

Global Rules on Foreign Direct Investment

Austria

On 25 July 2020, the Austrian Federal Investment Control Act (*Investitionskontrollgesetz – ICA*) came into effect. It significantly expanded the scope of foreign investment screening in Austria. Most cases concern the following sectors: health, data processing or storage and information technology.

FDI Regime

Foreign direct investment (**FDI**) screening in Austria is governed by the Federal Investment Control Act (*Investitionskontrollgesetz*).

The Federal Ministry of Labour and Economy (*Bundesministerium für Arbeit und Wirtschaft – BMAW*) carries out the reviews in consultation with the Federal Ministry for European and International Affairs, the Federal Ministry of Finance, the Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology, the Federal Ministry of Social Affairs, Health, Care and Consumer Protection and – depending on the specific foreign investment – with other federal ministries and the Austrian province (*Bundesland*) in which the target is located.

Internal restructurings are not exempted from the ICA and may therefore be subject to FDI screening (e.g., if a non-EU/non-EEA/non-Swiss group entity becomes a new shareholder). Asset deals are caught by FDI screening if the acquisition concerns an Austrian business (or material assets thereof). On the other hand, acquisitions of an Austrian branch office (*Zweigniederlassung*) are not subject to FDI screening according to the current administrative practice.

Notification Thresholds

The ICA only applies to foreign investors, i.e., to natural persons who are not citizens of, and legal persons which do not have their seat/headquarters in, an EU/EEA member state or Switzerland (**foreign investor**).

The foreign investment must concern the direct or indirect acquisition of

- an Austrian business,
- controlling influence over an Austrian business (or material parts thereof) or an Austrian legal entity, or
- a shareholding with which at least 10 % of the voting rights (if the target is active in a particularly sensitive sector) or 25 % of the voting rights (if the target is active in a "normal" sensitive sector) in an Austrian legal entity is reached or exceeded.

The Austrian target must be active in a sensitive sector. In its Annex, the ICA lists the sectors under scope and distinguishes between particularly sensitive and "normal" sensitive sectors:

Particularly sensitive sectors

The following sectors as set out in Part 1 of the Annex to the ICA (exhaustive list) are considered to be particularly sensitive: defence equipment and technologies; the operation of critical energy infrastructure; the operation of critical digital infrastructure (in particular 5G infrastructure); water; operating systems that guarantee the data sovereignty of the Republic of Austria; research and development in regard to medicinal products, vaccines, medical devices and personal protective equipment.

"Normal" sensitive sectors

Amongst others, the following sectors as set out in Part 2 of the Annex to the ICA (non-exhaustive list) are considered sensitive:

- critical infrastructures (e.g., energy, information technology, health, food, telecommunications, data processing or storage, defence, chemical industry)
- critical technologies and dual-use items (e.g., artificial intelligence, robotics, semiconductors, cyber security, defence technologies)
- security of supply of critical inputs (e.g., energy supply, supply of raw materials, food supply, supply of medicines and vaccines)
- access to or ability to control sensitive information, including personal data
- freedom and pluralism of the media.

The BMAW interprets the scope of sensitive sectors very broadly. In practice, the notion of "critical" does not limit the FDI screening (and the notification obligation) to core sensitive sectors of the economy.

Incremental share acquisitions

Even if the BMAW approves the initial acquisition of voting shares, a later increase of the voting shares will trigger a new notification obligation if the subsequent threshold (25 or 50 percent of the voting rights) is reached or exceeded.

Adding-up rule

Voting rights of foreign investors are added up in certain circumstances (e.g., if a foreign investment involves several foreign investors, if foreign investors are connected undertakings or in case foreign investors agree on the joint exercise of voting rights).

Exemption for micro-enterprises

The notification obligation does not apply to the acquisition of a micro-enterprise (de minimis rule). A micro-enterprise is an enterprise with less than 10 employees and an annual turnover or balance sheet total of less than EUR 2 million.

Review Proceedings

Any transaction for which a mandatory notification is required is subject to a standstill obligation until the BMAW has granted its clearance. A transaction that is implemented prior to clearance (gun

jumping) is provisionally invalid and constitutes a criminal offence, punishable by imprisonment of up to one year (possibly up to three years).

The FDI screening proceedings in Austria are quite lengthy, even in standard cases: Following receipt of the notification, the BMAW kicks off the EU cooperation mechanism (which usually takes 35 calendar days). Only once the EU cooperation mechanism has been completed, the BMAW starts the national phase 1 proceedings (up to one month). Where the BMAW sees concerns as to security or public order (or requires additional time to review the matter), the BMAW will open an in-depth investigation (phase 2 proceedings) which may last up to additional two months. In total, the FDI screening proceedings will take approx. 2.5 – 3 months if the matter can be cleared in phase 1 and approx. 4.5. – 5 months if the matter is pursued to phase 2.

Substantive test

The BMAW examines whether a foreign investment may pose a risk to security or public order. In assessing this risk, the BMAW mainly focuses on the following two factors:

- investor related factors, i.e., 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 an EU member state; or whether there is a serious risk that the foreign investor engages in illegal or criminal activities.
- the effect of the investment in the affected sensitive sector. In this context, the BMAW looks at the nature and scope of the Austrian target's activities, including the products and/or services offered, the position on the market, customers, competitors and substitute products.

In case of a risk to security or public order, the BMAW will approve the transaction only with conditions or, as last resort, will prohibit the transaction altogether.

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