

Foreign Investment Review 2020

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Lexology Getting The Deal Through is delighted to publish the ninth edition of Foreign Investment Review, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Armenia, Cambodia, Laos, Mexico, Myanmar, New Zealand, Thailand and Vietnam.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Oliver Borgers of McCarthy Tétrault LLP, for his continued assistance with this volume.



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LAW AND POLICY

Policies and practices

- 1 | What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

Austria introduced foreign investment control in 2011, by inserting a new section 25a into the Austrian Foreign Trade Act (FTA). Investments by persons and entities from foreign countries (outside the EU, EEA and Switzerland) that could pose a threat to security or public order became subject to an approval procedure. However, the respective procedure was of very little relevance in practice. In May 2019, the Austrian government proposed certain amendments to this review regime to tighten foreign investment control. The 2019 proposal was never adopted in Parliament, though.

In spring 2020, the (new) Austrian government proposed an entirely new legislative act, repealing the previous regime: the Investment Control Act (ICA) swiftly passed Parliament in July 2020. One reason for the new law was Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investment in the EU (FDI Screening Regulation), which fully applies in all EU member states as of 11 October 2020 and requires a national legal basis for the cooperation and information exchange mechanisms. Additionally, increasing direct investment from third countries, which may pose a threat to security or public order, were perceived to necessitate stricter control of such investments not only in Austria but also in the entire EU.

By contrast, Austria has a fully liberalised foreign exchange regime, laid down in the Foreign Exchange Act. Euros and foreign currencies can be transferred in and out of Austria in unlimited amounts. However, pursuant to Regulation (EU) 2018/1672 on controls on cash entering or leaving the Union, people carrying amounts of cash (currency, bearer-negotiable instruments, commodities used as highly liquid stores of value, prepaid cards) equal or greater than the value of €10,000 have to declare this to the Austrian customs authority when entering or leaving the EU via Austria.

Main laws

- 2 | What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals and investors on the basis of the national interest?

The Investment Control Act regulates acquisitions on the basis of the national interest by requiring ex ante approval for certain foreign direct investments. The general procedural rules governing the review procedure under the Investment Control Act are laid down in the General Administrative Procedures Act. The appeals procedure is set out in the Code of Administrative Court Procedure.

Scope of application

- 3 | Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

A foreign direct investment requires an approval from the Federal Minister for Digital and Economic Affairs (BMDW) under the ICA if all of the following three conditions are met and the de minimis exception does not apply:

- the target undertaking is active in one of the areas listed in the Annex to the ICA (see below), and
- provisions of EU law and international law do not conflict with an approval requirement, and
- one of the following thresholds are met:
 - 1 a share of 25 per cent or 50 per cent of the voting rights is reached or exceeded. If the target undertaking is active in a particularly sensitive area as defined in part 1 of the Annex to the ICA (see below), approval is already required if a share of only 10 per cent of the voting rights is reached or exceeded; or
 - 2 a controlling influence is acquired, regardless of specific voting rates. An acquisition of a controlling influence is the possibility of exercising decisive influence on the activities of the target undertaking by means of rights, contracts or any other means (in particular, but not limited to rights and contracts that confer decisive influence in the sense of the EU Merger Regulation No. 139/2004 on the composition, voting or decisions of the organs of an undertaking); or
 - 3 significant assets of an Austrian undertaking are acquired and such acquisition results in a controlling influence on these parts of the undertaking; or
 - 4 the (entire) undertaking is acquired.

Special rules apply to the calculation of shares of voting rights (the relevant thresholds being set out above, (1)). In the case of an acquisition made jointly by several foreign persons, their combined share of voting rights in the target undertaking is relevant for determining whether the thresholds are met. Furthermore, shares of voting rights in the target undertaking held by the investor have to be aggregated with shares in the target undertaking held by other foreign persons who (1) are affiliated with the investor via a share of voting rights of at least 25/10 per cent (depending on whether the target undertaking is active in an area listed in Part 2 or Part 1 of the Annex to the ICA) or via a relationship of control, or who (2) are obliged by a syndicate agreement to jointly exercise voting rights with the investor. These rules are quite complex and require an assessment on a case-by-case basis.

The incorporation of a new undertaking and the establishment of a new (greenfield) joint venture are not caught by the ICA.

The annex to the ICA provides a list of areas in which there may be a threat to security or public order, including crisis management and services of general interest as defined in articles 52 and 65 Treaty on the Functioning of the European Union (TFEU). A non-exhaustive list of relevant areas figures in part 2 of the annex:

- critical infrastructures (facilities, systems, plants, processes, networks or parts thereof), in particular energy, information technology, traffic and transport, health, food, telecommunications, data processing or storage, defence, constitutional institutions, finance, research facilities, social and distribution systems and the chemical industry, as well as investments in real estate that is crucial for the use of all these critical infrastructures;
- critical technologies and dual-use goods, including artificial intelligence, robotics, semiconductors, cyber security, defence technologies, quantum and nuclear technologies, nanotechnologies and biotechnologies;
- the security of supply with critical resources, including energy, raw materials and food supply as well as the supply of pharmaceuticals and vaccines, medicinal products and personal protective equipment, including research and development in these areas;
- access to sensitive information, including personal data, or the ability to control such information; and
- the freedom and plurality of the media.

The following particularly sensitive areas are exhaustively listed in part 1 of the annex: defence equipment and technologies, the operation of critical energy infrastructure, the operation of critical digital infrastructure (including 5G) and of systems that guarantee Austria's data sovereignty, water as well as research and development in the fields of pharmaceuticals, vaccines, medicinal products and personal protective equipment (the R&D activities are part of this list until 31 December 2022 only).

Definitions

4 | How is a foreign investor or foreign investment defined in the applicable law?

A foreign direct investment is defined as the direct or indirect acquisition of (1) an Austrian undertaking, (2) shares of voting rights in an Austrian undertaking, (3) a controlling influence on an Austrian undertaking or (4) significant parts of an Austrian undertaking, provided that at least one of the acquiring persons is a natural person without citizenship of the European Union (or an EEA state or Switzerland) or a legal entity with its registered office or head office outside the EU, the EEA and Switzerland.

An 'indirect acquisition' means a scenario where the direct transaction is carried out by a person other than the person who thereby gains actual influence on the target undertaking. This must be assessed in the light of the true economic substance of the investment on a case-by-case basis.

Special rules for SOEs and SWFs

5 | Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

The ICA does not contain specific provisions for SOEs or SWFs. However, when assessing whether a direct investment may pose a threat to security or public order, particular consideration must be given to whether the investor is directly or indirectly controlled by a government of a third country (due to the ownership structure or in the form of substantial financial resources, in particular high government subsidies).

Relevant authorities

6 | Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

The Federal Minister for Digital and Economic Affairs (BMDW) is the authority responsible for conducting the review.

A Committee for Investment Control serves as an adviser to the BMDW. The Committee consists of one member each of the BMDW and the Federal Ministries for European and International Affairs, for Finance, for Climate Protection, for Environment, Energy, Mobility, Innovation and Technology, and for Social Affairs, Health, Care and Consumer Protection. In addition, members representing other federal ministries and the federal states are part of the Committee if their areas of activity are affected by a foreign direct investment. Before initiating an in-depth examination procedure and before issuing a decision on the content of the application in the in-depth examination procedure, the BMDW must convene a meeting of the Committee for discussion. However, the Committee's decision recommendations are not binding on the BMDW.

7 | Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

The BMDW's margin of discretion is, furthermore, limited by EU law, especially the FDI Screening Regulation and the provisions regarding the free movement of capital (article 65 TFEU) and the freedom of establishment (article 52 TFEU). Thus, the principle of proportionality as well as the principles of transparency and non-discrimination between third countries have to be observed.

In general, Austrian law requires authorities to provide a particularly comprehensive reasoning for decisions involving the exercise of discretion. Such detailed reasoning, however, might often be missing in the case of approvals under the ICA, since approval does not necessarily require the BMDW to issue a written clearance decision, but can also be granted by way of expiry of the applicable deadlines.

PROCEDURE

Jurisdictional thresholds

8 | What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

A foreign direct investment requires a mandatory application for approval under the ICA if certain conditions are met.

The Investment Control Act (ICA), however, provides for a de minimis exception: Acquisitions of micro-enterprises, including start-ups, with fewer than ten employees and an annual turnover or balance sheet total of less than €2 million are not subject to an approval requirement.

Other elements such as purchase price or enterprise value do not trigger an approval requirement (ie, they are irrelevant for assessing whether the ICA applies).

If potential applicants are not certain whether an approval is required for a particular transaction, they can apply for a certificate of non-objection.

National interest clearance

9 | What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees? Is filing mandatory?

An approval procedure can be initiated in any of the following ways:

- the investor applies for clearance;
- the target undertaking notifies an acquisition;

- the investor applies for a certificate of non-objection and the BMDW determines that no certificate of non-objection can be issued because the transaction is subject to approval; or
- the BMDW initiates the approval procedure ex officio (this is the case if the persons obliged to submit an application do not comply with their obligation to do so within three working days after having been requested to submit an application).

The application or notification is mandatory and must be submitted to the BMDW. No fees or expenses are charged; the applicants have to bear their own expenses.

The application for approval shall contain in particular:

- contact information and a precise description of the business activities of the investor(s) and the target undertaking;
- a description of the market;
- a detailed description of the planned transaction;
- an indication of how it will be financed and the origin of the financing;
- an indication of the persons who ultimately own or control each investor; and
- a statement whether the transaction is also notifiable under the EU Merger Regulation.

10 | Which party is responsible for securing approval?

The obligation to apply for approval is generally incumbent on the direct investor. In the case of an exclusively indirect acquisition, the indirect investor is obliged to apply. The Federal Minister for Digital and Economic Affairs (BMDW) shall inform the Austrian target undertaking of the receipt of an application for approval. Although the target undertaking is not obliged to apply for approval, it is subject to a subsidiary duty of disclosure in the event that it becomes aware of an intended acquisition and has not been informed of an application for approval.

An approval procedure is initiated ex officio if the investor fails to fulfil its obligation to submit an application within three working days of having been requested to do so. If the acquisition process has already been entirely or partially completed, the process may be reversed.

Review process

11 | How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

The proceedings before the BMDW can be divided into two phases.

In phase I, after receipt of an application for approval, the BMDW has to inform the European Commission about the initiation of the review procedure. Both the European Commission and other EU member states may submit comments within 35 days from the date of this information. The decision in phase I is to be delivered within one month after the expiry of the 35-day deadline for submitting comments. If a comment is made by at least one member state, the one-month period starts to run 40 days after the Commission was informed by the BMDW about the initiation of the review procedure. The parties must be notified of the beginning of the one-month period. In cases of particular urgency, a decision may even be adopted before the expiry of the 35/40-day period. Within this time frame, the BMDW can either (1) issue a decision stating that there are no objections to the acquisition because there is no justified suspicion of a threat to security or public order (in this case, the proceedings are terminated and the direct investment can be carried out) or (2) issue a notification that an in-depth investigation procedure (phase II) will be initiated because a more detailed investigation is required. If neither a decision nor a notification is delivered within the one-month period, approval shall be deemed to have been granted.

In phase II, a decision is to be delivered within two months after completion of phase I. After an in-depth review, the BMDW shall (1) approve the transaction if there is no reason to fear a threat to security or public order, or (2) if there is reason to fear that the transaction will pose such a threat, either grant the approval with conditions or obligations necessary to eliminate such threat, or refuse the approval if conditions or obligations are not sufficient to eliminate such threat. Approval shall be deemed to have been granted if no decision is delivered within two months after completion of phase I.

12 | Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

Yes, the review must be completed before closing of the transaction. The investment may not be carried out until approval has been granted either by explicit decision or expiry of the applicable deadlines.

A breach of the standstill obligation is subject to criminal sanctions: imprisonment of up to one year may be imposed if the breach was committed intentionally; imprisonment of up to half a year or a monetary fine may be imposed if the breach was committed negligently.

Furthermore, legal transactions relating to investments that require an approval under the ICA shall be deemed to have been concluded subject to the condition precedent that the approval is granted. If the acquisition process has already been completed in whole or in part and an ex post approval is not possible, the process has to be reversed.

Involvement of authorities

13 | Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

If potential applicants are not certain whether an approval is required for a particular transaction, they can obtain formal guidance from the BMDW by applying for a certificate of non-objection under the ICA. An application for such certificate must include all the information contained in a standard application for approval. If the BMDW determines that a certificate of non-objection cannot be issued because the transaction is subject to approval, no subsequent application for approval is required and the applicant is informed of the initiation of the approval procedure.

It remains to be seen whether the BMDW will be willing to give informal guidance on whether an approval under the ICA is required for a particular transaction. Any sort of pre-filing dialogue is, at least for the time being, not expected, but should be possible at least in more complex cases.

14 | When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

The parties are free to refer to specialists for support of their application for approval. As far as lobbying is involved, the rules of the Austrian lobbying register must be observed.

15 | What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to pre-merger review?

If the transaction has already been entirely or partially completed and it is established during the (subsequent) approval procedure that there is reason to fear a threat to security or public order, the BMDW will impose

subsequent conditions to eliminate this threat. If such conditions are not sufficient, the BMDW will order the reversal of parts of or of the entire transaction.

SUBSTANTIVE ASSESSMENT

Substantive test

16 | What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

A foreign direct investment is examined according to whether it 'may lead to' a threat to security or public order, including crisis precaution and services of general interest as defined by articles 52 and 65 TFEU or whether such a threat 'is to be feared'. This assessment must, on the one hand, include an examination of the effects of the transaction in the areas listed in the annex to the Investment Control Act (ICA). On the other hand, the identity and previous activities of the investor must also be taken into account:

- whether the investor is directly or indirectly controlled by a government of a third country (by virtue of the ownership structure or of substantial financial resources, in particular through high government subsidies);
- whether the acquirer already carries out or has carried out activities that have or have had an impact on security or public order in another EU member state; and
- whether there is a significant risk that the investor is or has been involved in illegal or criminal activities.

The concept of threat to security or public order must be assessed in the light of the European Court of Justice's (ECJ) rulings on article 52 and 65 TFEU. According to the ECJ, a restriction can only be justified if the threat is real and sufficiently serious and affects a fundamental interest of society. Purely economic reasons are not sufficient. The concept of public order encompasses only those elementary, indispensable basic rules that are laid down in the fundamental interests of the civil and political structure of society in a member state. Public security is understood to mean a state of physical and mental non-violence in public, as well as the system of protection against internal and external violence, and to ensure the functioning of the state and its institutions. In a communication of 26 March 2020, however, the European Commission cited financial stability, public health, consumer protection, maintaining the financial equilibrium of the social security system and the achievement of social policy objectives as further possible justifications for national regulations restricting foreign direct investment. The Commission also stressed that, in the case of restrictions on transactions with third country participants, additional justifications are acceptable and the permissible justifications can be interpreted more broadly than in the case of intra-EU restrictions. The ECJ affirmed that public security is affected, for instance, in the event of crises, war or terrorism, when ensuring the availability of the telecommunications network and energy supply with electricity and oil products. Furthermore, military interests and national defence requirements are considered by the ECJ to fall under public security.

The Federal Minister for Digital and Economic Affairs (BMDW) conducts and organises the review procedure and investigates the facts of the case ex officio; the authority determines the course of the approval procedure and the evidence to be taken. The BMDW is not bound by the parties' submissions. However, the parties have an obligation to cooperate with the BMDW.

17 | To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

The foreign direct investment (FDI) Screening Regulation instituted an EU-wide cooperation mechanism between the European Commission and the EU member states and between the member states among themselves, applicable as of 11 October 2020. It is expected that on this basis the cooperation and exchange of information will be enhanced significantly.

Other relevant parties

18 | What other parties may become involved in the review process? What rights and standing do complainants have?

The ICA does not provide for an involvement of third parties in the review process. Persons other than the investors and the target do not have a legal right to be heard by the BMDW (under Austrian law a legal interest is required to obtain the status of a party).

Prohibition and objections to transaction

19 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If the transaction gives reason to fear a threat to security or public order in Austria, approval shall be granted either with conditions or obligations necessary to eliminate such threat or shall be refused if conditions or obligations are not sufficient to eliminate such threat.

20 | Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings or agreeing to other mitigation arrangements?

If the BMDW has initiated phase II-proceedings and is, after an in-depth review of the case, still concerned that the transaction will pose a threat to security or public order, the authority can grant approval subject to conditions or obligations necessary to eliminate such threat. The investor is free to propose remedies already at an earlier stage, but the authority will have to send the case to phase II-review and involve the Committee for Investment Control to issue a decision with conditions or obligations that are binding on the investor.

Challenge and appeal

21 | Can a negative decision be challenged or appealed?

The BMDW's decision can be appealed to the Federal Administrative Court.

Confidential information

22 | What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

As a general rule, officials of the BMDW are, by statutory law, bound to keep secret any confidential information that they obtain in the course of fulfilling their official duties. A breach of this duty may result in disciplinary measures and in criminal liability. The ICA, in addition, provides that members of the Committee for Investment Control as well as experts may not disclose or utilise any official secrets, business or trade secrets (neither during nor after expiry of their function).

However, the BMDW may transmit data on foreign direct investments in Austria to the institutions of the EU and to the national contact points of the other EU member states established in accordance with the FDI Screening Regulation. Such transmission may only take place if:

- 1 it is necessary for the implementation of the cooperation mechanism; and
- 2 the confidential treatment of personal data is guaranteed in compliance with the EU General Data Protection Regulation, Regulation (EU) 2016/679, and the Austrian Data Protection Act.

The BMDW may also process data on foreign direct investments from publicly accessible registers and specialist publications to the extent necessary to determine whether a transaction is subject to an approval requirement, or to prepare its annual activity report. However, the BMDW is not obliged to publish its decisions.

Even the parties' right of access to the BMDW's files can be restricted: Documents may not be inspected if such inspection would cause damage to the legitimate interests of a party or third person or be contrary to public interests. The investors enjoy party status in the proceedings before the BMDW; there are good reasons to argue that the target undertaking also has to be granted the status of a party (it remains to be seen in practice whether this will indeed be the case).

RECENT CASES

Relevant recent case law

- 23 Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

As the Investment Control Act has only recently come into force, there are no (published) decisions yet.

Approvals under the previous regime (section 25a Foreign Trade Act) were granted in two published cases:

- Decision of 4 November 2019: ADX Energy Ltd, Australia, acquired the Exploration & Production business of RAG Exploration & Production GmbH via ADX Vie GmbH, a 100 per cent subsidiary of ADX Energy Ltd. The authority had no objections.
- Decision of 7 July 2020: LLC Gazprom International Projects, Russia, acquired a 50 per cent share in South Stream Austria GmbH. The authority had no objections.

UPDATES & TRENDS

Key developments of the past year

- 24 Are there any developments, emerging trends or hot topics in foreign investment review regulation in your jurisdiction? Are there any current proposed changes in the law or policy that will have an impact on foreign investment and national interest review?

The Investment Control Act (ICA) was passed in July 2020. Thus, there are no legislative changes to be expected in the near future. However, the Federal Minister for Digital and Economic Affairs (BMDW) currently works on a list of FAQs to be published on its website (<https://www.bmdw.gv.at/Themen/Investitionskontrolle.html>). These answers might shed some more light on a couple of issues that leave room for different interpretations. It remains to be seen how much decisions will be taken by the BMDW in the first year of the ICA's existence, and how many of them will also become publicly accessible. The ICA does not require the BMDW to publish its decisions; the BMDW is only bound to provide a yearly report with statistics on different types of decisions.

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