International
Comparative
Legal Guides

Foreign Direct Investment Regimes 2021

A practical cross-border insight into FDI screening regimes

Second Edition

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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 ("**ICA**"; *Investitionskontrollgesetz*) entered into force in July 2020, following the trend 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) ("**EU FDI Screening Regulation**"). The cooperation mechanism set out in the ICA has entered into force as of 11 October 2020, concurrently with the EU FDI Screening Regulation, upon which it is based.

The ICA replaced the previously applicable instrument (under the Foreign Trade Act 2011), which had been of little relevance in practice.

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?

Austria has recently stepped up its FDI review policy by introducing the ICA (see question 1.1 above). The ICA aligns the national FDI regime with the framework set out under the EU FDI Screening Regulation. Future changes to the ICA are currently not imminent, but are possible, in particular against the background of the COVID-19 pandemic and the European Commission's ("**Commission**") ambition to further strengthen investment control in the EU.

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? 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 above). Under the ICA, the enforcement of Austrian foreign investment screening is entrusted to the Federal Ministry for Digital and Economic Affairs (*Bundesministerium 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 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;
(ii) voting interests in such an undertaking (10%, 25% and 50 % of the voting rights – see below);
(iii) a controlling influence over such an undertaking; and
(iv) the acquisition of essential assets of such an undertaking.

The Austrian undertaking must be active in one of the security-relevant sectors included in an 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 or not they confer control.

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 (only for these areas the new (lower) 10% threshold applies). The list is exhaustive:

(i) defence equipment/defence technology;
(ii) critical energy infrastructure;
(iii) critical digital infrastructure (in particular 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 purpose 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".

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

Foreign investors are defined as:
(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 is defined as the direct or indirect acquisition by the foreign investor of (i) an Austrian undertaking, (ii) shares (reaching/exceeding 10%, 25% and 50% (voting rights)) in such an undertaking, (iii) controlling influence over such an undertaking, or (iv) the acquisition of essential/all 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. 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.

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. However, the ICA sets out investor-related risk indicators in line with the EU FDI Screening Regulation. In particular, it is taken into account whether the foreign investor is directly or indirectly controlled by the government of a third country, whether the foreign investor has already been involved in activities affecting security or public order in a Member State, or whether there is a serious risk that the foreign investor engages in illegal or criminal activities.

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 ICA has a local nexus requirement, as the target undertaking needs to have its seat or place of central administration in Austria. However, the ICA extends to indirect acquisitions (see question 2.7).

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 ICA clarifies that indirect acquisitions are covered. This closes a loophole under the previously applicable FDI regime.

3 Jurisdiction and Procedure

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

A (mandatory) filing requirement is triggered if:
(i) a foreign investor, i.e. 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 listed in the Annex.

No filing is required for investments in micro enterprises, including start-ups, (A) with fewer than 10 employees, **and** (B) an annual turnover or balance sheet total of less than EUR 2 million. The precise scope of the exemption is not yet certain. In particular, it is unclear whether the exemption thresholds relate only to the Austrian target undertaking or to the potentially wider target group.

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 ICA Act. However, under the general Austrian administrative proceeding rules, the Authority could impose a charge (*Abgabe*) of up to EUR 1,090, while in practice this has not been done yet.

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

While the notification obligation rests primarily with the acquirer, the ICA foresees (in subsidiarity) a reporting obligation for the target company. In addition, the Authority can assume jurisdiction *ex officio* if it becomes aware of a transaction that has not been notified.

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 ICA foresees the possibility of requesting a non-jurisdiction letter (*Unbedenklichkeitsbescheinigung*) confirming that an investment is not subject to the approval requirement. Informal pre-notification contacts are possible.

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

A filing must include the investor(s)'s and target's contact details as well as a description of the business activities of the investor(s) and the target, 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 company, an indication of other EU Member States in which the investor(s) and the target company 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(s). Ultimately, it must be indicated whether the investment has an impact on a project or programme of Union interest.

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 mandatory approval regime. In case of pre-implementation, i.e. implementation prior to or without approval, the transaction is null and void. 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 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 company.

In addition, certain administrative fines can be imposed, *inter alia*, under the statute on responsibility of legal entities (*Verbandverantwortlichkeitsgesetz*).

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

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

Phase I: The one-month Phase I period only 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 Screening Regulation).

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

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

Furthermore, the ICA forsees a fast-track procedure in that in cases of particular urgency the one-month Phase I period can already start after receipt of the complete filing.

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 "immediately" (*unverzüglich*) after signing or, in case of a public offer, immediately after the publication of the decision to submit an offer. There is no filing deadline, but the acquisition cannot be implemented prior to obtaining the approval (suspensory effect). Thus, the approval must be obtained prior to implementation. 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.

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 ICA, only the acquirers are considered to be parties to the proceedings. Consequently, the target company 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.

Further, the new cooperation mechanism established under the framework of the EU FDI Screening Regulation leads to information exchanges and cooperation with the Commission and other EU Member States. In this context, requests for information from the Commission or EU Member States must be answered without delay. In accordance with Art 9 (2) of the EU FDI Screening Regulation, information on the structure of ownership, the value of the transaction, the activities of the target company, etc. must be submitted. Information requests which go beyond the points laid down in the ICA can be answered by the involved parties on a voluntary basis.

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 ICA does not foresee the publication of each approved notification by the Authority.

However, the ICA requires the Authority to issue an activity report annually 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. These (annual) reports must be submitted to the Parliament and be published in a suitable manner, i.e. the homepage of the Authority.

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?

Under the ICA, the enforcement of the Austrian foreign investment screening is entrusted to the Federal Ministry for Digital and Economic Affairs (*Bundesministerium für Digitalisierung und Wirtschaftsstandort*). Furthermore, a special committee ("**Committee**"), consisting of representatives from several Austrian ministries, advises the Authority.

Moreover, a considerable part of the ICA is devoted to the cooperation mechanism for exchanging information and cooperating with the EC and other EU Member States under the EU Screening Regulation. As outlined, the Commission and other

Member States have the right to comment on each Austrian approval application and the Authority must take these decisions into account. However, the final decision lies with the Austrian regulator.

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 affects the societies' fundamental interests, including the provision of basic needs and crisis prevention. The applicable test is aligned with the strict test under the case law of the Court of Justice of the European Union ("**CJEU**"), (as opposed to the more generous wording of the EU FDI Screening Regulation ("*likely to affect security or public order*")).

The burden of proof lies 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 substantive assessment is aligned with the jurisprudence of the CJEU under Arts 52 and 65 TFEU.

In particular (and in accordance with the EU FDI-Screening regulation), threats can arise:

(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.

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 and public order 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 (*Bundesverwaltungsgericht*), the Higher Administrative Court (*Verwaltungsgerichtshof*) and at the Constitutional Court (*Verfassungsgerichtshof*).

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.

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?

Considering that the ICA has entered into force only in late July 2020, there is no (publicly available) enforcement practice so far. Also, the number of informal consultations that have been carried out is not publicly accessible. However, the ICA has considerably extended the scope of the old regime. A broad range of investments will therefore need to undergo a screening process, which will in turn lead to relevant enforcement practice. This is in line with the general trend of FDI screening instruments being tightened/enacted across the EU.

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