

## NEW CZECH FOREIGN DIRECT INVESTMENT SCREENING REGIME

On 6 April 2020 the Czech Government approved a bill of a new act that aims to strengthen the control of foreign direct investments in the Czech Republic (the "**FDI Bill**"). The FDI Bill has been introduced as a result of the new EU framework<sup>1</sup> for the screening of foreign direct investments, which was adopted on 10 April 2019 and which shall apply from 11 October 2020. If passed by the Parliament as currently proposed, the FDI Bill may have a significant impact on many strategic investments from non-EU countries. Rigorous and potentially retroactive screening of investments may deter potential non-EU investors from considering the Czech Republic as an investment target. The Ministry of Industry and Trade will be in a position to hit the brakes on in-scope transactions made by non-EU investors.

The FDI Bill will now be debated in both chambers of the Czech Parliament, the rules as described below are therefore subject to potential change.

### SCOPE OF APPLICATION

Under the FDI Bill, a foreign direct investment is any investment made in the Czech Republic by a non-EU investor acquiring a stake in a Czech company that represents effective control, which means:

- acquisition of a stake equal to or greater than 10% of the shares or voting rights in the target,
- membership of the foreign investor (or its related party) in the corporate bodies of the target,
- ownership of the property through which the target's business activity is carried out by the investor, or
- other type of control resulting in the foreign investor gaining access to information, systems or technology which are important in connection with the protection of the security of the Czech Republic or its internal public order.

The application of the new FDI regime will be limited to investors whose residence is located outside the EU as well as to investors directly or indirectly controlled by persons whose residence is located outside the EU. Similar rules will apply to the residence of fund managers.

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<sup>1</sup> Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union

## INDUSTRIES AND CRITICAL INFRASTRUCTURE

Not all transactions will automatically fall under the scope of the FDI Bill. Pursuant to the proposed new regime, only investments in targets active in the following industries (the "**Specified Industries**") require approval<sup>2</sup>:

- manufacturing, research, development or innovation of arms and military equipment,
- critical infrastructure,
- critical cyber-security infrastructure, and
- dual-use items (items, including software and technology which can be used for both civil and military purpose).

Critical infrastructure is to be selected pursuant to the "cross-sectional criteria" specified in detail in governmental regulation and will impact the following industries - energy, gas, heat and water management, food and agriculture, healthcare, transportation, communication and IT systems, financial markets, emergency services and public administration.

Furthermore, an investment made in industries other than the Specified Industries will trigger a consultation requirement, if the investment can compromise the security of the Czech Republic or its internal public order.

Certain investments in media businesses will also trigger a mandatory consultation process. Based on the outcome of the consultation, the Ministry of Industry and Trade (the "**Ministry**") may initiate an examination of the investment.

## POWERS OF THE MINISTRY

A transaction in scope of the FDI Bill will be subject to approval by the Ministry. The Ministry will be able to prohibit the investment or its continuation if the investment has already been made. In general, the approval of the Ministry will be required prior to completion of the FDI transaction.

The Ministry will have 90 days to issue its approval, with an additional 30 days in particularly complex cases.

Any investment which can compromise the security of the Czech Republic or its internal public order will trigger the consultation requirements. Based on the outcome of the consultation, the Ministry may initiate an examination of the investment. The Ministry may prohibit the investment or its continuation if the investment has already been made.

The Ministry will be able to initiate an examination of the foreign investment:

- within five years after its completion, if the foreign investor did not comply with its consultation obligations, and
- without limitation in time, if the foreign investor did not seek the approval for the investment in the target active in the Specified Industries, or if the foreign investor concealed facts which, if disclosed, would allow the Ministry to initiate the examination proceedings in the five-year time limit.

Any foreign investor will be able to request the consultation with the Ministry. Such consultation would be advisable especially for transactions involving targets, where the application of the FDI Bill is not completely straightforward. The intertemporal provisions of the FDI Bill provide that the Ministry will not examine the investments completed before the FDI Bill becomes effective. However, in case a change in the controlling entity of the foreign investor occurs after the FDI Bill's effectiveness, such investment could be retroactively examined.

## SANCTIONS AND CONSEQUENCES OF BREACH

If the prior approval of the Ministry is required and not obtained, the transaction cannot be carried out. If the transaction is carried out anyway, it will be invalid under Czech law. Non-compliance with statutory obligations may also result in administrative fines, up to the amount of 2% of the turnover of the foreign investor (or up to approximately USD 4 million, if the turnover cannot be determined).

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<sup>2</sup> The approval will not be required for a specific type of foreign investment which is made as a part of a recovery procedure or similar procedure pursuant to the Czech Act No. 374/2015 Coll., the Financial Market Recovery and Crisis Management Act, or urgently needed to avert the failure of a financial institution.

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