

New guidance of the FDI authority regarding approval requirements in Austria

The Austrian investment control authority of the Federal Ministry for Economy, Energy and Tourism (“**FDI Authority**”) recently provided guidance on selected issues (<https://www.bmwet.gv.at/Themen/Investitionskontrolle.html>) to clarify when an FDI approval is required. This note summarizes the relevant rules in the introduction in Part A and the new guidance in Part B.

A. Introduction: approval requirement and critical sectors under the ICA

Pursuant to the Austrian Investment Control Act (“**ICA**”) it is necessary to obtain FDI approval from the FDI authority if

- a) a foreign natural or legal person (i.e. non-EEA, non-EU, non-Swiss)
- b) directly or indirectly acquires (i) voting rights of at least 25% or 50% (in particularly sensitive sectors 10%) in, (ii) a dominant influence over, or (iii) key assets of
- c) an Austrian undertaking
- d) which is active in a sector mentioned in the Annex of the ICA or otherwise in a "critical" sector.
- e) Start-up exception: If the above conditions a – d are fulfilled, a transaction still does not require FDI approval if the Austrian undertaking has (i) less than 10 employees (FTEs) and (ii) either a turnover or a balance sheet total less than EUR 2 million in in both of the two preceding years.

Particularly sensitive sectors (10% threshold)

- a) Defense goods and technology,
- b) operating critical energy infrastructure,
- c) operating critical digital infrastructure,
- d) water, and
- e) systems ensuring Austrian data sovereignty

“Less sensitive” sectors (25% / 50% threshold) include, inter alia:

- a) critical infrastructure (i.e. facilities, systems, equipment, processes, networks, or parts thereof) particularly in the fields of energy, IT, traffic and transport, health, food, telecommunications, data processing and storage, defense,
- b) critical technologies, e.g. biotechnology,
- c) security of supply in energy or health-related goods (including R&D),
- d) access to sensitive information,
- e) freedom and plurality of the media, and
- f) other sectors essential for maintaining key societal functions.

Importantly, the FDI Authority takes an expansive view of these sectors. Filings are expected where there is only a potential risk that the sector – or (sometimes) upstream or downstream markets – may be affected. Sales or distribution companies may be considered “active” in a sensitive sector if their products fall into a listed sector. Where the criteria are formally met, a filing is required regardless of the actual impact on public order or security. Issues such as the lack of Austrian customers or the purely commercial nature of the Target’s activity are assessed only at the substantive review stage – not for the filing obligation.

B Guidance by the FDI Authority

1. Interpretation of sensitive sectors

For several “less sensitive” sectors the FDI Authority clarified the following:

- **Energy:** The collection, treatment, recycling and energy recovery from and disposal of municipal solid waste does not fall under “energy”.
- **Information technology:**
 - **Ancillary activities** in the IT sector are not considered part of this sector if they only serve to fulfil the main activity and the main activity does not fall under “information technology” (example: an online shop of a clothing retailer).
 - **Marketing and communication services**, in particular the conception, planning and implementation of marketing strategies, advertising campaigns, and communication measures, as well as IT services for the creation and maintenance of websites and applications for marketing purposes, and the development of digital sales tools, do not fall under this sector.
- **Traffic and transport:** This sector includes, *inter alia*, passenger transport, freight transport, railway, road transport, motor vehicles, shipping, aviation, and cableways. The sale of paints and coatings, products for smart repair and dent removal technology for motor vehicles is not classified as falling under this sector.
- **Health:** Health and food refer exclusively to human medicine, but not veterinary medicine, and exclusively to food and not to animal feed.
- **Food:** Not all foodstuffs are considered critical (in the past, refreshments from vending machines, burger joints, frozen fries were not considered critical and do not require authorization).
- **Finances:** The gambling industry is also included in this sector due to risks related to money laundering or terrorist financing; source of income for criminal syndicates, financial market stability.
- **Other activities:**
 - Sectors not listed in the Annex of the ICA may still be critical, e.g. security services.
 - **Services:** Pure consulting services without their own operational business activities do not fall under the ICA. Services such as training, technical support as well as advice on workshop planning, process optimisation and management are also not covered by the approval requirement under the ICA; also not covered are the collection, processing, recycling, disposal of municipal solid waste, street cleaning, maintenance and maintenance of green spaces; maintenance and cleaning of buildings and facilities; treatment and disposal of industrial waste and the remediation of contaminated soils.
 - **Packaging:** Packaging for food and / or pharmaceuticals / medical devices fall under a critical sector (e.g. health, food) if the underlying product is critical and is subject to a legally regulated packaging obligation.
 - **Marketing:** Marketing and communication services, in the form of conception, planning and implementation of marketing strategies, advertising campaigns as well as communication measures and IT services for the creation and maintenance of websites and applications for marketing purposes as well as the development of digital sales aids do not fall under the ICA either.

2. Guidance relating to the acquisition of key assets (Section 1 (3) lit. d ICA)

An acquisition of key assets requires that the acquirer obtains a dominant influence over the material assets, potentially transferring market position and creating security risks. The FDI Authority provided the following examples for an acquisition of key assets:

- The contractual obligation to take over employees and / or the customers,
- acquisition of drug approvals, inventory, business records and customer lists.

3. Guidance relating to the acquisition of a dominant influence (Section 1 (3) lit. c ICA)

According to the FDI Authority, the acquisition of a dominant influence goes beyond the definition under merger control law. A dominant influence may exist even without reaching relevant voting rights

thresholds, if the acquirer can decisively intervene in the activities of the Austrian company (e.g. veto rights in strategic areas, e.g. budget, which could stop the onward supply of customers in Austria).

4. Guidance relating to the start-up exception (Section 2 (2) ICA)

The FDI Authority confirms that FDI approval is not required if the target is a micro-enterprise (fewer than 10 employees; turnover or balance sheet total below EUR 2 million), based on the EU Recommendation 2003/361/EC. An undertaking loses or retains the status of a micro-entrepreneur if it exceeds or falls short of these criteria in two consecutive financial years. Two important clarifications are made:

- For multiple target companies, a "stand-alone" assessment of each target company is carried out.
- The exemption always applies to the Austrian target company as a whole, not to individual business units. For example, if the Austrian target company operates several businesses and sells one of them, it does not matter whether the sold division would meet the start-up criteria. What matters is whether the target company as a whole meets the start-up thresholds.

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DR. PHILIPPE KIEHL
PARTNER
ANTITRUST,
COMPETITION &
INVESTMENT CONTROL

