

## Slovenia: New FDI Screening Rules Investment Promotion Act

30 June 2023

### New FDI screening rules to begin to apply on 1 July 2023

The new FDI screening mechanism introduced by the amended Investment Promotion Act ("**ZSInv**") substitutes the legal framework that was introduced in 2020 during the COVID-19 Pandemic, which was temporary in nature.

#### Key Changes

- The key change brought by the new regulation is the limitation of the definition of a foreign investor to **investors from third countries** (citizens from third countries; legal entities with their seat outside the European Union).
- A foreign direct investment ("**FDI**") is not only the initial investment (**directly or indirectly**) **but also any additional investment** of at least 10% of the capital / voting rights in a Slovenian entity.
- The new regulation provides for clarifications with respect to **information and evidence** to be disclosed in the FDI notification; the **procedure**; the list of **conditions** that can be requested by the governmental authority for the implementation of a foreign direct investment; and **sanctions**.

#### 1 Definition of a Foreign Investor and an FDI

The new regulation narrows down the notification obligation to foreign investors who are citizens of a third country, or legal entities with their seat in a **third country** (a country that is not an EU Member State). Foreign investors are also persons / entities who **directly or indirectly** hold at least 10 % of share or voting rights in an entity with its seat in a EU member State, which intends to conduct foreign direct investment in Slovenia.

"The new FDI screening regulation narrows down the notification obligation to foreign investors with their seat outside of EU Member States. The notification obligation applies also if a foreign investor holds (directly or indirectly) at least 10% of share or voting rights in an entity with its seat in a EU Member State, which intends to make a foreign direct investment in Slovenia."

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The definition of a foreign direct investment includes indirect as well as any subsequent foreign investments, as it now clearly states that the first, and each subsequent direct or indirect acquisition of at least 10% of the share capital or voting rights, constitutes a direct foreign investment. There is no exception for intra-group transactions.

## 2 Critical Sectors

For the most part, the list of critical sectors which trigger the FDI regime remains the same compared to the previous regulation, with the exception of health, medicinal and pharmaceutical technologies, which are now excluded from the list of critical technologies and medical and protection equipment which is itself now also excluded from the list of supply of critical resources. The definition of critical sectors follows the framework of Art 4(1) of Regulation (EU) 2019/452 on the screening of foreign direct investments into the Union.

## 3 Criteria for determining whether an FDI affects the public order or security of the Republic of Slovenia

The Slovenian Ministry of the Economy, Tourism and Sport ("**Ministry**") determines whether or not an FDI affects the public order or security of the Republic of Slovenia, based on the already established criteria<sup>1</sup>; furthermore, the Ministry will have to take into account whether:

- the foreign investor has reached the takeover threshold in the target company (one-third of voting rights in the target company) with a transaction that is the subject of notification, or has obtained a 10% share of voting rights in the target company, following the completion of a successful takeover bid process or with a successful takeover bid acquired at least 75 % of all shares with voting rights of the target company;
- the foreign investor, through the target company or through a newly established company, achieved a market share of at least 20% within the area of critical activities in the territory of the Republic of Slovenia; and
- whether the foreign investor has achieved a 25 % or 50 % participation in the capital or voting rights in the target through a transaction that is the subject of notification.

## 4 Information and evidence to be submitted with the FDI notification

The information that must be submitted in the FDI notification will, in addition to the currently required details, include:

- (i) a detailed description of the foreign direct investment; and
- (ii) the reasoning as to why the foreign investment will not have any effect on the public order or security of the Republic of Slovenia or any other EU Member State.

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<sup>1</sup> Whether the foreign investor: (i) is directly or indirectly under the control of a government (including state authorities or armed forces of a third country) including through a chain structure or significant financing, (ii) was already involved in activities that affected security and public order in the EU member state; (iii) is engaged in illegal or criminal activities.

From 1 July 2023 onwards, the evidence will have to be attached to the FDI notification, demonstrating the accuracy of the information provided, including the underlying transaction documentation.

The Ministry may request that the foreign investor or the target company submit additional explanations or documentation within a set deadline.

"Evidence will have to be attached to the FDI notification, demonstrating the accuracy of the information provided, including the underlying transaction documentation."

## 5 Procedural Changes

### Introduction of a 2-Phase Process

The new law introduces a **two-phase procedure**:

- (i) **Phase 1**: A Notification Commission at the Ministry performs a preliminary review and, if the transaction meets the criteria for an FDI, issues an opinion in which it assesses whether or not the transaction has a significant impact on public order and security in the Republic of Slovenia. Based on such an assessment, it recommends that the transaction be approved or that a review process (i.e., an in-depth screening procedure) must be initiated. The Ministry then issues the decision to approve a foreign direct investment or the decision to initiate a Phase 2 screening process.
- (ii) **Phase 2**: An Expert Group at the Ministry performs the review process and submits an opinion to the Ministry with a recommendation as to whether or not to approve an FDI (at the latest **2 years** after the initiation of the review process), on the basis of which the Ministry issues the decision to (i) approve the FDI, (ii) to determine conditions for its implementation or (iii) to prohibit the FDI. Said decision must be issued within **2 months** following the issuance of the opinion by the Expert Group.

The Ministry's decision may not be appealed. The foreign investor / target company has the right to instigate an administrative dispute before the Administrative Court.

### List of conditions for the implementation of an FDI

The amended framework stipulates a list of the conditions for the implementation of the foreign direct investment, which can be determined by the Ministry, if it identifies an impact by the foreign direct investment on the security or public order of the Republic of Slovenia. These conditions can apply for a certain period of time, which may be no longer than ten years. The list includes the following (*inter alia*):

- (i) prohibition of the sale of copyright and related rights owned by the target company, or the newly established company, to natural persons or legal entities from third countries;
- (ii) prohibition of the sale of certain tangible and intangible fixed assets acquired through direct foreign investment;
- (iii) prohibition of business cooperation with a legal or natural person that affects public order or security in any of the EU Member States, if this has been established by either the member state or the European Commission;
- (iv) the obligation to reduce the share acquired in the target company, or the acquired company, or the newly established company;
- (v) a commitment that certain parts of the target company, or the acquired company, or the newly established company will be preserved in the Republic of Slovenia;
- (vi) prohibition of certain practices in the market of the Republic of Slovenia; or

- (vii) the obligation to continuously perform the original activity of the target company, or the acquired company, or the newly established company in the Republic of Slovenia.

## 6 Sanctions

According to the new ZSInv, a fine of EUR 100,000 to EUR 500,000 (depending on the size of the legal entity) may be imposed on a legal entity, along with a fine of EUR 2,000 to EUR 10,000 on its responsible persons<sup>2</sup>, not only if the legal entity does not notify the foreign direct investment within 15 days, but also to the extent that it:

- does not disclose all the information required with the new law in the FDI notification; or
- does not submit relevant evidence or explanations at the request of the notification commission or the expert group; or
- does not report to the Ministry on the measures regarding compliance with the set conditions for the implementation of the transaction set by the Ministry.

"Foreign investors could be fined between EUR 100,000 to EUR 500,000, if they do not disclose all required information, or do not submit requested evidence, or do not report on the adoption of measures regarding compliance with the set conditions."

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<sup>2</sup> Managing director(s), executive directors or members of the management board.

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