

# Export Guarantees Decree 1981

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**Decree of the Federal Minister of Finance dated April 30, 1981, relating to the regulations for the granting of guarantees by the Federal Republic (Federation) in implementation of the 1981 Export Guarantees Act (1981 Export Guarantees Decree), published in Federal Law Gazette no. 257/1981,**

as amended by the Decrees published in Federal Law Gazettes

no. 203/1988, 349/1991, 130/1994, 816/1995, II no. 88/1998, 212/1998 and 90/1999.

In accordance with section 4 paragraph 1 of the 1981 Export Guarantees Act, Federal Law Gazette no. 215/1981, as amended, and with the consent of the Main Committee of Parliament the following regulations are decreed.

## **Form and object of the liabilities**

Section 1. (1) The liabilities are assumed in writing:

- a) as guarantees for the due performance of contracts by the foreign contracting partners as well as guarantees for the integrity of the rights of export enterprises according to section 1 of the Export Guarantees Act with regard to economic and/or political risks as well as the exchange rate risk;
- b) as commitments to guarantee bills of exchange by “aval”, which are to facilitate the financing of contracts and rights according to section 1 of the Export Guarantees Act.

(2) A promise to grant a guarantee may be given (promise). If a promise is given, the Federation is committed to convert it into a guarantee in accordance with paragraph 1 if the terms of the contract specified in the application to give a promise are not less favourable in the definitive contract and during the lifetime of the promise no material changes in the circumstances relevant for the issuance of the guarantee have occurred or become apparent (Section 936 ABGB – General Code of Civil Law).

(3) Guarantees issued according to section 2 paragraph 1 no.s 1 to 7 and 9 shall be based on general business conditions which together with the terms of the respective guarantees constitute the terms of the guarantee agreements.

## **Types of liabilities**

Section 2. (1) 1. Guarantees to cover risks resulting from

- a) contracts on the supply and the production of goods and the performance of services by exporters to foreign contracting parties (guarantees for direct deliveries and services);
- b) license agreements and agreements on the exploitation of patents, license agreements on know-how, agreements on copyright (comprehensive or specific copyright) of exporters, as well as agreements relating to the performance of other services with foreign contracting parties;

- c) lease or lease-purchase contracts on exporter's goods located abroad in the hands of foreign contracting parties and serving the production of other goods;
  - d) contracts on the supply and the production of goods and the performance of services by enterprises domiciled abroad, if the proceeds are applied directly or indirectly for the payment of contracts of exporters.
2. Guarantees to cover risks resulting from contracts on the supply and the production of goods and the performance of services by enterprises domiciled abroad to that extent, as exporters participate in the respective contract (guarantees for indirect deliveries and services).
3. Guarantees to cover risks resulting from the following contracts or commitments of credit institutions domiciled in Austria or abroad:
- a) loan or credit agreements entered into with enterprises domiciled abroad and serving the payment of legal transactions (guarantees for tied financial credits);
  - b) credit transactions (bond issues, commitments arising from bills of exchange or bonds or other commitments) the proceeds of which are applied for the payment of contracts;
  - c) credit agreements which are concluded between a credit institution domiciled in Austria and a contracting party domiciled abroad, insofar as for the underlying legal transactions liabilities have already been assumed (debt rescheduling agreements).
4. Guarantees to cover risks resulting from participations or legal transactions resembling participations of exporters in enterprises domiciled abroad (investment guarantees).
5. Guarantees to cover risks under a ceiling of turnover for contracts on the supply and the production of goods and the performance of services by exporters to a specific enterprise domiciled abroad (turnover guarantees).
6. Guarantees to cover risks under ceilings of turnover for all contracts on the supply and the production of goods and the performance of services by exporters to enterprises domiciled abroad, be it either in one or in several recipient countries (country turnover guarantees or comprehensive guarantees).
7. Guarantees to cover
- a) political risks resulting from the establishment of stocks of merchandise abroad by exporters, in view of the integrity of the goods located in these stocks of merchandise (guarantees for stock in commission);
  - b) political risks resulting from the use of machines and equipment by exporters to perform their contracts abroad, in view of the integrity of these machines and equipment (machinery deployment guarantees);
  - c) risks resulting from cash deposits, bonds or other advances made by exporters abroad in the context of contracts (advance guarantees).
8. Guarantees to cover risks resulting from guarantee or insurance contracts undertaken by export credit- or export credit insurance institutions (reinsurance guarantees).

9. Guarantees to cover risks resulting from the purchase of accounts receivable:

- a) guarantees to cover risks resulting from contracts of credit institutions domiciled in Austria or abroad on the acquisition of accounts receivable resulting from legal transactions;
- b) guarantees to cover risks resulting from accounts receivable acquired by Oesterreichische Kontrollbank Aktiengesellschaft insofar as liabilities have already been assumed for such accounts receivable.

10. Guarantees to cover the applicability of a certain rate of exchange between Austrian Schillings and the currency of the contract, which may be a currency freely convertible, a currency not freely convertible or a clearing currency (exchange risk guarantees).

11. Guarantees to cover risks in the context of initiating export activities according to section 1 Export Guarantees Act (market developing guarantees).

(2) Guarantees by “aval” on bills of exchange: guarantees for the drawer or for the acceptor of bills of exchange which were issued by credit institutions or exporters for the purpose of financing contracts.

#### **Assumption of liabilities**

Section 3. (1) Applications for the issuance of a guarantee or a guarantee by “aval” on a bill of exchange are to be filed in writing or by electronic means at the Oesterreichische Kontrollbank Aktiengesellschaft.

(2) The contracts underlying the guarantee or the guarantee by “aval” on a bill of exchange may be made out in Austrian Schillings, in a currency freely convertible, in a currency not freely convertible or in a clearing currency.

(3) Guarantees or guarantees by “aval” on bills of exchange may be assumed in Austrian Schillings, in a currency freely convertible at the date the contract is concluded or in a clearing currency.

(4) Guarantees or guarantees by “aval” on bills of exchange can be granted for the entire contract or right or only for a part thereof (partial covering).

(5) With regard to guarantees according to section 2 paragraph 1 no.s 6 and 9 a specific discretionary power and/or a free limit in respect of each customer may be granted to the beneficiary of the guarantee unless a specific authorisation is granted. With regard to contracts which fall within the beneficiary’s of the guarantee discretionary power, the liability of the Republic can be made dependent on the obligation of the beneficiary to have ascertained the sound financial standing of the foreign customer.

(6) Guarantees according to section 2 paragraph 1 no. 8 may be issued unconditionally.

#### **Self-participation**

Section 4. (1) At the issuance of guarantees under section 2 paragraph 1 no.s 1 to 9 a self-participation of the beneficiary of the guarantee may be stipulated in case of an economic and/or a political fact.

(2) When a guarantee is issued under section 2 paragraph 1 no.s 10 and 11 a self-participation of the beneficiary of the guarantee may be stipulated.

(3) If a self-participation is determined it shall amount to at least 5%, at the most 50% of the maximum amount determined in the guarantee agreement.

### **Special obligations of the beneficiary of the guarantee and of the guarantee by “aval” on a bill of exchange**

Section 5. (1) It shall be inter alia provided in the agreements on the assumption of liability, that

1. the beneficiary of the guarantee shall, if so requested at any time, inform the Republic on details and the state of the contract or right underlying the guarantee and disclose his books and documents to the extent necessary for the examination of the transaction involved;
  2. prior to any material amendment of the contractual basis of the contract or right underlying the guarantee the beneficiary of the guarantee shall obtain the consent of the Republic; as a material amendment are inter alia to be considered the extension of the payment/total payment date or the altering of securities;
  3. the beneficiary of the guarantee is bound to instruct upon expiry of a certain delay a debt collection agency or a lawyer resident in the country of the foreign contracting partner to collect an unpaid claim, unless the Republic agrees to a different procedure.  
Furthermore, the beneficiary of the guarantee may be obligated to inform the Republic within a certain delay in writing of the non-performance or contravention of the contract or right underlying the guarantee, of the occurrence of a fact justifying a claim according to section 6 and of the instructing of a debt collecting agency or a lawyer;
  4. the Republic may at any time, if the foreign contracting partner has not performed his contractual obligations or if facts justifying a claim according to section 6 have occurred, direct the beneficiary of the guarantee, whether and in which way the beneficiary of the guarantee has to perform his contractual obligations resulting from the contract or right under guarantee. For guarantees under section 2 paragraph 1 no. 2 the right to give directives is only applicable with regard to the beneficiary of the guarantee.  
With regard to guarantees under section 2 paragraph 1 no.s 5 and 6 it shall be stipulated furthermore that the Republic is entitled to restrain the beneficiary of the guarantee from the conclusion of further contracts under the guarantee agreement with the defaulting contracting partner;
  5. with regard to guarantees according to section 2 paragraph 1 no. 6 the beneficiary of the guarantee shall as a rule ascertain the financial standing of all foreign contracting partners for which neither a specific authorisation nor a free limit was granted, by obtaining a written report (inquiry) or the checking of the past orderly performance of the contracts by the foreign contracting partner;
  6. the beneficiary of the guarantee shall take all steps necessary to enforce his contractual rights against the foreign contracting partner. If goods to be delivered according to the obligations of the beneficiary of the guarantee have already been manufactured and are still at his disposal, they shall be turned to account in the most profitable way;
  7. the beneficiary of the guarantee is committed to take over the terms agreed by the Republic in a rescheduling for the self-participation, unless the Republic agrees to a different procedure;
  8. costs and losses incurred in connection with measures according to no.s 4, 5 and 7 shall be refunded to the beneficiary proportionately.
- (2) The beneficiary of the guarantee is to be obligated to take all steps to prevent the Republic from damage. The beneficiary of the guarantee shall report without delay, at the latest however within fourteen days from cognisance, all facts which became known to him which may jeopardise the orderly performance of the subject transaction.

(3) It shall be provided that the beneficiary of a guarantee by “aval” on a bill of exchange (drawer or acceptor) shall notify in writing to the Republic his financing requirement at the filing of the application for the issuance of the guarantee by “aval” on a bill of exchange and, in the following, at the commencement of each clearing period for that period. An increase of the notified financing requirement during the clearing period is possible. The notified financing requirement is limited with the maximum amount specified in the commitment to guarantee by “aval”. If no financing requirement is notified, the maximum amount specified in the commitment to guarantee by “aval” is deemed the financing requirement.

### **Admission of claims**

Section 6. (1) As conditions precedent for the admission of claims resulting from guarantees under section 2 paragraph 1 no.s 1 to 3, 5, 6 and 9 it shall be provided, that

1. the beneficiary of the guarantee has performed his contractual obligations or is ready to perform them,
2. the foreign contracting partner does not or cannot perform his contractual obligations,
3. an economic or political fact according to paragraph 2 or 3 is proven or has occurred and
4. a period of three months after maturity or in the case of a loss during production a period of six months after the occurrence of a fact has passed (waiting period). There shall be no waiting period when a fact according to paragraph 2 no. 2 has occurred and in the case of claims resulting from guarantees under section 2 paragraph 1 no. 3 alinea b and c, no.s 5, 6 and no. 9 alinea b.

(2) Economic facts are:

1. a reminder in writing by the beneficiary of the guarantee addressed to his foreign contracting partner, summoning him to perform the contract; the presentation of securities for payment shall produce the same effect;
2. insolvency of the foreign contracting partner, if it is proven by the commencement of insolvency proceedings;
3. impossibility of performance by the beneficiary of the guarantee or by his agents owing to circumstances they are not responsible for and which have occurred abroad.

(3) Political facts are:

1. war or warlike events;
2. rebellion or revolution;
3. governmental measures limiting or preventing the transfer or the free disposal by the beneficiary of the guarantee with regard to the consideration due to him; a default in payment shall be equivalent if the debtor or its guarantor represents the public authority and cannot, either judicially or administratively, be made insolvent.  
With respect to guarantees under section 2 paragraph 1 no.s 5 and 6 this fact has occurred when the transfer or payment delay has lasted for more than three months.
4. impossibility of performance owing to other political events.

(4) As conditions precedent for the admission of claims resulting from guarantees under section 2 paragraph 1 no. 4 it shall be provided that an economic or political fact according to no. 1 or 2 is proven or has occurred:

1. An economic fact has occurred when composition or bankruptcy proceedings or proceedings equivalent thereto have been commenced against the enterprise in which the participations or rights under contracts resembling participations have been acquired.

2. A political fact has occurred when

- a) participations or rights resulting from contracts resembling participations are directly or indirectly, totally or partially expropriated,
- b) such an essential part of the assets is destroyed or expropriated that the enterprise can no longer be run without a loss, or
- c) the transfer of the proceeds of the sale or the liquidation of participations, repayment of capital and payment of interest on contracts resembling participations, the transfer of a compensation or the free disposal thereover are limited or prevented.

(5) 1. As conditions precedent for the admission of claims resulting from guarantees under section 2 paragraph 1 no. 7 alinea a and b it shall be provided that goods stored on commission abroad or machines and equipment kept abroad are, for direct or indirect political reasons, destroyed or expropriated.

2. As conditions precedent for the admission of claims resulting from guarantees under section 2 paragraph 1 no. 7 alinea c it shall be provided that an economic or political fact according to alinea a or b is proven or has occurred:

- a) An economic fact has occurred when an advance is withdrawn or not paid back due to a wrongful action or omission or insolvency of the foreign contracting partner.
- b) A political fact has occurred when an advance is withdrawn or not paid back for direct or indirect political reasons.

Section 7. (1) With regard to guarantees according to section 2 paragraph 1 no. 10 it shall be provided as condition precedent for the admission of a claim that the exchange rate applied by the bank on the payment day is to the disadvantage of the beneficiary of the guarantee different from the exchange rate laid down in writing in the declaration of guarantee or the addendum thereto.

(2) With regard to guarantees according to section 2 paragraph 1 no. 11 it shall be provided as condition precedent for the admission of a claim that the market goal stipulated in the declaration of guarantee has not been reached.

Section 8. The contracts concluded with export credit- or export credit insurance institutions shall provide that claims resulting from guarantees according to section 2 paragraph 1 no. 8 shall be deemed justified, if they pay out a claim resulting from liabilities and reinsurance guarantees they have assumed.

### **Refusal of liability**

Section 9. (1) It shall be provided that the liability resulting from the guarantees under section 2 paragraph 1 no.s 1 to 7, 9 and 10 shall in particular be excluded in the following cases:

1. if losses have occurred for which the beneficiary of the guarantee or his agents are responsible;
2. if the beneficiary of the guarantee, deliberately or by gross negligence, violates a stipulation of the guarantee contract;
3. if the beneficiary of the guarantee contravenes domestic or foreign legal regulations, except in case he can prove that the non-performance of the contractual obligations by the foreign contracting partner is not caused by the contravention referred to above;
4. if the beneficiary of the guarantee was already at the time he applied for the guarantee aware that
  - a) performance of the contract by the foreign contracting partner is impossible,
  - b) with regard to another contractual agreement of the beneficiary of the guarantee with the foreign contracting partner the latter has within the last two years before the application was submitted, committed a breach of contract,
  - c) the foreign contracting partner is insolvent, in particular the assets of the foreign contracting partner have been subjected to insolvency proceedings, or
  - d) judicial execution proceedings have been commenced into the assets of the foreign contracting partner;
5. if the beneficiary of the guarantee has deliberately or by gross negligence made false statements in the application for the issuance of the guarantee;
6. if losses have occurred, for which following commercial usage insurance – except credit insurance – is available for the beneficiary of the guarantee with insurance companies domiciled in this country;
7. if with regard to guarantees under section 2 paragraph 1 no. 6 the provisions of section 5 paragraph 1 no. 6 have not been complied with, when an economic fact has occurred.

(2) It shall be provided that the beneficiary of the guarantee has to refund the amounts already obtained with interest if the refusal of the liability is based on circumstances which have occurred or become apparent after the recognition of the claim. Interest starts when the beneficiary of the guarantee received the amount and shall be computed at a rate of 300 basis points above the variable interest rate of the Export Financing Scheme of Oesterreichische Kontrollbank Aktiengesellschaft as applicable at the time.

#### **Maturity of the compensation due under the liability**

Section 10. The maturity of the compensation due to the beneficiary of guarantees according to section 2 paragraph 1 no.s 1 to 7 and 9, if a claim is deemed to be justified, shall coincide with the recognition of the claim, but not before the original maturity date of the guaranteed claim; an acceleration of maturity in case of breach of contract, which was stipulated between the beneficiary of the guarantee and the foreign contracting partner, cannot be asserted against the Republic.

Section 11. The maturity of the compensation due to the beneficiary of guarantees according to section 2 paragraph 1 no.s 10 and 11, if a claim is deemed to be justified, shall coincide with the recognition of the claim.

Section 12. The contractual agreements with export credit- or export credit insurance institutions shall provide the point of time at which the guaranteed amount is due for payment.

### **Cession of rights after facts justifying a claim have occurred and refund of expenses**

Section 13. (1) The beneficiary of the guarantee shall be obliged to assign that portion of his claims against the foreign contracting partner to the Republic that corresponds with the compensation payable under the guarantee. Such assignment shall be made at the latest upon recognition of the claim and the beneficiary of the guarantee shall take all legal steps necessary to that end and, in case he has obtained sureties, he shall assign them proportionally and with equal rank to the Republic.

(2) If the Republic does not itself represent the claim, the beneficiary of the guarantee shall take all steps necessary for the enforcement of the contractual rights in his own name, but with the consent of the Republic for proportionate account of the Republic. The consent is to be granted if the result to be expected from the necessary steps is economically adequate in view of the expenses caused by such steps. If goods to be delivered according to the obligations of the beneficiary of the guarantee have already been manufactured and are still at his disposal, they shall, unless otherwise directed in the individual case, be turned to account with the consent of the Republic in the most profitable way and upon request of the Republic be pledged in favour of the Republic. Furthermore, the beneficiary of the guarantee shall be put under the obligation to comply with the directives of the Republic concerning specific measures to be taken for the enforcement of rights.

(3) The beneficiary of the guarantee shall be obligated to take over the terms agreed by the Republic in a rescheduling for the self-participation, unless the Republic agrees to a different procedure.

(4) It shall, furthermore, be provided in which manner incoming payments and other revenue are to be distributed between the beneficiary of the guarantee and the Republic.

(5) If in connection with steps according to paragraph 2 costs occur they shall be refunded to the beneficiary of the guarantee proportionally.

### **Fees for the handling of applications, premiums payable for guarantees and guarantees by "aval" on bills of exchange**

Section 14. (1) A fee is payable for handling the file, which is also due when an application is turned down. A premium shall be agreed for the issuance of a guarantee in accordance with section 1 paragraph 1. For that part of a guarantee for which an irrevocable reinsurance guarantee of a foreign export credit- or export credit insurance institution has been issued, no premium is to be charged for the Republic.

(2) The fee for handling the application amounting to 0.1% of the value of the contract, but not less than 10 euro and not more than 720 euro or the respective countervalue in Austrian Schillings, is due to be paid upon receipt of the debit order.

(3) A reasonable premium, dependent on the kind and extent of the risk covered, is to be charged for guarantees.

(4) Provided that nothing else is stipulated, the premium for guarantees according to section 2 paragraph 1 no.s 1, 2, 3 alinea a and b, 4, 7, 8, 9 alinea a, no.s 10 and 11 is payable upon acceptance of the guarantee. The premium for guarantees according to section 2 paragraph 1 no. 3 alinea c, no.s 5, 6 and 9 alinea b is due and payable quarterly in arrears.

(5) In case the Republic has accepted a change in the contents or in the extent of the guarantee, a recalculation of the premium as well as a charging of an additional premium or a refund of premium shall be provided. In case of a refund of a balance a lump-sum for cost may be deducted.

(6) a) The premium for commitments to guarantee a bill of exchange by “aval” shall correspond to the risk and amount to at least 0.05% for each commenced quarter calendar year of the lifetime of such commitment.

b) The computation is to be based on the maximum amount of the commitment to guarantee a bill of exchange by “aval” or on the notified financing requirement for the respective clearing period. Provided that nothing else is stipulated in the respective commitment, the clearing period is equal to a quarter calendar year. For long-term commitments it may amount to a year or more. At the commencement of the lifetime of the commitment to guarantee a bill of exchange by “aval” the computation of the premium is to be based on the period extending from the validity of the said commitment to the commencement of the following clearing period and the premium is to be computed proportionally. This applies also to the subsequent notification of a higher financing requirement during the clearing period. The first premium is due immediately upon receipt of the aforesaid commitment, the subsequent premiums immediately upon receipt of the debit orders.

(7) If in the course of handling a particular contract a risk covered by a guarantee is taken under cover by transformation into another guarantee, the premium already paid is to be set off or refunded upon application from the day of the transformation.

(8) If the beneficiary of the guarantee or of the guarantee by “aval” on a bill of exchange cannot satisfy a condition imposed by the Federation at the assumption of the liability, the premium already paid for the guarantee or the guarantee by “aval” is to be refunded upon application, in case of a guarantee after deduction of a lump-sum for cost.

(9) If the fee for handling a file or the premium for a guarantee or the commitment to guarantee a bill of exchange by “aval” is not paid immediately upon being charged, default interest amounting to 300 basis points above the variable interest rate of the Export Financing Scheme of Oesterreichische Kontrollbank Aktiengesellschaft as applicable at the time may be debited for the period of time commencing with the charge until the premium is received.

#### **Enforcement of the claims resulting from liabilities by legal action**

Section 15. (1) The assignment of claims resulting from guarantees can be prohibited or limited.

(2) With regard to the enforcement of claims arising under guarantees by legal action certain time limits may be imposed.

#### **Final regulation**

Section 16. The 1977 Export Guarantees Decree, Federal Law Gazette no. 282, is repealed.

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Decree II no. 90/1999:

Section 17. These amendments of the Decree shall become effective on April 1, 1999.

Section 18. This Decree implements the Council Directive 98/29/EC, Official Journal L 148/22 of May 19, 1998.

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