

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

INVESTMENT MEASURE RELATING TO NATIONAL SECURITY

Notification by Austria

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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INVESTMENT MEASURE RELATING TO NATIONAL SECURITY

NOTIFICATION BY AUSTRIA

Following discussions regarding the prior authorisation requirement for some foreign takeover activities as established in § 25a of the Austrian Foreign Trade Act (Außenwirtschaftsgesetz- AußWG) 2011 on the occasion of the OECD Investment Committee last year, Austria has the pleasure to notify the OECD that the Austrian Parliament has adopted the bill regarding amendments to the Austrian Foreign Trade Act of 2011, including a new wording of § 25a.

The amendments were necessary on grounds of legal clarity after several months of practical experience in the implementation of the new provision, an English translation of which is provided in Annex 1 to this notification.

The amendment act was officially made public on 25 February, 2013 and entered into force on 26 February, 2013.

In particular, amendments include the following clarifications and changes:

- (1) Clarification that any authorisation procedure must be compatible with Austria's obligations under European Union and international law;
- (2) Reduction of the list of sectors which clearly affect public policy and public security, such as defence goods industry and security services as well as energy and water supply, telecommunications, transport and infrastructure facilities in the field of education, training and health services;
- (3) Clarification with regard to potential intent of circumvention of an authorisation requirement in the sense that the true economic content and actually achieved influence on the undertaking to be acquired are taken into consideration in evaluating a suspicion of circumvention;
- (4) Inclusion of a specific reference that the Federal Minister of Economy, Family and Youth shall issue a notification in writing within one month of receiving an application in case no authorisation process is commenced because of an international law conflict; if the investor does not receive a written notification within this period, the process shall be deemed to have been authorised;
- (5) Extension of the rules regarding the computing of voting right shares in order to calculate an interest of 25 percent or more as well as clarification what is meant by a controlling interest in an undertaking;
- (6) Publication of the type of decision taken on any application.

In line with its notification in March 2012 [[DAF/INV/RD\(2012\)6](#)], Austria therefore requests to adapt its entry under item I/A of the list of measures reported for transparency under the National Treatment Instrument as follows:

“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 provided that European Union or international law does not conflict with the authorisation obligation.

Authorisation will be granted if the acquisition constitutes 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 stipulations 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, including, without limitations,
 - a. energy supply,
 - b. water supply,
 - c. telecommunications,
 - d. transport, and
 - e. infrastructure facilities in the field of education and training and in the health services.

Authority: Foreign Trade Act (Außenwirtschaftsgesetz) § 25a, 7 December 2011, Amendment act 25 February 2013.

Annex: Austrian Foreign Trade Act (Außenwirtschaftsgesetz), Section 4: Restriction of investments in undertakings in the interest of public policy and public security

Authorisation obligations

§ 25a. (1) Except as otherwise provided in paragraphs (2) through (11), 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 and registered partnerships.

(2) Provided that European Union or international law does not conflict with the authorisation obligation, a process in the sense of paragraph (1) shall require the authorisation by the Federal Minister of Economy, Family and Youth if:

1. the enterprise 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
2. is active in a sector that affects public policy and public security in the sense of Articles 52 and 65 (1) of the TFEU, and
3. the acquisition is made by a natural person who is not a citizen of the European Union or a citizen of the European Economic Area or of Switzerland, or a legal entity or undertaking which is domiciled in a third country with the exception of the European Economic Area and Switzerland.

The process shall not be carried out prior to the issuance of the authorisation.

(3) Sectors in the sense of paragraph (2) 2 shall be:

1. sectors of internal and external security, including, without limitations,
 - a) defence goods industry, and
 - b) security services,
2. sectors of public policy and public security, including services of public interest and crisis prevention, including, without limitations,
 - a) energy supply,
 - b) water supply,
 - c) telecommunications,
 - d) transport, and
 - e) infrastructure facilities in the field of education and training and in the health services.

(4) No authorisation requirement under paragraph (2) shall apply to investments in undertakings where the voting right share of the buyer in the sense of paragraph (2)(3) is less than 25% after the acquisition of the stake. In computing such voting right share, the shares held in the undertaking to be acquired by other persons or undertakings in the sense of paragraph (2)(3) shall be added when they meet at least one of the following prerequisites:

1. the buyer holds 25% or more of the voting rights in such other person or undertaking,
2. such other person or undertaking holds 25% or more of the voting rights in the buyer,
3. another person or undertaking in the sense of Para (2)(3) holds 25% or more of the voting rights in such other person or undertaking as well as in the buyer, or
4. the buyer has entered an agreement with such other person or undertaking on the joint exercise of voting rights.

(5) The acquisition of a controlling interest shall be subject to the authorisation requirement pursuant to paragraph 2 if such controlling interest is exercised by the person or undertaking in the sense of paragraph (2)(3) on their own or jointly by several persons or undertakings of whom or which at least one person or undertaking is a person or undertaking in the sense of paragraph (2)(3). An acquisition in this sense shall be, without limitations:

1. two persons or undertakings in the sense of Para (2)(3) entering an agreement on the joint exercise of voting rights by which they are together entitled to at least 25% of the voting rights; or
2. the termination of an agreement on the joint exercise of voting rights entered with another person or undertaking upon which one person or undertaking in the sense of paragraph (2)(3) is entitled to at least 25% of the voting rights.

In computing the voting right shares pursuant to Items 1 and 2, paragraph (4) shall be applied *mutatis mutandis*.

(6) If an authorisation pursuant to paragraph (2) is required, the buyer(s) shall submit an application for authorisation

1. prior to entering the contract on the acquisition of the undertaking or stake or prior to entering the legal transaction(s) 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, without limitations:

1. name, address and, if available, telephone number, fax number and e-mail address of the buyer in the sense of paragraph (2)(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 paragraph (3)(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 issue a notification in writing within one month of receiving the application that either:

1. no authorisation process is commenced because of conflicting obligations under European Union or international law, or
2. there are no objections to the acquisition because there is no threat to the interests of public policy and public security in the sense of Articles 52 and 65 (1) of the TFEU including services of public interest and crisis prevention, or
3. an in-depth investigation procedure is initiated because a more exhaustive examination of the effects on such interests is required.

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

(9) Within two months of service of the written notification to initiate an investigation procedure in the sense of paragraph (8)(3), a written notification shall be issued by which:

1. the process shall be authorised if there is no threat to the interests specified in paragraph (8)(2), or
2. when the process is expected to constitute an actual and sufficiently serious threat to public policy and public security in the sense of Articles 52 and 65 (1) of the TFEU, including services of public interest and crisis prevention, which affects a basic interest of society:
 - a) authorisation shall be granted subject to stipulations necessary to eliminate such threat, or
 - b) authorisation shall be refused when stipulations to eliminate such threat do not suffice.

If no written notification 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 paragraph (8) or (9).

(11) The Federal Minister of Economy, Family and Youth shall be authorised to mandate *ex officio*, by way of a written notification, an authorisation requirement for the acquisition of, investment in or acquisition of a controlling interest in an undertaking domiciled in Austria if–

1. the process does not meet the requirements pursuant to paragraph (2)(3) and paragraph (4), and
2. there are reasonable grounds for the suspicion that the process is intended to circumvent an authorisation requirement, and
3. there are reasonable grounds for the suspicion that the process may endanger the interests referred to in paragraph (8)(2), and

4. the requirements pursuant to paragraph (2)(1) and (2) are met, and
5. no obligations under European Union or international law conflict with an authorisation process.

The process shall not be carried out prior to the issuance of the authorisation. In evaluating any suspicion of circumvention in the sense of Item 2 above, the true economic content and actually achieved influence on the undertaking to be acquired shall be relevant in terms of an economic consideration.

(12) The procedure pursuant to paragraph (11) shall be governed by paragraphs (9) and (10) subject to the condition that the two-month decision 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 a regulation, for exemptions from the authorisation requirements for certain types of processes in the sense of paragraph (1) if it is clear from the start that such processes will not constitute any threat to the interests referred to in paragraph (8)(2).

(14) The Federal Minister of Economy, Family and Youth shall provide for the suitable publication of decisions pursuant to paragraph (8)(1) or (2), paragraph (9) or paragraph (12) or final decisions based on procedural grounds. Such publication shall state:

1. the buying persons or undertakings,
2. the undertaking to be bought, and
3. whether:
 - a) the process was deemed to be unobjectionable,
 - b) conditions were stipulated,
 - c) the process was not authorised, or
 - d) the application was rejected on procedural grounds.