



First Activity Report on Austrian Investment Control Published

Some observations and conclusions for Austrian FDI-cases

The Austrian Ministry for Digital and Economic Affairs (“BMDW”) recently published its 1st Activity Report (*Tätigkeitsbericht*) on the first year (25 July 2020 – 24 July 2021) of the application of Austria’s new FDI-regime. Below please find, in no particular order and without claiming completeness, some findings of the Activity Report and some take-aways on how to deal with FDI-cases. For convenience, I have also listed the particularly sensitive sectors and other critical sectors specified in the Appendix of the Austrian Investment Control Act (“ICA”) below:

Findings in the BMDW’s Activity Report

- On a per-capita basis, Austria notifies the most FDI-applications of all EU Member States under the EU FDI-screening mechanism.
- The BMDW conducted 50 FDI proceedings. 37 of those 50 proceedings were ordinary approval proceedings and 13 were applications for the issuance of a clearance certificate.
- 35 of the 50 FDI proceedings ended with a clearance decision (31 in Phase I, 2 without conditions and 2 subject to conditions in Phase II) and 8 with the issuance of a clearance certificate. 3 applications were rejected as no FDI-approval was required and 4 applications were withdrawn by the applicants.
- The BMDW redirected 5 of the 13 (38%) applications for the issuance of a clearance certificate to a formal approval proceeding.
- The BMDW rejected one application as the Austrian Target was not active in a sector critical for security or public order. In another case, the BMDW redirected an application for the issuance of a clearance certificate to an ordinary proceeding as it was of the opinion that the transaction required approval although the Austrian Target was not active in one of the sectors listed in the Appendix to the ICA but in another sector.

Some take-aways and conclusions for dealing with Austrian FDI-cases

- Provide for sufficient time for the FDI proceeding. Ordinary approval proceedings may take between 2.5 and approximately 6 months (in contrast, simple merger control cases before the Austrian Federal Competition Authority are usually cleared within 4 weeks). To save time, consider filing as soon as the parties have agreed on the main terms of the FDI. It is not necessary to wait until after signing.
- When structuring a transaction, bear in mind that direct and indirect acquisitions of (i) voting rights of 25% or 50% (and - only in particularly sensitive sectors - 10%) or (ii) a decisive influence in an Austrian company or (iii) significant assets in particularly sensitive sectors or other sectors critical for security of public order will require approval by the BMDW.
- Analyse carefully whether the Austrian Target is active in a business area that would be critical for security or public order. According to the BMDW, an activity of the Austrian Target in any one of the particularly sensitive sectors or other critical sectors listed in the Appendix to the ICA (see below) is presumed to be critical for security or public order. In such a case, the FDI must be filed with and cleared by the BMDW before it may be implemented. Only in the FDI proceeding itself the BMDW will analyse whether the implementation of the FDI would, in reality, result in a risk for security or public order.
- However, if the Austrian Target is not active in one of the sectors mentioned in the Appendix to the ICA, an FDI approval may be necessary if it is active in another sector that is of essential importance for the maintenance of important social functions because their disruption, destruction, failure or loss would have serious effects on the health, safety or economic and social well-being of the population or the effective functioning of government. Nevertheless, according to the BMDW, there remain areas of activity of an Austrian target company that are not critical for security or public order and, therefore, are not subject to Austria's FDI regime at all.
- If you believe that a transaction is not subject to the Austrian FDI regime, you may apply for a clearance certificate, which would have to be issued within 2 months from filing. However, if the BMDW does not share your opinion, it will redirect your application to an ordinary approval proceeding. In case of a redirection, the review period for the preceding clearance certificate proceeding (up to 2 months) is lost and the review period for the approval proceeding starts from the date of redirection (not from the date of the application for the issuance of a clearance certificate!).

List of particularly sensitive sectors and other critical sectors listed in the Appendix to the ICA

- Particularly sensitive sectors: defence equipment and technologies, operation of critical energy infrastructure, operation of critical digital infrastructure, in particular 5G infrastructure, water, operating systems guaranteeing the data sovereignty of the Republic of Austria or research and development in the fields of pharmaceuticals, vaccines, medical devices and personal protective equipment.
- Other sectors that may be critical for security or public order:
 1. Critical infrastructure: energy, information technology, traffic and transport, health, food, telecommunications, data processing or storage, defence, constitutional institutions, finance, research institutions, social and distribution systems, chemical industry, and investment in land and buildings essential for the use of critical infrastructure
 2. Critical technologies and dual-use goods as defined in Article 2 Para 1 of Council Regulation (EC) No. 428/2009, including artificial intelligence, robotics, semiconductors, cyber security, defence technologies, quantum and nuclear technologies, nanotechnologies, biotechnologies
 3. Security of the supply of critical resources, including energy supply, supply of raw materials, food supply, supply of medicines and vaccines, medical devices and personal protective equipment, including research and development in these areas
 4. Access to sensitive information, including personal data, or the ability to control such information
 5. Freedom and plurality of the media.

Useful links

Austrian Investment Control Act: RIS - Investitionskontrollgesetz - Bundesrecht konsolidiert, Fassung vom 22.03.2022: [RIS - Investitionskontrollgesetz - Bundesrecht konsolidiert, Fassung vom 29.03.2022 \(bka.gv.at\)](https://www.ris.bka.gv.at/Investitionskontrollgesetz_Bundesrecht_konsolidiert_Fassung_vom_29.03.2022)

Convenience Translation of the Austrian Investment Control Act: https://trade.ec.europa.eu/doclib/docs/2020/september/tradoc_158955.pdf

BMDW, 1st Activity Report (*Erster Tätigkeitsbericht der Investitionskontrolle*): [Investitionskontrolle Tätigkeitsbericht 2020 barrierefrei v2 \(3\).pdf](https://www.bmdw.gv.at/Investitionskontrolle_Taetigkeitsbericht_2020_barrierefrei_v2_3.pdf)

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