

REGIONAL SURVEY OF

# FDI REQUIREMENTS IN CEE/SEE

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# SUMMARY OF FDI REGIMES IN CEE

- **Tremendous shift in policies** in many jurisdictions towards a stricter foreign investment regime triggered by EU Regulation (2019) and COVID-19
- **Governmental approvals are required in many jurisdictions** for certain cases of foreign investments; in particular, as far as such investments affect critical industries or infrastructure.
- In **M&A transactions** covering several jurisdictions, it has become critical to consider the applicable FDI regimes:
  - analyse which risks they may pose to the successful conclusion of a transaction
  - Is it likely that structural or behavioral remedies need to be offered?
  - understand which implications the rules of each country (considering the cooperation mechanism under the EU's FDI Regulation) may have for the overall transaction timeline.

# FDI SUMMARY SCHEDULE (1)

ISSUE	AUSTRIA	CZECH REPUBLIC	HUNGARY	POLAND	ROMANIA <sup>1</sup>	SLOVAKIA	SLOVENIA
<b>Evaluation criteria</b>	<ul style="list-style-type: none"> <li>▪ public order</li> <li>▪ public security</li> </ul>	<ul style="list-style-type: none"> <li>▪ public order</li> <li>▪ internal order</li> <li>▪ national security</li> </ul>	<ul style="list-style-type: none"> <li>▪ public order</li> <li>▪ national security</li> </ul>	<ul style="list-style-type: none"> <li>▪ public order</li> <li>▪ public security</li> <li>▪ public health</li> </ul>	<ul style="list-style-type: none"> <li>▪ national security</li> <li>▪ public order</li> <li>▪ projects or programmes of EU interest</li> </ul>	<ul style="list-style-type: none"> <li>▪ public order</li> <li>▪ national security</li> </ul>	<ul style="list-style-type: none"> <li>▪ public order</li> <li>▪ public security</li> </ul>
<b>Only foreign investors?</b>	✓	✓	EU/EEA/Swiss investors also within full scope	✓	EU investors also within scope, however special procedure and no stand still obligation	Applies to Slovak and also foreign investors	EU/EEA/Swiss investors also are within full scope
<b>Indirect acquisitions?</b>	✓	✓	✓	✓	✓	✓	✓
<b>Share deals?</b>	✓	✓	✓	✓	✓	✓	✓
<b>Asset deals?</b>	✓	✓	✓	✓	✓	✓	✓
<b>Financial / monetary thresholds?</b>	<u>exemption</u> for targets having fewer than ten employees <u>and</u> an annual revenue <u>or</u> total assets below <b>EUR 2 mln</b>	✗	<ul style="list-style-type: none"> <li>▪ generally not</li> <li>▪ investments above approx. <b>EUR 1 mln</b> in value under the <b>Temporary Regime</b></li> </ul>	target's revenues from sales and services exceeding in Poland, in any of the two financial years preceding the notification, the equivalent of <b>EUR 10 mln</b>	investment above <b>EUR 2 mln</b> in value (however, all investments might be subject to ex officio screening on grounds of public security)	✗	✗

<sup>1</sup> The new FDI screening regime presented herein for Romania is based on the last version published by the Government for public consultation (not yet adopted). The existing FDI regime applies for both EU and non-EU investors and is based on the referral of merger cases by the Romanian Competition Council to the Supreme Council for State Defense for review on national security grounds.

# FDI SUMMARY SCHEDULE (2)

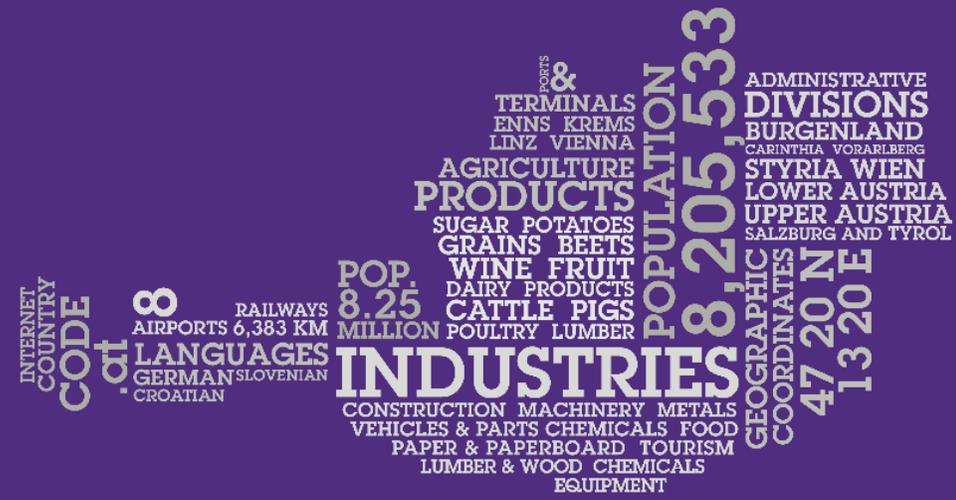
ISSUE	AUSTRIA	CZECH REPUBLIC	HUNGARY	POLAND	ROMANIA	SLOVAKIA	SLOVENIA
<b>Corporate thresholds?</b>	corporate thresholds start from <b>25%</b> of voting rights and <b>10%</b> for certain highly sensitive industry fields	corporate thresholds start from <b>10%</b> of shares or votes	corporate thresholds start from <b>25%</b> of ownership in private companies ( <b>10%</b> for public companies)	corporate thresholds start from <b>20%</b> of shares or votes	only participations conferring "control" subject to review  portfolio investments out of scope	corporate thresholds start from <b>10%</b> of shares or votes	corporate thresholds start from <b>10%</b> participation in capital or voting rights
<b>Mandatory filing?</b>	✓	✓	✓	✓	✓	✓	✓
<b>Time of filing</b>	<b>after signing, but before closing</b> – purchaser must file application immediately after signing of the agreement or after announcement of the intention to launch a public takeover bid	<b>after signing, but before closing</b>	<b>after signing, but before closing</b> – clear standstill obligation applies	<b>before signing</b> , i.e. before taking any legal action that leads to acquiring or achieving significant participation or acquiring dominance in a target	<b>after signing, but before closing</b> – clear standstill obligation is introduced	<b>after signing, but before closing</b> – clear standstill obligation is introduced	<b>no later than 15 days after signing</b>
<b>Time of review</b>	up to <b>3 months</b> (phase I), then, in some cases, up to <b>further 2 months</b> (phase II)	<b>Phase I</b> (approval): minimum 90 days <b>Phase II</b> (prohibition): minimum 135 days	<b>Lasting Regime:</b> 60 days extendable with up to 60 days <b>Temporary Regime:</b> 30 days extendable with up to 15 days	up to <b>6 months</b>	<b>Phase I:</b> minimum 75 days + 45 days for communication <b>Phase II:</b> minimum 150 days + 45 days for communication	<b>minimum 2 months</b> , then in some cases additional time due to review of the Slovak Government and the Supreme Court, if applicable	up to <b>2 months</b>

# FDI SUMMARY SCHEDULE (3)

ISSUE	AUSTRIA	CZECH REPUBLIC	HUNGARY	POLAND	ROMANIA	SLOVAKIA	SLOVENIA
<b>Authority</b>	Minster of Digitalisation and Economic Affairs	Ministry of Industry and Trade	<ul style="list-style-type: none"> <li>Minister of Interior Affairs under the <b>Lasting Regime</b></li> <li>Minister of Interior Economy under the <b>Temporary Regime</b></li> </ul>	<ul style="list-style-type: none"> <li>President of the Office of Competition and Consumer Protection</li> <li>relevant Minister</li> </ul>	<p><b>Phase I: FDI Screening Commission</b>, based on advisory opinion of <b>Cybersecurity Task Force</b> if FDIs impact IT&amp;C technologies</p> <p><b>Phase II: FDI Screening Commission</b>, based on mandatory opinion of the <b>Supreme Council for State Defence</b></p>	<ul style="list-style-type: none"> <li>Ministry of Economy</li> <li>Slovak Government</li> </ul>	Ministry of Economic Development and Technology
<b>Sanctions</b>	<ul style="list-style-type: none"> <li>statutory condition precedent;</li> <li>criminal liability</li> </ul>	financial penalty up to EUR 3.7 mln or up to 2% of total annual turnover of the offender for the preceding financial year	<ul style="list-style-type: none"> <li>transaction is null and void by virtue of law;</li> <li>administrative fines:                             <ul style="list-style-type: none"> <li>up to HUF10 mln under the <b>Lasting Regime</b></li> <li>at least 1% of the Hungarian target's annual turnover in the preceding financial year under the <b>Temporary Regime</b></li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>transaction can be null and void by virtue of law;</li> <li>financial penalties – up to EUR 22 mln;</li> <li>criminal liability</li> </ul>	financial penalties up to 5% of the investor's global turnover for the preceding financial year	Financial penalty up to EUR 200,000	<ul style="list-style-type: none"> <li>If the authority unwinds or prohibits the FDI, the transaction is null and void;</li> <li>In the case of non-compliance with the requirement to notify the FDI, administrative fines apply: up to EUR 500,000 for a legal entity, and up to EUR 10,000 for the responsible person of a legal person.</li> </ul>

# AUSTRIA

## THE FDI SCREENING MECHANISM



# NEW FDI SCREENING REGIME

- Mid 2020, the Investment Control Act (*Investitionskontrollgesetz*) entered into force, expanding the Austrian FDI control regime and implementing the EU cooperation mechanism
- The main changes of the FDI control regime included a broader scope of applicability, especially with respect to relevant industry fields, indirect purchases and asset deals:
  - Both direct and indirect acquisitions are caught also including transactions through an EU / EEA / Swiss based SPV
  - Intra-group and restructuring transactions may be covered, if control structure affected
- Generally applicable to
  - **direct and indirect acquisition** of: voting **rights** in (10, 25, and 50 percent thresholds apply), controlling **influence** over, or substantial **assets** of Austrian company
  - by one or more foreign persons (*i.e.*, non-EU / EEA / Swiss citizens or entities)
  - if the Austrian target active in certain relevant industry sectors
- Relevant industry sectors:
  - **Particularly sensitive sectors** (subject to 10, 25 and 50 percent thresholds with respect to the acquisition of voting rights), e.g., defense goods and technologies, operation of critical energy or digital infrastructure (especially 5G), research and development in the fields of medicinal products, vaccines, medical devices, etc.
  - **Other sensitive sectors** (subject only to 25 and 50 percent thresholds regarding the acquisition of voting rights), e.g., critical infrastructure, critical technologies and dual use goods, security of supply with critical resources (including supply with energy, raw materials, food, medicinal products and medical devices including vaccines, as well as R&D in these fields), Access to sensitive information, Freedom and plurality of the media

# NEW FDI SCREENING REGIME

- **Purchaser** must file application for approval immediately after signing of relevant transaction agreement or after announcement of the intention to launch a public takeover bid
- On receipt of complete application, the authority must immediately start the **EU cooperation mechanism** (which should usually take up to 6 weeks, while a recent case took almost 11 weeks) followed by a 2-stage proceeding:
  - **Phase I:** Authority must decide within 1 month after the EU cooperation mechanism has been closed and either (i) grant approval or (ii) initiate in-depth “Phase II” assessment (in the absence of which approval is deemed granted)
  - **Phase II:** Authority must decide within further 2 months and either (i) grant approval (subject to conditions, if necessary) or (ii) deny approval (in the absence of which approval is deemed granted)
- Any investor or the target company may file an application for issuance of a **non-objection ruling**, claiming that a specific FDI is not subject to the FDI approval requirement.
  - The authority must within 2 months following a complete filing either (i) issue a non-objection ruling, if the transaction is not subject to the FDI approval requirement or (ii) issue a notification that the application will be treated as an application for FDI approval
  - In the absence of such a decision or notification, the non-objection-ruling will be deemed granted
- Severe sanctions apply, including prison **sentence** of up to one year for implementing a transaction without necessary prior approval, for violations of the conditions imposed by the authority in its approving decision, or if an approval has been secured by false or incomplete statements
- Transactions subject to approval are subject to a statutory condition **precedent**

# CZECH REPUBLIC

## THE FDI SCREENING MECHANISM



# NEW FDI SCREENING REGIME

- Investments were previously only partially regulated in specific business sectors such as pyrotechnic industry, banking or energy (irrespective of the investor's origin).
- However, in January 2021 the Parliament approved the new Act no. 34/2021 Coll., On Screening of Foreign Investments. It came into effect as of 1 May 2021 and does not apply retroactively.
- The new Act aims to strengthen the state's control of foreign investments, which are:
  - Made by non-EU investors (which are not only investors with the seat outside of EU, but also EU investors controlled by non-EU subjects),
  - Directed mainly, but not exclusively, to strategic sectors such as military equipment or critical infrastructure (e.g. energy, telecommunications, chemical industry etc.); and also media industry, and
  - Providing investors with an effective control (e.g. at least 10% of voting rights or corresponding influence in a target; there is no monetary threshold).
- A change in the person of a foreign investor after the investment is made, is deemed to be a new transaction (foreign investment) and might be subject to a new review process.
- The new Act imposes an obligation to file an application for a permission of the investment or a proposal for a consultation to the Ministry of Industry and Trade ("Ministry") on those foreign investors considering an investment in strategic sectors or media industry. Unless the permission is obtained, the investment cannot take place.

# NEW FDI SCREENING PROCEDURE

- Before *any* foreign investment is made or within the period of 5 years from the moment the investment is made, the Ministry may initiate screening proceedings, if the investment is likely to affect the security or public order of the state and (subject to fulfilment of further conditions):
  - Impose obligations to fulfil specific conditions related to the investment,
  - Prohibit the investment or its continuation, if already made (i.e. order to cease the exercise of the voting rights or to sell the assets which constitute the investment), or
  - Permit the investment.
- The limitation period of 5 years does not apply if the investor breached his obligation to file an application for a permission or it is revealed he concealed relevant facts.
- Fine may be imposed for infringement of the obligation to apply for permission or propose a consultation or conditions imposed by the Ministry, amounting up to EUR 3.7 mln or up to 2% of total annual turnover of the offender for the preceding financial year.
- In order to protect the investment, we recommend to file a voluntary proposal for a consultation if any doubts arise, as the investment cannot be reviewed again after the consultation proceedings, unless it is revealed the investor submitted untrue or incomplete information. In this case, the investor must provide the Ministry with all relevant information.

# HUNGARY

## THE FDI SCREENING MECHANISM



# OLD AND NEW FDI SCREENING REGIME – SCOPE

- Since May 2020 a temporary FDI screening regime has been complementing the already existing (and lasting) regime applicable since January 2019. The temporary regime was introduced in the wake of the state of emergency announced in response to the COVID-19 pandemic.
- The **Temporary Regime** substantially expanded the requirements for investors to seek prior ministerial approval for their investments into Hungarian companies engaged in certain strategic industries:
  - the strategic fields of industries concerned under the **Lasting Regime** are weapons and military equipment, dual-use items, financial and insurance services, electricity and gas transmission, distribution and system operation, water supply as well as critical telecoms services, whereas
  - approximating what is set out in the framework Regulation (EU) 2019/452 of the European Parliament and the Council, the industries caught by the **Temporary Regime** are sweeping in nature and include manufacturing and chemicals, food and agriculture, health and medical, waste and building materials, transport and logistics and even certain retail and wholesale activities, in each case as long as those concern critical infrastructure.
- Although the **Lasting Regime** was designed not to capture any investors from the EU, the EEA and Switzerland, now both regimes require investors from outside and inside the EU, the EEA and Switzerland to make a filing for prior ministerial approval:
  - under the **Lasting Regime** without any deal value threshold; whereas
  - under the **Temporary Regime** with a deal value in excess HUF 350 million (approximately EUR 1 million).
- As for the relevant corporate shareholding thresholds triggering a filing requirement:
  - under the **Lasting Regime**: (direct or indirect) ownership alone or in combination with other already existing foreign shareholders in private companies in excess of 25%, and 10% in public entities; but
  - under the **Temporary Regime** already at a 10% shareholding.

# OLD AND NEW FDI SCREENING REGIME – PROCEEDINGS

- In addition to the straightforward (direct or indirect) acquisition of shares concerned under the **Lasting Regime**, the deal structures which fall under scope of the **Temporary Regime** include the acquisition of convertibles or rights in usufruct as well as corporate transformations, asset acquisitions, capital injections and even in-kind contributions, irrespective if the deal is for good consideration or for free.
- A subsequent amendment clarified in respect of the **Temporary Regime** that foreign-to-foreign transactions (i.e., which do not involve any direct dealing in the shares or over the assets of the Hungarian strategic company concerned) and intra-group reorganisations are exempted from any filing requirement in Hungary.
- In respect of the procedural aspects, the filing must be made under **both regimes** within ten days from concluding the relevant agreement and the ministerial decision will have to be rendered
  - under the **Lasting Regime** within 60 days thereafter, which can in the discretion of the minister extended with an additional period up to 60 days; whereas
  - under the **Temporary Regime** within 30 days thereafter, which if circumstances so require can be further extended with an additional 15-day period.
- Under **both regimes**, without the competent minister's approval, the transaction will be considered null and void under Hungarian law, and no changes can be entered into any relevant public registries (such as the corporate registry), nor will the acquirer be allowed to be entered in the relevant book of shareholders.
- The breach of these clear standstill obligations can furthermore trigger administrative sanctions:
  - under the **Lasting Regime** the minister can impose administrative fines up to HUF 10 million (approx. EUR 30,000); whereas
  - under the **Temporary Regime** the minister can impose administrative fines in the amount of at least 1% of the Hungarian target's annual net turnover.

# OLD AND NEW FDI SCREENING REGIME – EFFECTIVE PERIODS

- Although the minister's decision can be appealed in the administrative court under **both regimes**, the court will not be allowed to alter the decision but can only return the case to the minister for conducting its repeated review.
- The **Temporary Regime** is now expected to expire at the end of June 2021 (which is already a date revised from February 2021).
- It remains to be seen if any of the Temporary Regime's additional screening requirements will find their place in Hungarian law afterwards.

# POLAND

## THE FDI SCREENING MECHANISM



# NEW FDI SCREENING MECHANISM

- On 24 July 2020 Polish Act on the Control of Certain Investments was amended.
  - Before the amendment, only nine strategic Polish companies were covered by the FDI screening regime. The amended Act substantially **extended the sectors of strategic companies** covered by the approval requirements. The amendment does not provide a specific list of companies – it only presents types of companies and strategic sectors.
  - Strategic sectors covered by the Act include for example all **public companies, IT entities, companies providing cloud computing services, companies operating in energy, oil, gas, fuel, telecommunication, chemicals, medical or pharmaceutical sectors**.
  - FDI screening mechanism applies to investments resulting in the acquisition or achievement of **significant participation** or the acquisition of a **dominant position** over Polish entities operating in strategic sectors.
  - FDI screening regime applies to **share deals** and **asset deals** (transfer of enterprise). Corporate thresholds start from 20% of shares or votes in the target company. FDI regime covers also **indirect acquisitions**.
- Under the amended Act, there are four conditions that must be met for the law to apply:
    1. target company must be a **Polish company**;
    2. target company must operate in one of the **strategic sectors** specified in the Act;
    3. target company must have revenue from sales and services which exceeded in Poland in any of the two financial years preceding the notification, the equivalent of **EUR 10 million**;
    4. transaction must be conducted by the investor qualified as foreign investor, i.e.:
      - natural person not having a residential address within the EU, EEA or OECD;
      - **company not having a registered seat within the EU, EEA or OECD** for at least 2 years before the date of filing.

# NEW FDI SCREENING PROCEDURE

- FDI approval is granted by the **President of the Office of Competition and Consumer Protection**. The approval procedure is divided into a preliminary stage and a controlling stage. The preliminary stage shall be closed within **30 business days**. In the case of the controlling stage, the decision shall be issued within **120 calendar days** as of the beginning of controlling stage.
- Authority's decision **can be appealed** to administrative court.
- Notification shall be made **before taking any legal action** that leads to acquiring or achieving significant participation or acquiring dominance in a strategic company.
- Authority may oppose the transaction in particular if it may at least potentially constitute a **threat to public order, public security and/or public health in Poland**.
- If the transaction being subject to FDI regime is completed without notification or despite the relevant authority's opposition, it is null and void by virtue of law. Additionally, **financial penalties** of up to PLN 100 mln (approx. EUR 22 mln) can be imposed, as well as individuals from company's management may be **imprisoned** for a period ranging from 6 months up to 5 years.
- There is no clear data available with regard to the Polish authorities' approach on FDI under the new Act. Only 2 FDI decisions have been issued so far (allowing the transaction).
- New FDI regulation will have a definite impact on the Polish M&A market, especially when we consider the growing Polish start-up scene and boom in the high-tech and innovative companies sector.

# ROMANIA

## THE FDI SCREENING MECHANISM



# CURRENT FDI SCREENING PROCEDURE

- The current screening mechanism regime is inbuilt in the merger control procedure, meaning that once the Romanian Competition Council receives a merger filing involving a **sensitive sector**, it sends the data on the investor and investment to the Supreme National Security Council (“CSAT”).
- For transactions involving a change of control on targets active in sensitive sectors, which fall below the merger control thresholds, parties need to file a standalone notification to CSAT, via the RCC.
- However, currently, **there is no standstill obligation** and no fines for implementing the transaction prior a formal response from CSAT on security grounds.
- CSAT is **not bound to any procedural deadline** to respond. In practice, for notifiable transactions, the RCC regularly does not deliver the merger clearance before it receives the greenlight on security from CSAT.
- In case CSAT finds there is a risk to national security, it sends the transaction for review to the **Government, which may ban the transaction**.
- The **sensitive sectors** are currently defined very broadly, approx. 75% of the notifiable mergers are also reviewed on security grounds.
- **Both EU and non-EU investors** undergo the same procedure.
- **Green field investments**, which do not fall under merger control rules, are not subject to FDI screening.

# NEW VS. OLD FDI SCREENING MECHANISM

- Under the proposed new procedure, the FDI screening is provided as a **standalone procedure** (simplified or in-depth analysis), with specific timelines and the RCC keeps the interface role with the investors.
- The new standalone procedure shall only apply to non-EU investors, while the current procedure shall continue to apply to EU investors.
- The draft law provides for an **extension to the type of investments** subject to screening. The new regime shall cover any type of investment conferring a control right over the management of a Romanian company or assets, which is above **EUR 2 million in value**. "Control" defined in line with merger control rules, derived from any rights, contracts or any other elements, which confer decisive influence over an undertaking.
  - Direct or indirect acquisition of controlling shares/ voting rights
  - Acquisition of assets
  - Control on a contractual basis (right to use the assets or lease of business)
- But also "New investments"/ greenfield operations (start-up of a new unit, expansion of the capacity of an existing unit, diversification of the output with new products, fundamental change in the production process)
- Portfolio investments exempted
- Notably, as per the Draft Law, any other FDIs (which are below the EUR 2 million threshold or in non-strategic sectors) could be subject to *ex officio* screening on grounds of public security.
- The **current list of sensitive sectors is very broad** and will be updated in line with article 4 of the FDI Regulation.

# NEW DRAFT SCREENING MECHANISM

- New procedure introduced, with clear procedural deadlines for review.
- The **RCC keeps the interface role with the investor**; a new governmental body is set up to run the review, i.e. the FDI Screening Commission
- The **FDI Screening Commission**, which should also collect, in certain cases, the opinions of CSAT and of the Cybersecurity Task Force and may take the following decisions:
  - Authorization decision
  - Conditional authorization decision subject to behavioral or structural commitments
  - Prohibition decision
  - FDI annulment decision, for implemented FDIs
- A **clear standstill obligation** is introduced. **Fines between 1% and 5%** of the investor's global turnover could be applied for the breach of the *stand still* obligation and/or the provision of misleading or incomplete information.

# SLOVAKIA

## THE FDI SCREENING MECHANISM



# NEW FDI SCREENING MECHANISM

- On 1 March 2021, the amendment of the Slovak Act on the Critical Infrastructure (the “**Act**”) became effective. Before that, there was no formal FDI screening procedure in place under Slovak law.
- The screening mechanism now applies to companies designated as a part of “critical infrastructure” under the authority of the Ministry of the Economy, in the following industries: **mining, electric power engineering, gas, petroleum and petroleum products, pharmaceutical, metallurgical and chemical.**
- The FDI screening mechanism applies to investments resulting in the acquisition or achievement of **significant participation** or the acquisition of a **dominant position** over Slovak entities operating in the said strategic sectors.
- FDI screening applies to both **share deals** and **asset deals** (transfer of enterprise), which is subject to a reporting obligation and confirmation by the Slovak government. The obligation applies when the acquirer is either a Slovak entity or a foreign entity. Corporate thresholds start from **10% of shares** or voting right/equity in the target company.
- The FDI regime also covers **indirect acquisitions**. The change in persons who have a direct or indirect participation in the operator of a critical infrastructure exceeding a 10% shareholding or voting rights is eligible to be screened.
- The list of entities comprising “critical infrastructure” is **not publicly available**. Around twenty entities fall under this regime, some of which are already partially owned by foreign investors.
- Meeting at least one **sectoral criterion and at least one cross-sectional criterion** is required for a company in order to be considered critical infrastructure. The ministries submit a proposal to the Ministry of the Economy to **add or remove** a company from the list of critical infrastructure. Together with the assessment of the Ministry of Economy, the Slovak government decides whether the element shall be added or removed from the list.
- Following this procedure, the company receives an **informal decision notifying the company** that it has been designated as critical infrastructure.

# NEW FDI SCREENING PROCEDURE

- The notification of the transaction, which is a subject to **the new FDI screening regime shall be submitted to the Ministry of the Economy**, which may review the transaction on the grounds of public policy, national security of the Slovak Republic, the EU or another Member State of the EU.
- Based on the review, the **Ministry of Economy provides a recommendation to the Slovak Government** to grant consent for the transaction, to grant conditional consent or to prohibit the investment, in the case that the transaction poses a risk to the public order or national security.
- The **Slovak Government issues a consent or a conditional consent** with the transaction if the benefits associated with the transaction outweigh the risks to the public order or national security.
- The decision of the Slovak Government to not grant consent or revoke consent can be **appealed to the Supreme Court**, based on a claim of the requesting party, within 30 days from the date of issuing the decision.
- Pursuant to the Act, a **standstill obligation** will apply until the Ministry of the Economy and Slovak Government review the proposed transaction. Accordingly, neither party to the transaction shall exercise any rights and obligation under the transaction.
- In addition, pursuant to the Slovak Foreign Exchange Act, cross **border transactions exceeding the value of EUR 2 million per month trigger a reporting duty to the National Bank of Slovakia.**

# SLOVENIA

## THE FDI SCREENING MECHANISM



# NEW FDI NEW FDI SCREENING MECHANISM

On 31 May 2020, a third legislative package to contain the consequences of the COVID-19 epidemic introduced an FDI screening mechanism (as a provisional measure) which shall be applied until 30 June 2023. The Slovenian Government is currently drafting a bill that will amend the Slovenian Investment Promotion Act and adopt the FDI screening mechanism as a permanent measure.

The FDI screening mechanism is generally applicable to:

- **Investments** aiming to establish or to maintain **lasting and direct links** between the foreign investor and an economic entity established in the Republic of Slovenia **through a direct or an indirect acquisition** of at least **10%** participation in capital or voting rights in a Slovenian target company, and/or
- **Acquisition of real estate** essential to critical infrastructure or in the vicinity of such infrastructure
- made by a **foreign investor** (including EU / EEA / Swiss citizens or entities),
- if the investment poses a **threat to the security and public order of the Republic of Slovenia**, i.e. especially in cases where it may have an effect on any of the following areas considered as **risk factors**: (i) critical infrastructure, (ii) critical technologies and dual use items, (iii) supply of critical inputs, (iv) access to sensitive information, (v) the freedom and pluralism of the media, (vi) or projects or programmes of interest to the European Union.

The FDI must be notified to the authority within the following deadlines:

- **Share acquisition, takeover or merger:** no later than 15 days after the conclusion of the merger agreement or after the publication of the takeover bid. Notification must be made by the foreign investor / target company
- **Greenfield investments:** no later than 15 days after the establishment of a company in the Republic of Slovenia. Notification must be made by the foreign investor / its subsidiary
- **Acquisition of real estate essential for critical infrastructure or in the vicinity of such infrastructure:** no later than 15 days after the conclusion of the contract through which it acquired the legal title over land and real estate.

# NEW FDI SCREENING PROCEDURE

- On receipt of the complete FDI notification, the authority shall decide whether an in-depth screening of an FDI is necessary. The decision to engage in a **screening procedure** is based particularly on a preliminary evaluation of the following points:
  - whether the foreign investor is directly or indirectly controlled by a third country (non-EU) government including national authorities or third country armed forces, including through ownership structure or significant funding;
  - whether the foreign investor has already been involved in activities affecting security or public order in an EU member state;
  - whether there is a serious risk that the foreign investor engages in illegal or criminal activities.
- Based on an opinion by a commission of officials appointed by the authority, the authority shall no later than 2 months after the notification of the FDI issue a decision, through which it **authorises, conditions, prohibits or unwinds** an FDI.
- A decision to prohibit or unwind an individual FDI in the screening procedure has the consequence that the relevant merger agreement, takeover procedure or acquisition agreement is declared **null and void**.
- **Important:** The Act regulating the FDI screening mechanism allows the authority to carry out **retroactive screening of FDIs** made even before its enactment, i.e. within a period of 5 years after the conclusion of the relevant agreement / the publication of the takeover bid / establishment of the company in the Republic of Slovenia / conclusion of the contract regarding the acquisition of real estate.
- In the case of non-compliance with the obligation to make an FDI notification, **administrative fines** apply: up to EUR 500,000 for a legal person and up to EUR 10,000 for the responsible person of a legal person.

# KEY CONTACTS

If you have any questions regarding Wolf Theiss, please do not hesitate to contact our experts:



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