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Foreign Direct Investment Regimes 2020

A practical cross-border insight into FDI screening regimes

First Edition

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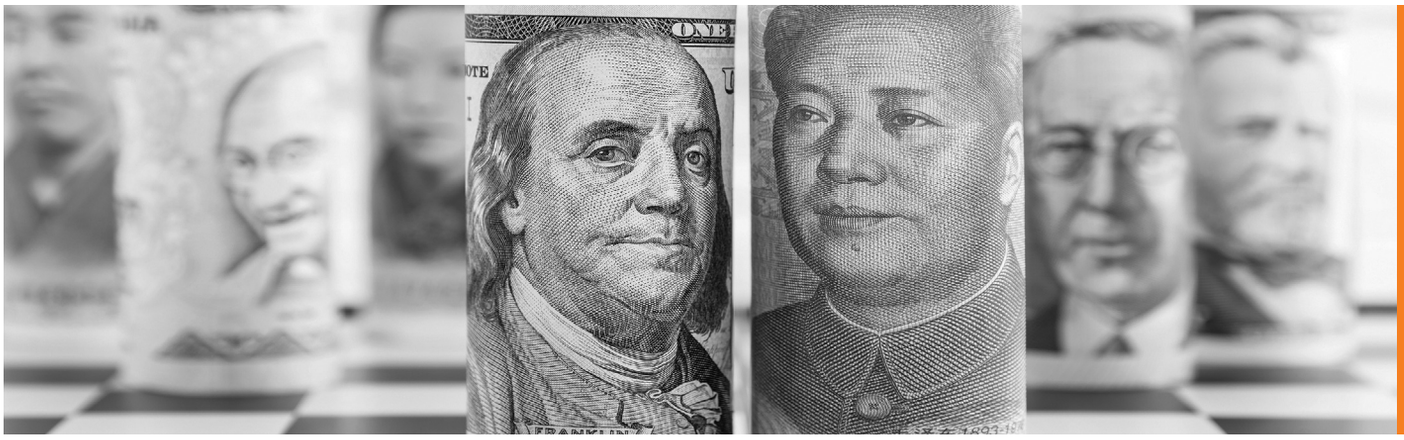

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Expert Chapters

Q&A Chapters

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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 grounds?

Austria introduced foreign investment control in 2011, though the instrument has so far been of little relevance in practice. In May 2019, the (then) Austrian government introduced a draft bill that aimed to step up control of foreign investments. This proposal is currently pending.

1.2 Are there any particular strategic considerations that apply during foreign investment reviews?

See question 1.1 above.

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

As mentioned above, in May 2019, the (then) Austrian government published a draft bill amending the current rules on foreign direct investments ("FDI") into Austria. The bill foresees a number of changes, including (i) the introduction of a new 10% threshold for companies that are mainly active in the high-tech, media and defence sectors, (ii) the creation of a special committee consisting of members from the Ministry of Finance, the Ministry for Digitalisation and Industry Location, the Chancellor's Office and the Ministry of Transportation, (iii) the extension of the notification obligation to the target undertaking, and (iv) the extension of the review period(s) as well as various amendments to align the national FDI regime with the framework set out under the EU foreign investment screening regulation (Regulation (EU) 2019/452) ("EU FDI Screening Regulation").

2 Law and Scope of Application

2.1 What laws apply to the control of foreign investments (including transactions) on grounds of national security?

The legal basis for foreign investment screening is laid down in the Foreign Trade Act 2011 (the "Act") (*Außenwirtschaftsgesetz*). In addition, the EU FDI Screening Regulation applies (see above). Under the current rules, the enforcement of Austrian foreign investment screening is entrusted to the Federal Ministry for Digital and Economic Affairs (*Bundesministeriums für Digitalisierung und Wirtschaftsstandort*) (the "Authority").

2.2 What kinds of foreign investments, foreign investors and transactions are caught? Is the acquisition of minority interests caught?

The Act's scope covers (i) the acquisition of undertakings, (ii) the acquisition of shares in undertakings, and (iii) the acquisition of a controlling influence over undertakings which have a seat in Austria and are active in a sector affecting the public security and/or order, by a non-EU, non-EEA and non-Swiss investor.

The acquisition of a controlling interest is not necessary to trigger the notification obligation. Thus, even a minority shareholding which does not confer control can be subject to investment screening. However, the Act exempts acquisitions of a shareholding conferring voting rights of below 25% (see question 2.4 below).

In addition, the Authority can assume jurisdiction if there are indications that a transaction was structured with the aim of avoiding examination under Austrian FDI rules.

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

Sectors that are under particular scrutiny include:

(i) Sectors concerning internal and external security (non-exhaustive list):
- defence equipment industry; and
- security service providers.

(ii) Sectors concerning public order and security, especially services to the public (non-exhaustive list):
- energy supply;
- water supply;
- telecommunications;
- transport; and
- infrastructure facilities concerning education and training and the healthcare sector.

2.4 How are terms such as 'foreign investor' and 'foreign investment' specifically addressed in the law?

The definition of foreign investor applies to both:

(i) foreign individuals; and

(ii) foreign entities (i.e. corporations, trusts, funds or organisations).

Foreign individuals/entities are defined as non-EU, non-EEA and non-Swiss individuals/entities.

A foreign investment can take the form of any acquisition, whereby the foreign investor acquires (i) an undertaking, (ii) the shares in an undertaking, or (iii) control over an undertaking that is seated in Austria. The relationship between these triggering events, notably the relationship between points (ii) and (iii), is unclear.

The Act exempts acquisitions of a shareholding conferring voting rights of less than 25% from the approval requirement. For determining/quantifying the voting right percentage, the acquirer must be attributed the voting rights of third parties in the undertaking if:

(i) the acquirer holds at least 25% or more of the voting rights of this third party;
(ii) the third party holds at least 25% or more of the voting rights of the acquirer;
(iii) another individual/entity holds 25% or more of the voting rights of this third party and of the acquirer; or
(iv) the acquirer has concluded an agreement with this third party on the joint exercise of voting rights.

2.5 Are there specific rules for certain foreign investors such as state-owned enterprises (SOEs)?

No, there are no specific rules for certain foreign investors.

2.6 Is there a local nexus requirement for an acquisition or investment to fall under the scope of the national security review? If so, what is the nature of such requirement (existence of subsidiaries, assets, etc.)?

The Act has a local nexus requirement, as the target undertaking needs to have a local presence, i.e. a seat in Austria. Moreover, the Act only covers investments in undertakings that are subject to the Austrian accounting rules under the Austrian Commercial Code (*Unternehmensgesetzbuch* – UGB). These include, among others, corporations (*Kapitalgesellschaften*), i.e. stock corporations (*Aktiengesellschaft*) and private limited liability companies (*Gesellschaft mit beschränkter Haftung*), certain partnerships (*eingetragene Erwerbsgesellschaften*) and other undertakings with an annual turnover of more than EUR 700,000.

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?

The rules of the Austrian FDI regime are unclear as to whether indirect investments are also caught. The wording of the Act and its legislative rationale would seem to extend the scope to indirect foreign investments.

3 Jurisdiction and Procedure

3.1 What conditions must be met for the law to apply? Are there any monetary thresholds?

There is no minimum monetary threshold.

Jurisdiction is determined through a four-prong test. A notification obligation is triggered if **(1)** a **foreign investor** (i.e. non-EU, non-EEA, non-Swiss individual/entity, see question 2.4), **(2)** intends to carry out an **investment** (i.e. acquisition of an undertaking, acquisition of shares in an undertaking or acquisition of control over an undertaking, see question 2.2), which is **(3)** active in a **sector affecting the public security and/or order** of Austria (see question 2.3), and **(4)** seated in Austria and subject to the accounting rules of the Austrian Commercial Code (**local nexus**, see question 2.5).

3.2 Is the filing voluntary or mandatory? Are there any filing fees?

The filing is mandatory. There are no specific filing fees applicable under the Act. However, under the general Austrian administrative proceeding rules, the Authority could impose a charge (*Abgabe*) of up to EUR 1,090.

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

The foreign investor and its management (as acquirer) are responsible for obtaining the necessary approval. Under the current rules, the target undertaking/seller is neither obliged to notify the transaction nor required to support the investor.

3.4 Can foreign investors engage in advance consultations with the authorities and ask for formal or informal guidance on the application of the approval procedure?

The rules do not provide for an advance consultation mechanism on a no-name basis or informal statements by the authority, albeit in practice, informal pre-notification/consultation contact does occur. However, the Act foresees a procedure to formally seek a declaration as to whether a specific transaction would fall under the FDI regime and/or is eligible for approval (with/without commitments). Declaratory proceedings can be initiated prior to transaction agreements being signed.

3.5 What type of information do investors have to provide as part of their filing?

The notification needs to be carried out based on a specific form, which includes the investor's and target's contact details as well as the investor's shareholder structure, a brief description of the target and the transaction structure including strategic aspects and arguments as to why the transaction will not jeopardise public order and security. Further, an authorised recipient within Austria needs to be nominated by the investor.

3.6 Are there sanctions for not filing (fines, criminal liability, 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 statutory approval regime. In case of pre-implementation, i.e. implementation prior to or without approval, the transaction is null and void. Further, the management of the investor that would have been responsible for the filing may be subject to criminal sanctions including fines and/or a custodial sentence of up to five years, depending on the seriousness of the infringement.

3.7 What is the timeframe of review in order to obtain approval? Are there any provisions expediting the clearance?

The Authority has to decide within one month of the filing (Phase I) whether to grant authorisation or to initiate a more detailed analysis (Phase II). The transaction is deemed approved in case it does not issue a decision (grant authorisation/initiate Phase II) within one month of the filing. A Phase II review has to be completed within an additional two months.

3.8 Does the review need to be obtained prior to or after closing? In the former case, does the review have a suspensory effect on the closing of the transaction? Are there any penalties if the parties implement the transaction before approval is obtained?

The approval must be obtained prior to closing. Prior to approval, the transaction cannot be implemented (suspensory effect). Transactions that require approval are by law deemed to be concluded with the condition of approval. Pre-implementation, i.e. implementation prior to/without approval, is penalised with criminal sanctions (see question 3.6 above). In addition, transactions that close without having the necessary approval are null and void under civil law.

The Act requires the notification to be carried out prior to signing of the transactional documents/prior to announcing a public takeover. This pre-signing/announcement rule has been criticised as being unworkable in practice and potentially incompatible with takeover laws. Despite this criticism, the pending draft bill does not seek to remedy this requirement.

3.9 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 FDI regime, the review procedure is basically established as a single-party proceeding with no third parties participating in the process. It is unclear whether third parties can intervene (based on the general Austrian administrative procedural rules). So far, there are no such proceedings known to the public.

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

The Authority has to publish decisions (notably approval/prohibition decisions) in an appropriate form. The Act stipulates that the publication should entail: (1) the name of the investor; (2) the name of the target; and (3) whether (a) the transaction was approved, (b) commitments were imposed, (c) the transaction was prohibited, or (d) the filing was rejected for procedural reasons.

The publication should not include any business secrets. If, however, the authority plans to do so, parties may request redaction of the relevant information.

3.11 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 authorisation (e.g. in the telecommunications, banking and insurance sectors).

4 Substantive Assessment

4.1 Which authorities are responsible for conducting the review?

The authority competent to receive notifications and conduct investment reviews is the Federal Ministry of Digital, Business and Enterprises (*Bundesministerium für Digitalisierung und den Wirtschaftsstandort*). The Austrian Federal Minister of Digital, Business and Enterprises is obliged to publish final decisions concerning the review procedure.

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

The Authority assesses whether the acquisition leads to an actual and sufficiently serious threat to the interests of public order and security which affect society's fundamental interests. The burden of proof is with the Authority.

4.3 What are the main evaluation criteria and are there any guidelines available?

There are no specific guidelines available. However, the jurisprudence of the Court of Justice of the European Union (CJEU) concerning Art. 52 and Art. 65 Abs. 1 AEUV (to which the Act explicitly refers) serves as a point of orientation.

Moreover, in line with the EU framework laid down in the EU FDI Screening Regulation, the authority focuses particularly on the following:

(i) whether 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) whether the foreign investor has already been involved in activities affecting security or public order in a Member State; and
(iii) whether there is a serious risk that the foreign investor is or will engage in illegal or criminal activities.

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

In view of the limited role the FDI regime has played so far in Austria, there is no practice on this.

4.5 How much discretion and what powers do the authorities have to approve or reject transactions on national security grounds?

The Authority's discretion is mainly limited by the CJEU's case law, pursuant to which the rejection of a necessary approval is limited to factual risks of public security and order. Only an actual and sufficiently serious danger to a fundamental interest of society would justify a rejection and mere economic reasons would not be sufficient.

4.6 Can a decision be challenged or appealed, including by third parties? Is the relevant procedure administrative or judicial in character?

Decisions can be appealed by the applying investor in an administrative proceeding at the Federal Administrative Court, the Higher Administrative Court and ultimately at the Constitutional Court.

4.7 Is it possible to address the authorities' objections to a transaction by providing remedies, such as undertaking or other arrangements?

Yes, the Authority can grant authorisation subject to remedies or undertakings offered by the acquirer.

4.8 Are there any other relevant considerations? What is the recent enforcement practice of the authorities?

Although Austria's FDI regime has now been in place for more than seven years, only one authorisation has been published on the authority's website. The number of informal consultations that have been carried out is not publicly accessible. In general, it is expected that in case the envisaged amendments to the FDI rules, in particular the lowering of the relevant thresholds, enter into force (see question 1.3), the FDI regime will become are a prominent instrument.

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