

May 2019

NEW PROVISIONS FOR THE SCREENING OF FOREIGN DIRECT INVESTMENTS IN AUSTRIA

The Austrian Foreign Trade Act (*AußWG 2011*) contains provisions requiring *ex ante* approval for certain foreign direct investments ("FDI") in Austria.

On 7 May 2019, the Ministry of Economic Affairs published a **consultation draft** for amendments to those provisions ("Draft"). The Draft aims to create more transparency and certainty around FDI approval in Austria, and a sharper approval regime for certain transactions (especially pertaining to investors affiliated with governments of non-EU states). In this regard, it also takes into account Regulation (EU) 2019/452 "*establishing a framework for the screening of foreign direct investments into the Union*", which establishes a framework including, *inter alia*, minimum standards and assessment criteria for the screening of FDI in Member States ("Regulation").

DETAILED SPECIFICATION OF "SECURITY OR PUBLIC ORDER"

Essentially, potential "*risks to security or public order*" are decisive for triggering and assessing the FDI approval requirement. Those risks shall now be specified by adding an extensive **list of criteria for their assessment**. The list explicitly refers to potential effects of an investment on

- **critical infrastructure** (physical or virtual) **and technologies**, including, *e.g.*, energy, water, traffic, health, communications, aerospace, media, data processing or storage, artificial intelligence, biotechnologies, etc.;
- **supply of critical resources**, including energy, material and food security;
- access to sensitive information including **personal data**, or the ability to control such information; or
- the **freedom and pluralism of the media**.

As part of its assessment of any related risk, the authority shall consider previous activities of the foreign investor affecting security or public order, as well as potential engagements in illegal activities and affiliations with governments of non-EU states.

PARTIALLY REDUCED MINIMUM THRESHOLD FOR VOTING RIGHTS

Generally, the **25 percent** threshold (in respect of voting rights) continues to apply. For companies operating in certain business sectors being particularly important for security or public order, the **minimum threshold** of voting rights triggering the FDI approval requirement shall be reduced to **10 percent**. This applies, *inter alia*, to companies that

- operate **critical infrastructure** in the field of **information technology** or develop **software** in this regard;
- are entrusted with organizational measures in the **telecommunications sector** or produce certain equipment in this regard;
- provide **cloud computing** services;
- belong to the **media industry** and contribute to the formation of public opinion through broadcasting for television and radio or in print; or
- produce certain products used for **military defense**.

AUSTRIAN TARGETS (ALSO) OBLIGED TO OBTAIN FDI APPROVAL

In case an FDI approval is required, **both the investor** and (unlike today) **the Austrian target company** shall be **obliged to obtain such FDI approval** prior to the investment. Non-compliance with this obligation may trigger **criminal penalties**, unless an FDI approval is granted to either one or both of them.

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For more information about our services, please contact:



Kurt Retter

Partner

kurt.retter@wolftheiss.com

T: +43 1 51510 5240



Dominik Engel

Associate

dominik.engel@wolftheiss.com

T: +43 1 51510 5248

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WOLF THEISS
Schubertring 6AT – 1010 Vienna
www.wolftheiss.com