



FOREIGN DIRECT INVESTMENT SCREENING

New Foreign Direct Investment
screening regime implemented



As of 1st March 2023, Slovak FDI laws are comparable to standards applied in other advanced EU jurisdictions. The main goal of the new legislation, possibility to review foreign investments in terms of protection of security and public order of the Slovak Republic and the EU, respects the openness of the Slovak economy. Therefore even though the implemented regulation represents a certain restriction in the field of foreign investment, the law is designed to guarantee legal certainty for foreign investors. Both, the amount of the penalties for violation of the respective rules and the length of the screening process (130 days) increase the importance of careful transaction planning, which thus should be entrusted to experienced advisors.

1. LEGAL FRAMEWORK

1.1 As of 1 March 2023, a freshly introduced package of legal regulations concerning foreign investment (“FDI”) screening has entered into force in the legal order of the Slovak Republic.

1.2 With this regulation, the Slovak Republic has joined the several-years lasting efforts of the European Union incurred in the area of FDI screening, with the primary objective to introduce a comprehensive legal system focused on the territory of the EU Member States and thus protect the Members of the EU against the illegal financial flows from the so-called third country states.

1.3 Hence, the legal framework for the newly implemented regulation concerning the FDI shall operate upon the recently enacted Act No. 497/2022 Coll. on the Screening of Foreign Investments and Changes and Amendments to Certain Laws (“FDI Act”) and thereto related Decree of the Government of the Slovak Republic No. 61/2023 Coll. establishing critical foreign investments (“Decree”), and upon the existing Regulation of the European Parliament and the Council of EU No. 2019/452 establishing a legal framework for the screening of Foreign Investment into the Union, as amended.

2. KEY TERMS OF THE FDI ACT

2.1 “Foreign Investment” representing the essence of FDI topic, is defined rather extensively, thus it covers any investment, the realization of which enables a foreign investor directly or indirectly to:

- 2.1.1 acquire a target or part of the target via an agreement for the sale of an enterprise or part thereof - “zmluva o predaji podniku alebo časti podniku” - asset deal;
- 2.1.2 acquire effective participation in a target through at least 10% of the share capital or voting rights for critical investment or through at least 25% of the share capital or voting rights for non-critical investment - share deal;
- 2.1.3 increase effective participation in a target to at least 50 % for non - critical investment or to at least 20% for critical investment, but also whenever the effective participation exceeds 33 % or 50 % of the share capital or voting rights of the target (the reason for reviewing a critical foreign investment is any single increase in the effective participation to or above any of the named thresholds);

- 2.1.4 exercise control in a target within the meaning as given by Act No. 187/2021 Coll. on the Protection of Competition,
- 2.1.5 acquire ownership or other rights to the target 's substantial assets - in case of critical investments (asset investment).
- 2.2 **“Target”** means basically any entity seated in the Slovak Republic irrespective of its legal form/the existence of legal personality/ the method of financing, and the focus of its activities.
- 2.3 **“Foreign Investor”** definition is designed to include both:
 - 2.3.1 foreign investors (natural persons and legal entities) from third countries,
 - 2.3.2 investors from EU (including Slovak Republic) if (i) controlled by entity from third country, (ii) ultimate their beneficial owner is third country entity, (iii) financed by resources provided by a public authority of a third country, etc.

3. CRITICAL FOREIGN INVESTMENT

- 3.1 Critical foreign investment, is a narrower term than Foreign Investment, as it covers such Foreign Investment (as defined by FDI Act), when specific Targets are involved. A critical Foreign Investment thus represents the acquisition of requested threshold in the Targets as listed in detail in the Decree, i.e., including but not limited to:
 - 3.1.1 producer of firearms, ammunition, pyrotechnics,
 - 3.1.2 producer of defense industry products or performing research/development/ innovation of such products,
 - 3.1.3 producer of dual use items or performing research/development/ innovation of such items,
 - 3.1.4 performing production, research/development/ innovation in biotechnology field, within the health sector,
 - 3.1.5 operator of a critical infrastructure element,
 - 3.1.6 operator of essential service under cyber security regulations,
 - 3.1.7 operator of digital services in the field of cloud computing,
 - 3.1.8 performing production, research/development/ innovation of national means of cryptographic protection;
 - 3.1.9 provider of content sharing platforms (for annual turnover exceeding EUR 2 million);
 - 3.1.10 publisher of periodical publications (except of community ones);
 - 3.1.11 operation of a news web portal (except of community ones);
 - 3.1.12 press agency.

- 3.2 On the other side, an ordinary (non-critical) Foreign Investment shall be the acquisition of a 25% or 50% (or exceeding) interest in any Target, excluding the sectors listed above (regardless of Target's turnover or the transaction's value).
- 3.3 As the critical Foreign Investments are presumed to have a heightened security risk, the Foreign Investor is, under FDI Act, obliged to apply to the Ministry of Economy for an assessment of the critical Foreign Investments. On the other hand, in the case of non-critical Foreign Investments, it follows that filing a request for verification of such an investment by the Foreign Investor is virtuously optional.
- 3.4 In addition to arrangements related to the abovementioned obligatory and voluntary proceedings initiated by Foreign Investor, the FDI Act grants the Ministry of Economy the power to begin screening a foreign investment from its own initiative. Such ex-offo screening may be initiated within two years from the closing date of the Foreign Transaction. On the other side, an ordinary (non-critical) Foreign Investment shall be the acquisition of a 25% or 50% (or exceeding) interest in any Target, excluding the sectors listed above (regardless of the turnover of the Target or the value of the transaction).


4. FOREIGN INVESTMENT ASSESSMENT

- 4.1 The procedure for assessing the negative impact of a Foreign Investment consists of several phases:
- 4.1.1 Assessing the potential risk (negative impact) of a Foreign Investment
- ▶ occurs solely in cases of non-critical Foreign Investment,
 - ▶ if no risk of non-critical Foreign Investment has been identified by the Ministry of Economy and other state authorities, the Ministry shall deliver respective confirmation to the Foreign Investor and to the Target,
 - ▶ if the Ministry of Economy identifies a risk of a negative impact of a transaction under consideration, the more stringent Foreign Investment screening procedures (described in section 4.1.2 below) will be initiated.
- 4.1.2 Foreign Investment screening
- ▶ occurs in cases of critical Foreign Investment and in the case when risk of a negative impact has been identified within the procedure under point 4.1 1 above for non-critical Foreign Investment,
 - ▶ upon receipt of the opinions from the concerned state authorities, the Ministry of Economy itself will prepare a draft opinion, by which the Foreign Investment will:
 - (i) permit,
 - (ii) conditionally permit, or
 - (iii) reject.

- ▶ the Foreign Investor and the Target are entitled to comment on a draft opinion within fifteen (15) calendar days following its delivery,
- ▶ upon completion of the consultations, the Ministry of Economy will issue a decision and:
 - (i) permit,
 - (ii) conditionally permit, or
 - (iii) submit an opinion to the Government to reject the Foreign Investment; if the Government agrees with the Ministry's opinion, the Ministry of Economy shall issue a decision prohibiting the Foreign Investment (in comparison, if the Government does not give its consent to the Ministry of Economy, the Foreign Investment shall be considered to be permitted).

5. SUMMARY

- 5.1 Slovak legislation from before 1 March 2023 was inadequate in terms of protecting security and public order, and lacked mechanisms for cooperation with EU Member States in the area of FDI screening. The revision resulted in the FDI Act, which brings to the legal realities of the Slovak Republic a significant change in the practice of concluding M&A agreements. Although some may feel that the new legislation may discourage foreign investors, such fears are not justified as the experience of EU member states shows that introducing a screening mechanism has no impact on foreign investment inflows.
- 5.2 The consequences for violation of the obligations under the FDI Act are severe. The Ministry will impose a penalty amounting up to the value of such investment or 2% of the total net turnover generated by the Foreign Investor (or controlling entity) for closing critical Foreign Transactions without granted consent. Furthermore, if the Foreign Investor violates the ban of Foreign Investment, except for the above penalty, the Ministry will impose to the Foreign Investor the obligation to return the respective investment or transaction to the state before its implementation.
- 5.3 The "foreign investment screening" is a reality and simply needs to be incorporated into transaction planning. The above sanctions and the fact that the screening process can take more than 130 days trigger the need to plan each step carefully in advance. The experienced BDO team shall be pleased to assist and ensure the smooth running of your transactions.
-



Our partner BDO Legal, Peter Káčer, and his M/A team are ready to come up with tailored advice. Do not hesitate to contact him.

KONTAKT

PETER KÁČER

PARTNER

kacer@bdoslovakia.com

Office +421 2 5920 8611

BDO Legal s. r. o.

Mostová 2, Bratislava - mestská časť
Staré Mesto 811 02

