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THE NEW AUSTRIAN INVESTMENT CONTROL ACT: A Practical Assessment

In mid-July, the Austrian legislature passed a new **Investment Control Act – ICA** (*Investitionskontrollgesetz – InvKG*) as proposed by the Austrian Federal Government. It is expected to enter into force and apply shortly after being signed by the Federal President and the Federal Chancellor and its publication in the Official Gazette (*Bundesgesetzblatt – BGBl*).

Essentially, the new act aims at

- **Increasing legal certainty** by further specifying the scope of application and the approval process under the Austrian foreign direct investment (FDI) regime; and
- Enacting rules required to **coordinate** Austrian FDI control proceedings with the European Commission and other Member States as required under the FDI Screening Regulation (*Regulation [EU] 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union*) which will apply from **11 October 2020**.

By way of introducing an approval requirement connected to a statutory condition precedent, the ICA establishes a rigid national foreign direct investment control regime which will affect a broad range of M&A transactions that, directly or indirectly, involve control rights in Austrian companies active in specific industry sectors.

To that end, the ICA sets forth the following:

WHICH TRANSACTIONS ARE SUBJECT TO THE NEW FDI APPROVAL REGIME?

The ICA contains an approval process for foreign direct investments. Transactions subject to the approval requirements are deemed concluded under a **statutory condition precedent** until such approval is being granted.

Relevant types of acquisition include the **direct or indirect acquisition** by one or more foreign persons of:

- an Austrian **undertaking** (under the ICA, including any target having its registered seat or main place of administration in Austria),
- **voting rights** in an Austrian undertaking (provided that the investor acquires **(i)** more than 25 percent or, following the initial investment, more than 50 percent of all the voting rights; or, additionally, **(ii)** in certain sensitive sectors, more than 10 percent of voting rights);
- a **dominant influence** on an Austrian undertaking in whatever form (by applying a substance test modelled after the EU Merger Control Regulation); or
- **an essential part** of the assets of an Austrian undertaking (thus covering asset deals).

For that purpose, **foreign persons** are defined as

- any individual not holding the citizenship of an EU or EEA Member State or Switzerland; or
- any legal entity having its registered seat or main place of administration outside the EU, the EEA and Switzerland.

The following **acquisition structures** therefore fall under the new approval regime:

- the direct acquisition by a foreign person;
- the direct acquisition by an Austrian/EU/EEA person which is in turn controlled by a foreign person (thus resulting in an indirect acquisition by such foreign person); and
- the indirect acquisition by a foreign person based on a change of control on shareholder level, bringing about an indirect change of control in the Austrian target.

The **minimum control thresholds**, which trigger the approval obligation depend on the industry sector in which the target is active:

- The category of **particularly sensitive sectors** subject to the **10, 25 and 50 percent** minimum control thresholds (applying each time one of them is exceeded) is limited to:
 - defense goods and -technologies,
 - operation of critical energy infrastructure,
 - operation of critical digital infrastructure, especially 5G infrastructure,
 - water,
 - operation of systems, which guarantee Austria's sovereignty of data, and
 - research and development in the fields of medicinal products, vaccines, medical devices and personal protective equipment (the 10% threshold for this sector will cease to apply from 1 January 2023).
- The category of **other sectors** subject (only) to the **25 and 50 percent** minimum control thresholds (applying each time one of them is exceeded), is defined more

broadly by reference to transactions in certain industry sectors bringing about potential threats to security or public order as well as to crisis prevention and fundamental public services (*Daseinsvorsorge*). By way of example, the law refers to:

- critical infrastructure (e.g. energy, IT, traffic and transport, health, finance, chemical industry),
- critical technologies and goods with dual use (e.g., AI, robotics, semiconductors, biotechnologies),
- security of supply of critical resources (e.g., energy supply, supply of raw materials, supply of food, supply of vaccines),
- access to sensitive information, and
- freedom and plurality of the media.

Considering the broad definition, we expect that the authority will take a rather wide approach in applying its authority under that provision. Further, the interpretation by the authority will likely also take into account circumstances prevailing from time to time, as it has already done in the face of the currently prevailing Covid-19 pandemic by seeking to expand the scope, arguing that the pandemic has an impact on whether a transaction has an influence on security or public order.

APPROVAL PROCESS

Who has the obligation to file for approval?

Under the ICA, **the investor(s)** – whether directly or indirectly acquiring – are responsible for filing for approval.

However, **if the target company** becomes aware of the intended investment and at the same time is not aware of an application for approval by the investor, it is obliged to immediately notify the competent authority of the proposed transaction.

In such case, the **authority** shall require the investor(s) to file an application within three working days. In case the investor(s) do not comply with this obligation, the competent authority must initiate the approval process *ex officio*.

When does the filing need to be made?

The application for approval must be filed **immediately** after the signing of relevant transaction documentation or, in the case of a public takeover offer, immediately after the announcement of the intention to make such bid.

To which authority does the filing need to be addressed?

The Federal Minister for Digital and Economic Affairs (*Bundesminister/in für Digitalisierung und Wirtschaftsstandort*) is the competent authority to decide upon the approval.

How long does it take to secure an approval?

Standard procedure phase I

The standard procedure kicks off after **(i)** a **complete filing** has been made by the applicant in line with detailed statutory content requirements and **(ii)** with the authority having carried out the **EU cooperation mechanism** under the FDI Screening Regulation.

The latter process may take up to **six weeks** (provided that there are no additional information requests from the EU Commission or Member States, which could extend the process to a maximum of **nine weeks**). The authority has to confirm completion of that process in writing to the applicant(s). Following such notification, the authority must render a decision within **one month** (phase I). Based on the circumstances, the authority may agree to accelerate the process by shortening the one month period, subject to all relevant information having been made available to it in parallel to the pending EU cooperation mechanism.

Summarizing, the phase I proceedings will typically take approximately **two to three months**. They are concluded by

- a formal administrative decision (*Bescheid*) of the authority to **close proceedings** since the transaction (a) does not raise any substantiated concerns in view of security or public order or (b) is required to be permitted under EU or international law; or
- a notification of the initiation of **phase II proceedings** (based on the EU cooperation mechanism or the circumstances of the transaction at hand, the authority may open phase II proceedings without fully exhausting the one month period).

In the absence of such a decision or notification being issued within one month after completion of the EU cooperation mechanism, the transaction will be **considered cleared**, which the authority must confirm in writing upon request.

Standard procedure phase II

Phase II proceedings are intended for an in-depth review of potential effects of the transaction on security and public order and may take up to **two months**. They are concluded by a formal administrative decision (*Bescheid*) of the authority to

- clear the transaction;
- clear the transaction by imposing conditions required to eliminate threats to security and public order; or
- prohibit the transaction in case the imposition of conditions would not be an adequate remedy to eliminate threats to security and public order.

In the absence of such a decision being issued within two months after initiation of phase II proceedings, the transaction will be **considered cleared**, which the authority must confirm in writing upon request.

Fast track procedure

In the exceptional case where the authority considers that security or public order requires immediate action, the authority may issue a decision without having to undergo the EU cooperation mechanism. In that case, phase I shall be concluded within **one month** following the filing of a **complete application**. This procedure will largely apply to distressed transactions where timing is critical.

Non-objection ruling

Any investor or the target company may file an application for issuance of a non-objection ruling in respect of a **specific foreign direct investment transaction**. In that case, the authority must issue such non-objection ruling within **two months** following a complete filing of the application, if the transaction is not subject to the approval requirement. Alternatively, the authority shall issue a notification that the application will be treated as an application for approval; in that case, the procedure will be conducted as set out above.

In the absence of such a decision or notification being issued within two months after filing of the application, the non-objection ruling will be **considered granted**.

The non-objection ruling is not available for the purposes of clarifying whether a certain target company or certain target assets fall within the statutory definition of the relevant industry sectors described above.

APPEAL PROCEEDINGS

Any of the above decisions can be appealed in front of the Federal Administrative Court (*Bundesverwaltungsgericht*) which can either decide the case on its merits or send the case back to the authority. Its decisions can be further appealed to the Highest Administrative Court (*Verwaltungsgericht*) and the Constitutional Court (*Verfassungsgerichtshof*). Such appeals processes may take even years to complete.

SANCTIONS

Due to relevant FDI transactions being deemed concluded under a statutory condition precedent until approval is granted, any such transaction will be deemed **null and void** in the absence of such approval.

The willful implementation of a transaction falling within the scope of the ICA without prior approval by the authority is a criminal offence subject to a **prison sentence** of up to one year; in the case of negligence, a prison sentence of up to **half a year** or a fine of up to 360 daily instalments (the amount of such instalments will vary, depending on the financial status of the individual concerned) may be imposed. The same applies in case of violations of the conditions imposed by the authority in its clearance decision, or if a clearance decision has been secured by false or incomplete statements. Note that such criminal law provisions have **extraterritorial effect**.

In addition, the ICA provides for **administrative penalties** in case of any infringements of the obligation to apply for approval, which will be imposed upon the responsible managers. Accordingly, the penalty for intentional infringement is a fine of up to EUR 40,000 or a prison sentence of up to six weeks. A fine of up to EUR 25,000 applies if the application for approval is omitted negligently.

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For more information about our services, please contact:



Kurt Retter

Partner

kurt.retter@wolftheiss.com

T: +43 1 51510 5240



Horst Ebhardt

Partner

horst.ebhardt@wolftheiss.com

T: +43 1 51510 5100



Florian Kuszner

Partner

florian.kuszner@wolftheiss.com

T: +43 1 51510 5590

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Wolf Theiss
Schubertring 6
AT – 1010 Vienna

www.wolftheiss.com