) “Foreigner determined by Presidential Decree” referred to in Article 11-2 (2) of the Act means any of the following persons:
1. An individual who has no nationality of the Republic of Korea;
  2. A corporation established pursuant to the law of a foreign state;
  3. An agency which vicariously conducts external economic cooperation affairs of a foreign government;
  4. An international organization which deals with affairs concerning international finance, such as the International Bank for Reconstruction and Development, the International Finance Corporation, and the Asian Development Bank;
  5. An international organization which deals with or vicariously conducts external investment affairs.
- (3) An institution possessing industrial technology which intends to report an overseas merger and acquisition, etc. pursuant to Article 11-2 (1) and (2) of the Act shall submit such a report on an overseas merger and acquisition, etc. related to any national core technology prescribed by Ordinance of the Ministry of Trade, Industry and Energy, to the Minister of Trade, Industry and Energy, together with the following documents:
1. A contract or written plan relating to the overseas merger and acquisition, etc. (only in case of making a report under Article 11-2 (1) of the Act);
  2. The name, major stockholders status, sales amount, total assets amount and business details of the foreigner who intends to conduct the overseas merger and acquisition, etc.;
  3. Materials concerning the details of the relevant overseas merger and acquisition, etc. and the current status of the related market;
  4. Technical data concerning the purpose and performance of the national core technology;
  5. Materials concerning the conditions and methods for the provision of the national core technology;

6. Materials concerning the market size and the competitiveness level of the related products of the related products using the national core technology.
- (4) Article 16 (2) shall apply mutatis mutandis to the reporting of an overseas merger and acquisition, etc. under paragraph (3).

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