

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
INVESTMENT COMMITTEE**

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Confidential

Measures having a bearing under the OECD Codes of Liberalisation and the National Treatment instrument

(Notification by Austria)

March 2012

Austria, pursuant to its obligations of notification under Article 11 of the OECD Codes of Liberalisation and Article 1 of the Third Revised Decision on National Treatment, has notified the Organisation of the introduction of measures concerning foreign direct investment operations in Austria which may have a bearing on Austria's position under the Code of Liberalisation of Capital Movements and under the National Treatment instrument.

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NOTIFICATION BY THE DELEGATION OF AUSTRIA

1. Austria has endorsed the objectives and principles of the Codes of Liberalisation of Capital Movements and Current Invisible Operations, hereinafter "Codes of Liberalisation". Austria's acceptance of the obligations of the Codes of Liberalisation is subject to reservations, which are listed in [\[C\(2009\)95/ANN1\]](#).

2. Pursuant to the provisions of Article 11(a) "Notification and Information from Members" of the Codes of Liberalisation and Article 1 "Notification" of the Third Revised Decision on National Treatment, the Delegation of Austria wishes to notify the Organisation that:

- Amendments to the Foreign Trade Act of 7. December 2011 were published in the official gazette and are now in force, which has a bearing on Austria's position under the OECD Codes of Liberalisation and under the National Treatment instrument.
- The amendments to the Foreign Trade Act have brought into force a prior authorisation requirement for foreign investors which intend to acquire an interest of 25 percent or more and for the acquisition of a controlling interest in an undertaking which is active in a sector that affects public policy and public security within the meaning of Articles 52 and 65 (1) of the Treaty on the Functioning of the European Union.
- The list of sectors subject to the prior authorisation requirement is provided under § 25a (2) of the Foreign Trade Act, an English translation of which is provided in Annex 1 to this notification.
- The Federal Minister of Economy, Family and Youth is the government body responsible for the granting of such authorisations.
- Authorisation will be granted if the acquisition is no threat to the interests of public policy and public security within the meaning of Articles 52 and 65 (1) of the Treaty on the Functioning of the European Union.
- When the acquisition process is expected to constitute an actual and serious threat to the said interests, authorisation shall be granted subject to conditions necessary to eliminate such threat. It will be refused when conditions to eliminate such threat do not suffice.
- EU, EEA and Swiss nationals are except from the above mentioned prior authorisation requirement.

3. Austria notes that the newly introduced prior approval procedure for foreign investment in specified sectors has a bearing on Austria's obligations under item I/A of the Code of Liberalisation of Capital Movements. Austria wishes to invoke Article 3 Public Order and Security of the OECD Codes to cover such measures.

4. Austria requests that the above noted measure be listed as a measure reported for transparency under the National Treatment instrument. The following text is to be added to the entry for Austria:

“A. Measures Reported for Transparency at the Level of the National Government***I. Measures based on public order and essential security considerations******a. Investment by Established foreign controlled enterprises***

Foreign investors, other than EU, EEA and Swiss nationals, require prior authorisation from the Federal Minister of Economy, Family and Youth to acquire an interest of 25 percent or more and for the acquisition of a controlling interest in an undertaking which is active in a sector that affects public policy and public security within the meaning of Articles 52 and 65 (1) of the Treaty on the Functioning of the European Union. Authorisation will be granted if the acquisition is no threat to the interests of public policy and public security within the meaning of Articles 52 and 65 (1) of the Treaty on the Functioning of the European Union. When the acquisition process is expected to constitute an actual and serious threat to the said interests, authorisation shall be granted subject to conditions necessary to eliminate such threat. It will be refused when conditions to eliminate such threat do not suffice. The following sectors are covered by the prior authorisation requirement:

1. Sectors of Austria's internal and external security, in particular
 - a. defence goods industry,
 - b. security services,
2. Sectors of public policy and public security, including services of public interest and crisis prevention, in particular
 - a. hospitals, ambulance and emergency physician system,
 - b. fire fighting and disaster control,
 - c. energy supply within the meaning of the Electricity Act of 2010 – ElWOG 2010, Federal Law Gazette I no. 110 and the Gas Management Act – GWG, Federal Law Gazette I no. 121/2000,
 - d. water supply within the meaning of the Water Act of 1959 – WRG 1959, Federal Law Gazette no. 215,
 - e. telecommunications within the meaning of the Telecommunications Act of 2003 – TKG 2003, Federal Law Gazette I no. 70/2003,
 - f. transport within the meaning of the Railways Act of 1957 – EisbG, Federal Law Gazette no. 60, the Aviation Act – LFG, Federal Law Gazette no. 253/1957, the Navigation Act – SchFG, Federal Law Gazette I no. 62/1997 and the Federal Roads Act of 1971 – BStG 1971, Federal Law Gazette no. 286,
 - g. universities within the meaning of the University Act of 2002 – UG, Federal Law Gazette I no. 120, universities of applied sciences within the meaning of the Law Governing Studies at Universities of Applied Sciences – FHStG, Federal Law Gazette no. 340/1993, schools within the meaning of the School Organisation Act, Federal Law Gazette no. 242/1962, kindergartens and child care facilities.

Authority: Foreign Trade Act (Außenwirtschaftsgesetz) § 25a, 7. December 2011

ANNEX 1: EXTRACT FROM AUSTRIAN FOREIGN TRADE ACT (AUßENWIRTSCHAFTSGESETZ), SECTION 4: RESTRICTIONS IMPOSED ON INVESTMENT IN UNDERTAKINGS IN THE INTEREST OF PUBLIC SECURITY AND PUBLIC POLICY.

“Authorisation requirements

§ 25a. (1) Except as otherwise provided in Paras (2) through (11) below, the following processes concerning undertakings which are domiciled in Austria shall not be subject to any restrictions:

1. acquisition of the undertaking,
2. acquisition of a stake in such undertaking, or
3. acquisition of a controlling interest in such undertaking.

Undertakings shall be deemed to mean legal entities, partnerships under commercial law or registered partnerships.

(2) Subject to Paras (3), (4) and (11) below, a process as defined in Para (1) above shall require the authorisation of the Federal Minister of Economy, Family and Youth if the undertaking concerned is domiciled in Austria and is subject to the accounting standards of the Third Book of the Austrian Commercial Code UGB, German Imperial Law Gazette p. 219/1897, and is active in a sector that affects public policy and public security within the meaning of Articles 52 and 65 (1) of the Treaty on the Functioning of the European Union. Such sectors shall be:

1. sectors of Austria’s internal and external security, in particular
 - a) defence goods industry,
 - b) security services,
2. sectors of public policy and public security, including services of public interest and crisis prevention, in particular
 - a) hospitals, ambulance and emergency physician system,
 - b) fire fighting and disaster control,
 - c) energy supply within the meaning of the Electricity Act of 2010 – ElWOG 2010, Federal Law Gazette I no. 110 and the Gas Management Act – GWG, Federal Law Gazette I no. 121/2000,
 - d) water supply within the meaning of the Water Act of 1959 – WRG 1959, Federal Law Gazette no. 215,

e) telecommunications within the meaning of the Telecommunications Act of 2003 – TKG 2003, Federal Law Gazette I no. 70/2003,

f) transport within the meaning of the Railways Act of 1957 – EisbG, Federal Law Gazette no. 60, the Aviation Act – LFG, Federal Law Gazette no. 253/1957, the Navigation Act – SchFG, Federal Law Gazette I no. 62/1997 and the Federal Roads Act of 1971 – BStG 1971, Federal Law Gazette no. 286,

g) universities within the meaning of the University Act of 2002 – UG, Federal Law Gazette I no. 120, universities of applied sciences within the meaning of the Law Governing Studies at Universities of Applied Sciences – FHStG, Federal Law Gazette no. 340/1993, schools within the meaning of the School Organisation Act, Federal Law Gazette no. 242/1962, kindergartens and child care facilities.

(3) Authorisation under Para (2) above shall be required only if either:–

1. the buyer of the undertaking, stake or controlling interest is a person or undertaking within the meaning of Section 1 (1) 9 who or which is not a citizen of the European Union or a citizen of the EEC or Switzerland or is domiciled in a third country, provided that such third country is not an EEC member state or Switzerland, or

2. authorisation is required ex officio under Para (11) below.

The process must not be carried out before authorisation is granted.

(4) No authorisation requirement under Para (2) above shall apply to investments in undertakings where the voting right share of the buyer within the meaning of Para (3) 1 is less than 25% after the acquisition of the stake. In computing such voting right share the following shall be added:

1. the shares held by other legal persons or entities in the undertaking to be acquired, provided that the buyer holds 25% or more of the voting rights in such other legal person or entity, and

2. voting rights of other persons or entities within the meaning of Para (3) 1 with whom or which the buyer has entered an agreement on the joint exercise of voting rights.

(5) The acquisition of a controlling interest shall be subject to the authorisation requirement if such controlling interest is acquired by the person or legal entity within the meaning of Para (3) 1 on their own or jointly by several persons or legal entities within the meaning of Para (3) 1.

(6) An application for authorisation shall be submitted by the buyer(s):–

1. prior to entering the contract on the acquisition of the undertaking or stake or prior to entering the legal transactions required for acquiring the controlling interest, or

2. in the event of a public bid prior to the publication of the decision on submitting the bid.

(7) The application for authorisation shall include, in particular:

1. name, address and, if available, telephone number, fax number and e-mail address of the buyer within the meaning of Para (3);

2. name, address and, if available, telephone number, fax number and e-mail address of the undertaking which is to be acquired or invested in;

3. description of the business activities of the undertaking in terms of Para (2) 1 or 2;
4. description of the planned acquisition; and
5. naming of a person authorised to accept service in Austria.

(8) The Federal Minister of Economy, Family and Youth shall give notice in writing within one month of receiving the application that either:–

1. there are no objections to the acquisition because there is no threat to the interests of public policy and public security within the meaning of Articles 52 and 65 (1) of the Treaty on the Functioning of the European Union, or

2. an in-depth investigation procedure is initiated because a more exhaustive examination of the effects on such interests is required.

If no written notice is issued within this period the process shall be deemed to have been authorised.

(9) Within two months of service of the written notice to initiate an investigation procedure within the meaning of Para (8) 2 above, a written notice shall be issued by which:

1. the process shall be authorised if there is no threat to the interests specified in Para (8) 1 above, or

2. when the process is expected to constitute an actual and serious threat to the said interests,

a) authorisation shall be granted subject to conditions necessary to eliminate such threat, or

b) authorisation shall be refused when conditions to eliminate such threat do not suffice.

If no written notice is issued within this period, the process shall be deemed to have been authorised.

(10) Upon application, a confirmation shall be issued concerning the fact that a process is deemed to be authorised by way of the expiry of the period defined in Para (8) or (9) above.

(11) The Federal Minister of Economy, Family and Youth shall be authorised to mandate ex officio, by way of a written notice, an authorisation requirement for the acquisition of, investment in or acquisition of a controlling interest in an undertaking domiciled in Austria by other buyers than those referred to in Para (3) 1 above if:–

1. persons or legal entities within the meaning of Para (3) 1 above hold at least 25% of the voting rights in the buyer or have a controlling influence on the buyer, and

2. there are reasonable grounds for the suspicion that this process is intended to circumvent an authorisation requirement under Para (3) 1 above, and

3. there are reasonable grounds for the suspicion that the process may endanger the interests referred to in Para (8) 1 above.

(12) The procedure pursuant to Para (11) above shall be governed by Paras (8) and (9) above subject to the condition that the two-month period commences as of the date of service of the instruction to obtain authorisation.

(13) The Federal Minister of Economy, Family and Youth shall be authorised to provide, by way of an ordinance, for exemptions from the authorisation requirements for certain types of processes within the meaning of Para (1) above if it is clear from the start that such processes will not constitute any threat to the interests referred to in Para (8) 1 above.