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Foreign Investment Control Regime in Slovenia – One Step Over the Edge

ABSTRACT: *After a relatively liberal period for foreign direct investment in the Republic of Slovenia, the enactment of the Act Determining the Intervention Measures to Mitigate and Remedy the Consequences of the COVID-19 Epidemic in May 2020 ushered in a significant change. It is not entirely clear why the government, while drafting the bill, decided to place the regulation of control over foreign direct investment under the intervention measures law, which addresses the consequences of the epidemic. A substantive analysis of the new arrangements for screening and controlling foreign direct investment reveals that the legislation was not carefully drafted. The definition of basic concepts and validity of the unique system for persons from the EU member states are already controversial. The Act is awkwardly drafted in terms of specifying a direct capital investment in the form of acquiring a share in a company with its registered office in the Republic of Slovenia. The conditions and procedure for revoking the consent authorising foreign direct investment are poorly regulated. Additionally, interpreting the Act to mean that the revocation of foreign direct investment can also be applied to foreign investments made before it came into force, that is, with a retroactive effect, is extremely controversial.*

KEYWORDS: foreign investments, free movement of capital, real estate, notification of foreign investment, merger, acquisition.

1. Legal Grounds for Monitoring and Control of Foreign Direct Investment

After a relatively liberal period for foreign direct investment in the Republic of Slovenia, a significant change took place with the enactment of the Act Determining the Intervention Measures to Mitigate and Remedy the Consequences of the COVID-19 Epidemic (*Zakon o interventnih ukrepih za omilitev in odpravo posledic epidemije COVID-19*

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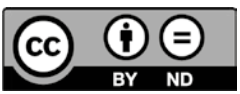

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– ZIUOOPE).[2] Chapter Eleven of the Act (Articles 69 to 75) is entitled 'Screening of Foreign Direct Investment.' While drafting the bill, the government decided to place the regulation of control over foreign direct investment under the intervention measures law, which addresses the consequences of the epidemic. The reasons for doing so are unclear and cannot be deduced from the explanatory note of the bill either.[3] However, one can reasonably assume that the government took the European Commission's guidelines into account while drafting the bill[4] and the coming into force of the EU Regulation 2019/452.[5] COVID-19 emergencies increase the risk of acquisition attempts in certain fields of activity (such as the production of medical or protective equipment) and the fields of research and production of vaccines and medicines. Therefore, the European Commission rightly emphasises that such foreign direct investment could adversely affect the EU's ability to respond to its citizens' health needs.[6]

ZIUOOPE was adopted by the National Assembly of the Republic of Slovenia on 29 May 2020 and came into force on 31 May 2020. The purpose and effects of the Act not only extend to harmonising the Slovenian legal order with the requirements of Regulation 2019/452, but the adopted measures operate much more broadly and apply to all types of foreign direct investment. These are not only screening, monitoring, and recording measures. The Act provides a legal basis for the exercise of state control over foreign direct investment and, as a last resort, the possibility of prohibiting foreign direct investment or eliminating its effects. As we will see below, some legal measures are nomotechnically very poorly designed, leading to diverging interpretations. In general, it is unclear in which cases the measures should be applied. However, some measures are also substantively controversial and may not pass the Constitutional Court's substantive review to assess the conformity of these measures with the Constitution. Including the foreign direct investment regime in the intervention legislation to eliminate the consequences of the epidemic has another interesting repercussion. The validity of measures for monitoring and controlling foreign direct investment is limited in time. Article 75 of the Act stipulates that the provisions shall be valid until 30 June 2023. This implies that a system law regulating this area is likely to be adopted

2 Official Journal of the Republic of Slovenia, No. 80/20.

3 Some other EU Member States also amended their respective legal regimes for controlling foreign investment during the epidemic or in a package of measures to limit the effects of its consequences. However, this was mostly not about establishing a control mechanism. It was about extending or defining public policy in greater details, which also extended to pharmaceutical products and protective equipment. For more, see: List of screening mechanisms notified by Member States; https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf. The same is true for some other countries that tightened control mechanisms for foreign direct investment, such as: Australia, Canada, China, India, Japan, and the USA.

4 Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation); https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158676.pdf.

5 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.

6 Guidance.

by the said deadline. We can only hope that the legislator would carefully prepare and adopt a more imaginative system of measures instead of waiting until the expiration of the deadline and then extending the current regulation quickly and without particular expert discussion.

2. Control of Foreign Direct Investment (FDI) under the New Law (ZIUOOPE)

■ *2.1. The Application of ZIUOOPE*

The introductory provisions of the Act define foreign investors and foreign direct investment. Both definitions are limited to this Act and have no meaning beyond it.

The definition of a foreign investor is unnecessarily complicated and lengthy. A foreign investor is a citizen of a member state of the European Union, a country of the European Economic Area, the Swiss Confederation, a third country, or a legal person established in a Member State of the European Union, a country of the European Economic Area, the Swiss Confederation, or a third country who intends to execute direct foreign investment in the Republic of Slovenia, or has already done so.[7] Instead of this statement, the legislator could have simply stated that a foreign investor is a natural person who is not a citizen of the Republic of Slovenia and every legal person who is not established within the Republic of Slovenia. This definition also transcends the scope of Regulation 2019/452, which applies only to foreigners from third countries and does not affect direct investment by foreigners from the Member States.[8] Therefore, the Act also interferes with the right to free movement of capital under Article 63 TFEU.[9] This is not an isolated case. Some other member states also apply individual control measures to foreign direct investment, which apply to all foreigners.[10] The right to free movement of capital is not unlimited, as Article 65 (1) (b) TFEU is devoid of prejudice regarding member states' right to take measures that are justified on grounds of public policy or security.[11] Only time will reveal whether the substance of the measures of the Slovenian law falls within this framework. However, one of the relevant indicators will also be the practice of competent authorities in enforcing the measures.

The second definition clarifies the notion of foreign direct investment. Foreign direct investment is an investment made by a foreign investor, the purpose of which is to establish or maintain permanent and direct links between a foreign investor and an

7 Article 69 of ZIUOOPE.
8 Point 3 of Article 2 of Regulation 2019/425.
9 See Klobučar, 2020.
10 See, for example, the rules in France, where monitoring and control measures also apply to all foreigners and even to French nationals who have the status of a foreigner under tax rules (Code monétaire et financier, Livre Ier, Titre V: les relations finanères avec l 'étranger, Article L.151-1).
11 See in more details, Esplugues, 2018, pp. 12–13; Zwartkruis and de Jong, 2019, p. 12.

economic entity established in the Republic of Slovenia by acquiring at least 10% participation in capital or voting rights.[12] The first part of this definition fully corresponds to the definition in Article 2 (1) of Regulation 2019/452. The establishment of permanent and direct connections between a foreign investor and a domestic economic entity is essential for foreign direct investment. Such a definition indicates that foreign direct investment is primarily an investment in a domestic legal entity engaged in economic activities. In Slovenia, these are companies organised on the basis of the Companies Act and are listed in the court register. However, they can also be other legal entities performing an economic activity. In the second part, the provision of Article 70 of the Act provides more detailed clarification than Regulation 2019/452 regarding the meaning of establishing a permanent connection. The permanence of the connection is determined by participation in the capital of the domestic company or by acquiring voting rights on another legal basis. The participation threshold is set relatively low at 10%. This again is not an isolated case if we compare the Slovenian system with some foreign ones.[13] Irrespective of the low participation threshold, the purpose of the Slovenian law must also be interpreted in such a way that foreign portfolio investments are not covered by special regulations.[14] The Act expressly emphasises that an essential element of foreign direct investment is the establishment of a permanent connection between a foreign investor and a domestic economic entity. Regulation 2019/452 also does not apply to portfolio investments.[15] However, we can expect that portfolio investors will also report their investments in excess of the set threshold to avoid legal consequences. More than the low participation threshold for determining foreign direct investment, however, some other uses of this term in the Act are disturbing. The Act is remarkably inconsistent in this regard. This applies in particular to Article 71 (3) which deviates from both the primary definition of a foreign investor and the definition of foreign direct investment.

Article 71 (3) stipulates that the subject of a foreign direct investment application is also a situation in which a foreign investor or its subsidiary in the Republic of Slovenia acquires the right to dispose of land and real estate essential for critical infrastructure or land and real estate located in proximity to such infrastructure. The departure from the definition of foreign direct investment in terms of content is that foreign direct investment is also considered as the acquisition of property rights in real estate. As aforementioned, according to the basic definition, FDI is the establishment

12 Article 70 of ZIUOOPE.

13 The same 10% threshold is set by §§ 56 and 60a of the German *Außenwirtschaftsverordnung* for certain economic operators, while the 25% participation threshold applies to most economic operators.

14 In accordance with the established approach, a portfolio investment is considered to be the acquisition of a participation in an economic entity with the sole purpose of a financial investment and without the intention of influencing the management and supervision of the economic entity. See also the ECJ case-law in Cases C-282/4 and C-283/4 (*Commission v. The Netherlands*), para. 19.

15 Zwartkruis and de Jong, 2019, p. 12.

of a permanent nexus between a foreign investor and a domestic economic entity by which the investor acquires influence over the management and control of the domestic economic entity. With such an expansion, the Act transcends the scope of Regulation 2019/452, which does not cover investments in the acquisition of property rights.[16] However, the Act is also textually inconsistent. It uses terms that are not entirely consistent with those used in the general rules. The phrase 'right of disposal' is not clarified in the general rules but is more or less clear that in this case, the legislator has the acquisition of property rights in mind. Under Article 37 of the Law of Property Code, disposition is one of the rights constituting the content of a property right.[17] Another inconsistency is the cumulative use of 'real estate' and 'land,' which is utterly superfluous. The concept of real estate in Slovenian law is broader than the concept of land, and any land that is subject to legal transactions is also real estate.[18] According to the additional wording of Article 71 (3), only the acquisition of property rights on real estate based on a legal transaction is subject to regulation. Further, the Act does not cover all real estate. It covers only those that, due to their location or properties, are important for ensuring public order and safety. The Act only applies to real estate, which is essential to critical infrastructure or located in the vicinity of such infrastructure. The Act does not specify what is 'critical infrastructure.' However, this phrase is also used in connection with the grounds for refusing a foreign investment, referring to infrastructure in the fields of energy, transport, water, health, communications, media, data processing or storage, the aerospace sector, and defence, electoral or financial infrastructure.[19] This is a rather vague rule. In practice, will certainly create difficulties in assessing whether or not the acquisition of property rights is the subject of an application. Legal entities of Slovenian law, which are subsidiaries of a foreign natural or legal person, are likely to remain uncertain.

Article 71 (3) extends the circle of foreign investments to include indirect investments as well, that is, in this case, the investment of a subsidiary of a foreign investor. It should be considered that the acquisition of property rights by foreigners on real estate in the Republic of Slovenia is already limited by general regulations. Article 68 of the Constitution of the Republic of Slovenia stipulates that foreigners may acquire ownership rights to real estate only under the conditions provided by law or an international treaty. Currently, several special regulations apply, which are the basis for the acquisition of ownership rights of foreigners from some countries, such as EU and EFTA members as well as candidate countries for accession to the EU and the OECD member states.[20] If a special legal basis for the country is not established, foreigners from these countries cannot acquire ownership of real estate in the Republic of Slovenia through a legal transaction. Therefore, the extension of the validity of control

16 Ibidem, p. 13.
17 Juhart, Tratnik and Vrenčur, 2004, p. 218.
18 Article 18 of the Law of Property Code. See Juhart, Tratnik, and Vrenčur, 2004, p. 86.
19 Article 72 (3) of ZIUOOPE.
20 See in more details, Šumah, 2017, p. 17; Kramberger Škerl and Vlahek, 2016, p. 28.

measures to subsidiaries of foreign investors is understandable. The use of the term 'subsidiary' is inconsistent. It is not explained in greater details either in this Act or in the general law of companies. As per case law, a subsidiary is a company that is controlled by the parent company.[21] A controlled undertaking is primarily a company owned by the parent company or one that is related to the parent company through an intercompany agreement.[22] Therefore, these are cases where the investment is made by a company established under Slovenian law with its registered office in the Republic of Slovenia and is a subsidiary of a legal person holding the status of a foreigner under Article 69 of the Act.

■ *2.2. Obligation to Notify About Foreign Direct Investment*

The basic measure of control over foreign direct investment introduced by law is the obligation to notify the Ministry of Economy about foreign direct investment. The purpose of such an obligation is twofold. The Republic of Slovenia thus fulfils the obligation of member states to notify the Commission and the other member states under Regulation 2019/452 of all foreign direct investment in their territory, which is regulated by this regulation. This establishes a cooperation mechanism between the member states and the Commission. At the same time, a database, being set up at the competent ministry, enables the screening of foreign direct investment, verification of its compliance with the interests of public order and security, and acts as the basis for imposing the envisaged measures to secure these interests.

Although the Act defines foreign direct investment in Article 70, the first three paragraphs of Article 71 set out the situations involving the obligation to notify. The obligation is defined by two criteria. The first criterion relates to the connection between the activity of the undertaking in which the foreign direct investment is obtained or the purpose of the immovable property and the state's interest in protecting its interests in the field of security and public order. The second criterion lists the forms in which foreign direct investment is made. Both criteria must be met at the same time. The obligation to notify exists in the case of foreign direct investment in one form referred to in Article 71 (1–3), and it relates to the economic sector referred to in Article 72 (3).

The subject of the notification is not all foreign direct investment, but only what is related to the performance of critical economic activities. These are set out in Article 72 (3), which specifies the grounds for deciding whether foreign direct investment presents a threat to security and public order. The Act seeks to identify those undertakings that perform economic activity in areas where the entry of a foreign investor into the capital and management structure could present such a threat. In this section, the Act reiterates verbatim the definitions from Article 4 (1) of Regulation 2019/452. The subject of the notification is, therefore, foreign direct investment in undertakings engaged in economic activities related to: (a) critical infrastructure, whether physical or virtual, including infrastructure in the fields of energy, transport, water, health,

21 Decision of the Supreme Court of the Republic of Slovenia III Ips 30/2017.

22 Ivanjko, Kocbek, and Prelič, 2009, p. 966.

communications, media, data processing or storage, the aerospace sector, and defence, electoral or financial infrastructure and sensitive facilities as well as land and real estate, which are essential for the use of such infrastructure or land and real estate located in the vicinity of such infrastructure; (b) critical technologies and dual-use items as defined in Article 2 (1) of Regulation 428/2009, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace and defence technology, energy storage technology, quantum and nuclear technology, nanotechnology and biotechnology, and health, medical and pharmaceutical technology; (c) the supply of critical resources, including energy or raw materials, food security, medical and protective equipment; (d) access to or control of sensitive information, including personal data; (e) freedom and pluralism of the media; (f) projects or programmes in the interest of the European Union as defined in Annex I to Regulation 2019/452.

The Act is inconsistent regarding the obligation to notify about foreign direct investment because the wording of its Article 72 (3) contains the phrase 'in particular,' which indicates that the list of economic activities is not exhaustive. However, such a way of listing could mean that it should be notified about in other areas as well. This is all the more so because some economic activities that are mostly related to security are not listed. This is especially true of the production of weapons and military equipment. In the Republic of Slovenia, this aspect is regulated by the Defence Act.[23] Article 78 of the Defence Act provides that the economic activity of arms and equipment may be performed only by a company that obtains the government's consent. However, the Act does not regulate the situation wherein the ownership structure in a company acquires such consent changes. In terms of substance, foreign direct investment in this area should undoubtedly be notified, and the question is whether the legal obligation to notify can be interpreted broadly. The legislator should not have allowed such inconsistencies.

In the first criterion, the Act, almost verbatim, took into account the Regulation 2019/452 text. However, the second criterion refers to the form of FDI. Again, these provisions involve a whole series of inconsistencies and ambiguities, which will undoubtedly cause difficulties in the Act's application. Article 71 (1) obliges to notify about direct investment in the form of a merger or acquisition. In this case, the notification must be by either the foreign investor or the target company no later than 15 days from the conclusion of the merger agreement or from the publication of the takeover bid. The Act refers only to merger agreements[24] or takeover bids. This could mean that only transactions involving the merger or publication of a takeover bid are subject to notification and screening. With such a plain textual interpretation, transactions of purchase of business shares or stocks between two parties would remain outside the

23 Official Gazette of the Republic of Slovenia, Nos. 103/04 – official consolidated text and 95/15.

24 Under the Companies Act (Article 580), a merger is only a merger by acquisition by one company of another company or the merger of two independent companies. Therefore, only the merger agreement and the agreement on merger by acquisition can be considered merger agreements.

new regime, which is the most common form of creating an investment in another company. Given the general definition of foreign direct investment and a few other hints in the text of the Act, such a restriction is unlikely and is more the result of vague wording.[25] The entire regulation loses its purpose if it was limited to mergers and acquisitions only and excluded the acquisition of blocks of shares and business stakes in limited-liability companies. Therefore, we can conclude that all contracts for acquiring stakes in a company active in one of the critical economic sectors must be notified about if at least 10% shareholding or sharing of voting rights is acquired in the company.

Article 71 (2) covers the establishment of new economic entities in Slovenia by foreign investors. The Act refers to the definition of 'initial investment' in European state aid law, which does not seem entirely applicable because the definition is not limited to the establishment of new entities: an investment in tangible and intangible assets related to the setting up of a new establishment, extension of the capacity of an existing establishment, diversification of the output of an establishment into products not previously produced in the establishment or a fundamental change in the overall production process of an existing establishment. In this case, the deadline for notifying is no later than 15 days from the establishment of the company in the Republic of Slovenia. Here too, the wording is inconsistent. The person liable to notify about the establishment of a new company is either a foreign investor or a subsidiary. Since the concept of a subsidiary lacks detailed clarification, the question arises again as to whether the legislator had in mind a newly established company in which a foreign investor holds more than 10% or only a new company that is a subsidiary of a foreign investor. It makes sense that even in this case, the notification can be made by both a foreign investor and a company that has been newly established.[26]

However, Article 71 (3) extends the concept of foreign direct investment to the acquisition of property rights in real estate (see above). In this case too, the deadline for notification is no later than 15 days from the conclusion of the contract on the acquisition of property rights. The notification must be made by the transferee. This may be a foreign investor or subsidiary subject to the obligation to notify.

With regard to the notification deadline, it should be added that all deadlines for notification are set from the date of execution of the legal transaction, which results in the realisation of foreign investment. Such a statutory provision presents no obstacles to the notification of the intended foreign direct investment. The economic interest of the foreign investor must be considered in the sense that he does not want to take risks by performing a transaction that could later be prohibited. Since the competent authority may also subsequently prohibit or cancel a foreign direct investment with the effect of nullity, there are risks and significant legal consequences involved.

The notification must, in most cases, be made by a foreign investor or a domestic target company. Given the scope of the information required in the notification, it is

25 Majzelj and Pipan Nahtigal, 2020.
26 Majzelj and Pipan Nahtigal, 2020.

undoubtedly more appropriate for it to be provided by a foreign investor or to provide the domestic company with relevant information so that it can fill in the application. The notification must be made in Slovenian. Article 71 (4) stipulates the contents of notification, which must include: (a) name, surname, residence or company name, and registered office of the foreign investor and the target or acquired company; (b) annual turnover of the foreign investor and the target or acquired company, (c) total number of employees of the foreign investor and the target or acquired company, (d) trading code of the securities of the foreign investor and the target or acquired company, (e) ownership structure of the foreign investor and the target or acquired company, including information on the ultimate investor and equity participation; (f) value and source of financing of foreign direct investment, (g) products, services, and business activities of the foreign investor as well as the target or acquired company (NACE economic activity classification); (h) countries in which the foreign investor and the target or the acquired company carry on relevant business activities, (i) date on which the foreign direct investment is expected to be completed or when it was completed, (j) contract by which a foreign investor acquires ownership of the real estate.[27]

The Ministry of Economy is obliged to prepare the notification form and make it available.[28] The set of data that the application form must contain corresponds with the data from Article 9 (2) of Regulation 2019/452, allowing the Ministry to fulfil its obligations to inform the other member states and the Commission as a contact point under Article 11 of the Regulation.

Article 81 outlines the legal consequences of the failure to notify. Considered a minor offence, it prescribes a fine for the failure to notify within the set deadline. The notification must be based on Article 71. This provision has several inconsistencies, and I believe that the strict rules of the minor offence procedure will make it difficult to impose fines. Here, the Act again stipulates only merger agreements and takeover bids, the incorporation of new companies, and real estate acquisition agreements as the subject of notification. It is beyond reasonable explanation as to why contracts on the acquisition of a business share in a limited-liability company and contracts on the acquisition of a qualified block of shares in a joint-stock company are excluded. These are undoubtedly the most common forms of FDI, and it is certainly not the Act's purpose to limit the notification to certain forms of execution of a transaction only. If the obligation to notify can be broadly interpreted, referring to the general definition of foreign direct investment, which means the establishment of a permanent capital or management connection between a foreign investor and a domestic company, such

27 It is unclear why the Act stipulates only the obligation to submit a contract for the acquisition of ownership of real estate and not a contract for the acquisition of a share, a contract of incorporation, a takeover bid or a merger contract.

28 Article 71 (8) of the ZIUOOPE.

interpretation in the field of minor offences law is legally incorrect.[29] The next inconsistency is the uncertainty of the person obligated to notify, and the question is whether to take action against a foreign investor or a domestic company. Fines for failing to notify depend on the size of the company committing the minor offence. The basic fine ranges from EUR 100,000 to EUR 250,000. This increases to EUR 200,000 to EUR 500,000 if a minor offence is committed by an undertaking considered as a medium-sized or large company under the law governing companies.[30] A fine is also prescribed for the person responsible for such a company, who is fined from EUR 2,000 to EUR 10,000.

■ *2.3. Screening of Foreign Direct Investment*

Screening of foreign direct investment is the procedure allowing assessment, investigation, authorisation, condition, prohibit or unwind foreign direct investments in the field of activity from paragraph 3 of this article.[31] The concept of screening is copied verbatim from point 3 of Article 2 of Regulation 2019/452. On this basis, the competent authority, the Ministry of Economy, has extensive decision-making power. Nevertheless, there are considerable ambiguities and inconsistencies. The first form of decision that can be issued is the authorisation of foreign direct investment. The competent authority will issue such a decision if it considers that the planned FDI does not threaten security or public order. Such a decision enables the intended investment to materialise. To reduce the foreign investor's risk, we can expect that in transactions of acquisition of shares in companies, obtaining the authorisation decision will be recorded as one of the conditions for its implementation. However, if the investor applies for a decision after the transaction, the decision averts the risk of the investment to be declared inadmissible, and its effects must be eliminated.

Another possible form is a prohibition decision issued by the competent authority in the opposite scenario when it views foreign direct investment as a threat to security and public order.[32] In making that assessment, the competent authority shall first take into account the nature and importance of the economic activity pursued by the undertaking to which the notification relates. The obligation to notify is vast, and indeed, not all companies engaged in activities in this field are important enough for a foreigner's participation to pose a threat to security and public order. It is mainly a matter of considering the market share of this company in the Slovenian market, product substitutability or service substitution. Furthermore, the volume of foreign direct investment is probably also an essential element. Minority participation rates are likely to be judged differently from majority decision-making or even full ownership.

29 'In punitive law (the field of criminal offences and minor offences), it is vital to respect the principle of legality and thus specificity in minor offences substantive law, the purpose of which is to prevent arbitrary application of state sanctions in cases that would not be specified in advance.' Judgment by the Celje Higher Court PRp 117/2017.

30 Article 55 of the Companies Act.

31 Article 72 (1) of the ZIUOOPE.

32 Article 72 (4) of the ZIUOOPE.

Finally, the Act also establishes special criteria for prohibition.[33] The criteria refer to the foreign investor and literally taken from Regulation 2019/452.[34] In assessing security threats and public policy, the competent authority may consider: (a) whether foreign investors are directly or indirectly controlled by the government, including state bodies or armed forces, of a third country, including through ownership structure or significant funding; (b) whether the foreign investor has already been involved in activities affecting security or public order in a member state; (c) whether a severe risk exists that the foreign investor engages in illegal or criminal activities.

The legal consequence of the decision to prohibit foreign direct investment is very strict, posing a high risk to foreign investors in legal transactions. The decision on prohibition implies that the legal transaction, the consequence of which is the establishment of the position of foreign direct investment, is null and void or there are other legal consequences with similar effects. If foreign direct investment is implemented through a contract, such a contract will be void. The Act mentions the nullity of the merger agreement and that of the real estate acquisition agreement. The annulment of other contracts establishing foreign direct investment, namely contracts for the acquisition of a share in a company must be added here. The public offer for the purchase of all shares under the Takeovers Act is also without legal effect.[35] For takeover procedures, the Slovenian Securities Market Agency advises that a decision on the authorisation of a foreign direct investment be obtained before the offer is published.[36]

However, it is unclear what legal consequences of other forms of decisions may be handed down by the competent authority in the screening procedure.[37] The competent authority may determine the conditions for the implementation of foreign direct investment, which can be understood as a kind of conditional authorisation. However, the Act remains silent on what conditions can be set. Such arrangements present competent authority with a wide range of possibilities to find appropriate conditions. I believe, however, only conditions that ensure public interest in the field of security and public order are justified. Undoubtedly, a nexus must exist between the purpose of the Act and the substance of the imposed condition. In the absence of such a nexus, the condition is, in my view, inadmissible. The Act also does not specify the effect of the decision stating conditions. We can conclude that it is a matter of authorising a foreign direct investment and simultaneously the obligation of a foreign investor to fulfil the conditions. However, the Act does not stipulate anything about the procedure for supervising the fulfilment of the conditions and the legal consequences that could follow in such a case.

33 Article 72 (4) of the ZIUOOPE.

34 Article 4 (2) of Regulation 2019/452.

35 Official Gazette of the Republic of Slovenia, Nos. 79/06, 67/07 – ZTFI, 1/08, 68/08, 35/11 – ORZ-Pre75, 10/12, 38/12, 56/13, 63/13 – ZS-K, 25/14 and 75/15.

36 See https://www.a-tvp.si/novica/prevzemna-ponudba-v-povezavi-z-obveznostjo-priglasanja-neposrednih-tujih-nalozb-po-ziuoope.

37 Majzelj and Pipan Nahtigal, 2020.

The decision to unwind is also scarcely and poorly regulated. In particular, it is not specified when such a decision should be delivered at all. It can certainly be delivered in cases where a foreign investor does not fulfil the conditions set for him. However, it is not specified whether the decision to authorise FDI can also be revoked. In doing so, it is certainly important to consider what circumstances and facts can be considered. However, whether these circumstances are only the ones that already existed at the time the authorisation decision was delivered or could also be circumstances that emerged later remains ambiguous. Nothing about the time limits within which the decision may be revoked and the manner in which the competent authority shall act before delivering the decision is specified either. The Act merely stipulates that a decision to revoke has the same legal consequences as a decision to prohibit. This implies the nullity or ineffectiveness of legal acts by which a foreign direct investment was made. With such a severe legal consequence, it is unacceptable for the legislator not to regulate these issues in more detail.

The Act also regulates the competence of the competent authority if the obligation to notify has not been fulfilled, and it is a foreign direct investment that meets the criteria referred to in Article 72 (3). Such a situation may arise mainly due to vaguely defined criteria, which do not cover all economic activities that could pose a threat to security and public order. A deliberate omission of notification can also occur. The competent authority may also act based on the information at its disposal. It may perform a screening procedure and issue an appropriate decision. It must do so no later than five years from the date on which the notification period begins.[38] After the expiration of this period, no action can be taken against a foreign investor on these grounds. I believe that such an arrangement is not in dispute if it relates to a foreign direct investment made after adopting the Act. Certainly, it may be controversial that the competent authority can perform a screening of foreign direct investment that has already been made before the adoption. The Act does not stipulate this. However, we can conclude such a position from the government's explanatory note during the legislative procedure.[39] The provision of Article 72 (2) sets out the criteria that justify the Act's retroactive effect. On this basis, the authors mention that investments made before the adoption of the Act may also be subject to screening.[40] Such an interpretation of the Act, which has no perfectly clear basis in the text, must be vehemently rejected. Even the arguments justifying retroactivity are not compelling.

■ *2.4. The Decision-making Process*

The decision-making process for the screening of foreign direct investment also has some specific features, although the rules of general administrative procedures apply

38 Article 72 (4) of the ZIUOOPE.

39 See https://www.iusinfo.si/AppendixExtSlo/PDZ/PORODZ2020M05D21N21_2_1.PDF.

40 Majzelj and Pipan Nahtigal, 2020; Klobučar, 2020.

to this procedure as well.[41] Screening is first performed by a commission appointed by the Ministry of Economy comprising 3 to 10 members. The Act is not clear whether this is a commission appointed on a permanent or temporary or *ad hoc* basis. At least three members are selected from among the employees of the Ministry, while other members can be appointed from other state bodies, local communities, and even private law entities. There are no special rules on the way the commission operates and decides. It is expressly stipulated that its members must make a written statement of lack of interest with the foreign investor and the target company and a statement that they will protect all data, facts, and circumstances with which they become acquainted when performing the commission's tasks.[42] When screening the notification of foreign direct investment, the commission may invite the foreign investor to provide a written or oral explanatory statement or additional clarification and to provide appropriate accompanying evidence.[43] It may also request other state bodies, local communities, and holders of public authority to state their respective opinions.

The commission shall conclude its work by issuing an opinion on whether foreign direct investment should be authorised, set the conditions for its implementation, prohibited or revoked. It shall forward this opinion to the Minister of Economy, who shall be responsible for delivering the decision. The minister is not bound by the proposal of the commission and may deliver a decision using his discretion. The decision shall be delivered within two months from the date of notification. The time limit is instructive because there is no presumption that the notification is considered approved if the decision is not delivered within this time limit.[44]

The minister's decision can be appealed against. The government decides on the appeal. The rules of general administrative procedures apply to the appeal procedure and the decision of the government on the appeal. Judicial protection in an administrative dispute is provided against the decision of the government on an appeal.

■ *2.5. Establishment of a Contact Point*

Regulation 2019/425 obliges member states to establish contact points for its implementation.[45] The Regulation sets out a mechanism at the level of the EU to coordinate the screening of foreign investment that could affect the security and public order of the member states. This mechanism establishes the obligation to exchange information between the member states and European Commission (hereinafter, the Commission) as well as the possibility for the Commission and the member states to communicate their comments and opinions on the transaction within 15 months of the completion of foreign investment.[46] The decision as to whether a particular investment should be

41 Official Gazette of the Republic of Slovenia, Nos. 24/06, 105/06 – ZUS-1, 126/07, 65/08, 8/10 and 82/13.
42 Article 73 (6) of ZIUOOPE.
43 Article 75 (5) of ZIUOOPE.
44 Majzelj and Pipan Nahtigal, 2020.
45 Article 11 of Regulation 2019/425.
46 See Articles 6, 7 and 8 of Regulation 2019/452.

authorised remains within the discretion of the member state in which the investment is made. The Regulation only provides for the possibility for the other member states to voice their concerns to the host country of foreign direct investment if this investment has broader effects. The purpose of the Regulation is to enable action to be taken to protect the vital interests of the member states and the Union as a whole in the face of threats arising from the growing number of acquisitions of EU companies by non-EU investors.[47]

Articles 71 (5–7) of the Act regulate the legal acts and procedures required of Slovenia as a member state by Regulation 2019/452. Article 71 (6) provides for the establishment of a special contact point at the Ministry of the Economy, but the details are not specified. We can conclude that this is part of the activities of the Ministry, which also includes cooperation with the other member states if a direct investment in a legal entity from another member state could compromise the security and public order of the Republic of Slovenia. Regarding the implementation of obligations under the Regulation, the question may arise as to what information Slovenia is obliged to communicate with the mutual information system, as provided for in Article 6 (1) of the Regulation. It stipulates the obligation for the member states to notify the Commission and the other member states of any foreign direct investment in their territory that is undergoing the screening. This obligation can be understood as an obligation to provide information only on those investments that meet the criteria set out in the Regulation. I believe this obligation cannot be extended to a broader definition of foreign investment, as defined by Slovenian law. These are mainly investments by foreigners coming from the member states and investments aimed at acquiring property rights in real estate. Legal provisions are further important from the perspective of the use and protection of the confidentiality of data obtained by the Ministry in notification procedures. Article 71 (5) of the Act provides the basis for the use of all collected data from the notification or data that were provided upon request in the procedure, for the purposes of the Act and the Regulation. This also applies to confidential information for which all appropriate protection mechanisms must be provided.

Conclusion

A substantive analysis of the new arrangements for screening and controlling foreign direct investment indicates that the legislation was not carefully drafted. The speed of the legislative process was probably influenced by several factors. On the one hand, account should be taken of the coming into force of Regulation 2019/452 and the corresponding adjustments it requires. On the other hand, there are fears that in times of pandemic and economic crisis, some undesirable activities may occur that require the government to be able to act. The necessity of prompt adoption and exceptional

47 For more detail see Sahin, 2020, p. 192.

circumstances, however, does not justify the numerous shortcomings and inconsistencies in the Act. The legislator simply should not allow itself to propose and adopt such a sketchy normative act.

The definition of basic concepts and the validity of the unique system for persons from the EU member states are controversial. If we combine this with the fact that the subject of screening and control is already an investment encompassing a 10% participation in the target company, the compliance of the regulation with the right to free movement of capital as one of the main pillars of EU legislation can be questioned. On the other hand, we can expect that a vast number of foreign investments to meet the conditions of notification.

The obligation to notify is unclear. It applies to all foreign direct investments that could pose a threat to the security and public order of the Republic of Slovenia. Critical economic activities are listed as examples only. Therefore, it is not entirely clear which target company notification is required. Foreign investors who want to avoid legal risks are likely to choose to make a notification in doubt. This situation is further complicated in terms of real estate. Here, it suffices that the real estate is in proximity to a critical facility. The concept of proximity can, again, be interpreted differently. This is probably not just an adjoining real estate, but real estate at a reasonable distance. The regulation covers a broad range of real estate and reporting agents, as the latter are all legal entities in the Republic of Slovenia in which foreigners have more than 10% participation. We can expect that public notaries in the process of verifying the signature on contracts will also require the submission of authorisation.

The Act is very awkwardly drafted in the part specifying a direct capital investment in the form of acquiring a share in a company with its registered office in the Republic of Slovenia. The so-called 'share deal' is the most widespread form of foreign direct investment. In this context, the text of the Act only mentions mergers and acquisitions of public limited companies. The drafter forgot to mention the most common form of contractual acquisition of a business share or block of shares.

The conditions and procedure for revoking the consent by which foreign direct investment is authorised are very poorly regulated. It is only clear that revocation entails the nullity consequence. However, it is not even possible to predict how the previously established effects of foreign investment will be eliminated. It is hard to imagine that later, in two or three years, the effect of the takeover bid would be reversed in such a way that shareholders would get their shares back and return payments to the acquirer. It would certainly be more appropriate for the Act to impose on a foreign investor an obligation to dispose of the excess of part of its participation, as provided, for example, in the law governing banks.

Finally, let me reiterate that the interpretation of the Act to mean that the revocation of foreign direct investment can also be applied to foreign investments made before it came into force, that is, with a retroactive effect, is extremely controversial. Such an interpretation would, in my view, be a step over the edge. Hence, it must be vehemently rejected.

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