

January 2024 changes to the Hungarian FDI regulations

I. Overview

The Hungarian legislator made some significant changes to the Hungarian FDI screening system effective as of 13 January 2024. The most important change is that a statutory pre-emption right will be granted to the Hungarian State in case of transactions including solar power plants. In addition, the “indirect transaction exemption” rule has also been amended.

II. Background

As a general background, Hungary has a complex FDI screening system, consisting of two parallel and independently functioning regimes. Transactions caught under either regime require the acknowledgement of the relevant authority as a precondition to implementation. The first regime, the so-called “**General FDI Regime**” was introduced in 2019 and focuses on a narrower scope and covers only sectors closely related to national security and public utility services, while the second FDI regime, the “**Special FDI Regime**”, introduced in 2021 as part of the Covid-19 extraordinary legislation and covers a much wider part of the economy and affects more transactions. The latest changes referred to in this newsletter relate to the Special FDI Regime.

III. Hungarian State’s pre-emption right

The new rules on the Hungarian State’s pre-emption right can be summarised as follows:

1. Scope. The Hungarian State’s pre-emption right is triggered in the following cases:

- a) the target company is a Hungarian company that is active in electricity production with solar power plants i.e. its registered general or secondary activity is electricity production activity under no. 3511’08 TEÁOR (the equivalent of the NACE numbering used in the EU); and
- b) the transaction covers the sale and purchase of the quotas / shares of such target company (i.e. other legal transactions resulting in change of the ownership structure of these entities such as capital increase, merger / demerger, converting bonds are not covered - we note that even in case of sale and purchase there certain de minimis thresholds, as to the value of the transaction and the percentage being acquired which may in certain cases apply, depending upon the status of the foreign investor).

If the above criteria (as well as other criteria of the Special FDI Regime, see our general newsletter on FDI Regimes in Hungary [here](#)) are met, the buyer’s FDI notification to the Economic Development Minister (“Minister”) shall include an additional notification that the Hungarian State has a pre-emption right to purchase the shares / quotas of the strategic company concerned.

Our insights: This new provision means that transaction structuring, from the outset, will be more important than ever including further considerations about other transaction types (e.g. capital increase or demerger) if the parties wish to prevent the applicability of the State’s pre-emption right.

2. Minister’s prior assessment. Upon submission of the transaction notification, the Minister assesses if the transaction falls under the Special FDI Regime and if the State’s pre-emption right applies. If so, and all necessary attachments are provided (including a conditional sale and purchase agreement as explicitly required by the Special FDI Regime), the notifying party will be informed by the Ministry that in this case the Hungarian State, through its national asset management company, i.e. Magyar Nemzeti Vagyonkezelő Zrt. (“**MNV Zrt.**”), has 60 business days to exercise its pre-emption right. Such deadline is calculated from the date of notification of the notifying party, by the Minister about the pre-emption right.



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Our insights: The new provisions supplement the notification process with an additional pre-emption phase, extending the overall duration of the FDI notification process. Also, the 60 business day's countdown only begins when all attachments are complete, and the Minister confirms that the State's pre-emption right applies and informs both the notifying party and the Energy Minister, for which confirmation / notification no deadline is set for the Ministry.

3. Energy Minister's review and response. Simultaneously with informing the notifying party, the Minister sends the received documentation to the minister responsible for energy policy ("**Energy Minister**"), who has 15 business days to assess and respond if the pre-emption right is indeed exercisable. The Energy Minister will then respond with a proposal either to exercise or waive the pre-emption right, informing both the Minister and MNV Zrt. within the specified timeframe. If the Energy Minister proposes to waive the pre-emption right or fails to respond within the stipulated timeframe, the Minister shall proceed with the substantive review of the transaction. In either case, the Minister shall finish this process within the abovementioned 60 business days deadline (which can be extended by 15 days under the general rules of the Special FDI Regime).

Our insights: The above means that if the State has a pre-emption right then a 60 business days deadline will apply i.e. a longer than the general 30 business days deadline defined under the general rules of the Special FDI Regime.

4. Possible outcomes. The pre-emption process shall finish with one of the following conclusions:

- a) If the Hungarian State does not exercise the pre-emption right, and there are no grounds to prohibit the transaction, the Minister acknowledges the transaction.
- b) If the Hungarian State refrains from exercising the pre-emption right but under the substantive review it turns out that the transaction shall be prohibited, then the Minister prohibits the transaction.
- c) If the Hungarian State exercises the pre-emption right, the Minister terminates the notification process.

Our insights: Unfortunately, the law remains silent on how such pre-emption shall eventually be exercised, especially under what conditions and contractual terms. This can further complicate the process if e.g. the purchase price cannot be easily determined on the basis of the sale and purchase agreement.

5. Exclusion for small-scale residential solar power plants. The regulations do not apply to solar power plants qualifying as household-sized small power plants, *i.e.* which are connected to the low-voltage grid with a connected load not exceeding 50 kVA at a connection point.

Our insights: It is clear that that the lawmaker's did not want to include household solar power plants, however, it remains open to interpretation whether such exemption shall include other industrial solar-power plants that were implemented to provide electricity for industrial activity (such as factory solar power plants).

IV. Indirect transaction exemption rule amendment

Under the pre-existing rules no FDI approval was required for indirect transactions (including intra-group restructurings) if such transactions took place at a parent company level and no direct ownership change occurred in Hungary at the level of the shares/quotas of the target company. This rule was referred to as the "indirect transaction exemption" rule and was widely relied upon in transaction structuring to avoid FDI screening in Hungary. The new amendments to the Special FDI Regime change the wording of this rule. The changes are far from clear and generate some confusion about how the exception rule for indirect investments shall be now.

Our insights: We are of the view that the exemption rule is still applicable, but it is arguable that the scope of the exemption rule was narrowed down. In view of this uncertainty, it is strongly recommended to check the potential need for any FDI notification under Hungarian law from the outset of any proposed transaction activity and to be aware of developing practice and implementation of the new rules.

V. Final thoughts and the FDI landscape in Hungary

The amendment of the Special FDI Regime regarding the Hungarian State's pre-emption right will have a major impact on the acquisitions of Hungarian companies producing electricity with solar power plants. The dual FDI system already affected the deal certainty in Hungary in these transactions, which will be further exacerbated by these amendments.

The FDI screening rules remain complicated and screening under both regimes is non-transparent, especially as there is no public register of FDI filings and decisions, and there are no published statistics. The Special FDI Regime leaves some room for maneuver in transaction structuring to avoid FDI screening, however these possibilities are narrowing and the legislation seeks to limit these opportunities. Increased scrutiny is expected if natural resources are involved in a transaction, and where the energy sector or national security linked activities are concerned. Veto decisions known to us include an acquisition where the target owned a mineral water spring, and the acquisition of Aegon insurance business by Vienna Insurance Group.

VI. Lakatos, Köves and Partners ("LKT")

LKT is a 10 partner, 53 lawyer firm based in Budapest with a predominantly international client base. The firm have developed strongly over the last few years and has a somewhat unique position as an independent one country firm focused on working for international clients and often working with international law firms. This status is reflected, for example, in the fact that LKT was shortlisted by The Lawyer in the European Law Firm Awards 2023 (and in previous years) in the Central European Law Firm category and by the award recently for the Hungarian "deal of the year" awarded by the magazine CEE Legal Matters. Due to its predominantly foreign clientele, LKT is very active in FDI notification procedures in Hungary.