

Corporate Finance/M&A - Austria

Changes to Foreign Trade Act could become an obstacle to M&A transactions

Contributed by [Binder Grösswang Rechtsanwälte GmbH](#)

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On November 15 2011 the National Assembly, the first chamber of Parliament, decided on the Budget Consolidation Act 2012. Unexpectedly, a fundamental change to the Foreign Trade Act for protecting certain Austrian undertakings was also incorporated into the law at the last minute.

From now on, acquiring Austrian undertakings, acquiring shares therein or acquiring a dominant influence in such undertakings will require the prior authorisation of the minister for economy, family and youth, if the target company is active in a field relating to public security and order. Affected areas include:

- Austrian internal and external security; and
- Austrian public order and security, including social security and crisis prevention (eg, hospitals and rescue services, fire services and disaster control, energy suppliers, water suppliers, telecommunications services, transport services and education).

The only three exceptions to this requirement are:

- acquisitions of very small companies;
- acquisitions that result in the acquirer holding less than 25% of the shares in the target; and
- acquisitions carried out by persons or undertakings that are nationals of, or have their statutory seat in, a member state of the European Union or Switzerland, Liechtenstein, Norway or Iceland.

The request to the minister for approval of a transaction must be filed before execution of the contract in relation to the intended acquisition or, in the case of a public offer, before publishing the decision to make the public offer. Furthermore, the acquisition may not be closed until prior consent of the minister has been obtained.

The authorisation proceedings within the ministry will occur in two phases:

- Within one month of receipt of a request for authorisation, the minister must decide whether to approve the transaction or to examine the case in a second phase.
- If a second phase is initiated, within two months of the initiation the minister must:
 - approve the transaction;
 - approve the transaction on certain conditions; or
 - reject the transaction.

A transaction may be denied approval only if it would result in an actual and serious danger to public security and order that cannot be remediated by conditions imposed by the minister. Should a transaction be carried out without obtaining the necessary approval from the ministry, both the company and the responsible persons may face criminal charges.

The law further grants the competent minister the power to subject other individual transactions to the authorisation procedure, in particular in cases in which through of the above rules appear to have been circumvented. This may occur where the acquisition is carried out through an EU undertaking that is at least 25% owned by a non-EU undertaking or is controlled by such, whether such ownership or control is direct or indirect.

It remains to be seen whether the new provisions of the act are in conformity with international law, EU law and the Austrian Constitutional Law.

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