

**FDI Guide**  
**Austria**

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**Foreword:** A specific chapter is dedicated to the new Regulation (EU) 2019/452 of 19 March 2019 creating a framework for the screening of foreign direct investment (FDI) into the European Union through a combination of: (1) mandatory information by the Member State receiving a filing under its FDI regime of all other Member States and the European Commission; and (2) the possibility for the latter to make comments or issue opinions to the former.

	<b>Topic</b>	<b>Explanation/Description of what is expected</b>	<b>Austria</b>
<b>1.</b>	<b>Principle</b>	Describe if the FDI regime is built by exception to a principle of freedom of investment or whether restrictions to transferring funds to and from your country apply generally.	<p><b>Regime by exception</b></p> <ul style="list-style-type: none"> <li>• The Maastricht Treaty is applicable to Austria and guarantees the principle of free movement of capital between Member States of the European Union and third countries.</li> <li>• In accordance with Article 65 of the Treaty on the Functioning of the European Union (TFEU), exceptions nevertheless exist, including, inter alia, measures grounded on public policy or public security.</li> <li>• Based on this exception principle, Austria has implemented a screening procedure regarding non-European Economic Area (EEA) foreign direct investment (FDI) in Austrian target companies operating in some sensitive sectors (the ‘FDI rules’).</li> </ul>

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2.	<b>Legal regime</b> Authority(ies) in charge	Describe source(s).  Name of authority in charge of applying the FDI rules (Minister/Agency/...).	Austrian foreign investment screening rules are set out in the Investment Control Act (Investitionskontrollgesetz or InvKG). <sup>1</sup>  Foreign investment clearance requests must be submitted to the Ministry of Economics (Bundesministerium für Digitalisierung und Wirtschaftsstandort or BMDW) in writing.  Within the BMDW, the relevant department is the Department for Investment Screening (Abteilung für Investitionskontrolle).
3.	<b>Transactions that may be subject to FDI</b> <ul style="list-style-type: none"> <li>• Type</li> <li>• Materiality thresholds</li> <li>• Rights of evocation</li> </ul>	Describe the nature of the transactions that may be subject to FDI rules.  In the case of share acquisition, specify if the FDI regime is triggered only beyond a certain threshold and, if so, describe such a threshold.	<b>Sector-specific foreign investment control</b>  FDI from a non-EU/EEA jurisdiction in sensible sectors may become subject to governmental screening if a foreign investor acquires ten, 25 or 50 per cent of the voting rights or controlling influence of a target company operating in this sector. For such acquisitions, filing for authorisation is mandatory.  ‘Controlling influence’ means the ability, through rights, contracts or other means, individually or collectively, to exercise decisive influence over the activities of the target company, taking into account all the circumstances, even if the thresholds regarding the voting rights are not reached, in particular by: <ul style="list-style-type: none"> <li>• rights of ownership or use in the whole or in substantial parts of the tangible or intangible assets of the target company; or</li> <li>• rights or contracts that confer decisive influence within the meaning of the EU Merger Regulation over the membership, deliberations or decisions of the boards of that undertaking.</li> </ul> <b>Cross-sector foreign investment control</b>  With respect to the cross-sector control of other than sensible sectors, the following applies: <ul style="list-style-type: none"> <li>• Acquisitions from a non-EU/EEA jurisdiction of 25 or 50 per cent of the voting rights or controlling influence of a target company operating in other than sensible sectors, but in areas in which there could be a threat to security or public order, including crisis</li> </ul>

<sup>1</sup> BGBl I Nr 87/2020.

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			<p>management and services of general interest, may be subject to screening by the BMDW. For such acquisitions, filing for authorisation is mandatory.</p> <p>No approval is required for FDI where the target enterprise is a microenterprise, including start-up companies, with fewer than ten employees and annual sales or an annual balance sheet total of less than EUR 2m.</p>
		<p>Are indirect acquisitions of assets or shares in the jurisdiction subject to the relevant FDI rules (acquisitions in a parent company outside the jurisdiction)?</p> <p>Are shares transfers involving a group company internal restructuring covered?</p> <p>Are greenfield investments covered?</p>	<p>Indirect acquisitions, that is, acquisitions by an EU investor acting as a ‘straw man’ for a foreign investor, are also subject to the Austrian FDI regime if there is a risk of circumvention because the direct acquisition is carried out by a person (EU company) other than the person (foreign investor) who will exercise actual influence over the target company. Whether such circumvention exists is to be assessed according to the true economic content of the transaction.</p> <p>No explicit exemption is available for internal restructurings. However, arguably there is no notification requirement for acquisitions of an indirect interest in an Austrian target if there is no change of control.</p> <p>Greenfield investments are not covered. With respect to microenterprises, please see above.</p>
		<p>Does the FDI authority (or another type of governmental authority) have a power of evocation/ex officio/call-in powers? If so, please describe.</p>	
4.	<p><b>Sectors falling under the FDI scope</b></p>	<p>Describe the economic sectors for which the FDI regime will apply. If relevant, explain for each sector the level of flexibility that the authority may apply (or not) in evaluating whether FDI rules should apply.</p> <p>Are there sector-specific stricter limits on foreign investment that will apply, such as a lower threshold of investment by foreign interests or sectors for which no foreign</p>	<p><b>Sector-specific foreign investment control</b></p> <p>This encompasses target companies active in:</p> <ul style="list-style-type: none"> <li>• defence equipment and technology;</li> <li>• operation of critical energy infrastructure;</li> <li>• operation of critical digital infrastructure, in particular 5G;</li> <li>• water;</li> <li>• operation of systems that guarantee the data sovereignty of the Republic of Austria; and</li> </ul>

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		investment is possible? If yes, which sectors (eg, nuclear energy/agriculture)?	<ul style="list-style-type: none"> <li>• companies active in R&amp;D in the areas of pharmaceuticals, vaccines, medical devices and personal protective equipment.</li> </ul> <p><b>Cross-sector foreign investment control</b></p> <p>With respect to other than sensible sectors, cross-sector foreign investment control covers target companies operating in areas in which there could be a threat to security or public order, including crisis management and services of general interest, that is, critical infrastructure and critical technology and dual-use goods, as well as critical resources.</p> <p>‘Critical’ means infrastructure, technology and resources that are essential to the maintenance of vital social functions because their disruption, destruction, failure or loss would have a serious impact on the health, safety or economic and social wellbeing of the population, or the effective functioning of government institutions.</p> <p>With regard to the application of the FDI rules, Austrian authorities have taken a rather strict approach. Therefore, we have not experienced much flexibility in this regard in Austria.</p>
5.	<b>Qualified investors</b>	Describe the main characteristics of investors that fall under the FDI regime and if there are nuances depending on their origin (eg, EU v not EU).	<p>There are two types of foreign investors defined in the InvKG:</p> <ul style="list-style-type: none"> <li>• a natural person without citizenship of the EU or citizenship of an EEA state or Switzerland; or</li> <li>• a legal person having its registered office or head office outside the EU, EEA and Switzerland.</li> </ul>
6.	<b>Procedure</b> 6.1 Before or post-closing filing		Any transaction fulfilling the sector-specific screening requirements or cross-sector screening requirements must be filed for approval <i>immediately after signing and before the closing of the transaction</i> ; and, in the case of a public offer, before the decision to submit an offer is published.
7.	6.2 In the case of pre-closing filing	Mandatory/optional filing	<p><i>It is mandatory</i> to file a request for clearance before the completion of the investment within the scope of the FDI rules.</p> <p>Like France, foreign investment clearance in Austria should therefore be a closing condition precedent to the completion of the transaction.</p>

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8.	6.3 In the case of post-closing, what are the powers of the authority?		Not applicable (pre-filing is mandatory).
9.	6.4 Advance ruling	Explain if it is possible to obtain a pre-ruling from the authority as to whether the transaction falls under the FDI rules and, as the case may be, describe the process to be followed.	<p>Any investor or the target enterprise may submit an application for the issuance of an advance ruling (non-jurisdiction letter, <i>Unbedenklichkeitsbescheinigung</i>) for a specific direct investment to the BMDW before the transaction is carried out.</p> <p>The application must contain all the information required for an application for approval.</p> <p>The BMDW may issue an advance ruling by notice within two months of receipt of the complete application if it has been established that the direct investment is not subject to any approval requirement; otherwise, notice may be given that the application will be treated as an application for approval.</p> <p>If the BMDW neither issues a notice nor any statements as described above within two months from the receipt of the complete application, the non-jurisdiction letter may be deemed granted.</p>
10.	6.5 Timing of various steps (i) Filing	How much lead time is required?	If a projected investment falls within the scope of the FDI rules, the investor must file a request for authorisation with the BMDW without undue delay after signing.
11.	(ii) Review by Authority	Specify the timing available to the authority; indicate if the timeframe is mandatory or not and describe what other flexibility may exist de facto or <i>de jure</i> .	<p><b>Regular procedure</b></p> <ul style="list-style-type: none"> <li>• Within a few days after receipt of the notification, the BMDW provides the European Commission and the other Member States with information under the EU Screening Regulation.</li> <li>• After the expiry of the 35 or 40-day period for the European Commission and other Member States to submit observations, the authority has a further month for its examination in Phase I. The total duration of Phase I therefore amounts to approximately 2.5 months.</li> </ul>

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			<ul style="list-style-type: none"> <li>At the end of Phase I, the authority either decides to initiate an in-depth review procedure (approval procedure – Phase II), which must be completed within two months, or issues a decision clearing the transaction.</li> <li>If the authority fails to issue a decision within the statutory periods, the <i>approval is deemed to have been granted</i>.</li> </ul> <p><b>Request for advance ruling (<i>Unbedenklichkeitsbescheinigung</i>)</b></p> <ul style="list-style-type: none"> <li>The deadline for advance rulings (non-jurisdiction letters) is two months from receipt of the complete application.</li> <li>If the BMDW deems that the transaction falls within its jurisdiction, the request will be treated as an application for clearance (triggering the deadlines of the regular procedure).</li> </ul>
12.	(iii) Negotiation with the authority	Describe how to handle the relationship with the authority, including when approval is subject to commitments from, or conditions imposed on, the investor.	There is room to discuss the transaction with the Department for Investment Screening. In particular, there is usually scope to discuss potential remedies with the BMDW before they are imposed by way of a decision.
		Are there any guidelines issued by the authority?	Currently no publicly available guidelines provide insight into how the relevant department processes applications or guidance on the applicable criteria for deciding clearance conditions, if any.
13.	(iv) Filing fees	Is there a filing fee?	No.
14.	(v) Information needed for filing	What information about the investor is required? Are there any thresholds for the identity and nationality of minority passive shareholders? Information on other FDI approvals by other authorities?	<p>An application to the BMDW must include:</p> <ul style="list-style-type: none"> <li>the name, address and, if available, telephone number and email address of each investor;</li> <li>a detailed description of the business activity of the investor (including products, services and business operations);</li> <li>a description of the market in which the business activity of the investor takes place (competitors and market share); and</li> </ul>

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			<ul style="list-style-type: none"> <li>an indication of the natural or legal person that ultimately owns or controls each investor, applying the criteria set out in section 2 of the Economic Owners Register Act (Wirtschaftliche Eigentümer Registergesetz or WiEReG).<sup>2</sup></li> </ul>
15.	(vi) Final decision	Indicate if the final decision is to be issued within a set timeframe and what are the consequences if the authority does not issue a decision within the set timeframe.	As set out in 11 above, if the Minister does not issue a decision within the legal time periods, that is, at the end of the Phase 1 or Phase 2 review, as the case may be, the transaction is deemed to be cleared.
16.	<b>Conditionality of approval</b> (i) Type of conditions or commitments	Describe the type of conditions or commitments to which FDI approval may be subject. Specify their usual duration. Specify what powers the authority may exercise to control/monitor the satisfaction of such conditions/commitments.	<p>The BMDW may attach to its Phase 2 clearance such conditions as may be necessary to remedy any threat to public order or security. In practice, conditions are imposed relatively rarely. Conditions usually impose behavioural obligations on the purchaser, aiming, inter alia, at ensuring security of supply, preserving know-how in Austria and preventing its disclosure to foreign powers.</p> <p>In order to monitor compliance with the provisions of the InvKG, the BMDW may at any time demand reports and evidence from any investor and the target company, and set a reasonable time limit for their submission. If effective monitoring cannot be carried out in any other way, the BMDW may also inspect books and warehouses through suitable experts.</p> <p>Staff of the BMDW may in particular:</p> <ul style="list-style-type: none"> <li>request the necessary data and information;</li> <li>interview the personnel of the entity to be inspected;</li> <li>have documents and records presented to them, inspect these and make copies; and</li> <li>carry out on-site inspections.</li> </ul>
17,	(ii) Level of discretionary power of the authority	Indicate if it exists and, if so, describe exceptional circumstances that have led to the use of such discretionary power.	The BMDW does not have discretion regarding the initiation of proceedings. If transactions fall within its jurisdiction, the BMDW is obliged to initiate review proceedings. The BMDW does have the right to investigate transactions that do not come within the scope of the InvKG.

<sup>2</sup> BGBl I Nr 136/2017 idF BGBl I Nr 148/2021.

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			By contrast, the BMDW has substantial discretion as regards its substantive decision, in particular with regard to remedies. Its decisions are subject to appeal. <sup>3</sup>
18.	(iii) Risk of veto	Describe a topical case.  Statistics	Vetoes are possible but have not been rendered so far.
19.	<b>Role of other national authorities</b>	Indicate if other authorities or administrations (eg, Army or Defence Minister) can get involved and, if so, how (by the authority or otherwise) and how much influence it may exercise.	The BMDW regularly consults other stakeholders in the FDI review process. Certain decisions are subject to consultation in an advisory committee comprising members of a number of federal ministries and provincial governments. Other Member States and the European Commission are also informed under the cooperation mechanism set out in the EU Screening Regulation.
20.	<b>Sanctions</b>	Describe the type of sanctions that may be imposed by the authority in the case of:	
		<ul style="list-style-type: none"> <li>breach of conditions and/or commitments attached to the approval; and</li> </ul>	The <i>intentional</i> breach of conditions imposed by the BMDW is subject to a prison term of up to one year. In certain qualified cases, the prison term can be increased to up to three years. In the case of <i>negligence</i> , the maximum term is six months.
		<ul style="list-style-type: none"> <li>investment carried out without prior approval.</li> </ul>	<p>The <i>intentional</i> closing of a notifiable transaction without prior clearance is subject to a prison term of up to one year. In certain qualified cases, the prison term can be increased to up to three years. In the case of <i>negligence</i>, the maximum term is six months.</p> <p>In addition, violations by the Austrian target of its obligation to inform the BMDW of notifiable transactions which are not notified by the purchaser, are subject to administrative fines of up to EUR 40,000 (EUR 25,000 in the case of negligence).</p> <p>Transactions are transitionally void until approval is granted. In the case of transactions that have already been closed and where there is a reasonable suspicion of a threat to security or public order, conditions up to and including rescission may be imposed.</p>

<sup>3</sup> Before the administrative court, the appellants may base their claim on the illegality of the decision or a manifest error of assessment by the authority (which, in practice, is very difficult to demonstrate).

	<b>Topic</b>	<b>Explanation/Description of what is expected</b>	<b>Austria</b>
	<b>Covid – special regime</b>	Please describe specific rules applicable as a result of the Covid-19 pandemic.	<p>The European Commission published guidelines on the protection of critical European assets and technology in the current crisis on 25 March 2020.<sup>4</sup> These show how existing control mechanisms may be applied by Member States in the crisis and with reference to health protection. At the same time, they urge their consistent use and thus emphasise the further increasing practical relevance of investment control mechanisms.</p> <p>In response to the health crisis, a resolution on measures to protect critical enterprises against takeovers from third countries (investment control) was adopted by the National Council on 3 April 2020. The BMDW has been called upon to submit a draft law to the National Council with the aim of preventing takeovers from third countries of key companies that are relevant or critical. Nevertheless, no measures have so far been adopted.</p>

<sup>4</sup> See [https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc\\_158676.pdf](https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158676.pdf) (10.6.2022) accessed 7 October 2022.