

Screening of Foreign Direct Investments in Austria

Introduction

Consistent with recent investment screening reforms adopted across the EU, Austria passed the Federal Investment Control Act (*Investitionskontrollgesetz* – **ICA**). While Austria used to have a basic regime for the control of Foreign Direct Investment (FDI) in the past under the Foreign Trade Act (*Außenwirtschaftsgesetz*), its practical relevance for international M&A transactions was rather limited.

With the ICA, the tides have turned: Against the backdrop of increasing geo-economic competition and with all major trading partners (such as the USA, UK and Australia) stepping up their efforts to protect strategic assets, Austria has considerably tightened the rules on the control of FDI. The ICA came into effect on 25 July 2020. In line with the EU FDI Screening Regulation¹, encouraging EU Member States to introduce a fully-fledged screening mechanism, the Austrian legislator created a regulatory instrument for scrutinizing foreign investments, with the possibility to intervene and – in severe cases – even prohibit investments.

Compared to other EU jurisdictions, the Austrian FDI regime is very broad: the ICA covers direct and indirect investments, contains a long list of sensitive sectors with very broad categories, the relevant threshold of voting rights is 25% (if the Austrian target company is active in a “normal” sensitive sector) and 10% (if the Austrian target company is active in a highly sensitive sector). At least EU investors and greenfield investments are not covered. In addition, the proceedings are quite lengthy, since full applications for approvals are submitted to the EU cooperation mechanism. Standard FDI proceedings therefore take approx. 2.5–3 months on average in Austria.

The wide scope of the Austrian FDI regime, the lack of harmonized FDI regimes throughout the EU (increasing the need for coordination) and the delay due to FDI proceedings pose a challenge to cross-border M&A transactions.

Over one and a half years into the new regime, the Federal Ministry for Digital and Economic Affairs (Bundesministerin für Digitalisierung und Wirtschaftsstandort – **BMDW**) as the competent authority published the brand new first report on the enforcement of the Austrian FDI regime and developments in the field of FDI covering the period from from 25 July 2020 to 24 July 2021 (**Austrian FDI Report**).

On the following pages, we have put together the most important findings from the Austrian FDI Report and included insights into the Austrian toolbox for investment screening as well as must-knows for foreign investors and their advisers.

¹ Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ 2019 No. L79/1.

Facts and Figures of the First Austrian FDI Report

Worldwide FDI Flows

1.5
trillion USD

Worldwide FDI-flows in 2019

1
trillion USD

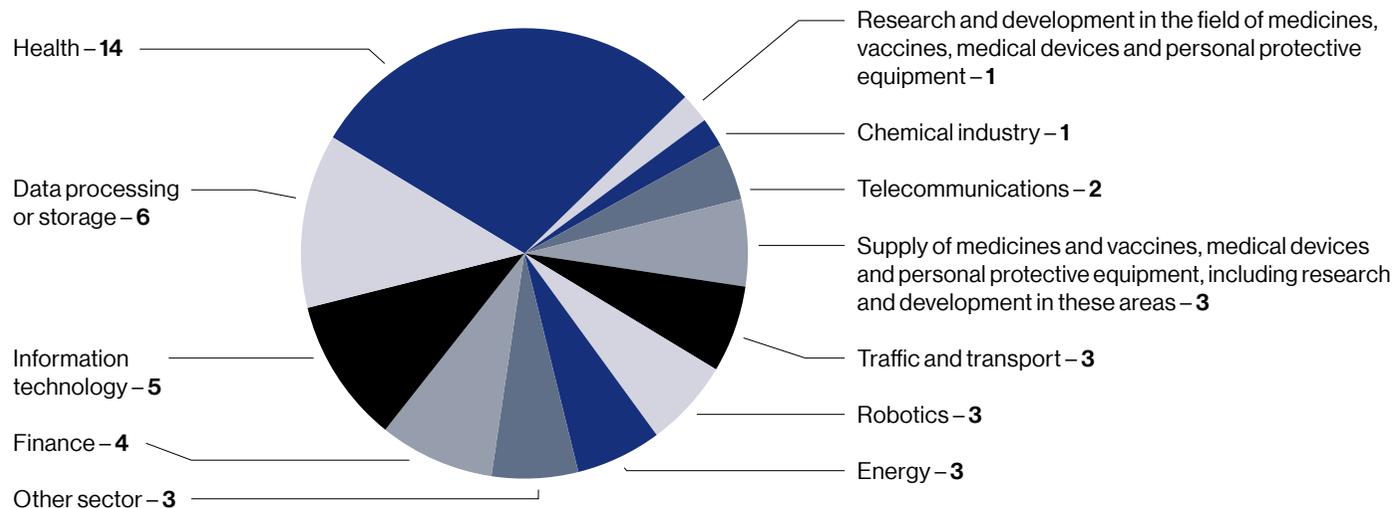
Worldwide FDI-flows in 2020

FDI by country of origin



Country	FDI
USA	31
United Kingdom	12
Japan	2
Singapore	2
United Arab Emirates (UAE)	2
China	1
Guernsey	1
Mexico	1
Switzerland	1
South Africa	1

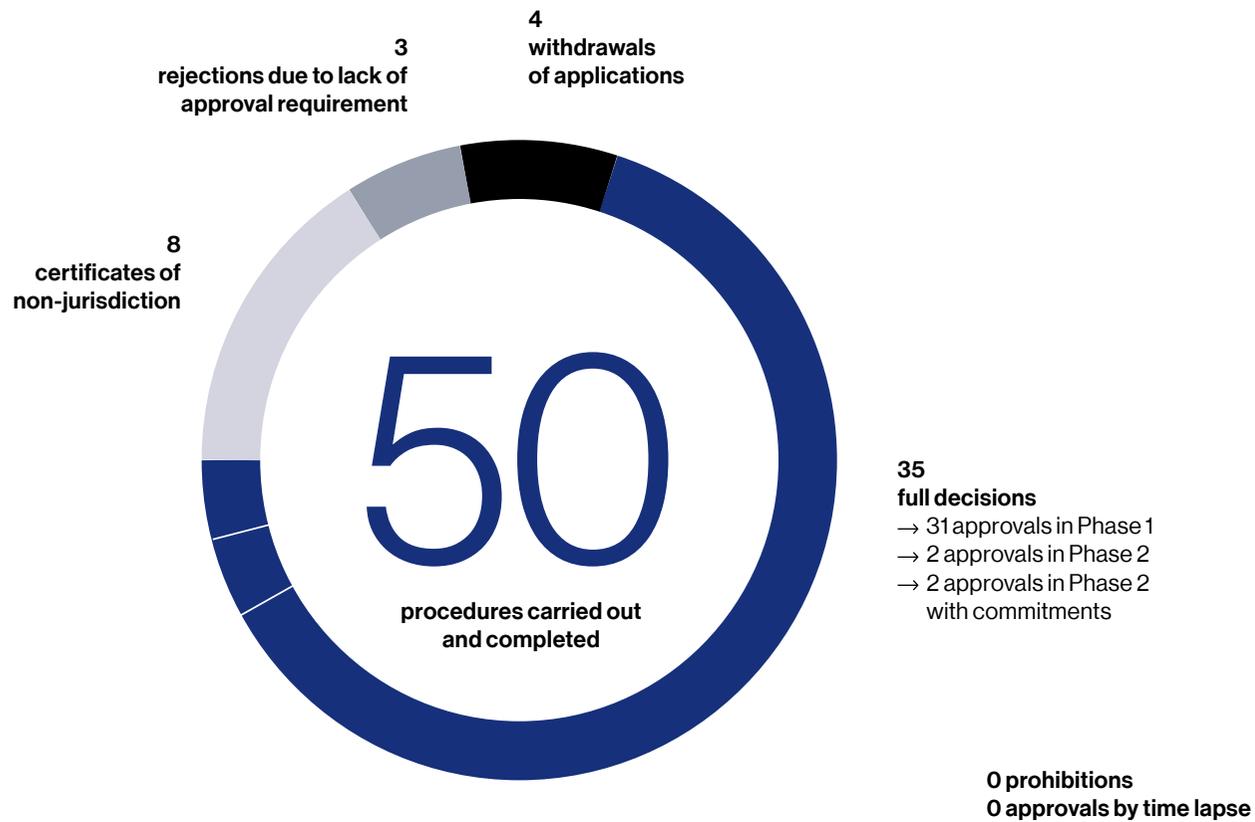
FDI by Austrian target sector



FDI by type of acquisition



Total number of FDI procedures carried out and completed



Total number of Phase 2 proceedings



Requests to file an application and ex officio proceedings

4 requests to file an application for approval within three working days

0 ex officio proceedings

Austria and the EU cooperation mechanism

33

Number of cases submitted to the EU cooperation mechanism by Austria

21

Number of notifications by Austria of its intention to provide comments on an investment in another EU Member State

21

Number of notifications by Austria of its intention to provide comments on an investment in another EU Member State in connection with a request for additional information

11

Number of comments provided by Austria on an investment in another EU Member State

11

Number of comments received by other EU Member States on an investment in Austria

0

Number of opinions by the EU Commission on an investment in Austria

The Austrian Toolbox for Investment Screening

The ICA came into effect on 25 July 2020 and implements the EU-FDI-Screening Regulation. Any advice should be based upon the authentic German version of the law. Restrictions on the purchase of land are a matter of Austria's federal states (Länder) and are not included in the table below.

Foreign investment triggering Austrian FDI control

A relevant investment triggering Austrian FDI control (**Relevant Investment**) is cumulatively:

- An investment by persons (natural and legal) who are not citizens of or do not have their seat/headquarters in the EU, the EEA, or Switzerland (**Foreign Investor**).
- The target is a company or business in Austria pursuing a commercial activity that may pose a threat to security or public order, including crisis prevention and services of public interest, within the meaning of Article 52 and 65 TFEU (see also sectors/industries of focus below).
- The investment concerns the direct or indirect acquisition of
 - a business or a legal entity.
 - material parts of a business resulting in the acquisition of a controlling influence over such parts of a business.
 - a shareholding with which at least 10% of the voting rights (if the target is active in a highly sensitive sector) or 25% of the voting rights (if the target is active in a “normal” sensitive sector) is reached or exceeded.
 - controlling influence over a business or legal entity.



Application

Mandatory?

An application (*Genehmigungsantrag*) is mandatory in case of a notifiable Relevant Investment. The competent authority is the Federal Minister for Digital and Economic Affairs (*Bundesministerin für Digitalisierung und Wirtschaftsstandort – BMDW*)

If the BMDW becomes aware of a notifiable Relevant Investment for which the foreign person / foreign entity has not applied for FDI approval, the acquiring foreign person / foreign entity is requested to submit an application within three business days. If no such application is submitted timely, the BMDW has to initiate an official approval procedure ex officio and to inform the investor accordingly.

Deadline

An application has to be submitted, at the latest, immediately following signing, or in case of a public takeover, immediately after the notification of the intention to submit an offer.

Responsibility

The obligation to submit an application for FDI approval rests with the direct or indirect investor (depending on the circumstances).

The target has a subsidiary obligation to notify the BMDW if the investor does not submit an application for FDI approval.

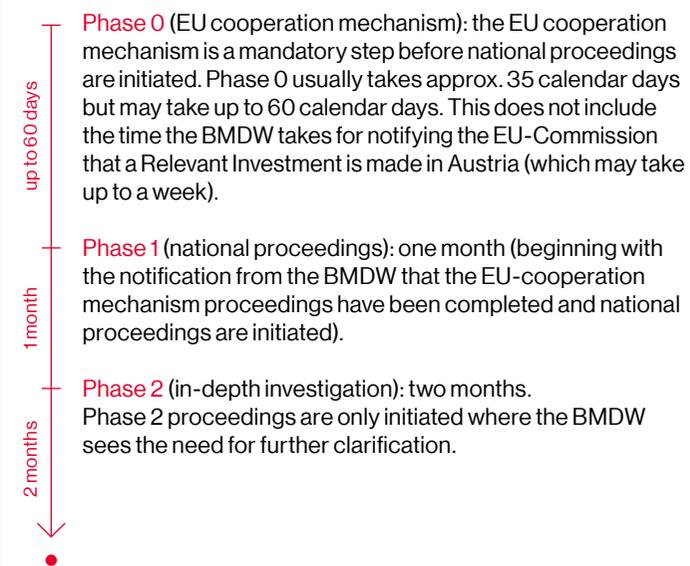
Fee

No administrative or other filing fee.



Procedure following an application

Timeline



In total the proceedings take approx. 2.5–3 months on average and may take 5–5.5 months in case of Phase 2 proceedings. The BMDW may send Requests for Information (**RFIs**) at any time. The deadline to respond to such RFIs is usually 5–7 calendar days.



Sectors/industries of focus

The Annex to the ICA specifies the sensitive sectors:

Part 1 of the Annex contains an exhaustive list of the highly sensitive sectors (if the target's activity comes within one these sectors, the threshold for the notifiable acquisition of voting rights is reduced to 10%):

1. Defense equipment and technologies
2. Operation of critical energy infrastructure
3. Operation of critical digital infrastructure, in particular 5G infrastructure
4. Water
5. Operating systems that guarantee the data sovereignty of the Republic of Austria
6. Research and development in the fields of medicines, vaccines, medical devices and personal protective equipment

Part 2 of the Annex contains a non-exhaustive list of the "normal" sensitive sectors. Thus, the transaction may still be notifiable if it poses a potential threat to security or public order.

1. critical infrastructures (facilities, systems, plants, processes, networks or parts thereof); these include in particular
 - 1.1. Energy
 - 1.2. Information technology
 - 1.3. Traffic and transport
 - 1.4. Health
 - 1.5. Food
 - 1.6. Telecommunications
 - 1.7. Data processing or storage
 - 1.8. Defense
 - 1.9. Constitutional institutions
 - 1.10. Finances
 - 1.11. Research institutions
 - 1.12. Social and distribution systems
 - 1.13. Chemical industry
 - 1.14. Investment in land and real estate essential for the use of the infrastructures referred to in items 1.1. to 1.13.



Information

The application for FDI approval has to include the following information:

- name, address and if available phone number, fax number and email address of all investors,
- name, address and if available phone number, fax number and email address of the target,
- a detailed description of the business activity (including products, services and business transactions) of the investor and the target including a description the market on which this business activity is carried out (competitors, market share),
- the identification of the natural or legal person who ultimately owns or controls each investor (structure charts; name, address and country in which the ultimate owner is registered),
- a detailed description of the planned operation and the exact ownership and participation structure in the target company (including information on voting rights),
- the other EU Member States in which each investor and the target company carry out significant business transactions and the nature and scope of these activities (including names of branches and / or subsidiaries),
- the financing / funding of the investment and its source,
- the date on which the direct investment is planned to be made or on which it was made,
- whether the transaction is also notifiable under the EU Merger Regulation,
- designation of one or more persons with power of attorney to act for each investor in Austria,
- information as to whether the operation has or could have an impact on a project or program of Union interest (if known to the investor).



Investigation powers

The BMDW may inter alia

- request data and information within an adequate timeframe.
- access the business premises if necessary.
- have documents handed over and copied.
- interrogate the staff of the legal entity.

Threat to security or public order?

In order to determine whether an investment poses a threat to public order or security, including crisis prevention and services of general interest within the meaning of Art 52 and 65 TFEU, two factors are taken into account:

1. the effect of the investment on the (particular) sensitive sectors listed in the Annex to the ICA
2. investor-related factors, in particular whether the foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces, of a third country, including through ownership structure or significant funding; whether the foreign investor has already been involved in activities affecting security or public order in a Member State; or whether there is a serious risk that the foreign investor engages in illegal or criminal activities

Potential outcomes

Phase 1:

- Decree that no approval procedure will be initiated.
- Decree that there are no objections to the acquisition.
- Approval by operation of law (legal fiction) in Phase 1 after expiry of the one-month period (national level).

Phase 2:

- Decree clearing the transaction.
- Decision clearing the transaction subject to commitments.
- Decree prohibiting the transaction.
- Approval by operation of law (legal fiction) in Phase 2 after expiry of the two-month period (national level).



2. Critical technologies and dual-use items as defined in Article 2 para 1 of Regulation (EC) No 428/2009, including
 - 2.1. Artificial intelligence
 - 2.2. Robotics
 - 2.3. Semiconductors
 - 2.4. Cyber security
 - 2.5. Defense technologies
 - 2.6. Quantum and nuclear technologies
 - 2.7. Nanotechnologies
 - 2.8. Biotechnologies
3. Security of supply of critical inputs, including
 - 3.1. Energy supply
 - 3.2. Supply of raw materials
 - 3.3. Food supply
 - 3.4. Supply of medicines and vaccines, medical devices and personal protective equipment, including research and development in these areas
4. Access to or ability to control sensitive information, including personal data
5. Freedom and pluralism of the media.

“Critical” shall be infrastructure within the meaning of No. 1, technologies within the meaning of No. 2 and inputs within the meaning of No. 3 which are of essential importance for the maintenance of important social functions because their disruption, destruction, failure or loss would have serious effects on the health, security or economic and social well-being of the population or the effective functioning of state institutions.

Calculation of voting rights

Specific rules apply for the calculation of the voting rights threshold:

- In case a transaction involves several Foreign Investors, the voting rights of such Foreign Investors in the Austrian target are added up.

In addition, it is common practice to submit the filled in form for the EU cooperation mechanism (available at <https://www.bmdw.gv.at/Themen/Investitionskontrolle.html>) together with the application for approval.

Other routes to obtain legal certainty

The investor / the target can seek an administrative decision as to whether a transaction is a notifiable Relevant Investment by applying for a certificate of non-jurisdiction (*Unbedenklichkeitsbescheinigung*).

Website

General information on the Austrian FDI regime by the BMDW, including FAQs, is available in German at: <https://www.bmdw.gv.at/Themen/Investitionskontrolle.html>

Appeals

The decree of the BMDW may be appealed. The Federal Administrative Court is competent to hear the appeal.

Also, the decision of the Federal Administrative Court may be contested in front of the Supreme Administrative Court (and the Constitutional Court).

The degree of review by the courts is limited given the discretion of the BMDW as to when security or public order is threatened.

Suspensory?

Yes. A notifiable Relevant Investment may only be implemented following approval by the BMDW. As long as FDI clearance has not been granted, a notifiable Relevant Investment (the underlying transaction agreement) is deemed to have been concluded subject to the condition precedent that approval is granted.

A notifiable Relevant Investment that is carried out without FDI Clearance is void under civil law until FDI Clearance has been obtained.

Sanctions

A closing of the legal transaction is not permitted prior to approval, and a transaction that is nevertheless completed (gun jumping) is a criminal offence punishable by imprisonment of up to one year (possibly up to three years).

Furthermore, the underlying legal transaction is invalid under civil law. The transaction can be “cured” by subsequent approval.

In the interest of transaction security, the application for approval must be complete and correct, otherwise, apart from (administrative) criminal sanctions, there is a risk of subsequent obligations being imposed or the transaction being prohibited and reversed. It is also conceivable that a legal entity could be held responsible under the Act on Criminal Responsibility of Legal Entities (*Verbandsverantwortlichkeitsgesetz*).



- On the part of each Foreign investor (**Company A**), the voting rights of any other foreign person/foreign entity (**Company B**) in the Austrian target must be included if one of the following criteria are met:
 - The acquiring Company A holds at least the applicable minimum voting rights threshold (10%, 25%) in, or can exercise controlling influence over, Company B.
 - Company B holds at least the applicable minimum voting rights threshold (10%, 25%) in, or can exercise controlling influence over, the acquiring Company A.
 - A third foreign person / foreign entity (**Company C**) holds at least the applicable minimum voting rights threshold (10%, 25%) in Company A and Company B.
 - Company A and Company B have a shareholder agreement in regard to the exercise of the voting rights in the Austrian target.

- A notifiable transaction may also occur where
 - two or more foreign persons/foreign entities holding shares in the Austrian target agree on the joint exercise of voting rights in the Austrian target and can thereby control at least the applicable minimum voting rights threshold (10%, 25%), or
 - an agreement on the joint exercise of voting rights in the Austrian target is terminated and as a consequence thereof one foreign person / foreign entity holds at least the applicable minimum voting rights threshold (10%, 25%).

Please be aware that the ICA is unclear as to the sufficient nexus in the vertical line of shareholdings.

De-minimis rule

Foreign investment control shall not apply if the target is a micro-enterprise (de minimis rule). A micro-enterprise is defined as an enterprise

- which employs fewer than 10 persons and
- whose annual turnover and/or annual balance sheet total does not reach or exceed the threshold of EUR 2 million.

The Austrian FDI Report in the Broader Context

Looking at a broader context, fewer foreign² M&A deals were announced in 2020 as compared to 2019 according to the First Annual Report on the screening of foreign direct investments into the Union by the European Commission (**EC Annual FDI Report**)³. Deal-making recovered slowly by end-2020 and in the first quarter of 2021 but remained 30% below the 2019 level.

Number of Cases

EU For the calendar year 2020, EU Member States have reported to have reviewed 1,793 investment dossiers upon request for approval. Of these investment dossiers about 80% were not formally screened⁴. Out of the remaining 20% undergoing formal screening, 91% were approved (thereof 79% without conditions and 12% with conditions). Only 2% were prohibited while 7% of the transactions were aborted. In the period from 11 October 2020⁵ through 30 June 2021 a total of 265 notifications were submitted by 11 EU Member States. More than 90% of these cases were notified by five EU Member States, namely Austria, France, Germany, Italy and Spain. Of the 265 cases notified, 80% (212) were closed by the European Commission in Phase 1 and 14% (36) proceeded to Phase 2⁶. The main sectors at issue in Phase 2 cases were Manufacturing, ICT and Financial service activities.

Austria Under the Austrian FDI regime, 50 FDI procedures were carried out and completed in total, with eight certificates of non-jurisdiction (*Unbedenklichkeitsbescheinigung*), 35 full decisions, three rejections due to a lack of an approval requirement and four withdrawals of applications. Out of the 35 full decisions, 31 transactions were approved in Phase 1. Four transactions underwent Phase 2 proceedings, with two of them being approved with commitments. No transaction was blocked or approved by time-lapse.

Origin of Investors

EU The largest investors in the EU in 2020 were the US and the UK (with 30.5% each of all non-EU investments in the EU), followed by EFTA countries (with 7.5% from Switzerland) and China (with 2.5%)⁷. In the 265 cases notified under the EU cooperation mechanism, the five main countries of origin (as for the origin of the ultimate investor) were the US, the UK, China, Canada and the United Arab Emirates.

Austria The Austrian FDI Report shows a similar picture, with the US (31 transactions) and the UK (12 transactions) being the most active investors followed by Japan, Singapore and the United Arab Emirates on a distant third (2 transactions each).

Main Targeted Sectors

EU The sectors which saw the greatest surges in deal-making across the EU in the period 2019-Q1 – 2021-Q2 were the medical supplies, pharma manufacturing and information and communications technology (ICT)⁸ sector. The three sectors with the highest number of transactions notified under the EU cooperation mechanism were Manufacturing, ICT, and Wholesale and Retail.

Austria The main targeted sectors under the Austrian FDI regime were the health, information technology and the finance sector.

² For the purposes of the European Commission's First Annual Report on the screening of foreign direct investments into the Union the term foreign refers to transactions made by non-EU investors in Europe. An Investor is classified as non-EU when it is majority owned by a non-EU entity (person or company). In the absence of a majority ownership, the location of headquarters will define the nationality of the investor.

³ Report from the Commission to the European Parliament and the Council, First Annual Report on the screening of foreign direct investments into the Union, COM(2021) 714 final.

⁴ Either because of an evident lack of impact on security or public order, or because they fell outside the scope of the national screening mechanism.

⁵ The EU cooperation mechanism came into effect on 11 October 2020.

⁶ The remaining 6% of the cases were still ongoing on the cut-off date.

⁷ The Chinese figure includes Hongkong and Macao.

⁸ In 2020 ICT totalled 35% of all M&A deals into the EU, surpassing manufacturing for the first time ever. ICT also drives the recovery in the first quarter of 2021, with a year-on-year 53% increase in M&A transactions.

Takeaways and Must-Knows for Foreign Investors and Their Advisors

That Austria is among the five countries responsible for the vast majority of the 265 cases notified to the EU cooperation mechanism and - in relation to the number of inhabitants – even submits the highest number of cases to the EU cooperation mechanism – shows how wide the Austrian FDI regimes is. This may partly be attributed to the fact that in contrast to other jurisdictions (such as Germany) Austria submits all cases⁹ to the EU cooperation mechanism. However, the main reason for the (disproportionately) high number of FDI cases is the wide scope of the Austrian FDI regime: While EU-investors are not caught, direct and indirect acquisitions are covered and the Annex to the ICA sets out a long list of sensitive sectors with immensely broad categories. It is clear that the focus of the Austrian FDI legislation (and many other European FDI regimes) goes beyond the protection of national security in the narrow sense. The protection of strategic assets is no longer limited to core national security sectors, such as the defense sector or critical energy infrastructure. Against the backdrop of the race for technological supremacy and the pandemic, putting security of supply into the limelight, the concept of national security is slowly evolving into a broader concept of national competitive interests and national economic security. The aim is to become aware of transactions of foreign investors acquiring (potentially) important Austrian (and EU) companies, assets and know-how and to intervene.

The rules on FDI screening also take their place in the broader context of the EU's (planned) measures to reduce dependency on non-EU countries for critical inputs and technologies, such as:

- The EU Chips Act¹¹, a set of measures to ensure an increase in research and production of semiconductor technologies and applications – the building block of all electronic products – and a resilient supply chain.

- The European Cybersecurity Resilience Act to establish common cybersecurity standards for products (envisaged publication in Q3 2022).
- An action plan for an accelerated digital transformation of the energy sector to ensure the shift towards renewables, connected mobility and smart buildings paired with measures for resilient and cyber-secure energy.
- A mechanism to scrutinize subsidies granted by non-EU governments, which benefit companies engaging in an economic activity in the EU. The mechanism includes, inter alia, a notification-based tool to investigate (i) concentrations or (ii) bids in public procurements involving a financial contribution by a non-EU government.

While some of these measures cater to the legitimate interest of a state to avoid a sellout of strategic assets, ensure security of supply and boost innovation, it will become increasingly difficult for policy makers to strike a balance between an open investment climate and the protection of assets critical for essential interests. In particular, the tools to ensure such protection should be as targeted and efficient as possible. In this regard, there is room for improvement under the Austrian FDI regime. In addition, the EU FDI Screening Regulation has created a system to cooperate and exchange information but has not fully harmonized investment screening throughout the Union; the decision on which investments to screen, approve, condition or block is taken by the screening EU Member States under their respective rules and screening mechanism. Consequently, there is no “one-stop-shop” or clear single path for investors. Dealmakers are not only confronted with FDI risks as such but also with possible delays due to lengthy FDI proceedings and increased efforts to coordinate cross-border M&A transactions.

The key to minimizing deal risk and avoiding delays is a clear focus on timing early in the transaction planning process and strategic coordination over multiple jurisdictions. FDI risks (a prohibition, the imposition of unfavorable commitments or an abortion of the transaction) need to be reflected in the transaction documentation.

⁹ Under the Austrian regime it is mandatory that all full applications for clearance are submitted to the EU cooperation mechanism. There is no corresponding requirement for applications for a certificate of non-jurisdiction (Unbedenklichkeitsbescheinigung).

¹⁰ Proposal for a Regulation of the European Parliament and of the Council establishing a framework of measures for strengthening Europe's semiconductor ecosystem (Chips Act), COM(2022) 46 final.

How we can help

With its very broad FDI regime, Austria should be on every dealmaker's checklist for FDI screening in multi-jurisdictional M&A deals.

We are your experienced partner when it comes to FDI, we have worked on well over 40% of all FDI filings during the reporting period and published numerous articles and the first commentary on the Austrian FDI regime. We have vast expertise in advising on the Austrian FDI legislation and are in regular contact with the authority. We assess the applicability of the Austrian FDI regime on an investment and the risk of potential intervention. We can assist in planning and implementing a strategy to deal with FDI risks. We have an interdisciplinary approach, working closely with our M&A specialists and can cover deal-structuring, FDI proceedings and risk mitigation in the transaction documentation. Let us help you navigate the Austrian FDI regime and meet the challenges of the new FDI world.

Additional literature



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