

# Screening of foreign investments: New condition for M&A transactions in Slovakia

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On 1 March 2023, the [Act on Screening of Foreign Investments](#) entered into force. It introduces a comprehensive screening mechanism for foreign investments in the Slovak Republic.

This puts Slovakia among the many countries that have introduced various foreign investment control (FDI control) regimes in recent years. The new Act replaces the previous control regime applicable for selected transactions, which was rather hastily passed in 2021 and is reflected in the Act on Critical Infrastructure. The new regime is more reflective of international standards and in line with the framework of the [EU regulation](#).

The new Act does not aim to reduce the number of foreign investments in Slovakia. The main objective is merely to ensure that foreign investments may be reviewed in terms of protection of security and public order of the Slovak Republic and the EU.

Whether this objective will be met will be determined in practice.

## Who is a foreign investor according to the Act?

- 1) In general, any person (legal or natural) outside the EU will be considered a foreign investor— i.e., persons that are not EU citizens or do not have their registered seat or place of business in the EU.
- 2) However, even EU citizens or persons with their registered seat or place of business in the EU will be considered foreign investors if they are controlled by a person outside the EU or by a public authority of a third country, such person is their ultimate beneficial owner or such person finances the transaction.

## What types of businesses and foreign investments will be regulated by the Act?

A foreign investment is any investment (irrespective of its amount) made by a foreign investor that enables the investor to directly or indirectly acquire a target person, to exercise effective participation or control in the target person, or to acquire its substantial assets.

It is irrelevant whether the investment is a planned investment or the result of pledge enforcement, execution or other enforcement right.

The Act distinguishes between two types of investments:

- 1) **A critical foreign investment** is the acquisition (or exceeding) of a 10%, 20%, 33% or 50% share in the target person in the following sectors<sup>1</sup>:
  - Specific products (in particular weapons, explosives, pyrotechnic products)
  - Defense industry products
  - Dual-use items (software and technology that can be used for both civilian and military purposes)
  - Biotechnology
  - Critical infrastructure
  - Essential services related to cybersecurity regulations
  - Digital service provider in the field of cloud computing
  - Providers of national-level information security encryption
  - Media services (broadcasting)
  - Content sharing platforms (with an annual turnover above €2 million)
  - Periodicals publishers
  - Operators of news web portals
  - Press agencies
- 2) **Non-critical foreign investment** is the acquisition (or the exceeding) of a 25% or 50% share in any target person, except in the sectors listed above (irrespective of the turnover of the target person or the value of the transaction).

However, the following are not considered to be foreign investments:

- Investments between related parties (i.e., intragroup reorganizations)
- The establishment of a pledge
- Transactions in the ordinary course of business for the purpose of selling or buying goods, products, supplies or services

## When will screening become mandatory?

The acquirer must apply for investment screening only when the investment is considered a critical foreign investment.

In other cases (non-critical foreign investments), the acquirer can decide whether to submit an application. Please note that the Ministry of Economy is entitled to initiate ex officio screenings up to two years after the date of the transaction and can potentially impose an obligation on the foreign investor to reverse the transaction. With that in mind, it is always necessary to assess the level of risk in a particular case when deciding whether to apply for an optional screening.

## How will the foreign investment screening process work?

The competent authority to carry out the screening is the Ministry of Economy.

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<sup>1</sup> The list of sectors is stipulated in a [government regulation](#).

Proceedings may be initiated upon the application of the foreign investor or ex officio screenings can be initiated by the Ministry of Economy.

This procedure has several phases; below we have summarized the essential ones:

1) **Assessing the foreign investment's negative impact risk:**

- This phase applies only in the case of a non-critical foreign investment.
- The Ministry of Economy notifies the ministries of Interior, Defense, Foreign Affairs and possibly other concerned ministries, as well as the police and intelligence services (known as “consulting authorities”) of the proceeding; these authorities then have 30 days to provide their statement regarding the risk of a negative impact of the foreign investment.
- If no risk has been identified, the Ministry of Economy sends a confirmation of this to the foreign investor and the target.
- If a negative impact risk is identified, the Ministry of Economy will initiate the screening process described below.

2) **Screening the foreign investment:**

- All critical foreign investments will undergo this phase as well as non-critical foreign investments if the risk of a negative impact is identified in the first phase.
- The Ministry of Economy notifies the consulting authorities again, and they provide their statement within 40 days.
- Subsequently, the Ministry of Economy prepares a proposal of the final statement (i) approving, (ii) conditionally approving or (iii) rejecting the foreign investment; the foreign investor and the target person then have 15 days to submit their comments to this proposal (this process is also referred to as “consultations”).
- After consultations, the Ministry of Economy issues a decision, either approving the investment, conditionally approving it (in this case it also sets out the mitigation measures), or it submits a statement to the government rejecting the foreign investment. If the government agrees with the rejection, the Ministry of Economy will issue a decision rejecting the foreign investment; if the government disagrees, the foreign investment will be allowed.
- If the Ministry of Economy does not issue a decision or submit a final statement to the government within 130 days from date proceedings were initiated, the foreign investment is considered to have no negative impact; however, the Act does not set out any respective time period in which a final statement must be assessed by the government.

Decisions are subject to appeal. Appeal is decided by the Minister of Economy. Following an appeal, the acquirer can then initiate an administrative action before the Supreme Administrative Court of the Slovak Republic.

### **What is the practical impact on M&A transactions?**

The new regime may have a significant impact on the course of the transaction. From a practical point of view, it is particularly important to point out the following:

- In the early stages of the transaction, it is necessary to assess whether the transaction is subject to mandatory screening (whether it can be classified as a critical foreign investment).
- If it is determined that the foreign investment is non-critical, it is necessary to assess the likelihood of the transaction being subject of an ex officio screening by the Ministry of Economy in the future, and on that basis to determine whether an optional screening should be applied for before the transaction closing.
- The amount of time for the screening has to be reflected in the transaction timeline — the screening process can take up to 130+ days.
- A critical foreign transaction cannot be closed without prior approval. In the event of a breach, a fine can be imposed of up to the value of the critical foreign investment or 2 percent of the total net turnover generated by the foreign investor or controlling person.

- If a foreign investment is completed without prior approval, the Ministry of Economy may initiate an ex officio screening procedure and impose an obligation on the foreign investor to reverse the transaction (this screening can be initiated up to two years after the transaction).

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