

# SK Legal Alert

February 2023

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## Foreign Investment Screening Act

Until 23 December 2022, investment from countries other than the European Union ("EU") member states was not comprehensively regulated in the Slovak Republic nor was any cooperation between the EU member states and the European Commission ("EC").

This deficiency was remedied by the approval and publication of the new Act No 497/2022 Coll., on the screening of foreign investments and on amendments and supplements to certain acts (hereinafter referred to as "**Act**"), which introduced a comprehensive mechanism for the screening of foreign investments from non-EU member states in the Slovak Republic ("**SR**").

### Basic Terms of the Act

For the purposes of the Act, a foreign investment refers to an investment that is planned or made by a foreign investor if it enables the foreign investor to directly or indirectly

- ▶ acquire the target person or a part thereof;
- ▶ exercise an effective participation in the target person;
- ▶ increase<sup>1</sup> the effective participation in the target person;
- ▶ exercise control in the target person or
- ▶ acquire ownership or other rights in the substantial assets (such as the right to use or dispose of the substantial assets) of the target person while it is a critical foreign investment.

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<sup>1</sup> An increase in effective participation means an increase in the already acquired effective participation of the foreign investor in the share capital/voting rights of the target person to at least 50%; in the case of a critical foreign investment, it means an increase in the already acquired effective participation of the foreign investor in the

### A foreign investor is:

- ▶ anyone who has made /plans to make a foreign investment and is not a citizen of the Slovak Republic or any other EU Member State, nor has a registered office/place of business in them ("**third-country person**");
- ▶ a citizen of the Slovak Republic/another EU Member State who has made/intends to make a foreign investment, the financing of which is secured by resources from a public authority of a third country/by an entity with the participation of a third country/if such citizen acts in concert (as defined in the Commercial Code) with a third-country person, a third-country public authority or an entity with the participation of a third country in relation to that foreign investment;
- ▶ a person established in the Slovak Republic/another EU Member State who has made a foreign investment or plans to make such an investment, if
  - it is controlled (as defined in the Commercial Code) by a third-country person, a third-country public authority or a third-country participating entity,
  - its ultimate beneficial owner is a third-country person, a third-country public authority or a third-country participant,
  - the financing of the foreign investment is secured through resources provided by a third-country public authority or an entity with a participation in a third country; or
  - acts in concert with a third-country person, a third-country public authority or a third-country

share capital/voting rights of the target person to at least 20% and in each case, it reaches at least 33% or 50%.

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participating entity in relation to that foreign investment;

- ▶ the legal arrangement of the property with a foreign element (i.e., a legal arrangement that the foreign investor as defined above manages in terms of the Act) on whose account the foreign investment has been made or is intended to be made; if the legal arrangement of the property with a foreign element does not have legal personality, the person entrusted with the management of such property shall be deemed to be the foreign investor.

The law defines a **target person** as a person existing or established in the Slovak Republic in connection with a foreign investment, regardless of its legal form, the existence of legal personality, the method of financing and the focus of its activities, including the focus of its activities on profit. The definition of the target group hence includes for instance so-called start-ups, civil associations or universities.

**The effective participation** is a share in the share capital or voting rights of the target person of at least 25%; in the case of a critical foreign investment, the effective participation is a share in the share capital or voting rights of the target person of at least 10%.

## Foreign investment subject to screening

Two groups of foreign investments will or may be subject to screening according to the Act:

### 1. Critical Foreign Investments

Critical foreign investments are foreign investments in connection with which, due to the importance of the target person or its activities from the point of view of maintaining

the basic functions of the state<sup>2</sup>, there is an increased risk of a negative impact on the security or public order of the Slovak Republic.

None of these investments may be executed without a prior investigation and without the issuance of a decision on the authorisation of the foreign investment or a decision on the conditional authorisation of the foreign investment.

The foreign investor will be obliged to submit an application for the issuance of the said decision to the Ministry of Economy of the Slovak Republic ("the Ministry").

### 2. Other foreign investments

Other foreign investment is "non-critical" foreign investment, i.e., foreign investment that does not fall into the category of critical foreign investment.

Screening of this group of investments will occur either at the request of the foreign investor or ex officio.

In the case of screening of "non-critical" foreign investments at the request, the foreign investor is only entitled to submit an application before the investment is made. However, a foreign investment may be made regardless of whether the procedure for its authorisation is still pending. In such a case, the State shall not be liable for any costs incurred by the foreign investor or the target person as a result of the conditional authorisation or prohibition of the foreign investment made earlier.

The foreign investments may be screened ex-officio within two years from the date of the investment. The Ministry is entitled to initiate a review in the following cases:

- ▶ it can be reasonably assumed that the risk of a negative impact of the foreign investment already existed at the time of its implementation;

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<sup>2</sup> Basic functions of the state are understood as both external functions, such as the defence of the state, and internal functions, such as security, legal, economic, social and cultural function.

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- ▶ an EU Member State submits reasoned comments or the EC submits a reasoned objections on the foreign investment; or
- ▶ there are reasonable grounds for suspecting circumvention of the law.

## Proceeding on Foreign Investment

The procedure consists of the following parts:

### 1. Risk assessment of the negative impact of the investment on the security and public order of the Slovak Republic

This part of the procedure relates exclusively to "non-critical" foreign investments, for which review the Ministry received a request. The Ministry will assess the risk of a negative impact of the foreign investment with two possible outcomes:

- ▶ risk is not identified - the Ministry will send a confirmation to the foreign investor and the target group;
- ▶ the risk is identified - the Ministry sends a notice to the foreign investor and the target group about the commencement of the foreign investment screening.

### 2. Screening of the Foreign Investment

The screening of the foreign investment begins on the day the notification of the commencement of the screening is sent to the foreign investor and the target person.

In addition to the Ministry, the following bodies are involved in the screening process:

- ▶ consulting bodies (Ministry of Interior, Ministry of Defence and Ministry of Foreign and European Affairs), which provide an opinion on the impact of the foreign investment;
- ▶ police forces and intelligence services that provide information;

- ▶ the Ministry of Finance, which provides an opinion on Slovakia's obligations under international investment promotion treaties.

Based on the above mentioned and other opinions and on the information from the foreign investor and target person, the Ministry shall prepare an opinion according to which the foreign investment:

- ▶ does not have a negative impact and a shall decide on approval of the foreign investment;
- ▶ has a negative impact that can be eliminated by mitigation measures<sup>3</sup> and shall decide on conditional approval of the foreign investment;
- ▶ has a negative impact and a shall decide to prohibit the foreign investment<sup>4</sup>.

**A foreign investor that has been (conditionally) approved for a critical foreign investment must be entered in the Register of Public Sector Partners ("Register") within three months of the date of receipt of the relevant decision; in the case of a planned foreign investment, the foreign investor must be entered in the Register within three months of date of the investment.**

## Review of the Decisions

The foreign investor and the target person have the right to file a **remonstrance** against the decision with the Ministry within 15 days from the date of delivery of the decision. The lodging of a remonstrance shall have no suspensive effect.

The Minister of the Ministry shall decide on the remonstrance on the basis of a proposal prepared by a commission appointed by him. No further remonstrance may be lodged against the Minister's decision on remonstrance.

<sup>3</sup> mitigation measures and the foreign investor's obligations to ensure compliance with mitigation measures are part of the opinion

<sup>4</sup> in the case of a realised foreign investment, the foreign investor's

obligations to ensure compliance with the prohibition on foreign investment are part of the opinion

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Within 30 days from the date of delivery of the decision, the foreign investor and the target person may also bring an **administrative action** with the Supreme Administrative Court of the Slovak Republic.

The decision may be also reviewed within a **renewal of proceedings**<sup>5</sup>:

- ▶ at the request of a party to the proceedings if new facts or evidence come to light which may have had a significant impact on the decision and which could not have been adduced in the proceedings without the party's fault;
- ▶ if the Ministry, after the final conclusion of the proceedings discovers that the foreign investor / the target person has provided it with a false or incomplete information, documents or explanations and thereby influenced the outcome of the inspection.

The decision issued in the renewed procedure shall annul and replace the original confirmation or decision.

## Administrative offences and penalties

Both the foreign investor and the target person may be committing an administrative offence by breaching their obligations under the Act. They may subsequently be fined for this offence.

### 1. Foreign Investors' Administrative Offences

Depending on the severity of the offence, the foreign investors may be imposed with fine in the maximum amount of:

- ▶ the value of the foreign investment; or
- ▶ the sum of 2 % of the total net turnover achieved by the foreign investor, the persons controlled by the foreign investor and the persons controlling the foreign investor

for the last completed accounting period (hereinafter referred to as '**Net Turnover**')

for the most serious defences such as:

- ▶ carrying out a critical foreign investment that has not been preceded by an application for review;
- ▶ breach of any of the mitigation measures / any of the obligations to ensure compliance with the mitigation measures;
- ▶ breach of the obligation to appoint a trustee;
- ▶ breach of the obligation to limit rights or prohibit the exercise of rights; or
- ▶ breach of the prohibition of foreign investment or the obligation to reverse a carried foreign investment.

In determining the maximum amount of the fine, the higher value shall be selected. If the above values cannot be determined, or if their determination causes undue delays in the proceedings, the maximum possible amount of the fine shall be EUR 1 000 000.

### 2. Target Persons' Administrative Offences

An administrative offence may also be committed by a target person if it:

- ▶ fails to provide cooperation and thereby makes it difficult to continue the course of action;
- ▶ provides false / incomplete information, documents or explanations and thereby influences the outcome of the procedure;
- ▶ breaches an obligation relating to an administrative or on-the-spot check;
- ▶ etc.

A fine of up to EUR 50 000 may be imposed on the target person who has committed an administrative offence. The Ministry may impose a fine repeatedly if the previous

<sup>5</sup> The Ministry shall order a renewal of proceedings within three months of the date on which it became aware of the facts justifying

the renewal, but not later than three years from the date of the valid conclusion of the proceedings.



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imposition of a fine has not led to a remedy and the unlawful situation persists.

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The above outlined foreign investment screening mechanism will **come into force** together with all the other provisions of the Act. Thus, foreign investors, target persons and other affected persons will start to have rights and obligations on the basis of the Act as of 1 March 2023.

The information contained in this bulletin is presented to the best of our knowledge and belief at the time of going to press. However, specific information related to the topics covered in this bulletin should be consulted before any decision is made. The information contained in this bulletin should not be construed as an exhaustive description of the relevant issues and any possible consequences, and should not be fully relied on in any decision-making processes or treated as a substitute for specific legal advice, which would be relevant to particular circumstances. Neither Weinhold Legal, s.r.o. advokátní kancelář nor any individual lawyer listed as an author of the information accepts any responsibility for any detriment which may arise from reliance on information published here. Furthermore, it should be noted that there may be various legal opinions on some of the issues raised in this bulletin due to the ambiguity of the relevant provisions and an interpretation other than the one we give us may prevail in the future.

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