

CERHA HEMPEL CEE NEWSLETTER

Austria

Investment Control Act in force

When the coronavirus crisis first started, the Austrian Federal Minister of Economic Affairs unveiled details of a new investment control law intended to prevent a "sell-off" of Austrian companies. On 15 July, the Austrian Parliament passed the Investment Control Act (InvKG), which for the most part has already entered into force. It is only the provisions on the cooperation mechanism within the EU that will not take effect until 11 October 2020. However, what changes will the new law introduce and what impact will it have on transactions?

The objectives of the Act

Firstly, the new Investment Control Act will transpose into Austrian law the European Union's Foreign Direct Investments Regulation, which will fully enter into force with effect from 11 October 2020. The implementation of the FDI Regulation will create a mechanism designed to ensure the EU-wide exchange of information and cooperation between the Union and its Member States on foreign direct investments.

Furthermore, it also aims to control or prevent investment from EEA third countries if and to the extent that such investments pose a threat to public order and security. The assessment will especially examine (i) whether the acquirer is (indirectly) controlled by the government, administrative bodies or armed forces of a "foreign" country, (ii) whether the acquirer or a natural person who holds a senior position at the acquirer is or has been involved in activities that negatively affect public security or order in another EU Member State, and (iii) whether there is a significant risk that the acquirer or a natural person who holds a senior position at the acquirer is or has been involved in illegal or criminal activities.

The most significant changes

These objectives are to be achieved by means of the following key elements:

- The InvKG lowers the thresholds for FDI screening. The acquisition of shareholdings of more than 10% in companies that fall within the sectors listed in Annex 1 and the acquisition of shareholdings of more than 25% in companies that fall within the sectors listed in Annex 2 may be subjected to closer examination.
- The InvKG substantially expands the list of areas relevant to security that may pose a threat to public safety and order. Annex 1 to the InvKG contains a second list of highly critical sectors, including defence goods and technologies, the administration of critical energy and digital infrastructure (especially 5G), water, the administration of systems that guarantee the data sovereignty of the Republic of Austria, and R&D related to pharmaceuticals, vaccines, medical products and personal protective equipment ("Annex 1 sectors").
- The list in Annex 2 to the InvKG includes *inter alia* critical infrastructure, energy, information technology, traffic and transport, health, food, telecommunications, data processing and storage, defence, constitutionally protected institutions, finances, R&D facilities, cyber security, quantum and nuclear technologies, nanotechnology, biotechnology, access to sensitive information including personal data, and freedom and plurality of media ("Annex 2 sectors").
- For the purposes of the approval requirement, the main voting rights thresholds are 25% and 50%, or 10, 25% and 50% in areas that are particularly sensitive. The voting rights of several foreign acquirers are decisive here; the

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Austria

transaction must always be viewed from an economic perspective. In other words, the voting rights of foreign parent companies and subsidiaries as well as companies associated through syndication agreements must be aggregated.

- The approval requirement not only covers the direct and indirect acquisition of shares, but also the purchase of individual assets belonging to the company under the terms of an asset deal.
- While the obligation to report is primarily the responsibility of the acquirer, the InvKG (subsidiary) provides for an obligation to report for the target company. In addition, the authority can assume responsibility *ex officio* if it becomes aware of an undeclared transaction that is subject to approval.

The procedure

In the case of foreign investors, this means that they can request a clearance certificate for a direct investment that may be subject to the Investment Control Act. If issued, the transaction does not require approval under the Investment Control Act. In an exception to the obligation to obtain approval, investments in microenterprises are not subject to approval. These are companies with fewer than 10 employees and at least one of the two financial key indicators (annual balance sheet total, annual turnover) does not exceed the threshold of EUR 2 million.

If approval is not granted, an examination procedure is initiated, which is divided into two phases:

Following receipt of the notification, the Government is required to inform the European Commission of the transaction without undue delay. The Commission and Member States then have 35 calendar days to comment on the transaction. If

additional information is submitted, the Commission and Member States have to submit their comments within 20 calendar days of the submission of the additional information. European Commission statements submitted within five calendar days after the expiry of the above-mentioned deadlines are deemed to have arrived prior to expiry of the deadline. Within one month of the expiry of the period for the submission of comments by Member States and the Commission, the Government must either approve the transaction or initiate an in-depth investigation. The opening of an in-depth investigation triggers a further two-month (Phase 2) review period.

The following review periods apply:

Phase 1: up to approx. 2 months.

Phase 2: another 2 months.

Legal consequences

The InvKG provides for imprisonment of up to one year for the implementation of a notifiable transaction without government approval, for a violation of conditions and obligations imposed in the approval decision, as well as for the provision of false or incomplete information. The draft provides for a custodial sentence of up to three years for especially serious violations. Violations resulting from negligence may lead to the imposition of a custodial sentence of up to six months or monetary fines.

The transaction is provisionally suspended until the approval procedure is completed.

In the event that the transaction was carried out without approval, conditions may be imposed until such time as the transaction is reversed if there are reasonable grounds to suspect that public order and security are at risk.

A stylized map of Central Europe in shades of blue, showing countries like Austria, Czech Republic, Slovakia, Hungary, Poland, and others. The map is semi-transparent and serves as a background for the header.

CERHA HEMPEL CEE NEWSLETTER *Austria*

Recent months have seen a tightening of FDI screening rules across the globe. Companies and individuals are therefore advised to assess FDI screening requirements carefully in the context of M&A transactions and to monitor the legal landscape carefully during the ongoing COVID-19 situation and beyond. It should be borne in mind that the new notification requirements apply to ongoing transactions (i.e. any transaction awaiting completion when the new rules entered into force), even if the transaction did not raise an FDI notification requirement in Austria when the purchase agreement was signed.

For any queries, please get in touch with your local CERHA HEMPEL contact. We look forward to advising you.

For more information

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