

Global Foreign Direct Investment

Slovakia

Slovakia has a new foreign direct investment regime introduced by Act No. 497/2022 Coll. on Screening of Foreign Direct Investments (the „FDI Act”), which will take effect on March 1, 2023. The new rules do not apply to investments completed prior to this date.

FDI Regime

Screening under the FDI Act concerns foreign investments made by foreign investors as defined in the FDI Act. According to the FDI Act, an investment is made when an agreement covering the investment comes into force. Foreign investments by foreign investors that fall into the category of critical foreign investments can only be made with the approval of the Slovak Ministry of Economy (“**MoE**”). Critical foreign investments are to be defined by the Slovak Government in a separate decree and will include sectors such as the production of and trade in military material, the production of and trade in certain dual-use goods, business activities in the field of biotechnology, the provision of digital and media services, the operation of a content sharing platform and others.

Foreign investments made by foreign investors that are not considered “critical” do not require prior approval. However, the MoE may review such investments within two years of the date of investment. Such a review may result in a prohibition of the investment with an obligation to return it. As a consequence of the risk of an investment ban, in some cases and for legal certainty, investors may choose to make an optional notification of their investment.

Foreign investments made by foreign investors

The definitions of “foreign investors” and “foreign investments” in the FDI Act go beyond what EU Regulation 2019/452 establishing a framework for the screening of foreign direct investments into the Union provides for. “**Foreign investors**” thus are not only natural persons that are not nationals of an

EU Member State and legal persons without a seat or place of business in the European Union, but also any other person (for example, Slovak legal persons) if linked, in a manner defined in the FDI Act, to any person of a third country defined in the FDI Act. Such a “person of a third country” is, for example, a legal person or other entity in the management of which a public authority of a third country participates (i.e. an entity with a capital participation of a third country).

A qualified link with a person of a third country exists, for instance, where the person of a third country is the ultimate beneficial owner of the foreign investor or where such person provides the financing of the foreign investment. Foreign investors also include various types of trusts, which are qualified under the FDI Act as a legal arrangement of assets with a foreign element where a person of a third country holds a position defined in the FDI Act.

A **foreign investment** is linked (directly or indirectly) to **its target**. A target is **any person with a seat in the Slovak Republic**. A foreign investment under the FDI Act is an investment that enables a foreign investor, directly or indirectly, to

- acquire a target or a part of a target;
- exercise an effective interest in a target. An effective interest is defined as a minimum of 25 percent of the registered capital or voting rights of a target and, in the case of a significant foreign investment, a minimum of 10 percent;
- increase an effective interest in a target. An increase in the effective interest means an increase in the effective interest of an existing foreign investor in the registered capital or voting

rights of a target to at least 50 percent, in the case of a critical foreign investment to at least 20 percent and always when at least a threshold of 33 percent or 50 percent is reached;

- exercise control over a target, where the definition of control is that used in the Slovak Act on the Protection of Competition; and
- acquire a title or other right to material assets of a target in the case of a critical foreign investment. "Other right" means any right to use or dispose of the material assets of a target. "Material assets" means those assets of a target that were or are essential for the conduct of the business of a target that is essential for a foreign investment to be classified as a critical foreign investment.

Notification process

The foreign investment screening process is initiated upon an application filed by an investor, or by virtue of official authority, and consists of the following two phases:

- **First phase** - assessment of the risk of negative impact of the foreign investment, which may take **up to 45 days**; and
- **Second phase (investment review phase)** - initiated if a risk of negative impact was identified in the first phase of the procedure or in the case of assessment of critical foreign investments.

The review process can take **up to 130 days** and can result in a decision to allow a foreign investment or in a decision to allow the foreign investment with conditions. The MoE may also prohibit an investment based on the opinion of the Slovak government. In such a case, the Slovak government has no statutory deadline for its decision. The law also provides for the possibility of extending the 130-day period.

Fines are imposed not only for serious breaches (such as, making a critical foreign investment

without approval), but also for those deemed less serious (such as breach of the obligation to notify the completion of an investment or to register in the register of public sector partners) and may be imposed also repeatedly. The amount of the fine depends on the nature of the breached obligation and ranges from **1 percent to 2 percent of the aggregate total net turnover** of the foreign investor, the person controlling the foreign investor, and the person controlled by the foreign investor, generated in the previous financial year (in case the foreign investor is a legal person) or from EUR 100 000 to EUR 1 million (in case the foreign investor is a natural person). If the value of the investment exceeds 2 percent of the investor's total net turnover, the value of the investment is the upper limit of the fine.

Special regime for transactions involving critical infrastructure elements

Under the FDI Act, the MoE has the right to screen certain transactions involving (directly or indirectly) elements of critical infrastructure in the energy, pharmaceutical, metallurgical or chemical sectors, as defined in Act No. 45/2011 Coll. on Critical Infrastructure. The MoE notifies the relevant operator that its element has been included in the list of critical infrastructure. The list is not public.

Screening may be triggered by the transfer or assignment of an element of critical infrastructure, or the acquisition of a direct or indirect interest in the operator of such an element of more than 10 percent of the registered capital or voting rights of that operator, or the acquisition of an interest that gives rise to the possibility of exercising an influence on the management of such an operator that is comparable to an influence corresponding to such an interest. This shall also be the case if the transfer is made in the context of a foreclosure procedure, the enforcement of a pledge or mortgage or any other similar procedure.

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