Hungary

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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?

In October 2018, the Hungarian Parliament adopted the Act setting out rules to enable the screening of acquisitions of certain Hungarian companies engaged in providing strategic services or otherwise handling critical infrastructure or technologies by foreign investors which have a background outside the EU (the FDI Act).

The FDI Act then pre-empted the European regulation establishing a framework for screening FDI in the European Union.

Before then, no such screening regime had existed in Hungary, except for certain sectoral reviews available in selected regulated industries, such as energy, utilities or banking, in which the acquisition of certain controlling stakes had long been subject to the prior approval of the competent national regulator (see also question 3.13 below).

Since May 2020, certain temporary FDI screening requirements, introduced in the wake of the state of emergency announced in Hungary in response to the COVID-19 pandemic, have complemented the existing (and lasting) regime applicable under the FDI Act (the Temporary FDI Regime).

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

Hungary has been pursuing a welcoming legal and regulatory environment for foreign investors, successfully attracting significant amounts of investment over the past several decades. Therefore, the introduction of the lasting Hungarian FDI screening requirements under the FDI Act in 2018 and then the Temporary FDI Regime in 2020 in response to the COVID-19 pandemic were both seen as exceptional tools, only supplementing the well-established and long-lasting industry-specific regulatory review frameworks.

The "national public interest" that the Hungarian FDI legislation proclaims is the security and operability of, the continuity of supply by networks and related equipment, as well as other public interests related to strategic economic interests which are substantial from the national economic perspective.

Accordingly, the key justification for the FDI Act was that some acquisitions by non-EU investors of strategic Hungarian companies or assets could be detrimental to national security or public policy in Hungary and that, until then, there had been limited and unsophisticated mechanisms available to the Hungarian government to screen and potentially prohibit acquisitions by foreign investors in such strategic companies.

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

Further to the several revisions and amendments of both Hungarian FDI screening regimes by lawmakers prompted by the COVID-19 pandemic (see question 2.1 below), no other proposals to change the FDI review policy or the relevant laws in Hungary are known at this time.

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?

The FDI Act (i.e., Act LVII of 2018 together with its implementing decrees of the Hungarian Government), setting out the lasting FDI screening regime in Hungary, has been effective since January 2019.

Since May 2020, the Temporary FDI Regime (i.e., Chapter 85 of the Act LVIII of 2020 together with its implementing Governmental decree) has been complementing the existing (and lasting) regime applicable under the FDI Act. The Temporary FDI Regime was introduced in the wake of the state of emergency announced in Hungary in response to the COVID-19 pandemic.

Both the FDI Act as well as the Temporary FDI Regime have been under constant revision and amendment by the Hungarian lawmakers during the COVID-19 pandemic. Some changes were obviously required to tighten the applicable material as well as procedural rules, while others appear to carry a connotation of the changing shift in the Hungarian review policy (for instance, bringing under the scope of the FDI screening regime sectors that have not been included since the outset, such as higher education or insurance).

The Temporary FDI Regime is now expected to expire at the end of 2021 (which is already a date revised from February and then June 2021). It remains to be seen if any of the Temporary FDI Regime's different screening requirements will find their place in the FDI Act afterwards.

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

The FDI Act makes the acquisition of a stake in excess of 25% in Hungarian companies (10% in respect of publicly listed Hungarian companies), or the acquisition of *de facto* control

by other means over the relevant Hungarian entities engaged in selected strategic businesses (and considered as "strategic companies" for the purposes of the FDI screening regimes, see also in question 2.3 below), subject to the prior review and acknowledgment by the competent Hungarian Minister. The prior review requirement of the Minister under the FDI Act also applies if the acquisition of ownership by a foreign investor of less than 25% in a strategic company would result that, in such a company, the combined shareholding of foreign investors would exceed 25% overall, or if a foreign investor proposes to establish a branch or subsidiary in Hungary for any activity that is otherwise considered as strategic under the FDI Act.

In addition to the straightforward (direct or indirect) acquisition of shares concerned under the FDI Act, the other deal structures which fall under the specific scope of the Temporary FDI Regime include the acquisition of convertibles or rights in usufruct as well as corporate transformations, asset acquisitions, capital injections and even in-kind contributions, irrespective of if the deal is for good consideration or for free, as long as those result in the acquisition of at least a 10% stake in a strategic company.

The notification obligation continues to apply if the foreign investor's stake building reaches the shareholding thresholds of 15%, 20% and 50% thereafter, or if a foreign investor's shareholding in a strategic company (with the exception of publicly listed Hungarian companies) combined with the existing shareholding of other foreign investors exceeds 25%.

Please also refer to what is explained in question 2.4 below.

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

The strategic fields of industries covered by the prior screening requirement under the FDI Act are weapons and military equipment, dual-use items, financial and insurance services, electricity and gas transmission, distribution and system operation, water supply as well as critical telecommunication services.

The industries covered by the Temporary FDI Regime are sweeping in nature and go far beyond what has been covered under the FDI Act. Approximating to what is set out in the framework Regulation (EU) 2019/452 of the European Parliament and the Council, those include manufacturing and chemicals, food and agriculture, health and medical, waste and building materials, transport and logistics, education and communication and even retail and wholesale activities, in each case as long as those concern critical infrastructure.

Under both regimes, the FDI screening reviews complement rather than substitute sector-specific review mechanisms in place in selected regulated industries, such as energy, utilities and banking, in which the acquisition of certain controlling stakes had long been subject to prior approval of the competent national regulator (see also question 3.13 below).

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

Although the lasting FDI Act was designed not to cover any investors from the EU, the EEA and Switzerland, now both Hungarian FDI screening regimes require investors from outside and inside the EU, the EEA and Switzerland to file for prior Ministerial approval:

a) under the FDI Act without any deal value threshold; or
b) under the Temporary FDI Regime with an overall deal value in excess of HUF 350 million (approximately EUR 1 million).

"Foreign investment" transactions brought under the scope of the FDI Act are:

a) acquisitions of a shareholding as well as legal or *de facto* controlling influence by other means, directly or indirectly, in a Hungarian strategic company; and
b) founding a Hungarian company or a Hungarian branch of the foreign investor, the activity of which is proposed to fall under the scope of the FDI Act.

"Foreign investment" transactions covered under the Temporary FDI Regime are:

a) the acquisition, directly or indirectly, of a shareholding in a strategic company pursuant to the transfer, in whole or in part, of a shareholding by way of transfer of ownership or in-kind contribution, increase of registered capital, or transformation, merger or de-merger of a Hungarian strategic company;
b) the acquisition, directly or indirectly, of convertible bonds, or bonds offering subscription rights in a Hungarian strategic company; and
c) the acquisition of a right of usufruct, directly or indirectly, by virtue of a contract or a unilateral declaration on the shares of a Hungarian strategic company.

Intragroup transactions or restructurings, which otherwise do not change the ultimate control relations over the Hungarian company or assets located in Hungary, are not covered under any of the Hungarian FDI screening regimes.

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

Further to what is explained in question 2.4 above, no specific rules apply to specific categories of foreign 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.)?

Both Hungarian FDI screening regimes require that there is a local nexus (i.e., a company registered in Hungary or assets located in Hungary in the proposed transaction).

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?

As explained in question 2.6 above, the Hungarian local nexus is a requirement under both FDI regimes to trigger a prior screening filing obligation. Accordingly, acquisition structures which are indirect from the Hungarian local perspective are also covered under both Hungarian FDI regimes.

The only exception is included in the Temporary FDI Regime, which provides that foreign-to-foreign transactions, i.e., which result in the indirect change of control over the Hungarian entity or the local assets, are exempted from any FDI screening filing requirement.

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?

Both Hungarian FDI screening regimes provide that a "foreign

investor" willing to make a "foreign investment" (both as further explained in question 2.4 above) in a company that is considered strategic in Hungary (see also in question 2.2 above) is required to seek the prior acknowledgment of the competent Hungarian Minister (see further in question 4.1 below).

Other than the shareholding thresholds applied for determining transactions that fall under the scope of the relevant Hungarian FDI screening regime (see as explained in question 2.2 above) generally no monetary or market share-based thresholds apply. The only exception is the HUF 350 million (approximately EUR 1 million) deal value threshold set out in the Temporary FDI Regime (see further in question 2.4 above).

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

No such discretionary right to review transactions that otherwise do not meet the prescribed thresholds is granted to any of the competent authorities (Ministers) under the relevant Hungarian FDI screening laws.

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

Both FDI screening regimes currently applicable in Hungary trigger a mandatory filing obligation with the competent Minister in the event that the relevant filing requirements have been met.

None of the Hungarian regimes require the payment of any filing fee or that the filing party completes a specific filing form, but the relevant laws set out the set of documents that any filing must include (see further in question 3.6 below).

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

Under both FDI screening regimes in Hungary, the foreign investor is obligated to make the relevant filing and seek prior acknowledgment of the transaction from the competent Minister.

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?

None of the Hungarian FDI screening regimes formally allow or otherwise foresee the possibility of undertaking any such prior consultation with the competent Ministers.

In practice, it is nevertheless possible to apply for informal interpretation and guidance with both Ministries, but they will not be obligated to revert on any or all details of such informal enquiries; additionally, any such responses will not have any binding effect. Therefore, practice shows that in their responses, the Ministries usually repeat the applicable provisions of the relevant FDI legislation and encourage the enquirers to submit their formal FDI screening filings.

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

The filing made under both Hungarian FDI screening regimes must:

a) set out the notifying party's (corporate) particulars and general contact details for both electronic and postal contact;
b) identify the local legal representative in Hungary acting on behalf of the notifier (as mandating a local counsel is required under both FDI screening regimes);
c) describe in detail the transaction bringing about the "foreign investment" together with circumstances relevant for the Ministerial screening process; and
d) enclose documents created in connection with the foreign investment, including the transaction agreement and related corporate resolutions.

Note that under both Hungarian FDI screening regimes, the acting Ministry will be authorised to request further information or clarification from the notifying investor.

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?

Under both Hungarian FDI screening regimes, a transaction implemented without having first obtained the competent Minister's prior acknowledgment would be considered null and void from the perspective of Hungarian law.

Furthermore, the breach of the filing obligations can trigger administrative sanctions, as the acting Minister can impose administrative fines on the foreign investor:

a) up to HUF 10 million (approx. EUR 30,000) under the FDI Act; or
b) at least 1% of the Hungarian target entity's annual net turnover in the preceding financial year under the Temporary FDI Regime.

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?

The filing deadline under both FDI screening regimes in Hungary is 10 calendar days from concluding the agreement which brings about the transaction covered under the scope of the relevant Hungarian FDI law.

Under the FDI Act, the competent Minister will then have 60 calendar days as a review period, which can, in the discretion of the Minister, be extended with up to another 60 calendar days.

Under the Temporary FDI Regime, the Minister's initial 30-business-day review period can, if circumstances so require, be extended with a period up to 15 calendar days.

Under no Hungarian FDI regime is it possible to expedite the review proceedings, meaning that it remains in the discretion of the acting Minister if she or he is prepared to render the acknowledgment within a shorter period of time.

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?

The formal Ministerial acknowledgment under both Hungarian FDI screening regimes is a precondition to closing the transaction. Furthermore, both Hungarian FDI laws set out that without having obtained the relevant Ministerial prior acknowledgment, the transaction is considered from the perspective of Hungarian law as null and void. This effectively means that the Ministerial review has a suspensory effect on the closing of the transaction.

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?

As noted in question 3.9 above, under both Hungarian FDI screening regimes, a transaction implemented without having first obtained the competent Minister's prior acknowledgment would be considered null and void from the perspective of Hungarian law, and no changes could be entered into any relevant public registries (such as the corporate registry), nor would the acquirer be permitted to be entered in the relevant book of shareholders.

Furthermore, the breach of these clear standstill obligations can trigger administrative sanctions, as the acting Minister can impose administrative fines on the foreign investor which has not sought the Ministerial acknowledgment before completing the transaction for Hungarian law purposes in the amounts as explained in question 3.7 above.

Furthermore, the FDI Act provides that the competent Minister will have powers to grant the foreign investor a maximum of three months to dispose its shareholding in the Hungarian strategic company or otherwise terminate its controlling influence, or unwind its Hungarian branch if relevant. If the foreign investor has not complied with such a disposal obligation within the relevant time limit, the Minister will designate a state body which will take measures to sell the foreign investor's share on its behalf. In any case, during the disposal process, the Hungarian state will have a statutory pre-emption right.

Accordingly, there is a considerable legal risk in closing a transaction at the global level prior to having obtained the local acknowledgment from the competent Minister in Hungary.

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 competent Minister has the right to involve other state organs and authorities in the review procedure. In such a request, the Minister will be required to indicate the particular information or other assistance sought from the state authority as well as a time limit for reply.

In its response to such a request, the authority involved will have the right to make a proposal to acknowledge the FDI screening notification or to make a prohibition decision, with a sufficiently detailed statement of reasons, which shall not be binding on the Minister, however.

Failure to reply within the time limit set by the Minister does not constitute an obstacle to the adoption of any decision by the Minister.

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 proceedings conducted under both of the Hungarian FDI screening regimes remain private and confidential to the parties involved. Likewise, the decisions resulting from the Ministerial reviews are not public.

Accordingly, the competent Ministries are required to ensure that in their proceedings, commercial information, including business secrets protected by law, remain confidential to the parties and are not disclosed to the public or made otherwise available to unauthorised persons.

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

Both FDI regimes in Hungary explicitly provide that the FDI screening reviews do not concern or substitute the other sectoral approval requirements in selected regulated industries, such as energy, utilities or banking, in which the acquisition of certain controlling stakes has long been subject to prior approval of the competent national regulator or the merger control requirement that are required under other applicable Hungarian laws.

4 Substantive Assessment

4.1 Which authorities are responsible for conducting the review?

In respect of the lasting FDI screening regime under the FDI Act, the Minister overviewing the civil secret services (which is currently the Minister of Interior) is responsible for conducting the review.

Regarding the temporary screening rules applicable under the Temporary FDI Regime, the Minister responsible for domestic economic affairs (which is currently the Minister of Innovation and Technology) is responsible for conducting the relevant review.

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

Under the lasting FDI screening regime in respect of the FDI Act, the competent Minister is required to examine whether the proposed transaction by the foreign investor violates the national security interests of Hungary. The Minister can render a prohibition decision if it is established that the foreign investor has been established for the purpose to hide or serves to obscure the existence of circumstances violating the national security interests of Hungary, to make control more difficult, or to circumvent the procedures specified in the FDI Act.

Under the temporary screening rules applicable under the Temporary FDI Regime, the competent Minister is required to examine whether:

a) the state interest, public safety, or public order of Hungary can be violated or endangered, pursuant to Articles 36, 52 (1) and 65 (1) of the Treaty on the Functioning of the European Union;
b) the foreign investor is controlled (including through ownership or by way of significant funding), directly or indirectly, by an administrative body of a State outside the European Union, including public bodies or the armed forces;
c) the foreign investor has already been involved in compromising the security interests or public order of another Member State of the European Union; or
d) in general, there is a serious risk that the foreign investor is engaged in illegal or criminal activity.

Under both regimes, the burden of proof lays with the acting Minister required to make its reasoned decision.

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

The FDI Act provides that circumstances requiring the prohibition decision of the competent Minister include, in particular,

if the foreign investor does not carry out an actual economic activity in the state of its incorporation or the existence of circumstances indicating its permanent economic activity, in particular, any economic establishments or employees, cannot be verified.

No evaluation criteria are available in respect of the temporary FDI Regime further than that which is explained in question 4.2 above.

None of the competent Ministries have made available any official guidelines on their evaluation criteria of the relevant FDI laws.

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

Both Hungarian FDI laws remain silent on whether the Ministers also take into account activities of foreign (non-Hungarian) subsidiaries in their jurisdiction.

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

Further to what is explained in questions 4.2 and 4.3 above, the competent Ministers under the relevant FDI screening regimes enjoy reasonably wide discretion and powers to approve or reject transactions on national security and public order grounds.

While under the Temporary FDI Regime, the competent Minister is required to attach reasons to its prohibition decision, indicating, in particular, the public interest which is believed to be violated or endangered, the FDI Act allows the competent Minister to issue its prohibition decision containing only simplified summary reasoning, which in any case is not permitted to contain any classified information.

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

Although the Minister's blocking decision under both regimes can be appealed by the aggrieved investor in the metropolitan administrative court of Budapest, the court (which will act in simplified proceedings and in chambers, i.e., without holding any formal hearings) is not permitted under the law to alter the blocking decision but can only return the case back to the Minister for conducting a repeated FDI review. Accordingly, no injunction or other interim relief is available to the claimant investor in such proceedings.

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

None of the Hungarian FDI screening regimes explicitly regulate or otherwise formally foresee that the foreign investor engages in any discussion with the competent Minister regarding remedies, such as any structural and/or behavioural undertakings or other arrangements.

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?

Practice has already shown that the competent Ministers are prepared to step up in the name of protecting Hungarian national interests and issue prohibition decisions under the relevant FDI regimes, even in respect of the Hungarian components of significant international transactions. Some of those blocking decisions recently have received controversial commentary from the business community as well as the European policymakers, as the decisions have been perceived by some as not genuinely falling within the domain of the prevailing and publicly asserted policies.

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