

H. BRÜCHER – D. PULCH

Auslands-Investment-Gesetz

The German Law of Foreign Investment Shares

Deutsch-Englische Textausgabe
Bilingual Edition with Introduction



FRITZ KNAPP VERLAG · FRANKFURT/M.

THE GERMAN LAW CONCERNING THE DISTRIBUTION OF FOREIGN INVESTMENT SHARES

Bilingual Edition with Introduction, Excerpts from
the Governmental Report, Summary of Tax Pro-
visions, and Regulations for filing Registration
Statement

Edited and translated by

DR. HORST BRÜCHER

DIETER PULCH

Attorneys at Law
Frankfurt am Main

FRITZ KNAPP VERLAG



FRANKFURT AM MAIN

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Auslands-Investment-Gesetz

The German Law Concerning the Distribution
of Foreign Investment Shares

AUSLANDS-INVESTMENT-GESETZ

Deutsch-englische Ausgabe mit Auszügen aus der
Regierungsbegründung und mit dem Merkblatt
für Anzeigen nach § 7 des Gesetzes

Herausgegeben und übersetzt von

DR. HORST BRÜCHER

DIETER PULCH

Rechtsanwälte
Frankfurt am Main

FRITZ KNAPP VERLAG



FRANKFURT AM MAIN

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Attorneys at Law
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Introduction

The German Law Concerning the Distribution of Foreign Investment Shares and the Taxation of their Proceeds (Gesetz über den Vertrieb ausländischer Investmentanteile und über die Besteuerung der Erträge aus ausländischen Investmentanteilen) ("the Law") was enacted on July 28, 1969. It was published in the Bundesgesetzblatt I, No. 68 of July 31, 1969 (p. 986). The Law became effective on November 1, 1969. At the same time the Capital Investment Company Law (Gesetz über Kapitalanlagegesellschaften) of 1957 which applies only to German investment companies was amended.

The goal of the Law is to control the "distribution" of foreign investment shares of every kind and legal construction in the Federal Republic of Germany and West Berlin. "Distribution" within the meaning of the Law is every public offering, public solicitation or any similar way of promotion of the sale of foreign investment shares. The trading in foreign investment shares on a German stock exchange and the publications connected therewith and required by the stock exchange are, however, not considered to be a distribution.

The Law does not subject foreign investment companies to the provisions which apply to German investment companies. The Law does not provide for an examination of the good quality of the shares of foreign investment companies. However, a foreign investment company which intends to distribute its shares in the Federal Republic of Germany and West Berlin must register with ("notify") the Federal Supervisory Agency for Banking (Bundesaufsichtsamt für das Kreditwesen) (the "Agency"). The intended activity is lawful if the Agency does not object within two months after receipt of the "notification" (registration statement). The Agency will object when the requirements of the Law are not complied with; it has also the power to prohibit a once permitted distribution if statutory regulations or administrative rules are violated.

The principal provisions and consequences of the Law are:

1. The foreign investment company which distributes its shares need not establish a German subsidiary nor a branch but must appoint a fully qualified representative in Germany whose authority to represent the foreign company in and out of court cannot be restricted. Venue for any litigation between a German investor and a foreign investment company, management company and distribution company is with the court of the representative's domicile.
2. For the custody of the fund's assets, a bank ("bank of deposit") is to be employed. It may be a foreign bank if it offers protection similar to that offered by a German "Depotbank". Several banks of deposit may be admitted if the business requires it and the security of the investors is not thereby impaired.
3. One or more German banks must be appointed as paying agents but payment may also be made to the investment company directly. It must be secured that the payments are immediately transferred to the bank of deposit or to the investors as the case may be.
4. The distribution of foreign investment shares is lawful only if the terms of the contract which govern the legal relationship between the investment company and the investor provide that:
 - a) Shares in the respective amount of the purchase price shall be transferred to the investor immediately after the payment of the price; that is, the investor shall acquire title to the shares,
 - b) the investor can require the payment of that portion of the fund which is allocable to his share; that is, only open end funds are permissible,
 - c) in the case of investment programs a maximum of one third of each of the payments for the first year may be applied to costs, and the remaining costs are evenly apportioned over all subsequent payments,
 - d) shares of other investment companies may not be acquired by the investment company,
 - e) the securities and accounts receivables of the fund may not be pledged nor encumbered in any other way,

f) borrowings on a fund consisting of securities may not be made except in special cases, for a short period and in amounts not exceeding 10 percent of the fund; borrowings on funds consisting of real estate may be made only if this is in line with orderly conduct of business and if the bank of deposit has consented to the terms of the loan,

g) the investment company does not contract short sales.

5. The terms of the contract, a sales prospectus of the foreign investment company and a copy of the purchase application shall be given to the purchaser of foreign investment shares. The prospectus must contain the detailed information specified in the Law; the Agency may require that additional information be included in the prospectus. The application form must contain an indication of any amount payable in addition to the issue price and of the compensation payable annually to the management company.

6. The Agency may prohibit misleading advertising and solicitation methods. If a commitment has been made outside of the offices of the seller or the agent, a private purchaser may rescind his commitment in writing within two weeks. If material statements in the sales prospectus were incorrect or incomplete, the purchaser may require the investment company, the management company or the distribution company to take over the shares and reimburse the purchaser the amount paid. If the respective companies had no knowledge thereof and such lack of knowledge was not due to gross negligence, this right does not exist.

7. The foreign investment company shall publish annually in Germany, in prescribed detail, an accounting report for the end of the fiscal year, a semi-annual report, and daily the prices of issue and redemption of the shares.

8. All publications, advertising and the promotion materials to be given to purchasers must be in the German language or accompanied by a German translation. The German version is controlling.

9. Foreign investment companies which are already distributing their shares in Germany must register with the Agency not later than December 31, 1969, and nominate a representative (no. 1

above) in the registration statement. They are given until April 30, 1970, to comply with the provisions regarding the bank of deposit, paying agent, terms of contract, information of purchasers and publications (nos. 2—8 above). During this time they may continue to distribute, unless the Agency prohibits the distribution.

10. The distribution of foreign investment shares

- a) without prior registration with the Agency or
- b) before two months have expired after the registration statement has been filed or
- c) after the distribution has been prohibited by the Agency

can be punished with a fine of up to Deutsche Mark 50,000.—.

11. A) In the field of taxes, the Law tries to achieve the same treatment for the holders of German investment shares as for the holders of foreign investment shares the distribution of which is permissible under the Law or which are listed on a German stock exchange. For the shareholders of foreign growth funds, this means that the tax advantage they enjoyed in the past over the holders of German investment shares will disappear. On the other hand, shareholders of foreign investment companies will receive the same preferential treatment as the shareholders of German investment companies with regard to the taxation of that part of the dividends which is allocable to capital gains realized by the investment company.

B) If foreign investment companies whose shares are not distributed in Germany in accordance with the Law furnish a detailed accounting of their income and expenses and in addition appoint an agent in Germany to represent them for tax purposes, the taxation of their German shareholders is less advantageous only in respect of that part of the dividends (either actual or constructive) which is the result of capital gains realized by the foreign investment company. Tax exemption for capital gains, realized upon sale of securities by the investment company, even if not distributed, is not granted.

C) For all practical purposes the taxation of the German shareholders is prohibitive if the foreign investment companies do not comply with the requirements mentioned under A) or B) above.

D) It should be noted that the Law affects only the taxation of the German holders of foreign investment shares, but not the taxation of the foreign investment companies. In this connection, the Law states that the activities of a "representative" or of an agent for tax purpose do not by themselves create a "permanent establishment" of the foreign investment company, provided such persons are not engaged in the distribution of the company's shares and do not decide on the investment of the assets of the company.

To prevent misunderstandings it should be emphasized that a (public) distribution of foreign investment shares without prior registration does not only expose the German holders of the same to the described tax disadvantages but likewise exposes all persons engaging in such unlawful distribution to substantial fines (cp. above no. 10).

The Bill, that is, the draft of the Law, was submitted on November 13, 1968, by the Executive Branch (Bundesregierung) to the Parliament (Bundestag) together with a report ("the Report") stating the reasons for the proposed legislation. Since the Agency will take this report into consideration in interpreting the Law, it appeared advisable to supply the reader with a translation of selected portions thereof. Certain passages which have become obsolete because of subsequent changes have been omitted. Certain other portions have been adapted on the basis of later legislative proposals which became part of the Law as enacted.

The portions of the report which deal with the tax provisions have not been translated because they are not sufficiently self-explanatory. Instead a summary of the provisions relating to the taxation of the investor is supplied.

Furthermore, it appeared appropriate to supply the reader with the text and a translation of the guidelines for the registration statement released by the Agency on August 26, 1969.

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