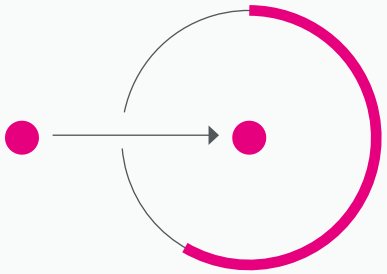


Foreign Direct Investment Screening in CEE

11 October 2020

schönherr

preface

FDI screening was for a long time a blank spot on the regulatory landscape for most countries in Central Eastern Europe (CEE). Unlike Western European Member States, relatively few countries in Central Eastern Europe had instruments to vet foreign investments and those that did exist often were of little practical consequence.

Due to the economic shock of COVID-19, the European Commission (EC) has highlighted the increased potential risk to strategic industries in the European Union in its Communication of 13 March 2020. It urged Member States “to be vigilant and use tools available to avoid that the current crisis leads to a loss of critical assets and technology” as a result of buyouts from foreign (i.e. non-EU/non-EEA) investors.

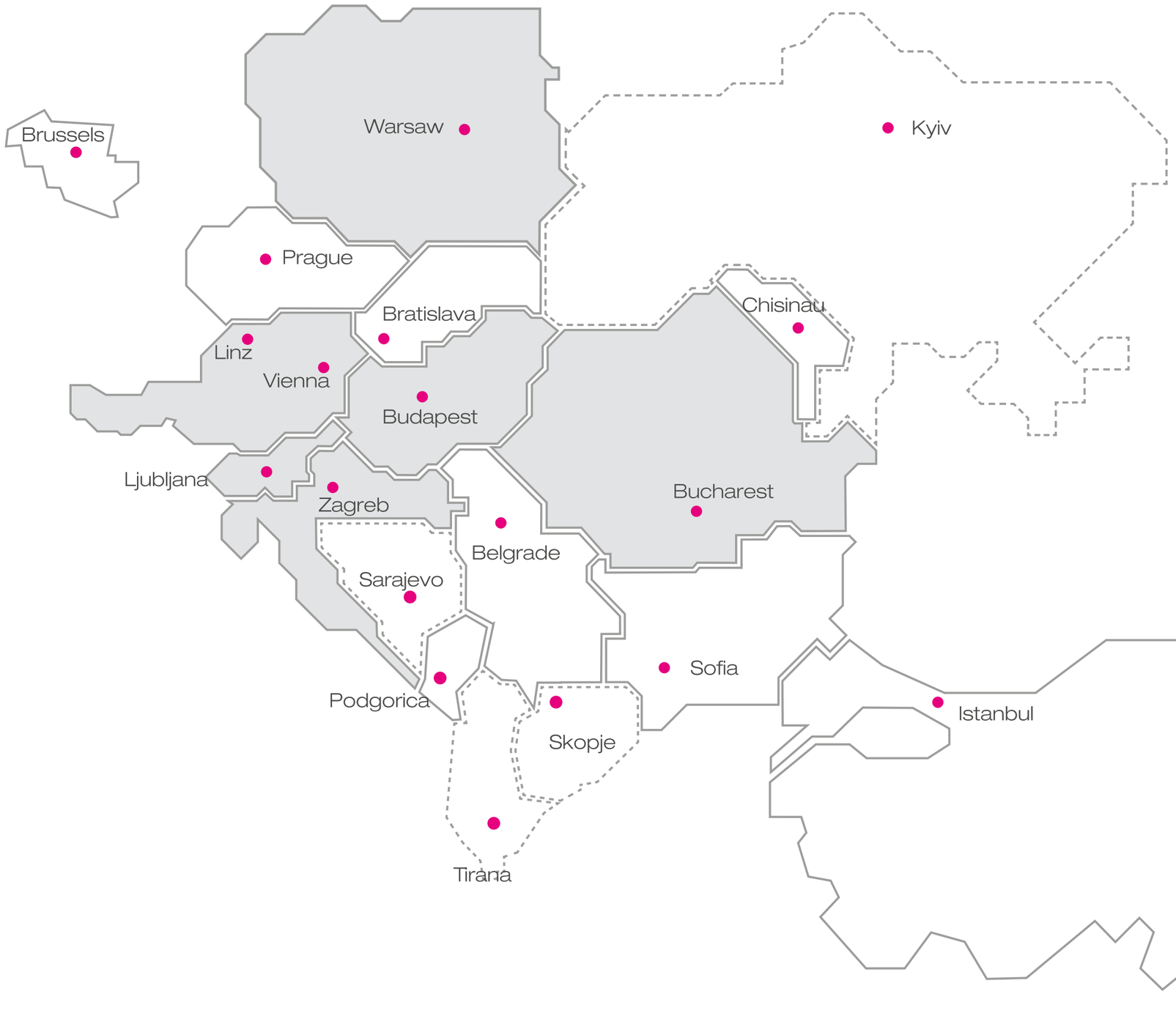
Subsequently and ahead of the application of the EU FDI Screening Regulation, the EC specifically addressed the increased risk of attempts by foreign investors to acquire healthcare capacities. In light of this, the EC encouraged Member States to (i) make full use of their existing FDI screening mechanisms or, where these are unavailable or inadequate, (ii) set up a full-fledged screening mechanism.

Now that the EU FDI Screening Regulation must be transposed into national law, national legislators in Central Eastern Europe have heard the wake up call. Member States across CEE have recently tightened or enacted new measures or initiated legislative processes to do so. These measures are largely shaped by the EU FDI Screening Regulation. Going forward, many foreign investments in critical sectors will have to undergo a vetting process.

This booklet provides an up-to-date overview of the currently existing FDI regimes in CEE. Following the trend to tighten / set up FDI screening mechanisms, it will also keep pace with ongoing developments in jurisdictions where new rules are in the pipeline (Austria, Croatia, Czech Republic, Poland and Romania) and therefore be continuously updated.

We invite you to visit our *website.*

index



austria

Legal basis

Investment Control Act ("**ICA**"), OJ, I No 87/2020, 24 July 2020.
EU FDI Screening Regulation (Regulation (EU) 2019/452), OJ L 79I, 21 March 2019.
The ICA has entered into force in July 2020.
The cooperation mechanism set out in the ICA is applicable since 11 October 2020 *(Austrian Parliament adopts new FDI screening act).*

Filing requirement

The notification obligation is triggered if:
- a foreign investor, i.e. non-EU, non-EEA, non-Swiss individual/entity, intends to carry out an investment (directly/indirectly) in an Austrian undertaking. This includes
- the acquisition of shares reaching/ exceeding 10%*), 25% and 50% (voting rights);
- the acquisition of control; and
- the acquisition of essential/all assets of an undertaking (asset deals)
- the undertaking is active in a sector listed in an **Annex** to the ICA, and
- the undertaking is Austrian, i.e. has its seat or its central administration in Austria (local nexus).

No approval is required for an investment in an undertaking with i) fewer than 10 employees and ii) an annual turnover or balance sheet total of less than EUR 2 million (start-up exception).
- The 10% threshold applies for investments in particular high-sensitive sectors (see below). For investments in other sensitive sectors the triggering threshold is at 25% and 50% (voting rights).

Relevant sectors

The ICA applies to an investment in an undertaking which is active in a sector listed in the Annex. Part I of the Annex lists the following, particularly sensitive areas, for which the 10 % threshold applies. The list is exhaustive:
(i) defence equipment / defence technology;
(ii) critical energy infrastructure;
(iii) critical digital infrastructure (in particular 5G infrastructure);
(iv) water;
(v) systems that enable data sovereignty of the Republic of Austria; and
(vi) research and development in the fields of pharmaceuticals, vaccines, medical devices and personal protective equipment (until 31 December 2022).
Part II of the Annex lists other areas which are critical for public security and/or order and for which the 25 % threshold applies. These, include (other than the above-mentioned) investments in the following non-exhaustive areas:
(i) critical infrastructure such as the sectors of energy, information technology, transport, health, food, telecommunications, etc.;
(ii) critical technologies and dual use items as defined in Regulation (EC) No 428/2009; included are in particular artificial intelligence, robotics, cyber security, quantum and nuclear technology, nano and biotechnology, etc;
(iii) supply of critical resources, including energy or raw materials, as well as food security, medicines, vaccines, medical devices and personal protective equipment, etc;
(iv) access to sensitive information, including personal data, or the ability to control such information; and
(v) the freedom and pluralism of the media.

Process and timetable

Competent authority: Federal Ministry for Digital and Economic Affairs
Mandatory filing requirement: Yes
Filing deadline: A relevant agreement needs to be reported immediately after signing of the contract / announcement of the intention of a public offer.
Responsibility for filing: While the notification obligation rests primarily with the foreign investor and its management (i.e. the acquirer), the ICA foresees a subsidiary reporting obligation for the target company. In addition, the relevant Authority can assume jurisdiction ex officio, if it becomes aware of a transaction subject to approval that has not been notified.
Sanctions: Implementation ahead of local regulatory clearance is subject to criminal sanctions and/or administrative fines.
Length of the proceedings:
Phase 1: 1 month after a 35-day period within which the EU Commission and/or Member States can comment on the transaction (under the EU FDI Screening Regulation).
Phase 2: 2 months.

croatia

Legal basis

Regulation on the implementation of EU FDI Screening Regulation (Regulation (EU) 2019/452), OJ L 79I, 21 March 2019 ("**Implementing Regulation**"). The Implementing Regulation entered into force on 2 October 2020.

Filing requirement

Although there is no FDI filing requirement, the Implementation Regulation establishes the National Contact Point (Nacionalna kontaktna točka) and the Interdepartmental Commission (Međuresorno povjerenstvo) which will act as a competent authority for the coordination mechanism under the EU FDI Screening Regulation. The regulation does not foresee a (mandatory) screening instrument.

The National Contact Point will be vested with the power to request information from a foreign investor making an investment in the Republic of Croatia or an undertaking located in the Republic of Croatia in which an FDI is planned to be made. The foreign investor or Croatian undertaking must submit the requested information to the National Contact Point within 7 days of receiving the request.

The main task of the Interdepartmental Commission is to coordinate interdepartmental cooperation and efficient flow of information between state and public administration bodies involved in the implementation of EU FDI Screening Regulation and to provide expert assistance to the National Contact Point on all issues related to EU FDI Screening Regulation, in particular through the preparation of proposals, opinions and expert explanations.

In addition to the above, there is a reporting duty to inform the Croatian National Bank of the investment within 30 days from the end of the month in which the investment was made (for statistical purposes).

Process and timetable

Competent authority: National Contact Point and Interdepartmental Commission.
Mandatory filing requirement: No screening mechanism in place.
Filing deadline: No screening mechanism in place.
Responsibility for filing: No screening mechanism in place.
Sanctions: n/a
Length of the proceedings: n/a

hungary

Legal basis

1. Approval of the Ministry of Interior
Act No. LVII of 2018 on the Control of Investments Detrimental to the Interests of Hungarian National Security (the "**Act**").
Government Decree No. 246/2018 (XII. 17.) on the execution of Act No. LVII of 2018 ("**Decree 246/2018**").
Hereinafter referred to as "**MI FDI Screening**".

2. Approval of the Ministry of National Economy
Government Decree No. 227/2020. (V. 25.) on measures regarding the protection of Hungarian companies during the epidemic effective until 31 December 2020 ("**Decree 227/2020**").
See: *New foreign investments screening rules in Hungary*
Hereinafter referred to as "**MNE FDI Screening**".
EU FDI Screening Regulation (Regulation (EU) 2019/452), OJ L 79I, 21 March 2019.

Filing requirement

1. MI FDI Screening
MI FDI Screening applies to (i) investors from outside the EU, Switzerland and EEA, and to (ii) any subsidiary of such an investor if the subsidiary is established in the EU, Switzerland or an EEA member state and the investor holds a majority of the vote rights in the subsidiary or has a decisive influence in the subsidiary. The foreign investor must obtain the prior approval of the Ministry of Interior if it intends to:

- directly or indirectly acquire more than a 25% interest (in the case of a publicly listed company, a 10% interest) in an existing or yet to be established company with its registered seat in Hungary, provided that this company pursues activities that are deemed sensitive for national security ("Hungarian Company");
- acquire decisive influence in a Hungarian Company;
- establish a branch office in Hungary; or
- acquire a right to operate or use sensitive infrastructure or assets in Hungary.

All transactions that result in a foreign investor acquiring more than a 25% interest in a Hungarian Company are subject to foreign investment control. Moreover, prior approval is required when a foreign investor acquires an interest of less than 25% but this acquisition results in more than a 25% interest in the respective Hungarian Company being held by (several) foreign investors.

2. MNE FDI Screening
Under Decree 227/2020, investments by foreign investors acquiring an interest exceeding (i) 10% and a value of HUF 350m (approx. EUR 1m), (ii) 15%, 20% or 50% irrespective of its value, or (iii) 25% if acquired by more than one foreign investor, require the approval of the Ministry. The foreign investor must notify the Ministry if it intends to acquire the right to use or operate infrastructure necessary for pursuing activities in strategic sectors (including using such strategic infrastructure as collateral).
A "foreign investor" is (a) a company or organisation domiciled in, or a citizen of, a state outside of the EU, the EEA or Switzerland, or (b) a company or organisation whose majority owner is domiciled in, or a citizen of, a state outside of the EU, the EEA or Switzerland. However, certain acquisitions of a majority interest require the Ministry's approval if the foreign investor is a company or other organisation domiciled in the EU, the EEA or Switzerland.
Decree 227/2020 applies to investments in companies that have their seat in Hungary and:
a) are a limited liability or private limited or public (listed) company; and
b) operate in specified "strategic" sectors.

Relevant sectors

1. MI FDI Screening
The Act contains a complex system regarding the sectors and activities which are under scrutiny. These activities in the specific sectors include activities that:
1) are traditionally considered sensitive, e.g. manufacturing of arms, dual-use items and secret service equipment;
2) all under the Hungarian Gas Act and Water Supply Act, Elec-

tricity Act, Credit Institutions Act and the Electronic Communications Services Act; and
3) involve the creation, development or operation of communication systems of the Hungarian State and Hungarian municipalities.

2. MNE FDI Screening
"Strategic" sectors such as manufacturing of medicines, medical devices or other chemicals, fuel production, telecommunications, retail and wholesale (including motors and cars), manufacturing of electronical devices, machinery, steel and vehicles, defence industry (e.g. manufacturing and trade of arms and ammunition as well as technologies used for military purposes), power generation and distribution, services connected to the state of emergency, financial services (including insurance, brokering and other services), processing of food (including meat, milk, grains, tobacco, fruits and vegetables), agriculture, transport and storage, construction (including the production of building materials), healthcare, tourism (hospitality and cafeteria services), and others (e.g. constructing a dam).

Process and timetable

1. MI FDI Screening
Competent authority: Ministry of Interior
Mandatory filing requirement: Yes
Filing deadline: The foreign investor must file its request for approval within 10 days from: (i) the date of execution of the underlying agreement, preliminary agreement, or undertaking; or (ii) the date of registration of activity change by the respective commercial registry.
Responsibility for filing: The foreign investor and its management (as the acquirer) are responsible for obtaining the necessary approval.
Standstill requirement: Yes
Sanctions: Implementation ahead of local regulatory clearance is subject to (i) criminal sanctions; (ii) fines under Decree 246/2018; and if the Ministry of Interior prohibits the transaction (iii) invalidity of the underlying agreement(s) and corporate actions (e.g. shareholders' resolution); and (iv) the foreign investor must sell its shares or eliminate its influence in the Hungarian Company or the Hungarian Company must modify its activity within three months or the foreign investor must close its branch.
Length of the proceedings:
60 days, which may be extended by an additional 60 days.

2. MNE FDI Screening
Competent authority: Ministry of National Economy
Mandatory filing requirement: Yes
Filing deadline: The request for the approval must be made within 10 days from the execution of the underlying agreement.
Responsibility for filing: The foreign investor and its management (as the acquirer) are responsible for obtaining the necessary approval.
Standstill requirement: Yes
Sanctions: Implementation ahead of local regulatory clearance is subject to (i) criminal sanctions; (ii) fines under Decree 227/2020; and if the Ministry of National Economy prohibits the transaction (iii) invalidity of the underlying agreement(s) and corporate actions (e.g. shareholders' resolution).
Length of the proceedings:
45 days, which may be extended once by an additional 15 days.

poland

Legal basis

Act of 24 July 2015, on Control of Certain Investments (the "**Act**", OJ 2020, item 117) as amended by so called Anti-Crisis Shield Act 4.0 (OJ 2020, item 1086).
The Act provides for two separate sets of rules related to different investors, with other companies / sectors protected, different competent authorities, separate procedural rules and fines. Both sets of rules are presented below as "FDI 1" and "FDI 2".

Filing requirement

FDI 1:
The notification obligation is triggered if:
- an investor (regardless of its nationality or place of registered seat)
- intends to carry out an investment (i.e. acquisition of an undertaking or its organisational part, acquisition of shares in an undertaking or acquisition of control over an undertaking)
- in an undertaking which is active in a sector affecting the public security and/or public order of Poland.
The FDI 1 covers the acquisition of a "significant participation", which is defined as a shareholding conferring at least 20%, 25% or 33% of the voting rights in the target entity.

FDI 2:
The notification obligation is triggered if:
- a foreign investor (non-EU, non-EEA, non-OECD individual / entity)
-intends to carry out an investment (i.e. acquisition of an undertaking or its organisational part, acquisition of shares in an undertaking or acquisition of control over an undertaking)
- in an undertaking with a registered seat in Poland that achieved domestic revenues exceeding EUR 10m in any of last two years and is covered by FDI 2.
Under FDI 2 a minority shareholding which does not confer control can be subject to investment screening, though acquisitions of a shareholding below 20% are exempted.

Relevant sectors

FDI 1:
The Act can be applied to companies operating in 15 strategic sectors of the Polish economy, for instance:
- power generation and distribution;
- gasoline and diesel production, transport and storage;
- production of chemicals and fertilisers;
- telecommunications;
- manufacture and trade of arms, ammunition and military technologies, etc.
A list of companies active in strategic sectors covered by the regulation is published by the Council of Ministers and currently includes nine companies.

FDI 2:
FDI 2 applies to targets which:
- are public (listed) companies; or
- own assets defined as critical infrastructure under Polish law; or
- develop or modify software for specific sensitive use, such as for instance: to control power plants, networks or operate facilities or systems for the supply of utilities, to operate equipment or systems used for voice and data transmission or for storage and processing, to operate or manage facilities or systems used for cash supply, card payments, conventional transactions, securities settlement and derivative transactions, to provide insurance services, or to operate transport systems or facilities ;or
- operate in selected sensitive sectors such as, for instance: telecommunications, power generation and distribution, fuel production, transport and storage, production of chemicals, manufacturing of medicines or medical devices, processing of meat, milk, grains, fruits and vegetables, manufacturing and trade of arms and ammunition as well as technologies used for military purposes, etc.

Process and timetable

Competent authority: Ministry of State Treasury, Ministry of Defence or Ministry of Maritime Economy (depending on the sector in which the protected undertaking operates) for FDI 1 and the President of the Office for Competition and Consumer protection for FDI 2.
Mandatory filing requirement: Yes (for both FDI 1 and FDI 2)
Filing deadline: A relevant agreement needs to be reported prior to the signing of a contract / publication of a public offer to the relevant authority (for both FDI 1 and FDI 2).
Responsibility for filing: The investor (as the acquirer) is responsible for obtaining the necessary approval. In certain cases the protected undertaking is obliged to submit the notification (e.g. if the acquisition of significant participation is a result of redemption of shares of the protected entity, demerger or amendments to the agreement or statutes of the protected entity with respect to the preference of shares) (for both FDI 1 and FDI 2).
Sanctions: Implementation ahead of local regulatory clearance is subject to criminal sanctions: a fine of up to PLN 100m (approx. EUR 24m) and / or imprisonment of six months to five years - for FDI 1 For FDI 2 respective sanctions are a fine of up to PLN 50m (approx. EUR 12m) or imprisonment of six months to five years.
Length of the proceedings: 90 days (FDI 1).

FDI 2:
Phase 1: 30 business days.
Phase 2: 120 calendar days.

romania

Legal basis

Competition Law No. 21/1996; Regulation on Economic Concentrations, as approved by Order of the Romanian Competition Council Chairman No. 431/2017; National Defence Council Decision No. 73/2012.
EU FDI Screening Regulation (Regulation (EU) 2019/452), OJ L 79I, 21 March 2019.
The Romanian Competition Council has published a draft law aimed to tighten the FDI-screening (as reported in *EU FDI Screening Regulation enters into force*). Public consultation Is still ongoing at this date.

Filing requirement

An information letter must be provided to the National Defence Council (via the Romanian Competition Council) to the extent:
- the economic concentration (which involves a change of control) occurs in the relevant sectors mentioned below; and
- the turnover thresholds required for a merger control filing (i.e. aggregate worldwide turnover of EUR 10m and Romanian turnover of EUR 4m for the involved parties) are not fulfilled.

The "foreign investment" clearance concept as such is not regulated under Romanian law. The wording of the law regulating the information of the National Defence Council does not differentiate between national / foreign investors.

Relevant sectors

The economic concentration must take place in one of the following domains (deemed of strategic importance for national security):
a) security of citizens and communities;
b) border security;
c) energy security;
d) transport security;
e) supply of vital resources security;
f) critical infrastructure security;
g) security of IT and communication systems;
h) security of financial, tax, banking and insurance activities;
i) security of weapons, munitions, explosives, toxic substances manufacturing and circulation;
j) industrial security;
k) protection against disasters;
l) protection of agriculture and environment;
m) protection of state funded companies or of their management during privatisation.

Process and timetable

Competent authority: National Defence Council (information is done via the Romanian Competition Council)
Mandatory filing requirement: Yes
Filing deadline: N/A (from a practical perspective, filing should occur as close as possible to the transaction signing date).
Responsibility for filing: The party or parties which acquire(s) control over the target(s).
Standstill requirement: Yes
Sanctions: No express provisions under Romanian law on fines for not informing the National Defence Council about the transaction.
In the event of national defence risks, the Romanian Government, upon the National Defence Council's proposal, will issue a decision banning the implementation of the respective transaction.
Length of the proceedings: No express provisions on timeframe. However, from a practical standpoint, a clearance letter (communicated via the Romanian Competition Council) is usually obtained within 30 – 45 calendar days as of the notifying party or parties sending out the information letter.

slovenia

Legal basis

Act Determining the Intervention Measures to Mitigate and Remedy the Consequences of the COVID-19 Epidemic *(Zakon o interventnih ukrepih za omilitev in odpravo posledic epidemije COVID-19; "***ZIUOOPE***"), Official Gazette of the Republic of Slovenia, No. 80/20.*
EU FDI Screening Regulation (Regulation (EU) 2019/452), OJ L 79I, 21 March 2019.
ZIUOOPE was published in the Official Gazette of the Republic of Slovenia on 30 May 2020 and came into force one day later. FDI screening provisions will be in force until 30 June 2023 *(Slovenia introduces foreign investments screening rules).*

Filing requirement

The notification obligation under ZIUOOPE is triggered if:
- a foreign investor (i.e. non-Slovenian individual/entity)
- intends to carry out or has carried out a foreign direct investment (i.e. merger or acquisition of an undertaking, investment in tangible and intangible assets, acquisition of the right to dispose of land and real estate essential to critical infrastructure / located near such infrastructure)
- which aims to establish or to maintain lasting and direct links between the foreign investor and an undertaking active in a sector affecting the security and public order of Slovenia and is seated in Slovenia, and
- the investment concerns at least 10 % of the capital or the voting rights.

Relevant sectors

Relevant sectors include:
1. critical infrastructure (such as energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure or land and real estate located near such infrastructure);
2. critical technologies and dual use items (such as artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies, nanotechnologies, biotechnologies as well as health, medical and pharmaceutical technology);
3. supply of critical inputs (such as energy or raw materials, food security as well as medical and protective equipment);
4. access to sensitive information (such as personal data or the ability to control such information);
5. the freedom and pluralism of the media; and
6. projects or programmes of EU interest as listed in Annex 1 of Regulation (EU) 2019/452.

Process and timetable

Competent authority: Ministry of Economic Development and Technology
Mandatory filing requirement: Yes
Filing deadline: 15 days from:
- the conclusion of a share purchase agreement or a public takeover bid (merger or acquisition of an undertaking);
- the establishment of a corporate entity in Slovenia (investment in (in)tangible assets);
- the conclusion of an agreement (acquisition of the right to dispose of land and real estate essential to critical infrastructure / located near such infrastructure).

Responsibility for filing:
- the foreign investor, target company or acquired company (merger or acquisition of an undertaking);
- the foreign investor or its Slovenian subsidiary (investment in (in)tangible assets or acquisition of the right to dispose of land and real estate essential to critical infrastructure / located near such infrastructure).

Standstill requirement: No
Sanctions: Failure to notify foreign direct investment is subject to monetary penalties.
Length of the proceedings:
- 2 months upon the Ministry initiating a screening-process
- the Ministry can initiate the screening in 5 years after the contract has been concluded.

contacts

austria

Volker Weiss
Partner
T: +43 1 534 37 50291
E: v.weiss@schoenherr.eu

Constantin Fladerer
Associate
T: +43 1 53437 50880
E: c.fladerer@schoenherr.eu

croatia

Srđana Petronijević
Partner
T: +381 11 3202 600
E: s.petronijevic@schoenherr.rs

Ana Marjančić
Associate
T: +385 1 4576 493
E: a.marjancic@schoenherr.eu

hungary

Kinga Hetényi
Partner
T: +36 1 8700 683
E: k.hetenyi@schoenherr.eu

Adrián Menczelesz
Associate
T: +36 1 8700 695
E: a.menczelesz@schoenherr.eu

poland

Pawel Kulak
Attorney at Law
T: +48 22 223 09 19
E: p.kulak@schoenherr.eu

Krzysztof Pawlak
Counsel
T: +48 22 223 09 22
E: k.pawlak@schoenherr.eu

romania

Georgiana Bădescu
Partner
T: +40 21 319 67 90
E: g.badescu@schoenherr.eu

Cristiana Manea
Attorney at Law
T: +40 21 319 67 90
E: c.manea@schoenherr.eu

slovenia

Eva Škufca
Partner
T: +386 1 200 09 82
E: e.skufca@schoenherr.eu

Urša Picelj
Senior Associate
T: +386 1 200 09 64
E: u.picelj@schoenherr.eu

www.schoenherr.eu