

## On steep hills: Hungary tightens rules on the clearance of foreign investments

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The current rules on foreign direct investments (FDI), which are already quite restrictive, will be tightened further from January next year: the current exemptions will be narrowed, and the Hungarian State will have a right of first refusal for solar power plant investments. The government is trying to address a long-standing and sensitive issue for domestic energy policy, while also affecting other non-renewable investments by tightening the exemptions.

Last week, on 14 December 2023, Government Decree No. 566/2023 (XII. 14.) of Hungary amending certain provisions of the so-called "alternative" FDI regime based on Government Decree No. 561/2022 (XII. 23.) of Hungary was published in the Hungarian Gazette (see no. 180/2023). The provisions of the government decree shall apply from the 30th day after its publication, i.e., from 13 January 2024. Moreover, yesterday, 19 December, Government Resolution No. 1576/2023 (XII. 19.) was published in the Hungarian Gazette (see no. 183/2023), clarifying certain issues of the right of first refusal contained in the government decree.

### 1 Narrowing exceptions – fewer possibilities for exemption from submitting a request

The new government decree amending the alternative FDI regime will narrow the scope of transactions that are not subject to submitting a request for FDI clearance (i.e., exempt from prior Ministerial approval). Under the current rules, no prior Ministerial approval is required for indirect foreign acquisitions of control and intra-group restructurings at the ownership levels above the Hungarian strategic target company, provided that they do not result in a change in the direct ownership structure of the Hungarian entity.

According to the newly adopted rules, these two exemptions are getting combined and from next year foreign-to-foreign transactions will remain exempted from the prior FDI screening filing requirement only in respect of subordinated Hungarian registered affiliates and provided that they do not concern any change in the direct ownership structure of the Hungarian strategic target company.

The Government Decree provides that the alternative FDI regime do not apply if a transaction implemented in respect of a foreign registered legal entity indirectly results in the change of ownership over a Hungarian registered subordinated affiliate of such foreign entity.

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## 2 Right of first refusal for solar investments

Another novelty of the rules amending the alternative FDI regime is that it grants the Hungarian State a right of first refusal in respect of domestic strategic target companies that are to be acquired by foreign investors for the implementation of photovoltaic (solar) projects, excluding companies interested in small household power plants (i.e., below 50 kVA).

According to the new rules, if the sale and purchase transaction subject to prior FDI approval is concluded in respect of a target which is engaged in solar power plant activities, the Hungarian State will have a statutory preemption right before any other party.

The right of first refusal will be exercised according to the following procedure:

- Firstly, the competent Minister will examine the submission received to determine whether the transaction is covered by the right of first refusal and inform the applicant accordingly. The Hungarian State may exercise the right within 60 working days, which shall be calculated from the date of sending the foregoing information to the applicant. If the deadline expires without result, the right is lost.
- In a second step, at the same time as the information is sent to the applicant, the competent Minister will send the documentation received as part of the submission to the Minister responsible for energy policy, who will decide within 15 working days whether or not the exercise of the right of first refusal is justified in the underlying case. The Minister responsible for energy policy has to forward his reply and the relevant documentation to the Hungarian National Asset Management Zrt. within the time limit and at the same time inform the competent Minister conducting the FDI clearance.
- Finally, if the competent Minister receives a proposal to exercise the right of first refusal, the Minister will terminate the FDI clearance procedure, expressly stating that the Minister responsible for energy policy is of the opinion that the exercise of the right of first refusal is justified. If, on the other hand, the Minister responsible for energy policy makes a proposal not to exercise the right of first refusal in respect of the underlying transaction within the time limit, or does not take a position on the exercise of the right of first refusal on time, the competent Minister conducting the FDI screening will assess the merits of the submission and, where appropriate, prohibit the transaction or, failing that, authorize it.

Another new obligation for the applicant is that its FDI filing must now include, in addition to the other mandatorily prescribed content, a reference to the existence of a right of first refusal in relation to the transaction. In other words, the applicant must draw the attention of the competent Minister to the possibility of exercising the right of first refusal.

In addition to the foregoing, under Government Resolution No. 1576/2023 (XII. 19.), the the Minister responsible for energy policy is mandated as the beneficiary of the ownership rights and obligations of the State over the strategic target companies acquired as a result of the right of first refusal. Furthermore, the target companies have to be in-kind contributed to the state-owned MVM Zrt. within 6 months of their acquisition by the State.

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