

# Czech Republic

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## 1 Foreign Investment Policy

### 1.1 What is the national policy with regard to the review of foreign investments (including transactions) on national security and public order grounds?

Czech policy on foreign investments has been very liberal in the past. Investments have been regulated only in specific business sectors such as ammunition manufacturing, the pyrotechnic industry, the electronic communication industry, or banking and energy.

However, in February 2021, the new Act No. 34/2021 Coll., on the Screening of Foreign Investments (the “FDI Act”) was enacted. The FDI Act aims to strengthen the control of foreign investments by introducing a mechanism of foreign investment screening that includes both a preliminary mandatory application for permission and screening proceedings initiated by the Ministry of Industry and Trade (the “Ministry”) as detailed below.

### 1.2 Are there any particular strategic considerations that apply during foreign investment reviews?

The FDI Act aims to protect the security of the Czech Republic and its public and internal order. In order to make a risk assessment of investments, the authority considers the nature of the business sectors in which the investments are made, as well as assessing the target companies and foreign investors themselves (mainly in respect of the criteria mentioned in Article 4(2) of EU Regulation 2019/452). However, no strategic (economic) considerations are taken into account.

### 1.3 Are there any current proposals to change the foreign investment review policy or the current laws?

As the FDI Act was only recently passed, no proposals to change the law or policy have yet emerged.

## 2 Law and Scope of Application

### 2.1 What laws apply to the control of foreign investments (including transactions) on grounds of national security and public order? Are there any notable developments in the last year?

As already mentioned, the new Act No. 34/2021 Coll., on the Screening of Foreign Investments was enacted in February 2021. Consequently, foreign investors were required to comply with the new FDI rules in the Czech Republic from 1 May 2021.

The FDI Act introduces both a preliminary mandatory application for permission (in respect of foreign investments in specific business areas such as critical infrastructure, dual-use goods, production and military equipment production) and screening proceedings initiated by the Ministry *ex officio* (in respect of any foreign investment which might endanger a public or internal order or the security of the Czech Republic), as detailed below.

### 2.2 What kinds of foreign investments, foreign investors and transactions are caught? Is the acquisition of minority interests caught?

The FDI Act provides for a review of foreign investors (i.e. a natural or legal person from outside the European Union or legal person or trust fund directly or indirectly controlled by such a person or legal entity as detailed in question 2.4) who intend to make or have made (i.e. completed) an investment of any kind that could endanger the security of the Czech Republic or its public or internal order.

The Czech FDI control regime distinguishes between investments in:

- (i) specified industries such as manufacturing, research, development, innovation and maintaining the life cycle of military equipment; the operation of critical infrastructure and services (e.g. power plants, water supply, hospitals); administration and development of software (information system) designated for such critical infrastructure and services; manufacturing or development of dual-use goods and other goods listed in Annex IV of EU Regulation 428/2009 (each a specified industry);

- (ii) media; and
- (iii) all other sectors.

Whereas investments in (i) specified industries, and (ii) media are subject to stricter scrutiny by requiring an application for permission or proposal for consultation as detailed in question 2.4, no direct obligation is imposed on foreign investors who intend to make or have made investments in other sectors. However, the Ministry may initiate a review of any investment (i.e. not only investments in one of the specified industry sectors) which might endanger the security of the Czech Republic or its public or internal order. Such an investment review may result in a prohibition of the investment, or of its continuation if the investment has already been made. The authority may intervene before the investment is made or within a period of five years from the moment the investment is made; however, this limitation period does not apply if the investor breached his or her obligation to file an application for permission or if it is revealed that he or she concealed facts which if disclosed, would have allowed the authority to initiate the proceedings within the time limit.

Therefore, in order to protect the investment, any foreign investor may submit to the authority a proposal for “consultation” (i.e. even if not required to do so). As in the case of the obligatory consultation procedure (detailed in question 2.3), the investment is deemed to have been approved and to be ineligible for subsequent review after this consultation, unless it is revealed that the investor submitted untruthful or incomplete information. In the proposal for consultation, the investor must provide the authority with all relevant information. We also stress that not only the investor, but also the target entity, is notified that the investment will not be reviewed.

Only foreign investments which would enable the foreign investor to gain effective control of an economic activity can trigger an investment review. However, effective control can be acquired by enjoying 10% of voting rights (and in the other ways described in question 2.4), which means that also minority investments may be subjected to review.

### 2.3 What are the sectors and activities that are particularly under scrutiny? Are there any sector-specific review mechanisms in place?

Pursuant to the FDI Act, a review may be initiated in respect of any foreign investment which might endanger the security of the Czech Republic or its internal or public order. Nevertheless, the sectors under the strictest scrutiny are:

- (a) target entities engaging in the production, research, development, innovations or lifecycle of military equipment pursuant to legislation governing foreign trade with military equipment;
- (b) target entities operating a critical infrastructure element identified by a relevant central administrative authority (e.g. water supply, power-plants or hospitals);
- (c) target entities that are the administrator of an information system of critical information infrastructure, the administrator of a communication system of critical information infrastructure, the administrator of an information system of a basic service, or the operator of a basic service;
- (d) target entities that develop or produce the goods listed in Annex IV to Council Regulation (ES) 428/2009, setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, as amended, or in target property through which such items are developed or produced (specified industries); and
- (e) target entities that are the holders of a nationwide radio or television broadcast licence or the publishers of a periodical with a minimum average print run of 100,000 copies per day for the last calendar year (media).

Foreign investors who intend to invest in a specified industry must apply to the Ministry for permission. Permission is not required if the foreign investment is made as part of a recovery procedure or similar procedure under Act No. 374/2015 Coll. (the Financial Market Recovery and Crisis Management Act), or is urgently needed to avert the failure of a financial institution. The investment must not be completed without permission.

Foreign investors aiming to invest in media (if the media company is the holder of a nationwide radio or television broadcast licence or the publisher of a periodical with a minimum average print run of 100,000 copies per day for the last calendar year) must submit a proposal for consultation to the Ministry. If the Ministry does not find grounds to initiate a review of the investment, it must notify the foreign investor and the target entity within a period of 45 days. After that time, the investment will be deemed approved and cannot be reviewed again unless it is revealed that the investor submitted untruthful or incomplete information. If the Ministry finds that there are grounds to initiate the review of the investment, it initiates the procedure and notifies this fact to the foreign investor within a period of 45 days.

Foreign investors aiming to invest in any other sector are not required to propose a consultation, but they may propose it voluntarily to protect their investments (see question 2.2).

### 2.4 How are terms such as ‘foreign investor’ and ‘foreign investment’ specifically addressed in the law?

Under the FDI Act, a foreign investor is defined as a natural or legal person who has made or intends to make a foreign investment and is not:

- a Czech citizen or citizen of another Member State of the European Union;
- a legal person with its seat inside the European Union;
- a legal person directly or indirectly controlled by a person who fulfils the above-mentioned conditions; or
- a trustee of a trust fund (in Czech: “*svěřenský správce svěřenského fondu*”) if a founder or trustee of the trust fund, the person in whose interest the fund is established or another person able to control those persons fulfils the above conditions. The term “trust fund” also applies to any comparable establishment under foreign law (this also applies to the term “trustee”).

In view of the above, the definition of “foreign investor” also includes investors from Great Britain, Switzerland, Liechtenstein and Norway.

“Foreign investment” means an investment of any kind by a foreign investor to pursue an economic activity in the Czech Republic if it enables the foreign investor to effectively control that economic activity. “Effective control of an economic activity” is defined as where:

- the foreign investor enjoys at least 10% of the voting rights or corresponding influence in an entity conducting the economic activity (including the voting rights of persons who are subject to joint management or practices in concert with the foreign investor);
- the foreign investor or a person closely related to him or her is a member of an elected body (e.g. a director) of an entity conducting the economic activity;
- the foreign investor holds the ownership rights to property through which the economic activity is conducted; or
- the foreign investor has another level of control that would enable him or her to gain access to information, systems or technologies that are important for the protection of the security of the Czech Republic or for its internal or public order.

Furthermore, a change in the person of the foreign investor after the investment is made is deemed to be a new transaction (foreign investment) for the purposes of the FDI Act and, therefore, is subject to a new review process.

To sum up, the definition of “foreign investment” includes indirect acquisitions, both share and assets deals, expansions of existing business and possibly even intra-group restructurings.

### 2.5 Are there specific rules for certain foreign investors (e.g. non-EU / non-WTO), including state-owned enterprises (SOEs)?

The FDI Act applies only to non-EU foreign investors, including investors from Great Britain, Switzerland, Liechtenstein and Norway. However, the FDI Act does not distinguish between non-WTO and WTO investors, or state-owned enterprises and private companies. Therefore, the same FDI rules are applicable for all non-EU investors.

### 2.6 Is there a local nexus requirement for an acquisition or investment to fall under the scope of the national security review? If so, what is the nature of such requirement (existence of subsidiaries, assets, etc.)?

Yes, the investment reviews under the FDI Act only apply to investments made or intended to be made to pursue an economic activity in the Czech Republic. The FDI Act does not stipulate any formal requirement such as the existence of subsidiaries or assets and, therefore, whether an investment falls within the meaning of the term “pursuing an economic activity in the Czech Republic” will be assessed case-by-case.

### 2.7 In cases where local presence is required to trigger the review, are indirect acquisitions of local subsidiaries and/or other assets also caught?

Yes, as the FDI Act stipulates that a change in the person of a foreign investor after the investment is made is deemed to be a new transaction (foreign investment) for the purposes of the FDI Act, indirect acquisitions might also trigger a review or the obligation to file an application for permission of such an investment.

## 3 Jurisdiction and Procedure

### 3.1 What conditions must be met for the law to apply? Are there any monetary or market share-based thresholds?

The FDI Act applies to all foreign investments which meet the conditions described above (see questions 2.2–2.4). There are no separate monetary thresholds.

### 3.2 Do the relevant authorities have discretion to review transactions that do not meet the prescribed thresholds?

The Ministry, as the relevant authority, is empowered to review *ex officio* only transactions which meet the conditions described in questions 2.2–2.4 above. Nevertheless, given that these conditions are defined by indefinite terms (such as “may endanger the security of the Czech Republic or its internal or public order” or “another level of control”), the Ministry must interpret these vague terms while applying the FDI rules, which provides the Ministry with a certain margin of appreciation.

### 3.3 Is the filing voluntary or mandatory and is there a specific filing form? Are there any filing fees?

The FDI Act provides for three types of filings: (i) mandatory application for permission in respect of foreign investments in a specified industry; (ii) mandatory proposal for consultation in respect of foreign investments in media; and (iii) voluntary proposal for consultation in respect of other foreign investments.

Both the application for permission and the proposal for consultation must be filed in the specific filing form and in the Czech language provided by Government Regulation No. 178/2021 Coll. on the application form for a foreign investment permission and a proposal for consultation.

No filing fees apply.

### 3.4 In the case of transactions, who is responsible for obtaining the necessary approval?

The foreign investor (i.e. acquirer) is responsible for obtaining any permission from the Ministry.

### 3.5 Can foreign investors engage in advance consultations with the authorities and ask for formal or informal guidance on the application of the approval procedure?

The FDI Act does not provide for any formal procedure in this respect. However, the Ministry offers informal guidance and answers the questions sent to the e-mail address FDI-SCREENING@mpo.cz. Furthermore, the Ministry plans to publish an FAQ section answering the most frequently asked questions.

### 3.6 What type of information do investors have to provide as part of their filing?

Each filing must include the following information:

- information on the foreign investor (e.g. name, registered office and/or place of residence, the law under which a legal person was established, identification number if any);
- information on the members of the foreign investor’s statutory body, supervisory body or other body (e.g. name, place of residence, telephone number, email address, date and place of birth);
- information on the ownership structure of the foreign investor, including information on the final investor and the person who controls the foreign investor, his or her share and changes in this information during the past year;
- information on the products or services and business activities of the foreign investor and the place of business;
- information on the foreign investment (such as the source and amount of financing, and the time frame of the investment); and
- information on the target company (e.g. name, registered office, identification number if any, information on its ownership structure, its business activities and place of business).

The Ministry may request any other details from the investor or target company (or its owner) that are not listed in the FDI Act or the Government Regulation, if necessary to assess the investment.

### 3.7 Are there sanctions for not filing (fines, criminal liability, unwinding of the transaction, etc.) and what is the current practice of the authorities?

A breach of the obligation to file an application for permission or propose a consultation is punishable as an administrative offence under the FDI Act. The fine for breaching the filing obligation is up to 1% of the offender's annual turnover over the preceding financial year; if the annual turnover cannot be found, the FDI Act provides for a minimum fine of approximately EUR 2,000 and a maximum fine of approximately EUR 2 million.

Moreover, if an investment in a specified industry is made without prior permission, the Ministry is empowered to prohibit the continuation of the investment. Consequently, the investor may be forced to cease to exercise the voting rights or to sell the assets which constitute the investment.

As the FDI Act is applicable to investments completed after 30 April 2021, there are no precedents under the new rules yet.

### 3.8 Is there a filing deadline and what is the timeframe of review in order to obtain approval? Are there any provisions expediting the clearance?

In respect of mandatory filings or voluntary proposals for consultation, the Ministry must notify the foreign investor of the outcome of the consultation – by issuing either a decision to initiate a review or a notification that it did not find any grounds to initiate a review – within a period of 45 days from the date it receives the complete filing.

To issue any decision that is subject to the prior approval of the Government (such as decisions to prohibit an investment, prohibitions of its continuation or conditional permission), the Ministry must request a Government resolution no later than 90 days after the date on which it initiates the review proceedings (an additional 30-day period will be granted for more complex cases) and the Government must issue its resolution within 45 days. The Ministry must then issue its decision without undue delay.

To issue any decision that is not subject to the prior approval of the Government, the Ministry must issue a decision no later than 90 days after the date on which it initiates the review proceedings. In more complex cases, an additional 30 days may be granted.

The period will be suspended for the duration of any remedy negotiations between the investor and the Ministry (see question 4.7).

The FDI Act does not provide for any expediting of the process.

### 3.9 Does the review need to be obtained prior to or after closing? In the former case, does the review have a suspensory effect on the closing of the transaction?

Clearance must be obtained before closing. It must be noted that the FDI Act does not stipulate whether an application for clearance should be filed before signing or before closing, but it is likely that it is sufficient to obtain the clearance before closing. Although the review has no suspensory effect on the closing by operation of law, the Ministry can impose a penalty for breaching an obligation under the FDI Act and it can initiate the screening procedure and, consequently, prohibit the continuation of the investment. For the amounts of penalties, please see question 3.7 above.

### 3.10 Are there any penalties if the parties implement the transaction before approval is obtained? Can the parties close the transaction at global level prior to obtaining local clearance?

If the parties implement the transaction before approval is obtained, the Ministry can impose a penalty on the foreign investor. For the amounts of penalties, please see question 3.7 above.

Furthermore, if the foreign investor has failed to apply for approval, the Ministry will initiate the screening procedure *ex officio* and, if the Ministry and the Government believe that the investment endangers the security of the Czech Republic or its public or internal order, the continuation of the investment can be prohibited and the foreign investor can be forced to sell the assets which constitute the investment or cease to exercise of the voting rights.

If the parties wish to comply with the FDI Act, they cannot close the transaction at a global level prior to obtaining local clearance.

### 3.11 Can third parties be involved in the review process? If so, what are the requirements, and do they have any particular rights during the procedure?

The target company and its owner can be involved, as the Ministry may ask them to provide information. The FDI Act does not establish any particular rights for third parties.

### 3.12 What publicity is given to the process and the final decision and how is commercial information, including business secrets, protected from disclosure?

The FDI Act does not require filings or decisions to be published and reviews of investments (or consultations) are not made public.

Moreover, documents containing trade and other secrets are kept separately from the matter filed and any person who gains such information in connection with the review procedure or the consultation is required to maintain confidentiality.

### 3.13 Are there any other administrative approvals required (cross-sector or sector-specific) for foreign investments?

No, there are no other administrative approvals required specifically for foreign investments.

In general, competition regulations may establish other requirements (i.e. merger control reviews) and some industries may be subject to specific regulation (e.g. ammunition manufacturing, the pyrotechnic industry, the electronic communication industry, or banking and energy).

## 4 Substantive Assessment

### 4.1 Which authorities are responsible for conducting the review?

The Ministry of Industry and Trade is responsible for conducting the review and consultations over the investment and administrative proceedings in relation to offences committed under the FDI Act. However, opinions of other authorities will be required throughout the process, such as those of the Ministry

of the Interior, the Ministry of Defence, the Ministry of Foreign Affairs, the Police, the Czech National Bank and others, including the European Commission and other EU Member States under EU Regulation 2019/452.

Moreover, any decision by the Ministry to grant conditional permission for an investment to prohibit an investment or to prohibit its continuation may be issued only once it has been approved by Government resolution.

#### 4.2 What is the applicable test and who bears the burden of proof?

A foreign investment may be prohibited on the grounds of national security or internal or public order. The Ministry provides the reasoning of the decision and, therefore, it bears the burden of proof.

#### 4.3 What are the main evaluation criteria and are there any guidelines available?

The Ministry has not published any guidelines and there are no criteria other than those described above (see question 4.2), nor is a more detailed description given of those criteria. According to the statement made by the Ministry, an FAQs section will be published answering the most frequently asked questions.

#### 4.4 In their assessment, do the authorities also take into account activities of foreign (non-local) subsidiaries in their jurisdiction?

Yes. All business activities of foreign investors not only in the Czech Republic, but also anywhere else, may be assessed by the Ministry. Information about such activities in the Czech Republic and other EU Member States must be included in the filing under the FDI Act.

#### 4.5 How much discretion and what powers do the authorities have to approve or reject transactions on national security and public order grounds?

The FDI Act empowers the Ministry to initiate the review of any foreign investment which is considered to possibly affect national security or public or internal order. Given that the Ministry is not obliged to initiate such proceedings, the Ministry has a margin of appreciation as to whether a review will be initiated.

If a review is initiated, the Ministry may, on condition that the Government issues a resolution declaring it to be necessary in order to protect the security or internal or public order:

- (i) impose obligations on the foreign investors to fulfil specific conditions related to the investment;
- (ii) prohibit the investment; or
- (iii) prohibit the continuation of an investment already made and, in such a case, impose obligations on the investor to refrain from exercising voting rights or to divest the respective assets.

As the wording of the criteria is subject to interpretation (i.e. public order, national security, internal order), the Ministry (the Government) has a wide margin of discretion. However, the Ministry must give reasons for its decision, which may be subject to judicial review if an administrative action challenging a Ministry-issued decision is filed with the court.

#### 4.6 Can a decision be challenged or appealed, including by third parties? Is the relevant procedure administrative or judicial in character?

The FDI Act rules out appeals against any decision made based on the prior approval of the Government (i.e. decisions prohibiting an investment or its continuation, or imposing conditions on the investment). In such a case, filing an administrative action with the court is the only measure available to challenge the decision. This appeal must be lodged within a period of two months from the delivery date of the decision and it has no suspensory effect. Administrative actions may be filed by the person whose rights have been impaired by the decision – theoretically speaking, this may not only be a foreign investor, but also a target company or one of its shareholders.

#### 4.7 Is it possible to address the authorities' objections to a transaction by providing remedies, such as undertaking or other arrangements?

Yes. The FDI Act empowers the Ministry to issue a conditional permission imposing specific obligations to be fulfilled by the foreign investor, based on discussions made with the foreign investor. Such a decision is subject to prior approval by the Government. Lack of cooperation of the foreign investor in the discussion on conditions may constitute grounds to not grant the permission, to prohibit the investment or to prohibit further continuation of the investment.

Any conditions imposed must amend the original intention of the foreign investor so that the foreign investment does not jeopardise the security of the Czech Republic or its internal or public order. These conditions may also include an obligation on the foreign investor to propose a new consultation in case of a further increase in his or her share of voting rights or an increase in his or her influence over the target entity, and/or in cases of changes or extension to the scope of the business activities of the foreign investor or target entity.

Due to the generally applicable principle of proportionality under Czech law, the Ministry must impose the least restrictive measure available which safeguards the public interest (e.g. the public order). In other words, the Ministry must consider all options and choose the most suitable one from the point of view of both the public interest and the foreign investor's interest.

#### 4.8 Are there any other relevant considerations? What is the recent enforcement practice of the authorities and have there been any significant cases? Are there any notable trends emerging in the enforcement of the FDI screening regime?

Given that the FDI Act has been in force and effective only for a few months, there is no relevant practice of the authorities or any significant cases yet that might be mentioned.



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