

HUNGARIAN FOREIGN INVESTMENT RESTRICTIONS - UPDATE

As we reported in May (<http://www.lakatoskoves.hu/en/news/hungary-introduces-foreign-investment-restrictions-using-the-pretext-of-the-coronavirus-immediate-impact-on-m-a-deals->) new foreign investment restrictions were introduced by a Government Decree during the Covid 19 state of emergency. At that time the restrictions appeared extensive and burdensome for foreign investors. With effect from 18 June 2020, the Hungarian Government terminated the Covid 19 state of emergency declared on 11 March and several Government Decrees issued in the past few months ceased to have effect. However the Parliament adopted an Act which contains certain provisions from those Decrees (and certain refinements of those provisions) which will therefore remain effective – most of them until the end of 2020. In this Newsletter we focus on provisions of this Act on foreign investment restrictions and certain practical issues which arise from their implementation.

The regime introduced by the Government Decree and to a large extent maintained by the Act, with some notable exceptions, is not unique and unprecedented in the EU and several other Member States have also adopted similar regulations and from October 2020 the EU FDI Regulation will come into force. Nevertheless, the Hungarian regulation has its own local flavour and many foreign investors in Hungary need to take account of these new rules in relation to any planned transaction.

SUBSTANTIALLY SAME REGIME, SOME NOTABLE REFINEMENTS

The new Act repeats many of the provisions of Government Decree no. 227/2020, (the “Decree”) which introduced the new restriction regime in late May 2020. The substance of the regulation remains the same, namely that the notification and acknowledgement by the Minister of Innovation and Technology is required as a precondition to implementing foreign investment into Hungarian companies operating in a large number of sectors. The main body and logic of the regulation have also remained identical to the Decree (e.g. the type of investments, procedural steps required for notification and acknowledgement, sanctions for non-compliance etc.). Some ambiguities in the original drafting, however, have been addressed or clarified – see below.

ONLY CHANGES IN DIRECT OWNERSHIP OF HUNGARIAN ASSETS CAUGHT BY THE ACT

The very broad restrictions in the Decree are significantly narrowed in the Act so that transactions involving a foreign target which result in the indirect acquisition of an interest in Hungarian subsidiaries are outside the Act’s scope. Transactions that do not involve a direct change in ownership of the Hungarian entity or assets are not caught, thus many cross border transactions (e.g. sales or internal restructurings of multinational groups, or any sale where there is a holding structure outside Hungary) may be exempt from the new regulation.

ANY CHANGES IN THE SCOPE OF STRATEGIC SECTORS?

The uncertainties surrounding the definition of ‘strategic’ sectors have not been removed. The Act does not contain the Annex to the Decree which listed the strategic sectors which can be affected. Instead, the Act grants the power to the Government to determine the scope of activities that qualify as strategic. The Government already exercised its new power and on 17 June 2020 adopted a new Government Decree (no. 289/2020.), which contains almost the same categories as the Decree, but with the addition of “temporary employment agency activities” and the explicit exclusion of financial infrastructure from the list of strategic sectors.



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APPLICATION TO EU, EEA AND SWISS INVESTORS

In the Decree there was some ambiguity regarding its application to entities registered in the EU, EEA or Switzerland. It is now clearer that the Act applies to certain transactions involving EU, EEA or Swiss entities (e.g. acquisition of ownership interest in strategic companies, resulting in direct or indirect majority control). The Act extends the scope of its provisions to natural persons who are citizens of EU, EEA Member States (other than Hungary) or citizens of Switzerland.

EUR 1 MILLION DE MINIMIS THRESHOLD FOR EU, EEA AND SWISS INVESTORS

The Act changed the position created by the Decree so that transactions implemented by EU, EEA or Swiss investors will be subject to notification and acknowledgement only if the transaction value exceeds HUF 350 million (approx. EUR 1 million), and majority ownership is to be acquired. There is no change in the position that investors controlled by persons originating from outside the EU, EEA or Switzerland would need to file (i) upon exceeding the foregoing transaction value, if acquiring ownership of 10% or more, or (ii) irrespective of transaction value, upon passing 15, 20, 25 or 50% levels. The compatibility of the foregoing provisions of the Act with EU law on the free movement of capital raises questions and it remains to be seen to what extent the Government would be able to defend them with reference to public health, security or order.

LIQUIDATION PROCEEDINGS

The previous provisions of the Decree which exempted transactions arising from liquidation processes is not carried through to the Act. Such transactions, of which there may be many in the current economic environment, are now potentially subject to the new regulations.

WHEN DO THE RESTRICTIONS APPLY FROM AND UNTIL WHEN?

The new rules are applicable until 31 December 2020. The Act provides that the date of signing of transaction documentation is relevant, so the restrictions are applicable if the signing of the transaction documentation takes place between 26 May and 31 December 2020, irrespective of the date of completion. It is considered likely that the restrictions may be extended again beyond 31 December 2020.

CONTINUING UNCERTAINTY

The Act has provided significant clarification and reduced the impact of the restrictions introduced by the Decree. However many transactions will be subject to the approval process provided in the Act and uncertainties remain. These rules need to be taken into account whenever a transaction involving Hungarian assets is being considered, and the issues covered in our earlier Newsletter continue to be relevant. In addition, the existing Act on Foreign Investment (Act LVII of 2018) continues to apply to acquisitions of companies active in key strategic sectors such as energy, telecoms and defence.

WHO TO CONTACT?

If your business may be affected by the above Decree or by the state of emergency, please do not hesitate to contact any member of our team:

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