

PROPOSED SCREENING OF FOREIGN DIRECT INVESTMENTS TO HUNGARY

The new Hungarian Government has submitted its draft act setting out the rules to enable screening of foreign acquisitions of certain Hungarian strategic companies engaged in providing strategic services (such as finance and telecoms) or otherwise handling critical infrastructure or technologies by investors having their background outside the European Union (EU), the European Economic Area (EEA) or Switzerland.

The main reason for this proposal is that some of these acquisitions by non-EU/EEA investors could be detrimental to national security or public policy in Hungary and that currently there is limited and unsophisticated mechanism available for the Hungarian Government to screen and potentially prohibit acquisitions by foreign investors in such strategic companies.

Accordingly, the proposal would make the acquisition of a stake in excess of 25% in Hungarian companies (or 10% in respect of publicly listed Hungarian companies) or the acquiring of de facto control by other means over the relevant Hungarian entities operating in the selected strategic businesses subject to the prior review and approval by a competent Hungarian minister (expectedly the one for internal affairs).

This Hungarian national proposal comes just parallel of the very similar proposal the European Commission issued in September 2017 for a Regulation establishing a framework for screening FDI in the European Union.

Unlike the United States or China, who pursue aggressive trade policies and where FDI transactions have long been subject to certain screening and restrictions, Hungary currently does not have any legislation in place on the review of foreign investments. At an EU level, about half of the European Member States, such as Germany or Poland, have their own national screening mechanisms, which vary widely but generally can lead to the modification or prohibition of certain investments on grounds of public policy and national security.

As mentioned, no such rules exist in Hungary yet, let alone certain sectorial reviews available in selected regulated industries, such as energy or banking, in which the acquisition of certain controlling stakes have long been subject to prior approval of the competent national regulator.

The draft act would require the seeking of prior consent by the relevant investor from the competent Ministry for the closing of its proposed acquisition in Hungary. The rendering of the Ministerial decision on whether to restrict a given investment would carry a wide amount of discretion as it is dependent to essential public policy concerns only and could in a worst case scenario be delayed as long as for 90 days.

Although a decision on prohibiting the acquisition would remain subject to appeal to administrative courts in Hungary, but such courts would not be allowed to overturn the Ministerial prohibition, they could only refer the case back to the Minister for reconsideration and solely on grounds of procedural mistakes.

If the draft act is approved by the Hungarian Parliament and gets promulgated, it will become effective as from October 2018 already. It is to be seen, however how the Hungarian proposal will eventually progress its way against the European Commission's proposal in the same subject matters.

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