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Foreign Direct Investment Regimes

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Expert Analysis Chapter

Q&A Chapters

Austria

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1 Foreign Investment Policy

1.1 What is the national policy with regard to the review of foreign investments (including transactions) on national security and public order grounds?

In Austria, a new foreign investment screening act (*Investitionskontrollgesetz*) (the "**ICA**") entered into force in July 2020, following the trend across the European Union (the "**EU**") to tighten the regulatory framework for foreign-investment screening. The ICA largely transposes the requirements under the EU foreign investment screening regulation (Regulation (EU) 2019/452) (the "**EU FDI Screening Regulation**"). The rules on the cooperation mechanism, as foreseen in the ICA, entered into force as of 11 October 2020, concurrently with the EU FDI Screening Regulation.

The ICA replaced the previously applicable instrument (under the Foreign Trade Act 2011), which had been of little relevance in practice. The new regime is rigorously enforced. It is generally perceived to have a wide reach.

1.2 Are there any particular strategic considerations that the State will apply during foreign investment reviews? Is there any law or guidance in place that explains the concept of national security and public order?

The Austrian FDI regime employs a security and public order test (Sec 3 of the ICA). It assesses whether the investment leads to a threat to security or public order (including crisis management and services of general interest). The test aligns (largely) with Art 4 of the EU FDI Screening Regulation. In defining the terms of security and public order, the legislative explanatory notes revert to the case law of the Court of Justice of the European Union (the "**CJEU**"). Thus, there needs to be serious threat that affects a fundamental interest of society. Conversely, purely economic reasons (e.g. labour market considerations) cannot justify an intervention.

It is currently not clear whether the threat to security or public order has to be an actual, imminent threat (in accordance with the jurisprudence of the CJEU) or whether a "mere" likelihood to affect security or public order (as provided by the EU FDI Screening Regulation) is sufficient to prohibit the investment.

1.3 Are there any current proposals to change the foreign investment review policy or the current laws?

At present, there are no proposals to change the foreign investment review policy. However, the ICA's applicability for target businesses active in the sector of "research and development in the fields of pharmaceuticals, vaccines, medical devices and personal protective equipment" was initially limited until 31 December 2022 and has been prolonged to 31 December 2023. It cannot be excluded that the legislator will again prolong the applicability of the ICA for investments in this sector.

2 Law and Scope of Application

2.1 What laws apply to the control of foreign investments (including transactions) on grounds of national security and public order? Does the law also extend to domestic-to-domestic transactions? Are there any notable developments in the last year?

The legal basis for foreign-investment screening is laid down in the ICA. In addition, the EU FDI Screening Regulation applies (see questions 1.1 and 1.2). Under the ICA, the enforcement of Austrian foreign-investment screening is entrusted to the Federal Ministry for Labour and Economy (*Bundesministerium für Arbeit und Wirtschaft*) (the "**Authority**").

The screening of the lCA extends only to the review of direct or indirect investments by non-EU, non-EEA and non-Swiss persons and legal entities into domestic undertakings. A domestic-to-domestic transaction is caught if the (domestic) acquirer has a foreign owner(s) (indirect acquisitions).

There were no notable developments of the ICA in the last year. In line with past practice, the Authority continued to rigorously enforce the ICA.

2.2 What kinds of foreign investments, foreign investors and transactions are caught? Is the acquisition of minority interests caught? Is internal re-organisation within a corporate group covered? Does the law extend to asset purchases?

The ICA covers foreign direct investments by a non-EU, non-EEA and non-Swiss person or legal entity.

Foreign direct investments as defined by the ICA include the direct/indirect acquisition of:

(i) an Austrian undertaking (e.g. mergers);
(ii) voting interests in such an undertaking (10%, 25% and 50% of the voting rights – see below) (e.g. share deals);
(iii) a controlling influence over such an undertaking; and
(iv) the acquisition of control over essential assets of such an undertaking (e.g. asset deals).

The Austrian undertaking must be active in one of the security-relevant sectors as defined in the annex (the "**Annex**") to the ICA.

The scope of the ICA extends to minority shareholdings which do not confer control, i.e. the voting share thresholds apply regardless of whether they confer control.

The ICA also captures asset deals. This is defined as taking control over essential assets of an Austrian undertaking. The ICA does not define "essential assets", although it is likely to cover assets that are (*in abstracto*) capable of affecting national security or public order.

An internal re-organisation within a corporate group can be subject to approval under the ICA. There is currently no established practice. An internal re-organisation needs to be assessed on a case-by-case basis.

The Authority takes a very wide-reaching approach when defining jurisdiction. For instance, an activity in a critical infrastructure is legally assumed whenever the Austrian target undertaking is active in the subcategory-sectors that are laid out in the Annex (e.g., health, food, telecommunication, transport, etc.), even if the undertaking does not form part of an infrastructure.

2.3 What are the sectors and activities that are particularly under scrutiny? Are there any sector-specific review mechanisms in place?

The ICA applies to an investment in an undertaking which is active in a sector listed in the Annex. Part 1 of the Annex lists the following particularly sensitive areas. For these areas the (lower) 10% threshold applies. The list is exhaustive:

(i) defence equipment/defence technology;
(ii) critical energy infrastructure;
(iii) critical digital infrastructure (particularly 5G infrastructure);
(iv) water;
(v) systems that enable data sovereignty of the Republic of Austria; and
(vi) research and development in the fields of pharmaceuticals, vaccines, medical devices and personal protective equipment.

Part 2 of the Annex lists other areas which are critical for security and/or public order. These include (other than the above-mentioned) investments in the following non-exhaustive areas:

(i) critical infrastructure such as the sectors of energy, information technology, transport, health, food, telecommunications, etc.;
(ii) critical technologies and dual-use items as defined in Regulation (EC) No 428/2009; included are, in particular, artificial intelligence, robotics, cyber security, quantum and nuclear technology, nano and biotechnology, etc.;
(iii) supply of critical resources, including energy or raw materials, as well as food security, medicines, vaccines, medical devices and personal protective equipment, etc.;
(iv) access to sensitive information, including personal data, or the ability to control such information; and
(v) the freedom and pluralism of the media.

The Annex defines resources (for the purposes of points (i), (ii), and (iii)) as critical, "if they are essential for the maintenance of important social and economic functions, because their disruption, destruction, failure or loss would have serious consequences for the health, safety or economic and social well-being of the population or the effective functioning of government institutions".

As mentioned, the Authority gives the sectoral scope of the ICA a very wide reach, which "detaches" from the above criticality definition. Thus, the ICA captures a significant number of transactions (see question 2.2).

2.4 Are terms such as 'foreign investor' and 'foreign investment' defined in the law?

Foreign investors are defined as: (i) foreign individuals; and (ii) foreign entities (i.e. corporations, trusts, funds or organisations).

Foreign individuals are defined as natural persons without EU citizenship or citizenship of an EEA state or Switzerland.

Foreign entities are defined as legal entities with their registered office or place of central administration outside the EU, EEA and Switzerland.

A foreign investment is defined as the direct or indirect acquisition by a foreign investor of (i) an Austrian undertaking, (ii) voting rights (reaching/exceeding 10%, 25% and 50%) in such an undertaking, (iii) controlling influence over such an undertaking, or (iv) the acquisition of control over essential assets of such an undertaking (asset deals).

Under the voting interest test (share acquisition), reaching or exceeding a shareholding (in terms of voting rights) of 10%, 25% and/or 50% triggers a filing requirement. The 10% threshold applies only to undertakings active in particularly sensitive areas (part 1 of the Annex). An increase of the shareholding does not trigger a filing requirement unless the thresholds are met/exceeded or a controlling influence is obtained. Thus, not every increase of shares is subject to a new approval requirement, but only an increase in which the next higher threshold is reached or exceeded or control is obtained (particularly in listed entities with a broad free float).

2.5 Are there specific rules for certain foreign investors (e.g. non-EU/non-WTO), including state-owned enterprises (SOEs)?

No, there are no specific rules for certain foreign investors. However, the ICA sets out investor-related risk indicators in line with the EU FDI Screening Regulation. Among other factors, it is taken into account for the purposes of the risk assessment whether the foreign investor is directly or indirectly controlled by the government of a third country.

2.6 Is there a local nexus requirement for an acquisition or investment? If so, what is the nature of such requirement (sales, existence of subsidiaries, assets, etc.)?

The ICA has a local nexus requirement, as there needs to be a target undertaking within the target perimeter which has its seat or place of central administration in Austria.

2.7 In cases where local presence is required to trigger the review, are indirect acquisitions of local subsidiaries and/or other assets also caught (e.g. where a parent company is acquired which has a local subsidiary in the jurisdiction)?

Yes, indirect acquisitions of local subsidiaries and/or other assets are caught.

3 Jurisdiction and Procedure

3.1 What conditions must be met for the law to apply? Are there any financial or market share-based thresholds?

A (mandatory) filing requirement is triggered if:

(i) a foreign investor, i.e. a non-EU, non-EEA, non-Swiss individual/entity, intends to carry out an investment (directly/indirectly) in an Austrian undertaking (for more details see above, in particular questions 2.2 and 2.4); and
(ii) the undertaking is active in a sector as defined in the Annex.

No filing is required for investments in micro enterprises, including start-ups, with (a) fewer than 10 employees, and (b) an annual turnover or balance sheet total of less than EUR 2 million.

3.2 Do the relevant authorities have discretion to review transactions that do not meet the prescribed thresholds?

There is no discretion for the Authority to call-in jurisdictions over investments which do not meet the jurisdictional thresholds. *Vice versa*, provided that a target business meets the criteria for a micro enterprise (see question 3.1), the Authority must review the transaction.

3.3 Is there a mandatory notification requirement? Is it possible to make a notification voluntarily? Are there specific notification forms? Are there any filing fees?

The filing is mandatory. The ICA requires a written application to the Authority and lays down the necessary information which needs to be provided. Under the ICA, it is possible to voluntarily file for a binding, non-jurisdiction letter (*Unbedenklichkeitsbescheinigung*). In the current practice, there are no filing fees.

3.4 Is there a 'standstill' provision, prohibiting implementation pending clearance by the authorities? What are the sanctions for breach of the standstill provision? Has this provision been enforced to date?

The ICA foresees a standstill requirement, i.e. prior to or without approval of the Authority the Transaction cannot be closed.

Pre-implementation, i.e. implementation prior to or without approval, is penalised with criminal sanctions (see question 3.8). In addition, investments that close without having the necessary approval are null and void under civil law.

As far as we understand, there has been no criminal enforcement of this provision.

3.5 In the case of transactions, who is responsible for obtaining the necessary approval?

The notification obligation rests with the acquirer. In subsidiarity, the ICA foresees a reporting obligation for the Austrian target undertaking. In addition, the Authority can assume jurisdiction *ex officio* if it becomes aware of an investment that has not been notified.

3.6 Can the parties to the transaction engage in advance consultations with the authorities and ask for formal or informal guidance (e.g. whether a mandatory notification is required, or whether the authority would object to the transaction)?

The ICA foresees the possibility of requesting a (binding) non-jurisdiction letter (*Unbedenklichkeitsbescheinigung*) confirming that an investment is not subject to the approval requirement.

Informal pre-notification consultations are possible but are typically on jurisdictional questions. The Authority is generally well accessible for consultation before and during a FDI notification process. However, consultation is a mere informal instrument and, thus, advice obtained during such consultation is not binding.

3.7 What type of information do parties to a transaction have to provide as part of their notification?

A filing must include: the investor's and target business's contact details; a description of the business activities of the investor and the target business, including a description of the market in which these business activities are carried out; the investor's shareholder/ownership structure; a description of the transaction structure and the shareholder/ownership structure of the target business; an indication of other EU Member States in which the investor and the target business have significant operations; information on the financing of the transaction; and the date on which the investment is intended to be carried out. Furthermore, it must be indicated whether the investment is notifiable under the EU Merger Control Regulation and an authorised recipient must be nominated by the investor. Lastly, it must be indicated whether the investment has an impact on a project or programme of Union interest. In addition, Form B of the EU Cooperation Mechanism must be submitted.

3.8 What are the risks of not notifying? Are there any sanctions for not notifying (fines, criminal liability, invalidity or unwinding of the transaction, etc.) and what is the current practice of the authorities?

Transactions that fall under the FDI rules are subject to a mandatory approval regime. In case of pre-implementation, i.e. implementation prior to or without approval, the transaction is provisionally null and void (*schwebend unwirksam*). Furthermore, in case of pre-implementation, the ICA foresees criminal sanctions including fines and/or a custodial sentence of up to three years, depending on the seriousness of the infringement. Also, in case the reporting duty falls on the target business and no report is made, administrative fines or a custodial sentence of up to six weeks can be imposed on the management of the target business. In addition, criminal fines can be imposed, *inter alia*, under the statute on responsibility of legal entities (*Verbandverantwortlichkeitsgesetz*).

3.9 Is there a filing deadline and what is the timeframe of review in order to obtain approval? Is there a two-stage investigation process for clearance? On what basis will the authorities open a second-stage investigation?

There is no filing deadline, but the ICA requires submission of the notification with undue delay.

The ICA foresees a two-stage process (Phase I and Phase II).

Phase I: The one-month Phase I period starts after an up to 40-day period within which the EU Commission and/or Member States can comment on the transaction (under the EU FDI Screening Regulation).

Phase II: A Phase II review (in case the competent authority has concerns) must be completed within an additional two months upon initiation.

Phase II is an in-depth investigation, which will be initiated if the Authority must examine the impact of a transaction on security or public order in more detail.

The procedural deadlines are maximum deadlines, and the Authority will in principle take a decision without undue delay.

3.10 Can expedition of review be requested and on what basis? How often has expedition been granted?

In cases of exceptional urgency, particularly if a potential threat to security or public order requires immediate action or the process must be carried out quickly for important economic interests, a decision may be issued before expiry of the time limits of the cooperation mechanism.

However, the European Commission and the other Member States must be informed immediately after the exceptional urgency has been granted and the reasons for the urgency must be explained.

As decisions are not published, there are no indications as to whether and how often expedition has been granted.

3.11 Can third parties be involved in the review process? If so, what are the requirements, and do they have any particular rights during the procedure?

Under the ICA, only the investors are considered to be parties to the proceedings. Consequently, the target business has no party status in the review proceedings. Third parties have under the ICA, in principle, no party rights. It has not been tested in practice whether materially affected third parties may intervene in the proceedings.

3.12 What publicity is given to the process and how is commercial information, including business secrets, protected from disclosure?

The Authority does not publish any notifications or decisions, or even the fact that a notification was submitted. Therefore, no commercial information is made public. However, after the notification is filed, the Authority will inform the Austrian target undertaking that a notification was submitted.

Moreover, the ICA requires the Authority to issue an activity report containing aggregated information in the form of anonymised statistical data on the procedures and the cooperation mechanism, as well as on FDI in Austria, in accordance with the relevant provisions of Union law, annually. These annual reports must be submitted to Parliament and be published in a suitable manner, i.e. the homepage of the Authority.

3.13 Are there any other administrative approvals required (cross-sector or sector-specific) for foreign investments?

Apart from the approval under the FDI regime, there are, in principle, no other approvals required that are specifically designed to capture foreign investments. However, irrespective of the acquirer's status, the Austrian legal framework foresees other regulatory approval obligations, such as the approval requirements for merger control and sector-specific ownership control proceedings (e.g. in the telecommunications, banking and insurance sectors).

4 Substantive Assessment

4.1 Which authorities are responsible for conducting the review?

Under the ICA, the enforcement of the Austrian foreign investment screening is entrusted to the Federal Ministry for Labour and Economy (*Bundesministerium für Arbeit und Wirtschaft*). Furthermore, the Committee for Investment Control, a special committee consisting of representatives from several public stakeholders (e.g. ministries), advises the Authority.

A considerable part of the ICA is devoted to the cooperation mechanism for exchanging information and cooperating with the European Commission and other EU Member States under the EU FDI Screening Regulation.

4.2 What is the applicable test and what is the burden of proof and who bears it?

The Authority assesses whether the acquisition leads to a threat to the interests of public order and security which affects societies' fundamental interests, including crisis management and services of general interest. The burden of proof lies with the Authority.

4.3 What are the main evaluation criteria and are there any guidelines available? Do the authorities publish decisions of approval or prohibition?

The substantive assessment aligns with the jurisprudence of the CJEU under Arts 52 and 65 of the Treaty on the Functioning of the European Union (the "**TFEU**").

In line with the EU FDI Screening Regulation, there is a heightened national security risk:

(i) if the foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces, of a third country, including through ownership structure or significant funding;

(ii) if the foreign investor or a natural person with a management function in an acquiring entity has already been involved in activities affecting security or public order in a Member State; and

(iii) if there is a serious risk that the foreign investor or a natural person with a management function in an acquiring entity engages in illegal or criminal activities.

At present, there are no specific guidelines on the substantive assessment. Moreover, the Authority does not publish its decisions.

4.4 In their assessment, do the authorities also take into account activities of foreign (non-local) subsidiaries in their jurisdiction?

So far, there is no practice on this in Austria.

4.5 How much discretion and what powers do the authorities have to approve or reject transactions on national security and public order grounds? Can the authorities impose conditions on approval?

The Authority's discretion is mainly confined by the CJEU's case law, pursuant to which the rejection of a necessary approval is limited to risks of public security and order. The Authority can impose conditions on approval, and did so in two cases in 2021. Possible conditions include (i) site guarantees, (ii) supply guarantees for a certain period of time, (iii) reporting obligations to the Authority, and (iv) ring-fencing of technology (e.g. patents and other intellectual property rights). Statistics for 2022 are not yet available.

4.6 Is it possible to address the authorities' objections to a transaction by the parties providing remedies, such as by way of a mitigation agreement, other undertakings or arrangements? Are such settlement arrangements made public?

After an in-depth investigation, the Authority can grant authorisation subject to condition. Such conditional decisions are not made public.

4.7 Can a decision be challenged or appealed, including by third parties? On what basis can it be challenged? Is the relevant procedure administrative or judicial in character?

The applicant (i.e. the investor) can appeal against the decision to the Federal Administrative Court (*Bundesverwaltungsgericht*) for judicial review. Third parties are generally regarded as not having a party status, and therefore cannot challenge the decision.

4.8 Are there any other relevant considerations? What is the recent enforcement practice of the authorities and have there been any significant cases? Are there any notable trends emerging in the enforcement of the FDI screening regime?

Since the ICA entered into force in late July 2020, it has played a critical role for foreign investments in Austria. The Authority published its activity report for 2021, with aggregated numbers. Based on the report, in the initial year, 70 transactions were notified and in four cases a Phase II in-depth investigation was initiated. To our knowledge, the Authority has not denied approval for any transaction so far. There is no visibility on informal consultations that have been carried out.

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- Law and Scope of Application
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