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European Restrictions on Foreign Investment Due to the COVID-19 Crisis

Opinion

Cuba: A Year of the Helms-Burton

Force Majeure Clauses and the COVID-19 Pandemic: The Portuguese Case

INDEX

4 Restrictions on Foreign Investment from the COVID-19 Crisis Adopted by European Countries

6 Austria
8 Bosnia and Herzegovina
10 Bulgaria
13 Croatia
15 Cyprus
17 Germany
20 Greece
22 Hungary
25 Italy
27 Luxembourg
29 North Macedonia
33 Poland
36 Portugal
39 Republic of Kosovo
41 Romania
44 Serbia
46 Slovakia
48 Slovenia
51 Spain
54 Switzerland
56 Ukraine

Opinion

60 Cuba: A Year of the Helms-Burton
62 Force Majeure Clauses and the COVID-19 Pandemic: The Portuguese Case

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Restrictions on Foreign Investment from the COVID-19 Crisis Adopted by European Countries

Yes	Following a law in force on restrictions and implementing a new “Act on the Control of Foreign Direct Investments” (InvKG) to protect critical infrastructure.	Austria
No	Foreign investors have the same rights and obligations as domestic ones.	Bosnia and Herzegovina
No	The law does not establish any limitations and provides for equal treatment and protection of all investments regardless of their origin.	Bulgaria
No	Following the Guidance to the European Union Member States concerning foreign direct investment and free movement of capital from third countries.	Croatia
No	Following the Guidance to the European Union Member States concerning foreign direct investment and free movement of capital from third countries.	Cyprus
Yes	Adopting an amendment to the Regulation on investments in strategic sectors and implementing a Draft Bill to make the German FDI screening mechanism more efficient.	Germany
No	Foreign investors continue to receive the same treatment as before the crisis, according to the national rules.	Greece
Yes	The acquisition of foreign stakes in so-called strategic companies is subject to ministerial acknowledgment until 31 December 2020.	Hungary
Yes	New Decree-law provided for measures to safeguard national strategic sectors from possible acquisitions made by foreign investors.	Italy
Yes	Establishing a framework for screening Foreign Direct Investments (FDI) to protect strategic sectors.	Luxembourg

North Macedonia	The government did not establish any restrictions on foreign investment during the COVID-19 crises and the law provides for equal treatment and protection of all investments regardless of their origin.	**No**
Poland	Special 24-months protection procedure against takeovers of companies by non-EU/EEA/OECD entities.	**Yes**
Portugal	The applicable regime remains unaltered and the Government is iplementing measures to attract foreign direct investment.	**No**
Republic of Kosovo	The government didn’t adopt any restrictions on foreign investment during the COVID-19 crisis.	**No**
Romania	Has not designed specific restrictions on Foreign Direct Investment related to the COVID-19 crisis.	**No**
Serbia	Foreign investors are free to invest in accordance with the Constitution and applicable laws, as are domestic investors.	**No**
Slovakia	Foreign investors are free to invest according to the EÚ legislation and national law and the Government is adopting direct investment incentives.	**No**
Slovenia	New screening mechanism applies to all non-Slovenian investors (including EU investors) and shall apply until 30 June, 2023.	**Yes**
Spain	The previous general liberalisation regime for foreign investments has been suspended and new prior requirements apply.	**Yes**
Switzerland	The Government grants bridge credit facilities to companies based in Switzerland, regardless of the nationality of their owners.	**No**
Ukraine	No foreign investment restrictions have been introduced in addition to existing sectoral restrictions and limitations based on the investor’s origin.	**No**

The Austrian government has not adopted any restrictions on foreign investments that were triggered by the COVID-19 crisis; however, it is currently in the process to implement a new "Act on the Control of Foreign Direct Investments" (InvKG)"

Mag. Piotr Daniel Kocab - Attorney-at-Law
LANSKY, GANZGER + partner (LGP), Austria
Collaborating Firm of Andersen Global

1 Has the government adopted any restrictions on foreign investment during the COVID-19 crisis? What is the extension foreseen for the applicability of such measures? What are the sectors and the investment transactions affected or limited by the measures?

The government has not adopted any restrictions on foreign investments that were triggered by the COVID-19 crisis. Austria had already a law in force restricting foreign direct investments. Currently, the Austrian government is in the process to implement a new "Act on the Control of Foreign Direct Investments" (InvKG). This new law has not yet been passed; however, we shall elaborate on the key issues of this new draft law.

The InvKG applies to direct investments into companies operating in "critical infrastructure". Schedule 1 to the InvKG contains an exemplary list of sectors within the definition of "critical infrastructure". Those sectors are, among others, energy, health care, telecommunication, national security, artificial intelligence and many more. In addition, the freedom and plurality of the press is also considered to be "critical infrastructure". Higher scrutiny applies to the highly sensitive sectors, such as research and development in the fields of vaccines, drugs, medicine products and protective equipment, 5G infrastructure, water, armed defence equipment and technology. In those highly sensitive sectors, the voting threshold for any foreign investor is 10 % (i.e. acquisitions by a foreign investor exceeding 10 % are subject to approval).

The InvKG applies to foreign direct investments. "Foreign" is an investor not having the citizenship of a member state of the European Union, the European Economic Zone or Switzerland or, in case of a legal person, an investor not having its legal seat or its main place of administration in a member state of the European Union, the European Economic Zone or Switzerland.

A "direct investment" can occur by way of an asset deal or a share deal. Such investment can occur directly but also indirectly. Thus, a direct investment is the direct or indirect purchase of (i) an Austrian target company, (ii) shares (voting rights) in an Austrian target company, (iii) a controlling stake in an Austrian target company, or (iv) material assets of an Austrian target company. Therefore, transactions aiming at obtaining a controlling stake in the Austrian target company fall within the purview of the InvKG. Subject to approval are investments of foreign investors into Austrian target companies operating in a "critical infrastructure". However, an approval is not required if European Union laws or international treaties exclude a specific investment from approval.

If the Austrian target company is deemed critical because of its field of operations and no international treaties exist excluding the respective investment from approval, additional prerequisites must be fulfilled to subject the investment to approval. Namely: the investor (i) acquires the entire Austrian target company, (ii) acquires the share-threshold of 10%, 25% and 50% in case of highly sensitive infrastructure companies or (iii) acquires the share-threshold of 25% and 50% in all other cases. Excluded from approval are small enterprises, including start-up companies, with less than 10 employees or with less than EUR 2 million turnover or balance-sheet amount.

2 What is the procedure foreseen to obtain permission to carry out the restricted or limited investments, if any? Are there any other relevant requirements to be considered by potential foreign investors?

The application is to be submitted after the signing of the respective contract (e.g. share purchase agreement, asset purchase agreement or other contracts aimed to obtain a controlling stake). Thus, the closing of a transaction subject to the InvKG is subject to the mandatory condition precedent of the government's approval. Both the investor and the Austrian target company can apply for approval. Moreover, if the Austrian target company becomes aware of an attempt of an investor to purchase material assets or shares exceeding the thresholds laid down in the InvKG, the Austrian target company must submit an application by itself. This scenario will likely be more relevant for publicly listed companies.

Investors have the possibility to request from the government an "advanced ruling" on proposed transactions. The application for an advanced ruling must contain all relevant information that would need to be submitted in an application for approval. The government – in particular, the competent branch of government – shall issue a ruling within 2 months of the date of the receipt of the application whether the proposed transaction is subject to approval. In case the proposed transaction requires approval, the application for the advanced ruling will be deemed as the application for the approval.

3 What are the consequences foreseen in the event of non-compliance with the referred restrictions or limitations on foreign investment?

Infringements of the InvKG may lead to criminal liability. I.e. closing a transaction without an approval or an advanced ruling or not adhering to the conditions set forth in the approval (in case the approval is conditioned), may lead to a criminal liability with a sentence up to 1-year imprisonment.

Transactions that are closed despite not having obtained the approval are deemed void as the approval is deemed a condition precedent to closing. In such case, the closing would be deemed void and the assets or shares would not be considered as transferred to the buyer.

Final note: in this article, we comment on the current available draft of the InvKG. Changes to this draft are, therefore, not excluded since the law-making process is pending at the time of this article.

> Foreign investors continue to enjoy national treatment, which means that they have the same rights and obligations as residents of Bosnia and Herzegovina

Igor Letica - Associate
SAJIĆ Banja Luka, Bosnia and Herzegovina
Collaborating Firm of Andersen Global

1 Has the government adopted any restrictions on foreign investment during the COVID-19 crisis? What is the extension foreseen for the applicability of such measures? What are the sectors and the investment transactions affected or limited by the measures?

The legal regime of foreign investment in Bosnia and Herzegovina during the pandemic caused by spread of the new coronavirus, i.e. the COVID-19 crisis, is not subject to any restrictions or limitations imposed by public authorities.

Foreign investors continue to enjoy national treatment, which means that they have the same rights and obligations as residents of Bosnia and Herzegovina. In accordance with domestic laws, foreign investors during the COVID-19 crisis may establish a legal entity in Bosnia and Herzegovina under the same conditions as those applicable to domestic investors, in accordance with the provisions of the laws and by-laws governing companies and other positive legal regulations of Bosnia and Herzegovina and its entities. There are no any additional requirements or limitations when it comes to transactions related to establishment of a legal entity or investment in the existing legal entity in Bosnia and Herzegovina in a relation with COVID-19 crisis.

A foreign investor has also the right to invest and reinvest the gains in any sector of economic or non-economic activities in Bosnia and Herzegovina, in the same form and under the same conditions as those required for domestic investors even during COVID-19 crisis. Further, rights of a foreign investors to convert the national currency into any freely convertible currency for payments related to their investment and to transfer the funds resulting from their investment in Bosnia and Herzegovina, are not a subject to any restrictions. Also, there are no restrictions connected with the COVID-19 crisis in the right to acquire ownership on immovable property in Bosnia and Herzegovina. A foreign investment are exempt from the payment of duties and customs taxes, in accordance with the provisions of the laws governing the customs policy in Bosnia and Herzegovina.

However, foreign investors are affected by the Decision of Council of Ministers of Bosnia and Herzegovina on proscribing additional conditions for the entry of foreigners in Bosnia and Herzegovina. Primarily, there was a prohibiton of entry for foreigners coming from certain areas with intensive transmission of coronavirus. In the interim, the decision was changed, and now it prohibits the entry of foreigners in Bosnia and Herzegovina, with certain exceptions which, among others, include entry of a foreigner who have been granted permanent or temporary residence in Bosnia and Herzegovina, as well as entry due to the business activites in Bosnia and Herzegovina. Before abovementioned change of the decision, the right of foreign investors to freely employ foreign employees was de facto suspended, because there was no exception for entry in Bosnia and Herzegovina due to the business activites.

2 What is the procedure foreseen to obtain permission to carry out the restricted or limited investments, if any? Are there any other relevant requirements to be considered by potential foreign investors?

Because there are no restrictions introduced by public authorities strictly regarding foreign investments, no additional permissions are required to carry out investments in Bosnia and Herzegovina. However, a foreigner who enters Bosnia and Herzegovina due to the business activites must have an invitation from a legal entity from Bosnia and Herzegovina that hires him and a certificate of negative test for SARS-CoV-2 virus, not older than 48 hours from the moment of entry.

3 What are the consequences foreseen in the event of non-compliance with the referred restrictions or limitations on foreign investment?

As mentioned, there are no restrictions or limitations on foreign investment in Bosnia and Herzegovina due to the COVID-19 crisis.

When it comes to restriction on entry in the state, if a foreigner does not meet conditions and requirements proscribed in the Decision of Council of Ministers of Bosnia and Herzegovina, the Border Police of Bosnia and Herzegovina will issue a decision refusing entry in accordance with the Law on Aliens.

In conclusion, Bosnia and Herzegovina has remained in line with the liberal model of the foreign investment regime in order to further attract investment in all areas of the economy.

> The Bulgarian legislation does not establish any limitations or restrictions towards foreign investors. Further, Bulgarian law provides for equal treatment, possibilities for access, promotion and protection of all investments notwithstanding their origin"

Veronika Hadjieva - Partner
Kambourov & Partners, Bulgaria
Collaborating Firm of Andersen Global

1 Has the government adopted any restrictions on foreign investment during the COVID-19 crisis? What is the extension foreseen for the applicability of such measures? What are the sectors and the investment transactions affected or limited by the measures?

The legislation adopted by the Bulgarian government has not imposed any restrictions on foreign investment during the COVID-19 crisis.

2 What is the procedure foreseen to obtain permission to carry out the restricted or limited investments, if any? Are there any other relevant requirements to be considered by potential foreign investors?

The Bulgarian legislation does not establish any limitations or restrictions towards foreign investors (irrespective of the investor's nationality) to acquire share capital in companies registered in Bulgaria or to establish companies in Bulgaria (irrespective of the scope and sector of activities of the company).

Further, Bulgarian law provides for equal treatment, possibilities for access, promotion and protection of all investments (investors) notwithstanding their origin. Bulgarian law generally does not establish preferential policies or regimes or any other measures that may lead to more favourable position of certain investors compared to others. All such polices, that may potentially be implemented for some reasons, fall within the scope of state aid regulation. Bulgarian legislation does not establish any special foreign investment approval / screening mechanisms.

Offshore Companies Act

The Offshore Companies Act establishes an exception from the general principle for non-restricted access of all foreign investors. According to this Act, companies registered in preferential tax treatment jurisdictions and the persons controlled thereby shall not, directly and/or indirectly, participate in companies operating in the businesses listed in the law.

On 11 April 2019 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 ("FDI Regulation") entered into force. However, the provisions of the FDI Regulation will only apply as of 11 October 2020, i.e. 18 months after its entry into force. Investments that have not been subject to screening and that were completed before 10 April 2019 will not be subject to the provisions of the Regulation. Investments completed after that date may still be subject to screening based on Article 7 of the Regulation, even if the provisions of the Regulation will only apply as of 11 October 2020.

Member States remain free to decide whether or not to put in place a national screening mechanism. Therefore, Member States without a review mechanism (like Bulgaria) will not be under an obligation to adopt one.

3 What are the consequences foreseen in the event of non-compliance with the referred restrictions or limitations on foreign investment?

There is no general requirement for foreign companies to establish a local entity in Bulgaria in order to conduct their business. This might, however, appear necessary for tax or organisational reasons.There is also no general limitation of foreign investor shareholding in local companies.

Foreign investment companies are subject to the general requirements of Bulgarian law in terms of their incorporation, corporate organisation, forms and governance. There are no sector specific regulations in this regard.

In general, the legal framework in relation to the protection and encouragement of the foreign investments introduces a system of promotion measures and legal provisions provided in the:

(i) EU legislation:

- Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty ('Regulation (EU) No 651/2014');

- Regulation (EU) 2017/1084 of 14 June 2017 amending Regulation (EU) No 651/2014;

(ii) Bulgarian legislation:

- The Investment Promotion Act ('IPA');

- The Rules for Application of the Investment Promotion Act ('RAIPA');

The IPA regulates the terms and procedures for the promotion and protection of investments as well as the competent authorities that govern and supervise these investments. The IPA introduces a system of promotion measures for initial investments in tangible and intangible fixed assets and the related new employment.

Classification of Investments

The Bulgarian legislation introduces the investment certification approach. In accordance with IPA, depending of the size of the investment, the economic sector and the region of the country where the investment is implemented, investors may apply for a certificate for class promotion of their investment (Class A or Class B) or a certificate for Priority Investment Project.

The investments should meet the following cumulative criteria:

(i) should be connected with the creation of a start-up enterprise or expanding an existing enterprise/business activity;

(ii) investments should take place in one of the following economic sectors: industrial sector, manufacturing or in the services sector as high-tech activities in the field of the information technology and services; education; scientific research, human health and medical care services, warehousing and support activities for transportation;

(iii) the revenues from the investment project should be at least 80% of the total revenues of the company;

(iv) the investment should be maintained for at least five years (three years for SMEs);

(v) the term for implementation of the investment should be up to three years;

(vi) the amount of investment for the project should be no less than BGN 10,000,000 for Class A and BGN 5,000,000 for Class B investment projects. This threshold could be reduced for investments in economically disadvantaged regions and for investments in high-tech activities of the industrial and service sectors.

Priority projects are investment projects that relate to all sectors of the economy and are particularly important for the economic development of the country and its regions. These projects need to meet the minimum requirements for an investment amount of BGN 100 million and 200 jobs.

These requirements can be reduced in certain cases (for ex. In high-tech and knowledge-based services, as well as in high-tech activities in manufacturing and / or in municipalities with high levels of unemployment).

Authority responsible for foreign investments

There is no single authority in Bulgaria designated and empowered to regulate foreign investments. There is an agency to the Ministry of Economy called - InvestBulgaria Agency, Its purpose is, however, to promote Bulgaria as an investment destination and to provide investors with information. InvestBulgaria Agency is not a regulatory authority.

Foreign investments (investors) are subject to regulation by the general established authorities in Bulgaria, such as:

- tax issues are regulated by the National Revenue Agency;
- energy sector is regulated by Energy and Water Regulatory Commission;
- banking and finance sector – by Bulgarian National Bank and Financial Supervision Commission;
- employment issues – by General Labor Inspectorate Executive Agency, etc.

> Croatian government has not yet adopted any restrictions on foreign investment during COVID-19 crisis and will try to follow and comply with the recently issued Guidance to the Member States of the European Union concerning FDI"

Ivna Medić - Managing Partner
KALLAY & PARTNERS ltd, Croatia
Collaborating Firm of Andersen Global

1 Has the government adopted any restrictions on foreign investment during the COVID-19 crisis? What is the extension foreseen for the applicability of such measures? What are the sectors and the investment transactions affected or limited by the measures?

According to our knowledge and available information, Croatian government has not yet adopted any restrictions on foreign investment during COVID-19 crisis, so we could only assume that Croatia will try to follow and comply with the recently issued Guidance to the Member States of the European Union 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 (further: Guidance).

As the previously mentioned Guidance states, 14 EU Member states have already started applying screening mechanisms for foreign investments and some of the rules and points defined in the upcoming Regulation 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 (further: FDI Screening Regulation) which will be in force as of October 2020. However, Croatia still has a low level of limitations when it comes to direct foreign investments, but given the mentioned Guidance and the FDI Screening Regulation it is expected to have some changes in the existing or new regulations further defining the processes from the directly applicable FDI Screening Regulation mentioned above, once it is in force.

It is also important to keep in mind that, in case a foreign investment does not undergo a national screening process, the FDI Screening Regulation stipulates that Member States and the Commission may provide comments and opinions within 15 months after the foreign investment has been completed.

This can lead to the adoption of measures by the Member State where the investment has taken place, including the necessary mitigating measures. In practice, a foreign investment completed in 2020 could be subject to ex post comments by Member States or opinions by the Commission as from 11 October 2020 (date of full application of the FDI Screening Regulation) and until June 2021 (15 months after completion of the investment).

2 What is the procedure foreseen to obtain permission to carry out the restricted or limited investments, if any? Are there any other relevant requirements to be considered by potential foreign investors?

The Guidance states that those Member States that currently do not have a screening mechanism, or whose screening mechanisms do not cover all relevant transactions, should set up a full-fledged screening mechanism and in the meantime to consider other available options, in full compliance with Union law and international obligations, to address cases where the acquisition or control of a particular business, infrastructure or technology would create a risk to security or public order, including health security, in the EU.

Given that there are no restrictions or limitations introduced because of the COVID-19 situation, we could assume that Croatia will follow the above mentioned Guidance and that there will be changes made in the existing laws or new ones adopted regarding this issue.

3 What are the consequences foreseen in the event of non-compliance with the referred restrictions or limitations on foreign investment?

Croatian government has not adopted any restrictions on foreign investment during the COVID-19 crisis yet. This is a consequence of the past situation whereas after experiencing a period of growth in 2005-2008, foreign direct investment inflows to Croatia collapsed as an effect of the global economic crisis (the tourism sector was particularly affected). Since then, foreign direct investment flows have been struggling to return to their pre-crisis levels. Having that in mind Croatia is in general open to foreign investment. The government has committed itself to increasing foreign investment and has taken measures to improve the investment climate in the country. To accomplish this, it has implemented tax reductions and employment incentives for manufacturing, technology centres and support services. Amongst the main measures enacted by the government are:

- Equal treatment of nationals and foreigners
- Low company administrative fees
- Laws protecting intellectual property
- All measures were enacted to create an attractive framework for investors and to make Croatia a trusted foreign investment recipient.

Croatia still faces a number of challenges to gain competitiveness and attract more foreign investments:

- Vulnerability of the national economy because of its dependence on the economic situation of the European Union
- The administrative and judicial system is slow and needs improvement
- A high level of public debt despite tax reforms in the recent past
- Structural weaknesses, including an imbalance in current payments, significant private external debt and a trade deficit

Having all aforesaid in mind, it is expected that Croatia acts on it given that the above described Guidance calls for Member states of EU that yet do not have any mechanisms or restrictions to regulate the process of addressing risks when it comes to foreign investments.

> The Cypriot government has not adopted any restrictions with regards to foreign investment during the pandemic. Cyprus will follow Regulation 2019/452 relating to the screening of foreign direct investments into the EU"

Nicky Xenofontos Fournia - Legal Advisor
Andersen in Cyprus
Member Firm of Andersen Global

1 Has the government adopted any restrictions on foreign investment during the COVID-19 crisis? What is the extension foreseen for the applicability of such measures? What are the sectors and the investment transactions affected or limited by the measures?

To the best of our knowledge and information available from the official governmental websites, the Cypriot government has not imposed or adopted any restrictions with regards to foreign investment during the pandemic. It is safe to assume that Cyprus will follow Regulation 2019/452 relating to the screening of foreign direct investments into the EU. On the contrary, Cyprus has actually adopted and implemented various measures to boost and 'jump start' the economy in an attempt to tackle the side effects and negative consequences as a result of the COVID-19 crisis.

In summary, the measures announced have five main strands as follows:

(i) Improving the liquidity of both businesses and the self-employed

(ii) Stimulating new investments

(iii) Accelerating existing development projects

(iv) Boosting the tourism industry and

(v) Strengthening the agricultural sector

Detailed information can be found in our local website.

2 What is the procedure foreseen to obtain permission to carry out the restricted or limited investments, if any? Are there any other relevant requirements to be considered by potential foreign investors?

Considering that there are no restrictive measures in place due to the pandemic, it can be safely assumed that Cyprus will follow the guidance in the aforementioned Regulation.

3 What are the consequences foreseen in the event of non-compliance with the referred restrictions or limitations on foreign investment?

Again, since there are no restrictive measures in force, there cannot be any consequences.

General Information on Foreign Investments in Cyprus

Cyprus ranked 8th out of the top 20 countries globally in the Global Finance magazine's 'FDI Superstars 2018' for Foreign Direct Investments (FDI) performance and appeal.

Cyprus is now attracting significant inflows of foreign investments from countries like the US, Asia, Russia, and the Middle East. Cyprus' enhanced credit ratings by international credit rating agencies, the successful recapitalisation of its major banks and recent government bond issues raising over €5 billion in the international markets tied with the many large-scale projects, have contributed to Cyprus' renaissance as a top FDI destination.

Over €10bln of FDI has been deposited in Cyprus over the last 6 years, the most important being the recapitalization of the banks, major acquisitions in the pharmaceutical and retail industries with major foreign investors entering the market, investments in hotel and leisure the most significant being the €0,5bln investment in the integrated casino resort. Additionally, there have been new investors moving into the health and education sectors.

Global investors or organisations looking to set up in a particular country need to have support from local sources in the legal, accounting and human resource sectors and services. Cyprus offers all such services to an exceptional standard.

The recent gas findings are encouraging and some of the big names in the industry have already set up operations on the island. Apart from the gas findings, the educational sector has also created opportunities, making Cyprus a regional centre for attracting foreign students from around the globe.

Cyprus is well – known for being an ideal location to establish a business presence, combining an ideal climate, business and culture mindset with plenty benefits to foreign investors including their family members. Apart from financial stability, a gateway to Europe and the Middle East, Cyprus offers a high quality standard of living.

We encourage everyone to explore and make the most of our uniqueness.

"The German Federal Government adopted an amendment by which investments in businesses involved in the public communications infrastructure and in the health sector fall within the scope of the catalogue of investments which need to be notified in advance"

Dr. Hermann Knott - Partner
Andersen in Germany
Member Firm of Andersen Global

1 Has the government adopted any restrictions on foreign investment during the COVID-19 crisis? What is the extension foreseen for the applicability of such measures? What are the sectors and the investment transactions affected or limited by the measures?

German Law on FDI screening is provided for in two different legal instruments, the German Foreign Trade Act (Außenwirtschaftsgesetz – the 'Act') and the German Foreign Trade Regulation (Außenwirtschaftsverordnung – the 'Regulation'). In the wake of the COVID-19 crisis, the German Federal Government proposed a Draft Bill on the reform of the Act. The Draft Bill must still pass the legislative procedure.

The purpose of this Draft Bill consists in making the German FDI screening mechanism more efficient and in adapting it to the Regulation (EU) 2019/452 of 19 March 2019 establishing a framework for FDI screening in Europe. While this reform is also intended to prevent a sell-out of critical assets and technology that may be acquired at a discounted price from previous owners who may face financial difficulties resulting from the Coronavirus crisis, the German Federal Government is well aware of the importance of FDI for the German economy. The first aspect of the reform is that German national investment screening may include in future, in addition to public order or public security of the Federal Republic of Germany, a 'foreseeable interference' with public order or with the security of another Member State of the European Union or in relation to projects or programs of Union-wide interest.

The standard of review is also lowered since the previous standard of a concrete and considerable endangerment of the public order or security (tatsächliche und schwere Gefährdung) is replaced by the new standard of a prospective impairment (voraussichtliche Beeinträchtigung). This change is intended to provide the German screening authorities with more margin of maneuver.

The second aspect relates to the concept of extending the prohibition to implement a transaction before having obtained FDI clearance (Vollzugsverbot) to all kinds of transactions which need to be notified under the applicable legal scheme.This aspect of the reform is intended to close a loophole in the enforcement of the German screening mechanism which previously consisted

in the risk of a factual implementation of a transaction before the screening proceedings had been completed. Such a factual implementation would undermine the underlying rationale of the screening proceedings which is to avoid that critical technologies are diverted in the meantime and a prohibition of the transaction at the end of these proceedings amounts to a toothless tiger.

This prohibition to implement the transaction prior to FDI clearance has a significant impact on completing a transaction under ordinary contract law. Accordingly, the transaction is provisionally ineffective (schwebend unwirksam) until the completion of the screening procedure. This legal classification also has an impact under public (administrative) law and is consequently accompanied by specific administrative prohibitions to implement the transaction. Observance of such administrative rules is subject to penalties under criminal law.

On 20 May 2020, the German Federal Government adopted an amendment to the

Regulation which is in force since 3 June 2020.

According to this amendment investments in businesses which are involved in the public communications infrastructure and in the health sector such as pharmaceuticals, medical products, in vitro diagnostics and protective equipment fall within the scope of the catalogue of investments which need to be notified in advance where the threshold of par-ticipation of 10 % of the voting rights is met. In particular the following products and businesses are affected:

- business that provides services which are necessary to ensure the fault free and functioning of state communication infrastructures within the meaning of the BDBOS Act or

- personal protective equipment within the meaning of Article 3(1) of Regulation (EU) 2016/425 of the European Parliament and of the Council of 9 March 2016 on personal protective equipment and repealing Council Directive 89/686/EEC (OJ L 81, 31.3.2016, p. 51) or

- business that develops, manufactures or places on the market medicinal products which are essential for ensuring the provision of health care for the population within the meaning of Section 2 Paragraph 1 of the German Medicines Act, including their starting materials and active ingredients, or is the holder of a corresponding marketing authorization or

- business that develops or manufactures medical devices within the meaning of the medical device law which are intended for the diagnosis, prevention, monitoring, prediction, prognosis, treatment or alleviation of life threatening and highly contagious infectious diseases or

- in vitro diagnostic medical devices within the meaning of the law on medical devices which are used to provide information on physiological or pathological processes or conditions or to determine or monitor therapeutic measures in connection with life threatening and highly contagious infectious diseases.

2 What is the procedure foreseen to obtain permission to carry out the restricted or limited investments, if any? Are there any other relevant requirements to be considered by potential foreign investors?

The Federal Ministry for Economic Affairs and Energy may decide that it excercises its power of review only within three months from the notification. The formal review procedure may only last four months.

In order to obtain legal certainty, the investor may request a binding certificate of non objection.

If the Federal Ministry for Economic Affairs and Energy does not open formal review procedures within two months from this request, the certificate of non objection is deemed to be granted.

3 What are the consequences foreseen in the event of non-compliance with the referred restrictions or limitations on foreign investment?

Fines of up to EUR 500.000 are possible. According to the Draft Bill the transaction will be provisionally ineffective (schwebend unwirksam) until the screening procedures are terminated. The Draft Bill also foresees an extension of the prohibition to implement the transaction before having obtained FDI clearance (Vollzugsverbot) to all kinds of transactions which need to be notified. The observance of this prohibition shall be accompanied by penalties under criminal law.

> Greek government has not adopted specific restrictions on foreign investments during the COVID-19 crisis. Foreign investors doing business in Greece continue to receive the same treatment during the COVID-19 crisis as before the crisis, according to the national rules"

Dimitra Gkanatsiou - Senior Associate
Andersen Legal in **Greece**
Member Firm of Andersen Global

1 Has the government adopted any restrictions on foreign investment during the COVID-19 crisis? What is the extension foreseen for the applicability of such measures? What are the sectors and the investment transactions affected or limited by the measures?

The COVID-19 crisis has accelerated the adoption of new and stricter foreign direct investment (FDI) rules and has resulted in an ever-increasing legal uncertainty for potential foreign investors. Since the beginning of the COVID-19 crisis, several jurisdictions have introduced additional FDI restrictions, and various other jurisdictions are discussing the implementation of additional FDI restrictions.

However, the Greek government has not adopted specific restrictions on foreign investments during the COVID-19 crisis. That practically means that foreign investors doing business in Greece continue to receive the same treatment during the COVID-19 crisis as before the crisis, according to the national rules. Furthermore, no restrictions have been imposed in regards to the foreign investors who are interested to invest in Greece during the COVID-19 pandemic.

Notwithstanding the above, the necessary measures received worldwide for the limitation of the spread of coronavirus have resulted indirectly to the restriction of the foreign investments in Greece, especially in the sectors of the real estate market (golden visa programs) and tourism, which are affected the most. Nevertheless, according to experts, Greece and other countries that handled the COVID-19 threat with the most successful antiepidemic policies are more likely to be the focus of investors' interest once the current health crisis is over.

Considering the above, today more than ever Greece's and the whole EU's openness to foreign investment needs to be balanced by appropriate screening tools, so that the increased risk of Third Countries' attempts to acquire increased control on crucial sectors of the industry (mainly healthcare related industries) via FDI, is limited (if not eliminated). For this purpose, on March 26, 2020, the Commission issued a new Guidance to the Member States (Official Journal of the EU: 2020/C 99 I/01) concerning FDI 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), without undermining the EU's general openness to foreign investment.

Within the EU, for the moment, national law on FDI takes precedence. However, from October 2020 the European Commission will be entitled to send comments to Member States on transactions to which the relevant national government must give due consideration, and may feel they need to have a good reason to arrive at a different conclusion from the EC.

In light of the above, we may conclude that Greece has not yet a high level of limitations concerning FDI but given the mentioned Guidance and the Regulation it is expected to follow the European Commission's rules and guidelines.

2 What is the procedure foreseen to obtain permission to carry out the restricted or limited investments, if any? Are there any other relevant requirements to be considered by potential foreign investors?

As stated above, there are no restrictions on foreign investments adopted by the Greek government during the COVID-19 crisis. The general policy of the Greek government was to set the country at a lock down, phase that lasted almost two months. That measure minimized the spread of the virus but also halted most of the business activities (except e-commerce, that flourished) and local investments. On the field of investments, both domestic and foreigners, activities are practically postponed for the period when the pandemic will be officially declared over. However, all major strategic investments are encouraged by the Greek government to proceed as originally planned.

Furthermore, the European Commission by the said guidance calls upon those Member States that currently do not have a screening mechanism, or whose screening mechanisms do not cover all relevant transactions, to set up a full fledged screening mechanism and in the meantime to consider other available options, in full compliance with Union law and international obligations, to address cases where the acquisition or control of a particular business, infrastructure or technology would create a risk to security or public order, including health security, in the EU. In view of the above, it is probable that the Greek government will follow the above-mentioned Guidance, therefore amendments are likely to be adopted in existing or new legislation, in regards with the issue.

That remains to be seen…

3 What are the consequences foreseen in the event of non-compliance with the referred restrictions or limitations on foreign investment?

As previously mentioned, there are no restrictions or limitations on foreign investment in Greece as a repercussion of the COVID-19 crisis.

However, the compliance or non-compliance of the Greek government to the European Commission's rules and guidelines is something to be seen. In any case, the need of the country for openness to foreign investments is essential for its economic growth, competitiveness, employment and innovation.

Every course of action will certainly be judged by its result, when the time comes for Foreign Investors to submit a binding interest in any of the large Greek privatization projects. Therefore, only then the consequences of the compliance or non-compliance of the Greek government to any restrictions on foreign investment will be evaluated.

The Hungarian Parliament enacted a law on the maintenance of measures restricting the acquisition of foreign shareholdings. The restrictions introduced by law will remain in force until December 2020 and apply to Hungarian strategic companies operating in specific sectors”

Gábor Hugai - Partner
Andersen in Hungary
Member Firm of Andersen Global

1 Has the government adopted any restrictions on foreign investment during the COVID-19 crisis? What is the extension foreseen for the applicability of such measures? What are the sectors and the investment transactions affected or limited by the measures?

In the period of the extraordinary legal order (i.e. the “state of danger”) introduced in Hungary in view of the COVID-19 crisis, the Hungarian Government was entitled to suspend the application of higher level legal (statutory) provisions and deviate from statutory provisions by way of passing Government Decrees.

Pursuant to such powers, the Government passed Government Decree 227/2020 and made the acquisition of foreign stakes in so-called strategic companies pending ministerial acknowledgment with effect from 26 May 2020. Due to the termination of the state of danger on 18 June 2020, the Government Decree too ceased to be in force. However, on the exact same day, the Hungarian Parliament enacted a law on the maintenance of measures restricting the acquisition of foreign shareholdings (Act LVIII of 2020).

The law preserved the provisions of the Government Decree with some amendments, i.e. transactions resulting in the acquisition of shares of a strategic company between 26 May and 17 June and transactions concluded on or after 18 June are not governed by the exact same rules.

The restrictions introduced by law will remain in force until 31 December 2020 and apply to Hungarian strategic companies operating in the following sectors: energy, transport, communications, chemical industry, trade, tourism, production of various equipment, devices, raw materials, healthcare, certain agricultural, construction activities, utilities, transport, transportation services, temporary staffing, and information technology services. The list of affected sectors may be amended by Government Decree pursuant to a statutory authorization.

The restrictions apply to the acquisitions of shares in a strategic company with a value of at least HUF 350 million and conferring a majority influence on a legal entity or a natural person established in or being a citizen of an EEA Member State or Switzerland, or conferring at least a 10% influence on a legal entity or a national investor registered in or being a citizen of a third country, or an EEA Swiss legal entity in which a third country has a direct or indirect majority shareholding. In the latter case, any further acquisition by which the investor achieves a 15%, 20% or 50% influence requires additional ministerial acknowledgment.

2 What is the procedure foreseen to obtain permission to carry out the restricted or limited investments, if any? Are there any other relevant requirements to be considered by potential foreign investors?

A legal transaction aimed at acquiring a shareholding affected by the restriction may not take effect until ministerial acknowledgment has been issued i.e. an investor may not be registered in the share register or register of members of the strategic company and may not exercise ownership rights emanating from the acquirable shareholding. In view of this, in such a transaction signing and closing are always separated.

The Ministry designated for issuing the acknowledgment is the Ministry of Innovation and Technology. A foreign investor shall submit the request for acknowledgment electronically within 10 days of concluding the legal transaction; legal representation is mandatory.

The notification shall include information on the investor (if the investor is a legal entity, data on its ownership structure and UBO), a detailed description of the transaction, and relevant circumstances of the transaction with transaction documents attached. The Ministry may request additional information at its discretion.

The Ministry shall issue its decision within 30 days of the submission of the application; this period may be extended by the Ministry by 15 days under certain justified cases. The Ministry may decide to either approve or prohibit the acquisition of the shares.

A prohibition may only be justified by reasons specified by law, such as a violation or endangerment of the state interests of Hungary, public security, and public order, in particular the security of the satisfaction of basic social needs, the investor having been involved in an activity affecting security or public order in an EU Member State, a risk of the investor engaging in illegal or criminal activity, or the investor being under the control of a non-EU public administration (e.g. through financing).

There is a judicial remedy against the Ministry's decision on prohibition.

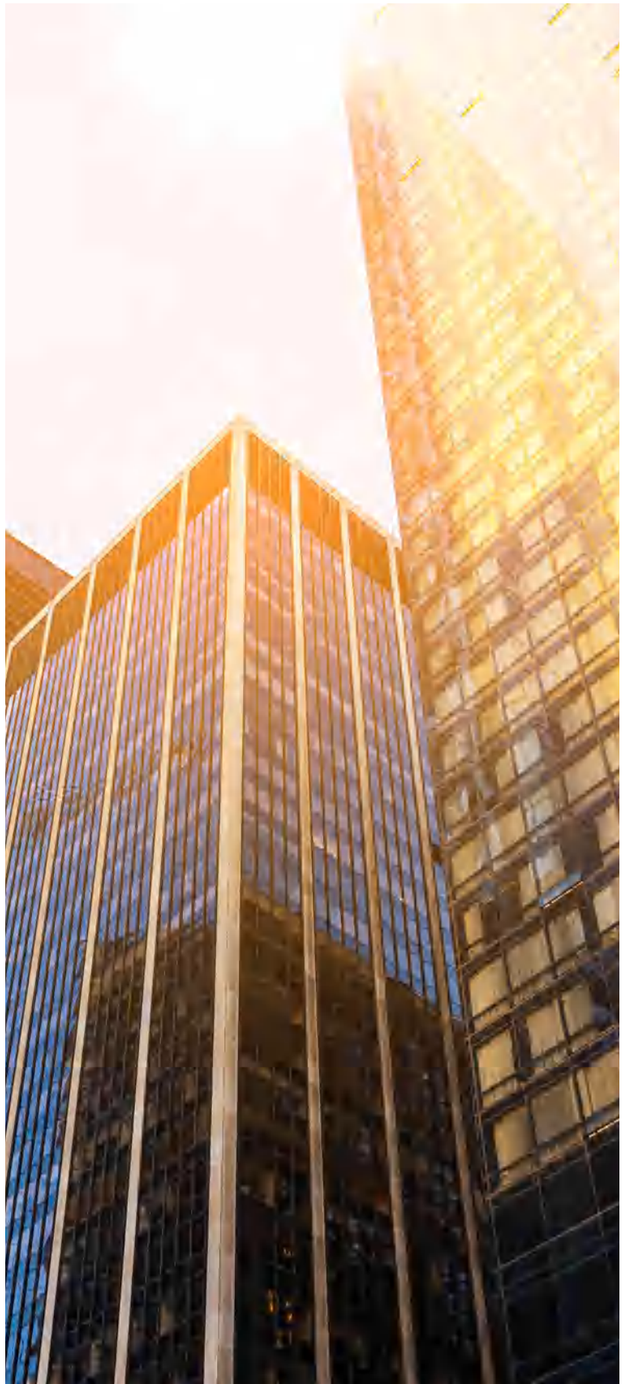
It is important to note that the restrictions do not only apply to the transaction aimed at the acquisition of the ownership of a strategic company, but also to usufruct, bonds convertible into shares, or legal transactions aimed at acquiring the right of ownership or operation of the basic infrastructure (assets) of the strategic company.

If the transaction is not directed at the strategic company but at one of its foreign parent companies, the acquisition of a stake in the foreign parent company (and through it, the acquisition of a stake in the Hungarian strategic company) is exempt from legal restrictions (i.e. the law has no extraterritorial effect).

3 What are the consequences foreseen in the event of non-compliance with the referred restrictions or limitations on foreign investment?

Failure to comply with the restrictive rules will result in severe legal consequences. In case of failure to notify, the Ministry may impose an administrative fine on the investor of up to twice the value of the transaction, but at least amounting to 1% of the annual net sales of the strategic company if the investor is a legal person and at least to HUF 100,000 if the investor is a private individual.

In addition, any undeclared transaction or any transaction which has been declared but in respect of which the Ministry has issued a prohibition shall be deemed invalid (i.e. not capable of producing legal effects).



"The Italian Government has not issued specific rules providing for restrictions on investments from foreign companies. Instead, it will be the task of companies with brands considered historical and of national importance to inform the Government of their divestment plans"

Francesco Inturri - Partner
Andersen in Italy
Member Firm of Andersen Global

1 Has the government adopted any restrictions on foreign investment during the COVID-19 crisis? What is the extension foreseen for the applicability of such measures? What are the sectors and the investment transactions affected or limited by the measures?

The Italian Government has not issued specific rules providing for restrictions on investments from foreign companies.

The main Decree-laws, produced to deal with the crisis, were aimed at safeguarding all the main players in the national economy and providing the necessary liquidity to meet short-term commitments.

The Decree-law no. 34/2020 called "Rilancio" also provided for measures to safeguard the national economy from possible acquisitions by foreign investors, who could use the crisis situation to acquire large companies with historic brands.

The reasons for this measure are in line with the 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).

On the other hand, the Government has also established, with the "Rilancio" Decree, measures to encourage investment in companies under Italian law, including those controlled by foreign investors.

In order to improve the balance sheet of companies with revenues of between 5 and 50 million euros that, due to the emergency situation, have seen a reduction in their operating profitability of more than a third compared to the same period last year, was introduced a new capital contribution tax credit.

The tax credit is granted to parties who contribute resources to companies that have approved a capital increase of more than 250,000 euros and is equal to 20% of the contributed capital, calculated on a maximum of 2 million euros.

In order to avoid opportunistic situations, the investment must be held until the end of 2023 and the company must not distribute resources until that date. It is also essential that the company is not in difficulty and that it complies with all regulatory provisions and various tax requirements.

If the company has approved the capital increase as a result of losses, it is entitled to a tax credit equal to 50% of the losses exceeding 10% of shareholders' equity, up to a maximum of 30% of the capital increase carried out.

The short / medium term forecast is the contrast between the right of foreign investors to obtain fair and equitable treatment and the above-mentioned reasons of nation states.

2 What is the procedure foreseen to obtain permission to carry out the restricted or limited investments, if any? Are there any other relevant requirements to be considered by potential foreign investors?

Since there are no real restrictive measures, foreign investors do not have to follow any procedure to obtain permits to operate in Italy. Instead, it will be the task of companies with brands considered historical and of national importance to inform the Government of their divestment plans.

3 What are the consequences foreseen in the event of non-compliance with the referred restrictions or limitations on foreign investment?

As there are no such restrictions or indications, nor are there any consequences for non-compliance with them. ■

Raphael Collin - Partner
CM Law, Luxembourg
Collaborating Firm of Andersen Global

> On 7 May 2020, a draft law has been submitted to the Luxembourg Parliament establishing a framework for screening FDI to protect strategic sectors which contains a non-exhaustive list of factors that may be taken into consideration to determine whether an FDI is likely to affect security and public order or national or European essential interests"

1 Has the government adopted any restrictions on foreign investment during the COVID-19 crisis? What is the extension foreseen for the applicability of such measures? What are the sectors and the investment transactions affected or limited by the measures?

On 7 May 2020, a draft law has been submitted to the Luxembourg Parliament establishing a framework for screening foreign direct investments (FDI) to protect strategic sectors.

Foreign investment is qualified in the draft law as being the acquisition by the investor of a significant influence (holding directly or indirectly at least 10% of the shares or voting rights) in an enterprise, part of an enterprise, or a group of enterprises established in Luxembourg.

The draft law contains a non-exhaustive list of relevant factors that may be taken into consideration to determine whether an FDI is likely to affect security and public order or national or European essential interests (the Screening Factors).

The Screening Factors may include the potential effects on, inter alia, (i) critical infrastructure (including energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructure and sensitive facilities); (ii) critical technologies and dual use items; (iii) supply of critical inputs (including energy or raw materials); (iv) sensitive information (including personal data or the ability to control such information); and (v) freedom and pluralism of media.

The context and the circumstances of the FDI may also be taken into consideration, in particular (i) whether a foreign investor is directly or indirectly controlled by the government of a third country, including through ownership structure or significant funding; (ii) whether the foreign investor has already been involved in activities affecting security and public order or national or European essential interests or (iii) whether there is a serious risk that the foreign investor engages in illegal or criminal activities.

Even if the draft law has been motivated by inter alia the COVID-19 crisis and anticipated consequences, the application of the law once entered into force, if any, will not be limited in time.

2 What is the procedure foreseen to obtain permission to carry out the restricted or limited investments, if any? Are there any other relevant requirements to be considered by potential foreign investors?

The draft law provides (i) a prior notification procedure to be carried out by the investor before making an investment in an enterprise, part of an enterprise, or a group of enterprises established in Luxembourg.

3 What are the consequences foreseen in the event of non-compliance with the referred restrictions or limitations on foreign investment?

The draft law provides (i) administrative sanctions (fines, suspension of voting rights, etc.) and criminal sanctions in case of non compliance by the investor of the screening procedure and (ii) judicial redress against screening decisions.

"The government didn't adopt any measures concerning the foreign investment during the COVID-19 crisis, apart from what was available for the domestic firms in the implemented economic measures"

Ana Pepeljugoska Kostovska - Partner
Pepeljugoski, North Macedonia
Collaborating Firm of Andersen Global

1 Has the government adopted any restrictions on foreign investment during the COVID-19 crisis? What is the extension foreseen for the applicability of such measures? What are the sectors and the investment transactions affected or limited by the measures?

The contribution of foreign investment in the last three years in the economies of the Western Balkans is particularly significant, because it has affected the technological progress and knowledge transfer, job creation, and thus stimulating economic growth and this was appreciated also by Republic of North Macedonia.

In the past period a huge part of the economic policies of the country were focused on attracting foreign investors, and lastly on suggestion of the Ministry of Economy and with the support of all members of the Government, the Law on Financial Support of Investments was adopted, which equalizes the treatment for domestic and foreign investors, and which in the most transparent way promotes the benefits that investors will receive if they decide to invest in Republic of North Macedonia.

Therefore, the situation with the COVID-19 crisis was not a reason for the Macedonian Government to change anything in the aspect of the foreign investment. Namely, the government didn't adopt any restrictions on foreign investment during the COVID-19 crisis. In contrary, the economic measures that were taken by the Government in the past period for decreasing the economic effects of the crisis, did not exclude the foreign investments.

So far, the state has presented three packages of measures that target both domestic and foreign companies. Through the first two sets of measures, intervention was made to minimize the damage to the economy, while the third package of measures is developmental and should help stimulate personal consumption and the working of the companies.

The first two sets of measures ensure the liquidity of both domestic and foreign and the preservation of jobs, through interest-free credit lines for micro, small and medium enterprises, financial support for the payment of wages or subsidizing contributions. These measures cover all companies, including foreign ones, and a total of 110,325

employees in 17,813 companies were assisted and supported in April 2020.

Also, with effect until June 30, the customs rates for 12 products have been reduced by half, for what the foreign companies can be interested.

Some of the economic measures are that: a Decree with legal force was passed for financial support of private sector employers affected by the health and economic crisis caused by the COVID-19virus, due to the payment of salaries for the months of April and May 2020, which enabled private sector companies to seek assistance for payment of salaries to employees.

Conditions for using financial assistance are:

(i) the employer-applicant suffered reduction in total income in April or May which is higher than 30% of the monthly average of total income generated in 2019;

(ii) the employer - applicant does not pay dividends to the owners;

(iii) at most 10% of the total number of employees at the employer - applicant to have an individual net salary over 12,500 denars for the month for which financial support is requested.

Also, the government in order to mitigate the effects of the Coronavirus COVID-19 epidemic brought Decision for the period during the duration of the state of emergency and three months after the termination of the duration of the state of emergency, the funds from the Compensation Funds from foreign aid in the amount of 492,000,000 denars will be used for direct help by lending to micro, small and medium enterprises of all activities.

Regarding agriculture, a Decree with legal force was adopted on the implementation of the Law on the Establishment of the Agency for Financial Support in Agriculture and Rural Development during the state of emergency. All deadlines provided by the relevant law (for deciding on requests for approval of financial support and payment of financial support, for concluding contracts for financial support, etc.) are extended for 60 days after the termination of the state of emergency.

The deadlines set in the financial support agreements for realization of the investment-subject to the contract, cease to run during the duration of the state of emergency and continue to run after the expiration of the duration of the state of emergency, but only for as many days as they have when stopped for the emergency situation until the day of expiration.

Deadlines for submitting requests for financial support specified in the public call for submission of requests for financial support under the IPARD Program 2014-2020 are postponed during the duration of the state of emergency and continue to run after the termination of the state of emergency for successful implementation of the started investments and completion of the necessary documentation.

Additionally, the Government took on activities that directly support the investments. Some of them are the following:

- Namely, the government announced the Public Call for Investment Support that the companies started during the pandemic and which will have the courage to invest additionally by the end of 2020, for which 25% of the total value of the investment will be covered by the state.

NORTH MACEDONIA

- The government made a public call submitting a request for determining the status of a strategic investment project, where a strategic investment projects are considered investments in the amount of at least 100 million euros for two or more municipalities, investments of at least 50 million euros in municipalities based in city and investment projects of at least 30 million euros in rural municipalities.

- Also, in May 2020, the Ministry of Economy announced the beginning of a new investment cycle in renewable energy sources and signed agreements with 23 investors for the construction of photovoltaics on private land with a total installed capacity of 21 mega.

- And in July 2020, the key news in terms of investments is the start of operation of the Macedonian-Dutch company “Glass Flex” in the Technological-Industrial Development Zone Tetovo.

It should be highlighted the Organisation for Economic Co-operation and Development (OECD) Report on the Western Balkans stated that the Republic of Northern Macedonia has the most favorable business climate in the region, and also has fewer fiscal risks compared to other countries. These are the main points for our country in the OECD report on the Western Balkans (“Government at a glance: Western Balkans 2020”).

The Council of Foreign Investors and the Association of Foreign Companies with technologically advanced production, which functions within the Council, on multiple occasions participated in proposing concrete measures to support foreign companies, proposing measures directly aimed at preserving jobs, urgent support to companies in terms of tax breaks and providing favorable credit lines for large industrial facilities, as well as measures to prepare for a speedy recovery.

In this regard, the members of the Council of Foreign Investors at the Economic Chamber of R.North Macedonia support the Government's efforts to create measures for all affected companies, but insist in their creation to be taken into account the positive multiplier effect of these foreign-investing companies on reviving economic activity in the coming period.

Foreign investors united in the Association of Technologically Advanced Manufacturing companies are seeking subsidies and direct financial support from the Macedonian government in order to overcome the crisis from which, as they say, they are significantly affected. It is about 25 companies with 28,000 employees that are mainly or predominantly focused on the automotive industry, which is globally one of the hardest hit.

The companies openly point out that in conditions of reduced production and exports, and without proper state support, somehow everything can be maintained by cooperating with employees only for a very short period of time.

Namely, multinational companies monitor and analyze the comparative experiences from the work of their companies in different countries, hence, this may be one of the reasons for relocating production to another country, which offers increased support for the work of foreign investors, which of course, can have huge consequences for the national economy, in terms of reduced economic activity, reduced production of sophisticated value-added products, increased number of unemployed, etc.

2 What is the procedure foreseen to obtain permission to carry out the restricted or limited investments, if any? Are there any other relevant requirements to be considered by potential foreign investors?

As explained, there are no restricted or limited investments referring the foreign investments in Republic of North Macedonia due to the COVID-19 crisis, therefore there is no procedure for obtaining permission, nor are there, any new and related to the COVID-19 crisis situation, requirements for foreign investors.

3 What are the consequences foreseen in the event of non-compliance with the referred restrictions or limitations on foreign investment?

As explained, there are no restrictions or limitations on foreign investment at this moment in the country therefore there are not any consequences for non-compliance. In contrary for the whole time of the COVID-19 crisis the Government of Republic of North Macedonia did not differ the foreign investments of the domestic firms in the taken economic measures and kept their value as an important part of the Macedonian economy.

"The Polish government introduced a special procedure for controlling acquisitions of selected companies by entities from outside the EU/EEA/OECD. These changes were reflected in the Anti-Crisis Shield 4.0 - the Act of 19 June 2020 and will enter into force on July 24, 2020"

Magdalena Rydel - Associate
Andersen in Poland
Member Firm of Andersen Global

1 Has the government adopted any restrictions on foreign investment during the COVID-19 crisis? What is the extension foreseen for the applicability of such measures? What are the sectors and the investment transactions affected or limited by the measures?

In response to the current situation created by COVID-19 epidemic, the Polish government decided to introduce a special procedure for controlling acquisitions of selected companies by entities from outside the EU / EEA / OECD.

These changes were reflected in one of the acts of the so-called Anti-Crisis Shield 4.0 - the Act of 19 June 2020 ("the Act"). The provisions of the Act governing control of acquisitions of selected companies will enter into force on July 24, 2020.

The Act provides for a period of 24 months protection against takeovers of companies by non EU / EEA / OECD entities, which could threaten security, public order and health due to the worsening economic situation caused by the COVID-19 epidemic.

The authority provided for this special protection is the President of the Office of Competition and Consumer Protection ("the President"). Investments made by the following entities outside the EU / EEA / OECD are subject to control:

- natural persons who are not citizens of an EU / EEA / OECD Member State, and
- entities other than natural persons, not possessed a registered office on the territory of an EU / EEA / OECD Member State for at least two years (before the date preceding notification required under the Act).

The special control procedure refers to companies with a registered office on the territory of Poland, additionally belonging to at least one of the following categories:

- a public company (listed at stock exchange),
- an entrepreneur who:
  (i) has property disclosed in the list of facilities, installations, equipment and services included in the so-called critical infrastructure;

(ii) develops or modifies the certain types of software (e.g. for plant control, management, control and automation of drinking water supply installations, etc.);

(iii) provides cloud computing data collection or processing services, or

(iv) conducts the business activity involving the certain industries specified in the Act (i.e. the energy, water, food, telecommunication, transport and traffic, health, and military sectors).

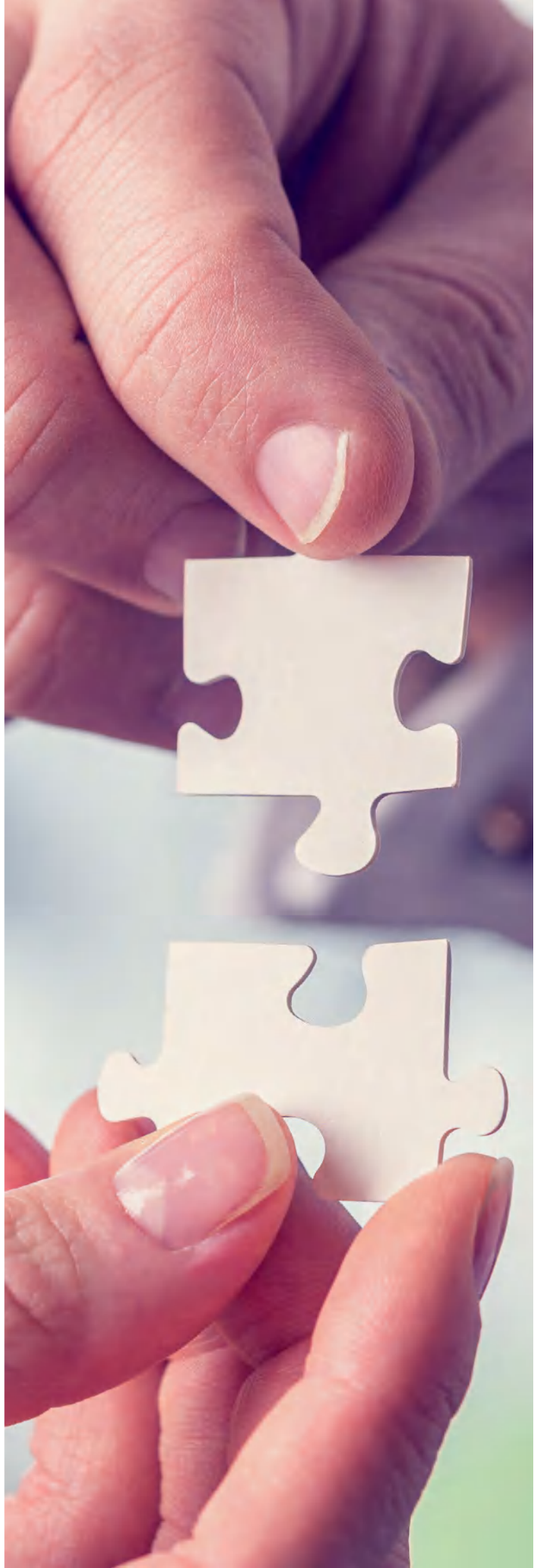
As long as the income from sales and services of these companies in Poland exceeded the equivalent of EUR 10,000,000 in any of the two financial years preceding the notification concerning the planned investment.

2 What is the procedure foreseen to obtain permission to carry out the restricted or limited investments, if any? Are there any other relevant requirements to be considered by potential foreign investors?

The control proceedings is initiated on the basis of a notification which the obliged entities (depending on the type of investment, it will be: a protected entity, an entity taking over/acquiring shares or an entity controlling it) shall submit, in the event of:

- an intention to acquire or achieve a significant participation (in principle, reaching or exceeding accordingly the 20% or 40% threshold of the voting rights, profits entitlement or capital share in case of partnerships, as well as acquiring or leasing from the protected entity the enterprise or its organised part);

- an intention to acquire a dominant position (which can be defined, in general, as the majority stake identified due to capital, personal or contractual links);



POLAND

- acquisition or achievement of significant participation;

- acquisition of dominance towards the protected entity.

Indirect acquisitions shall also be notified (the Act lists numerous connections that may exist between an entity from outside the EU / EEA / OECD and the actual investor), as well as subsequent acquisitions (i.e. resulting from the activities of the protected entity, e.g. amendments to the articles of association).

If there are indications of abuse or circumvention of the law, the proceedings may also be initiated ex officio. However, ex officio proceedings cannot be initiated, if 5 years have passed since the acquisition or achievement of a significant participation or domination.

The control proceedings is conducted by the President and consists of two phases:

- preliminary control proceedings (up to 30 days),

- control proceedings (up to 120 days), if the preliminary proceedings do not give rise to a decision on the absence of objections to the investment and the control will have to continue.

The President objects to the acquisition or achievement of significant participation or acquisition of dominance over the protected entity, if the entity submitting the notification fails to rectify the formal deficiencies or fails to provide the required explanations (formal reasons) or, if the transaction constitutes, even potentially, the threat for public order, security, public health or projects of EU interest (material reasons).

It is worth noting that the Act uses indefinite phrases in this respect (public order, security, public health, EU interest), which implies significant scope of discretionary power of the President. The decision of the President may be appealed to the administrative court.

3 What are the consequences foreseen in the event of non-compliance with the referred restrictions or limitations on foreign investment?

In principle, if the required notification is not made or the acquisition is made against the decision of the President opposing the acquisition, the achievement of a significant participation or the acquisition of dominance shall be null and void.

Acquisition or achievement of significant participation or dominance by an entity which has failed to make the required notification or a person acting on behalf of or for the favour of such an entity is subject to a fine of up to PLN 50,000,000 and a penalty of imprisonment from 6 months to 5 years (the penalties may be imposed jointly).

> No restrictions have been adopted by the Portuguese Government with regard to the foreign direct investments, due to the COVID-19 crisis. Consequently, the applicable regime remains unaltered and is reasonable to speculate that it will remain as such"

João Valbom Baptista - Associate
Andersen in Portugal
Member Firm of Andersen Global

1 Has the government adopted any restrictions on foreign investment during the COVID-19 crisis? What is the extension foreseen for the applicability of such measures? What are the sectors and the investment transactions affected or limited by the measures?

So far, no restrictions have been adopted with regard to the foreign direct investments, due to the COVID-19 crisis. Furthermore, the Portuguese Government, the political parties that support it and the main opposition parties have not yet claimed for the approval of such restrictions. Consequently, the applicable regime remains unaltered and is reasonable to speculate that it will remain as such.

Furthermore, the Government is in the process of implementing several measures, aimed to promote the internationalisation of the Portuguese economy, by fomenting the exports and by trying to attract foreign direct investment. Here are some examples:

(i) Financing the fulfilment of international orders, allowing companies to have liquidity to meet the demands of foreign customers;

(ii) Granting a tax benefit to internationalization;

(iii) Strengthening of the structural funds allocated to the digitalization of businesses, including the fomenting of e-commerce and digital business matchmaking;

(iv) Incentives to nearshoring strategies;

(v) One of the measures that the European Commission took in response to the pandemic was to allow the coverage of credit insurance policies to be extended to OECD countries as well. The global cap available for Portuguese companies has increased from 2 to 3 billion.

Foreign Investors may endeavour to negotiate fiscal contracts, to be approved by the Portuguese Government, by which there can be granted tax incentives or benefits for a period of up to ten years, under the condition that the investment achieves a set of goals. The projects must be relevant to the strategic development of the national economy, or contribute to boost national technological innovation and scientific research, to improve the environment or to strengthen competitiveness and productive efficiency.

2 What is the procedure foreseen to obtain permission to carry out the restricted or limited investments, if any? Are there any other relevant requirements to be considered by potential foreign investors?

Since no restrictions were introduced, no special permissions are required to carry out investments in Portugal.

The competent authority for the screening process is the member of Government who has legal competence to supervise the strategic assets that the investment can put at risk. However, it is the Portuguese Council of Ministers, under proposal from the said

member of Government, which has legal competence to act upon the results of the screening process.

As a matter of principle all investment operations may be subject to foreign investment screening under the general investment screening regime, provided they constitute a potential risk to the defence, security, energy, transport and telecommunications sectors' infrastructures, technologies, readiness, availability and other interests.

Investment in the military, banking, insurance and mass media sectors are screened in the context of specific screening regimes.

There is no need for the competent authority to be notified, before or after the investment. The investors can, however, prior to the investment, address the member of Government who has legal competence to supervise the strategic assets that the investment can put at risk and ask whether if the Government will oppose the planned investment.

That member of Government has 30 days to either start a screening process or to declare whether if the Government will not be opposed. If the member of Government fails to act within the said period, it is presumed that his/her answer is favourable.

A screening process may be commenced until 30 days after the investment, or after the investment becomes of the public knowledge if later, by initiative of the competent authority.

Upon the decision of opening a screening process, both the investor and the undertaking in which the foreign direct investment is planned or has been completed will be asked to provide information and documents.

Once all information and documentation has been provided, the Council of Ministers will decide if it opposes the investment, within 60 days. If the Council of Ministers fails to decide within the said deadline, it will be considered to have decided not to oppose the investment.

3 What are the consequences foreseen in the event of non-compliance with the referred restrictions or limitations on foreign investment?

As explained, no special restrictions have been put in place.

Consequently, the foreign direct investments in Portugal remain subject to a general rule of freedom, with the possibility of being subjected to a screening process.

The opposition from the Council of Ministers, at the end of a screening process, renders all agreements and operations related with the investment null and void.

In conclusion, the COVID-19 crisis has not yet provoked any changes in the rules applicable to foreign direct investments. ■

> The situation with the COVID-19 crisis was not a reason for the Government to change anything in the aspect of the foreign investment therefore there are not any requirements for the foreign investors which are related to the COVID-19 crisis situation"

Agron Curri - Associate
Pepeljugoski, Republic of Kosovo
Collaborating Firm of Andersen Global

1 Has the government adopted any restrictions on foreign investment during the COVID-19 crisis? What is the extension foreseen for the applicability of such measures? What are the sectors and the investment transactions affected or limited by the measures?

The contribution of foreign investment in the last three years in the economies of the Western Balkans is particularly significant, because it has affected the technological progress and knowledge transfer, job creation, and thus stimulating economic growth.

In the past period a huge part of the economic policies of the country were focused on attracting foreign investors, and lastly on suggestion of the Ministry of Economy and with the support of all members of the Government, the Law on Financial Support of Investments was adopted, which equalizes the treatment for domestic and foreign investors, and which in the most transparent way promotes the benefits that investors will receive if they decide to invest in Kosovo.

Therefore, the situation with the COVID-19 crisis was not a reason for the Government to change anything in the aspect of the foreign investment. Namely, the government didn't adopt any restrictions on foreign investment during the COVID-19 crisis.

In contrary, the economic measures that were taken by the Government in the past period for decreasing the economic effects of the crisis, did not exclude the foreign investments.

2 What is the procedure foreseen to obtain permission to carry out the restricted or limited investments, if any? Are there any other relevant requirements to be considered by potential foreign investors?

As explained, there are no restricted or limited investments referring the foreign investments in due to the COVID-19 crisis, therefore there is no procedure for obtaining permission, nor are there, any new and related to the COVID-19 crisis situation, requirements for foreign investors.

3 What are the consequences foreseen in the event of non-compliance with the referred restrictions or limitations on foreign investment?

As explained, there are no restriction or limitations on foreign investment at this moment in the country therefore there are not any consequences for non-compliance. In contrary for the whole time of the COVID-19 crisis the Government did not differ the foreign investments of the domestic firms in the taken economic measures and kept their value as an important part of Kosovo's economy.

"Romania has not designed specific restrictions on Foreign Direct Investment related to the COVID-19 crisis. However, Romania does have a general FDI screening procedure"

Horia Ispas - Partner
Țuca Zbârcea & Asociații, Romania
Collaborating Firm of Andersen Global

1 Has the government adopted any restrictions on foreign investment during the COVID-19 crisis? What is the extension foreseen for the applicability of such measures? What are the sectors and the investment transactions affected or limited by the measures?

The health emergency caused by the COVID-19 pandemic exposed structural vulnerabilities of various industries within the EU block and put pressure on many debt-ridden economies across the continent. In this context, some European governments implemented or announced legislative measures aimed at limiting potential harmful impact of FDI (generally defined as sourced outside EU / EEA), particularly in strategic sectors.

So far, Romania has not designed specific restrictions on FDI during or related to the COVID-19 crisis. Also, as local public agenda is focused on other matters (with both local and Parliament elections scheduled later this year), no such restrictions are expected in the near future.

However, Romania does have a general FDI screening procedure, as detailed below.

2 What is the procedure foreseen to obtain permission to carry out the restricted or limited investments, if any? Are there any other relevant requirements to be considered by potential foreign investors?

Pursuant to Romanian legal framework, a FDI screening procedure applies in case of transfer of the control over a company, a business or assets (as generally defined under competition law) in one of the industries deemed strategically important, namely:

- energy supply (this includes electricity, as well as oil & gas sectors);
- transportation;
- critical infrastructure;
- IT and communication systems;
- vital resources supply systems (e.g. water supply);
- financial, fiscal, banking and insurance activities;
- security of the citizens;

- security of borders;

- security of guns, ammunitions, explosives and toxic substances manufacture and movement;

- industrial security;

- protection against disasters;

- agriculture and the environment;

- protection of privatization operations of state-owned enterprises or their management.

The scope of the FDI screening procedure is to address potential threats to the national security via a control takeover in businesses activating in one of the abovementioned industries.

The Supreme Council for National Defense ("SCND") is the public authority competent to conduct the FDI screening procedure. From a procedural point of view, the process may be summarized as follows:

(i) The prerequisites triggering the screening procedure are the following:

- a change of control over the business (qualified as economic concentration under competition norms); and

- a transaction to be related to one of the sectors of interest for the SCND review.

There is no financial *de minimis* threshold for the screening to become applicable, but naturally, SCND will investigate big deals with strategic impact.

(ii) Typically, where a transaction is also subject to the antitrust clearance by Romanian Competition Council, the competition authority (and not the applicant directly) notifies the SCND concerning the intended transaction. The FDI screening and the antitrust clearance procedure will then be performed in parallel.

(iii) Where the transaction does not fall under the Romanian Competition Council clearance competence (e.g. either the transaction does not meet the turnover de minimis thresholds, or it falls under the clearance competence of the European Commission), the control acquirer makes the application to the SCND via the secretarial channel of the Romanian Competition Council (i.e. the application is filed with the Romanian Competition Council to be forwarded to the SCND).

Typically, completion is set conditional upon SCND approval / non objection on the proposed transaction.

(iv) A notification filed with SCND shall include details at least on (i) transaction type, structure and object; (ii) the parties; (iii) the sectors of activity of the parties and their market activities.

(v) Formally, if SCND finds risks for the national defense it shall make a proposal for prohibition of the concerned transaction and the Romanian Government shall issue a decision in that respect. Henceforth, that transaction is prohibited and cannot be completed.

(vi) There is no legally imposed maximum duration of the procedure. In practice, however, the overall SCND screening process is completed within 2 months (on average);

We note that, while SCND routinely performs screening operations, to our knowledge to date there is no public information on a transaction being actually banned further to such screening.

3 What are the consequences foreseen in the event of non-compliance with the referred restrictions or limitations on foreign investment?

As per the law, if a threat to national security is found, the SCND may propose to the Romanian Government to issue a Government Decision banning the transaction. If the procedure takes place in parallel with the merger control procedure, the SCND's resolution may block the local merger control clearance.

Unlike the merger control procedure where the competition authority may order administrative penalties in case of failure to follow the completion clearance procedure, the law is silent as regards the consequences for the failure to seek or obtain the approval under the SCND screening procedure.

Still, it may be inferred that if the SCND gives a negative resolution and the proposed transaction is banned by Government Decision, the transaction cannot be completed, or, if previously completed, it needs to be reversed.

No such cases occurred in practice so far. As noted above, based on the publicly available information, we are not aware of a case of SCND opposing a transaction subject to a FDI screening.

> The Republic of Serbia did not adopt any restriction in respect of foreign investment. All foreign investors are free to invest in accordance with the Constitution and applicable laws. Foreign investors enjoy the same position and have the same rights and obligations as domestic investors"

Srdjan Tolpa - Partner
Joksovic, Stojanovic & Partners, Serbia
Collaborating Firm of Andersen Global

1 Has the government adopted any restrictions on foreign investment during the COVID-19 crisis? What is the extension foreseen for the applicability of such measures? What are the sectors and the investment transactions affected or limited by the measures?

The Government of Republic of Serbia has declared state of emergency on 15th March 2020, that lasted until 6th May 2020. During that period, Serbian Government has adopted numerous measures and restrictions in order to prevent spread of the COVID-19 virus. Sets of restrictions were diverse, that included closing of the borders (with certain exceptions), curfew, prevention of group gatherings, mandatory quarantine for all persons coming from abroad, temporary ban on exports of basic products important to the population, etc.

Additionally, measures were taken also to preserve the stability of the financial system that included the obligation of the banks to offer delay in repayment of obligations (moratorium), deferral of payment of due tax liabilities, direct payments to companies through the payment of three minimum wages, preserving the liquidity of companies by providing favorable loans, etc. However, according to our knowledge, the government did not adopt any restriction in respect of foreign investment. Furthermore, to the best of our knowledge, there have not been any restriction related to payments abroad.

Foreign investors are free to convert the national currency into any freely convertible currency for payments related to their investment and to transfer abroad the funds resulting from their investment, in accordance with the applicable regulations.

Serbia continues to maintain and attract foreign investors. There is a set of regulations for the purpose of improving the investment environment in the Republic of Serbia and encouraging direct investment in order to strengthen economic development and employment growth.

The government ensured that during the COVID-19 crisis all governmental institutions continue to work without interruptions in order to maintain the operation of the companies to the possible extent and economy in general. We can only assume that there will be no restrictions in respect of the foreign investments, as it seems that the government continues to support and encourage foreign investments. ▶

2 What is the procedure foreseen to obtain permission to carry out the restricted or limited investments, if any? Are there any other relevant requirements to be considered by potential foreign investors?

As previously described, in the Republic of Serbia there have not been and currently there are no restrictions related to foreign investments. All foreign investors are free to invest in accordance with the Constitution and applicable laws. Foreign investors enjoy the same position and have the same rights and obligations as domestic investors.

Furthermore, Republic of Serbia provides significant incentives for direct investments.

Having in mind the aforementioned, foreign investors do not have to obtain any permissions for direct investments, whereas they may only consider if they meet the criteria for rather attractive incentives.

3 What are the consequences foreseen in the event of non-compliance with the referred restrictions or limitations on foreign investment?

As already mentioned, there are no restrictions related to foreign investments due to COVID-19 and thus no potential consequences.

At the moment there are also no limitations in force related to entry of foreigners into the Republic of Serbia, that existed during a certain period of time during the COVID-19 19 crisis. However, such restriction is subject to change depending on the COVID-19 situation. Other than the possible restrictions related to entry of foreigners into the Republic of Serbia, we do not anticipate any other restrictions that may have negative impact to foreign investments.

It may be concluded that the Republic of Serbia remains open to foreign investments during the COVID-19 crisIs and also endeavors to attract new foreign investments. This is supported by the fact that few new factories of international companies were opened and started working in June 2020, as well as that a few other international companies announced opening of production facilities in the Republic of Serbia. ■

> The Slovak government has not adopted any special restrictions on foreign investments that were triggered by the COVID-19 crisis

JUDr. Martin Jacko - Managing Partner
LANSKY, GANZGER + Partner (LGP), Slovakia
Collaborating Firm of Andersen Global

1 Has the government adopted any restrictions on foreign investment during the COVID-19 crisis? What is the extension foreseen for the applicability of such measures? What are the sectors and the investment transactions affected or limited by the measures?

The Slovak government has not adopted any special restrictions on foreign investments that were triggered by the COVID-19 crisis. Foreign investors are free to invest according to the EU legislation (free market rules) and according to the national law.

The COVID-19 impact on foreign investments could be caused only indirectly by measures adopted to slow down the spread of the virus, e.g. by restrictions on number of people that can visit some event or meet at one place (restaurants, sport and cultural events, hotels etc.) or by restriction of export of some specific goods, that are needed for the fight against the COVID-19.

As Slovakia has not adopted any restrictions on foreign investment during the COVID-19 crisis, on the contrary, the Ministry of Economics during this period came up with a call addressed to the business entities which plan to implement their investment in the less developed regions to submit their investment plans. During the following period, the Ministry of Economics plans to adopt direct investment incentives to these regions, particularly in the form of tax relief. In the case of direct subsidies for salaries or for the purchase of fixed investment assets it will be strictly assessed whether it is reasonable. The important criteria shall not only be the number of newly created jobs but also their added value. The Ministry of Economics has promised flexibility in the assessment of the applications for investment aid.

The government has also approved a package of 114 measures from the workshop of the Ministry of Economics. It is the largest package to improve the business environment and reduce administrative burdens.

In this context, it should be noted that Slovakia has prepared a set of economic measures, which were the response of the Slovak government to the consequences of the crisis situation caused by the spread of COVID-19. These were measures to mitigate the negative effects business entities operating the enterprises and restart the economy. ▶

2 What is the procedure foreseen to obtain permission to carry out the restricted or limited investments, if any? Are there any other relevant requirements to be considered by potential foreign investors?

In general, there are no restrictions or limitations on foreign investments in Slovakia. The specific permission may be required only if any company wants (both domestic and foreign) to export some specific health equipment, like pulmonary ventilators or respirators but only with the intention to secure sufficient resources for the domestic market and hospitals.

If there is no demand for such good on the domestic market, the Ministry of Economics shall issue the permission for export. Export restriction are not in force as general rules but are adopted with regards to the current COVID-19 situation.

3 What are the consequences foreseen in the event of non-compliance with the referred restrictions or limitations on foreign investment?

As explained, there are no restrictions or limitations on foreign investment at the moment therefore there are not any consequences for non-compliance. Both domestic and foreign companies are subject to national measures fighting against COVID-19 spread and are adopted or changed by state authorities with regards to the current COVID-19 situation (that can be changed daily). ■

A new screening mechanism on the grounds of public policy and public security was recently introduced which applies to all non-Slovenian investors (including EU investors) and will apply until 30 June, 2023"

Katja Šumah - Partner
Miro Senica and Attorneys, Slovenia
Collaborating Firm of Andersen Global

1 Has the government adopted any restrictions on foreign investment during the COVID-19 crisis? What is the extension foreseen for the applicability of such measures? What are the sectors and the investment transactions affected or limited by the measures?

Yes, a new screening mechanism on the grounds of public policy and public security was recently introduced with the Act Determining the Intervention Measures to Mitigate and Remedy the Consequences of the COVID-19 epidemic, which applies to all non-Slovenian investors (including EU investors) and shall apply until 30 June, 2023.

As foreseen in the legislation, the areas affected by this type of screening shall be those that may have an effect on:

- critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure or land and real estate which are near of such infrastructure,
- critical technologies and dual use items as defined in point 1 of Article 2 of Council Regulation (EC) No 428/2009, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies, nanotechnologies and biotechnologies as well as health, medical and pharmaceutical technologies,
- supply of critical inputs, including energy or raw materials, food security as well as medical and protective equipment,
- access to sensitive information, including personal data, or the ability to control such information,
- the freedom and pluralism of the media and projects or
- programs of Union interest as defined in Annex I of Regulation 452/2019/EU.

The threshold for screening is acquisition of at least 10% of participation in the capital or at least 10% of voting rights.

2 What is the procedure foreseen to obtain permission to carry out the restricted or limited investments, if any? Are there any other relevant requirements to be considered by potential foreign investors?

A foreign investor (or the target company, acquired company or the foreign investor's subsidiary in the Republic of Slovenia) must notify a foreign direct investment in the areas listed above to the Ministry of Economic Development and Technology no later than within 15 days after the conclusion of the merger contract, contract on purchase of real estate, decision on entry in the court register or the takeover bid.

The following information must be notified to the Ministry of Economic Development and Technology in Slovenian language:

- name and registered office of the foreign investor and the target company or the acquired company,
- annual turnover of the foreign investor and the target company or the acquired company,
- the total number of employees of the foreign investor and the target company or the acquired company,
- trading code of the securities of the foreign investor and the target company or the acquired company,
- the ownership structure of the foreign investor and the target company or the acquired company, including information on the ultimate investor and equity participation,
- value and source of foreign direct investment financing,
- products, services and business activities of the foreign investor and the target company or the acquired company (under the Nomenclature of Economic Activity classification),
- countries in which the foreign investor and the target company or the acquired company carry on relevant business activities,
- the date on which the foreign direct investment was to be completed or when it was completed,
- a contract regulated by the law of obligations, by which a foreign investor acquires the right of ownership over real estate.

The screening procedure is a procedure in which the Ministry of Economic Development and Technology decides whether a foreign direct investment in the listed activities is approved, determines the conditions for its implementation, or prohibits or cancels it if it poses a threat to the security or public policy of the Republic of Slovenia.

The Ministry of Economic Development and Technology, in determining whether the foreign direct investment may affect security or public policy, shall take into account in particular:

- whether the foreign investor is directly or indirectly under the control of the government, including state authorities or the armed forces of a third country, including through an ownership structure or substantial funding;
- whether the foreign investor has already been involved in activities affecting security or public policy in a Member State;
- whether there is a serious risk that the foreign investor is engaging in illegal or criminal activities.

The Ministry of Economic Development and Technology shall issue a decision no later than two months after the notification of the foreign direct investment.

3 What are the consequences foreseen in the event of non-compliance with the referred restrictions or limitations on foreign investment?

In case the Ministry of Economic Development and Technology does not approve the transaction on the grounds of public policy or public security, this results in the nullity of the merger contract, contract on purchase of real estate, decision on entry in the court register or the takeover bid. Foreign investor may file an appeal against such decision before the Government of the Republic of Slovenia.

Additionally, in case that the foreign investor does not apply for approval the fine can be amounted up to 500.000,00 EUR (fines depends on the size of the company and the fact whether the foreign investor is an individual or legal entity).

The Ministry of Economic Development and Technology may open the screening procedure on the grounds of public policy and public security in 5 years since conclusion of the contract, publication of the takeover bid or establishment of a company. ■

> Extraordinary measures have been taken with regard to certain foreign investments in Spain. In particular, the new legislation establishes the suspension of the prior existing liberalisation regime. Since from now, a prior authorisation will be required to carry out the investments"

Jaime Espejo - Partner
Andersen in Spain
Member Firm of Andersen Global

1 Has the government adopted any restrictions on foreign investment during the COVID-19 crisis? What is the extension foreseen for the applicability of such measures? What are the sectors and the investment transactions affected or limited by the measures?

The legislation approved by the Spanish Government during the COVID-19 crisis has caused a direct impact on foreign investments.

Royal Decree-law 8/2020, of March 17, supplemented by Royal Decree-law 11/2020, of March 31, takes urgent and extraordinary measures to reduce the socio-economic impact caused by the COVID-19 crisis in Spain. For this purpose, extraordinary measures have been taken with regard to certain foreign investments in Spain.

In particular, the new legislation establishes the suspension of the prior existing liberalisation regime, which required an ex post declaration of the foreign investment to the Investments Registry, if foreign investments affect, or may affect, strategic sectors of the economy and public powers, public order, security or public health-related activities.

Accordingly, the current article 7 bis of Law 19/2003, of July 4, on the legal regime of the capital movements and cross-border economic transactions, modifies the investment screening regime in some cases, since from now on a prior authorisation will be required to carry out the investments that we explain below.

The modification of the investment screening regime has been resolved for an indefinite term. It will remain in force until it is reversed by agreement of the Council of Ministers. There is no fixed period of validity. However, since this regime has an express temporary nature, it can be expected to be reversed when the circumstances justifying it disappear. This new legal regime applies to those foreign investments that take effect from March 18, 2020 (the date on which Royal Decree-Law 8/2020 comes into force).

For the purposes of the current legal framework, not only those investments executed directly by non-residents of the European Union or the European Free Trade Association ("EFTA") are considered as foreign investments, but it is extended to investments carried out by entities resident in areas which are actually owned by the ▶

non-resident of the European Union and the European Free Trade Association.

This beneficial ownership shall exist when the latter owns or ultimately controls, directly or indirectly, a percentage greater than twenty-five percent (25%) of the capital stock or the voting rights of the investor or, by other means, they exercise control, directly or indirectly, over the investor and provided that (i) the investor holds a stake equal to or greater than ten per cent (10%) of the capital stock or (ii) the investor effectively participates in the management of a Spanish company or in its control, all resulting from the investment.

The sectors and the investment transactions affected or limited by the measures are the following:

(i) Critical physical or virtual critical infrastructures (including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, as well as lands and real estate essential for the use of these facilities);

(ii) Critical technologies and dual-use items as defined in article 2 of Council Regulation (EC) 428/2009, of May 5;

(iii) Supply of essential inputs (e.g. energy, raw materials, food safety);

(iv) Sectors with access to sensitive information, in accordance with Spanish Organic Law 3/2018, of October 5, on the Protection of Personal Data and digital rights;

(v) Mass media.

In any case, it is envisaged in the new legislation that the Government may also suspend the liberalisation regime in sectors other than those mentioned above if they affect, or may affect, national security, public order or public health.

In addition, the former screening regime will be suspended in the event that the following subjective conditions are met:

(i) The foreign investor is controlled, directly or indirectly, by a third country Government;

(ii) The foreign investor has executed investments or participates in activities affecting security, public order or public health in another EU Member State;

(iii) Whether an administrative or judicial proceedings is conducted against the foreign investor in another EU Member State, in its country of origin or in a third country.

2 What is the procedure foreseen to obtain permission to carry out the restricted or limited investments, if any? Are there any other relevant requirements to be considered by potential foreign investors?

The new legislation establishes as a precondition that the investments described above shall require a prior administrative authorisation from the competent authority (i.e. the Council of Ministers), in accordance with the conditions set by the competent administrative authority (i.e. the regulator of the strategic sector concerned).

The authorisation should be submitted to the Directorate General of International Trade and Investments. The final decision will be made by the Council of Ministers, pursuant to a joint proposal from the Ministry of Economic Affairs and Digital Transformation and the Ministry of Industry, Trade and Tourism, and a report issued by the Foreign Investments Board.

Once the authorisation has been requested, the Council of Ministers is the only body with authority to grant or refuse the authorisation. If the Council of Ministers does not decide within six (6) months, it is understood the authorisation has been refused ("negative silence mechanism").

Additionally, the Second Transitional Provision of the Royal Decree-law 11/2020 establishes a simplified procedure temporarily in order to authorize the following foreign investments:

(i) Investments for which there is evidence of an agreement between the parties or a binding offer with a price set before March 18, 2020, which is the effective date of Royal Decree-law 8/2020, of 17 March; or

(ii) Investments of € 1,000,000 or more and less than € 5,000,000. Consequently, on a temporary basis, foreign investments below € 1,000,000 are excluded from the required prior authorisation.

Under this simplified procedure, the application for an authorisation must be submitted to the Directorate General for International Trade and Investment, which will decide whether to grant or refuse such authorisation.

It is important to note that the new legislation does not exclude or replace another authorisations or screening mechanisms that may apply to the transaction. In particular, the authorisation required by the Spanish National Securities Market Commission ("CNMV") or the Spanish National Markets and Competition Commission ("CNMC") will not be excluded for the relevant transactions.

3 What are the consequences foreseen in the event of non-compliance with the referred restrictions or limitations on foreign investment?

New article 7 bis of Law 19/2003, of July 4, has led to the modification of the applicable penalty system. The foreign investment transactions carried out without the required prior authorisation shall have no validity or legal effects.

In the event the obligation to apply the authorisation or any other established condition is not complied, as well as to carry out the investment before it has been authorised, it constitutes a very serious infringement. This breach may result in the following penalties: (i) a fine consisting of the economic value of the transaction (in any case, it will have a minimum of € 30,000) and (ii) a public or private warning.

> There are no limitations to invest in Switzerland and the Government grants bridge credit facilities to companies based in the country, regardless of the nationality of their owners"

Roberto Cavadini - Partner
Andersen in Switzerland
Member Firm of Andersen Global

1 Has the government adopted any restrictions on foreign investment during the COVID-19 crisis? What is the extension foreseen for the applicability of such measures? What are the sectors and the investment transactions affected or limited by the measures?

Swiss Government did not issue any specific rules restricting foreign investment during the COVID-19 crisis.

However, Federal Council adopted on March 25, 2020 the Joint Guarantees Emergency Ordinance COVID-19 (RS 951.261), granting bridging credit facilities to Swiss companies suffering from the COVID-19 crisis.This ordinance is applicable to companies having seat in Switzerland, regardless of whether the owners are residing in Switzerland or abroad.

Credit applications can be filed until July 31, 2020.

Affected companies can apply to their banks for a bridging credit facility for an amount up to 10% of their annual turnover and for no more than CHF 20 millions. Reimbursement is required within 5 years (extended to 7 in critical cases).

Credits up to CHF 0.5 mio are fully secured by Swiss Government and are paid out within short time, without particular bureaucracy. The part exceeding CHF 0.5 mio is secured 85% by Swiss Government, so that the risk for the lending bank is reduced to the remaining 15%.

The interest rate amounts currently to:

(i) 0,0% per year for the amounts up to CHF 0.5 mio and secured by Swiss Government,

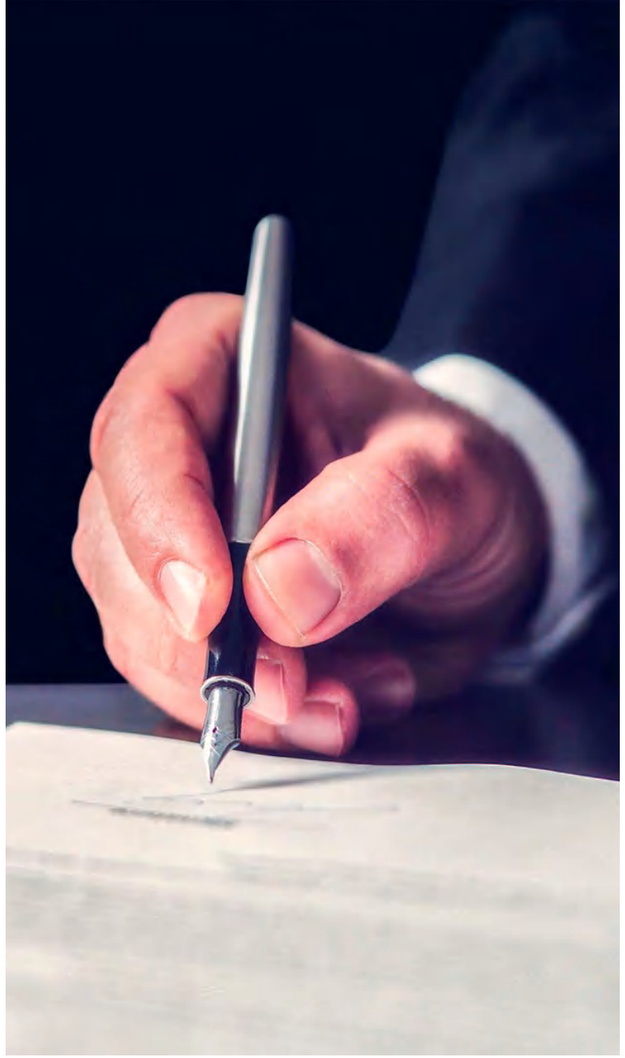
(ii) 0.5% per year for the amounts exceeding CHF 0.5 mio and secured by Swiss Government,

(iii) at the interest rate agreed with the bank for the part not secured by Swiss Government.

Swiss Government reserves the right to review the interest rate (i) and (ii) yearly, first time on March 31, 2021.

Companies, that apply for the bridging credit facilities, have the following obligations, for the time such facility is not reimbursed:

(i) they may not distribute dividends, tantièmes or reimbursement of capital contributions;



(ii) they may not grant financings, with some exception,

(iii) they may not reimburse group financing,

(iv) they may not transfer the credits jointly guaranteed by above ordinance to companies of the group, which do not have seat in Switzerland.

2 What is the procedure foreseen to obtain permission to carry out the restricted or limited investments, if any? Are there any other relevant requirements to be considered by potential foreign investors?

As said before Swiss Government did not issue any specific rules restricting foreign investment during the COVID-19 crisis. And as a general rule, there are no limitations to invest in Switzerland. Foreign investors (individuals or companies) may acquire participations or establish companies in Switzerland for pursue their businesses.

However, acquisition of real estate properties located in Switzerland is restricted by the Federal law on the purchase of real estates by person residing abroad (RS 211.412.41), irrespective if the purchase is done by a person residing abroad or by a Swiss company held by a person residing abroad. Purchase of any kind of flats, condominiums and apartments to be used as an accommodation is subject to such authorization. Properties used for commercial, industrial or trading activities are exempt. Our suggestion is to carefully verify before to purchase any real estate property in Switzerland.

A particular case is the purchase by a foreign investor of companies holding real estate properties. An analysis shall be done to determine if authorization is needed following modification of ultimate beneficiaries.

3 What are the consequences foreseen in the event of non-compliance with the referred restrictions or limitations on foreign investment?

In the event of non-compliance with the restrictions or limitations set out under paragraph 2 above, the purchase is not registered within the Land Registry till the authorization is not received. In some cases, the deed for the purchase of the real estate property is considered void or voidable.

A particular case is the purchase by a foreign investor of companies holding real estate properties. The company may be compelled to sell them.

The Ukrainian government has not adopted any COVID-19 related restrictions on foreign investments. Ukrainian law guarantees to the foreign investors the same legal regime for investment and other business activity as applied to the Ukrainian nationals"

Oleksandr Nikolaichyk - Partner
Sayenko Kharenko, Ukraine
Collaborating Firm of Andersen Global

1 Has the government adopted any restrictions on foreign investment during the COVID-19 crisis? What is the extension foreseen for the applicability of such measures? What are the sectors and the investment transactions affected or limited by the measures?

To our knowledge, the Ukrainian government has not adopted any COVID-19 related restrictions on foreign investments. In that respect, Ukraine still bases its foreign investment regulation on rather outdated legislation dating back to 1990s.

Generally, Ukrainian law guarantees to the foreign investors the same legal regime for investment and other business activity as applied to the Ukrainian nationals, unless specifically provided otherwise. In particular, non-residents can invest in Ukraine by setting up new companies or buying shares of the existing companies in Ukraine, and acquiring assets, including real property, goods, products and property rights, unless specifically prohibited by the law.

In terms of restrictions to the above general rule, there are sectoral restrictions, restrictions based on the investor's origin and restrictions related to the sanctioned investors.

The **sectoral restrictions** include the following:

- acquisition of a qualifying holding in a Ukrainian financial institution is subject to clearance of a relevant regulator, depending on the type of the financial institution (the National Bank of Ukraine for banks, financial and insurance companies, or the National Securities and Stock Market Commission for the stock market players, or the National Commission for State Regulation of Financial Services Markets for other financial institutions). This restriction applies both to domestic and foreign investors;

- Ukrainian law prohibits the following persons to own shares in television and radio broadcasting service providers: (i) individuals and legal entities registered in offshore jurisdictions, the list of which is designated by the Government; (ii) stateless persons; (iii) individuals and legal entities, which are residents of the state determined by the Parliament as a military aggressor state, as well as legal entities whose ultimate beneficial owners or shareholders are residents of such state; and (iv) political parties, professional unions, religious organisations and legal entities founded by them;

- foreign ownership in the informational agencies is restricted to 35 per cent in aggregate;

- foreigners, stateless persons, foreign legal entities and foreign states are prohibited from owning agricultural land in Ukraine;

- privatisation is prohibited in respect of certain sectors of economy (e.g., nuclear energy and nuclear waste management, production of weapons used by the state's armed forces, international airports, public railways);

- individuals and legal entities registered in offshore jurisdictions, the list of which is designated by the Government, the ultimate beneficial owners of which are not fully disclosed, cannot participate in the privatisation process as purchasers.

The investor's origin based restrictions are relevant for the residents of, and the legal entities controlled by the residents of, a state that is carrying out aggression against Ukraine or creates by its actions conditions for emergence of an armed conflict or use of military force against Ukraine.

To that effect, Ukrainian law precludes such investors from acquiring control over legal entities which carry out a licensed type of activity (except for banking, tele- and radiobroadcasting and production and trade of alcohol and tobacco products), as well as from participating in the privatisation process as purchasers.

Finally, individuals and legal entities which are subject to Ukrainian sanctions are further limited in use of their property and participation in privatisation and provision of services. They are also precluded from obtaining approval of the Antimonopoly Committee of Ukraine for concentration. The antitrust restriction applies also to all individuals/entities connected to such sanctioned investors by the relations of control.

At the same time, the law-making activity has speeded up during the COVID-19 crisis, which resulted in several investment-related laws being proposed or even adopted, including:

- the Law of Ukraine "On Capital Markets and Organised Commodity Markets" which significantly revised the securities and stock market regulations and introduced (i) a notion of qualified (professional) investors in line with the EU regulations (notably, MiFID I/II) and, respectively, amended regulation of OTC capital markets; (ii) new financial instruments; (iii) new rules on acquisition of a holding in a professional participant of

capital markets and organised commodity markets; and (iv) rules to impose restrictions on transactions with financial instruments for unqualified investors;

• the draft Law "On Joint Stock Companies", which restates the regulation on joint stock companies, introduces optional one-tier corporate governance structure, remote shareholders' meetings, sets out new standards for fiduciary duties of the companies' managers.

The Ukrainian government also drew up other draft laws. However, they have not yet been submitted to the Parliament and, therefore, it is early to make any assumptions.

2 What is the procedure foreseen to obtain permission to carry out the restricted or limited investments, if any? Are there any other relevant requirements to be considered by potential foreign investors?

Since no COVID-19 related restrictions on foreign investments have been introduced, no additional permissions are required to carry out investments in Ukraine.

3 What are the consequences foreseen in the event of non-compliance with the referred restrictions or limitations on foreign investment?

As mentioned, there are no restrictions or limitations on foreign investments in Ukraine due to the COVID-19 crisis. ■

Opinion

'Cuba: A Year of the Helms-Burton' by Ignacio Aparicio, Partner at Andersen in Spain and Coordinator of the Corporate Legal Service Line for Andersen in Europe

'Force Majeure Clauses and the COVID-19 Pandemic: The Portuguese Case' by João Valbom Baptista, Associate at Andersen in Portugal

Cuba: A Year of the Helms-Burton

Ignacio Aparicio - Partner
Andersen in Spain
Member Firm of Andersen Global

To deny that the coming into force of Title III of the Helms-Burton Act (1996) has strengthened the U.S. blockade of Cuba would be to deny the evidence.

As you will remember that title allows lawsuits to be filed in U.S. federal courts against those who "traffic" in property confiscated from Americans in Cuba after Fidel Castro's revolution. Its application was suspended by the Clinton, Bush, Obama and Trump administrations, although the latter lifted the suspension on May 2nd 2019.

One year later, we can affirm that Trump's "star" measure in relation to Cuba has had an effect, not in terms of the number of lawsuits filed, but in terms of companies rethinking their business decisions on the island, taking more than ever the risk of being sued in the U.S. for possible "trafficking" with confiscated/nationalized goods into account. Financial institutions have also reduced their exposure in their transactions and those of their clients with the Island.

Accompanying the Helms-Burton, the Trump Administration has adopted other measures against Cuba: restrictions on travel to the United States; reductions in remittances to $ 1,000 per person per quarter; interdiction of certain financial transactions; inclusion of new entities on the Cuba Restricted List ("black list" on which there is a ban on trade with the United States); sanctions against Venezuela that affect Cuba financially, etc.

With six months to go until the presidential elections (3rd November 2020), sources point to further measures against Cuba. Florida, with many Cuban exiles, is a Republican stronghold that Trump needs to revalidate.

On May 13th, the State Department registered Cuba under the Arms Export Control Act for not having "fully cooperated" in 2019 with the U.S. anti-terrorism efforts. Although this qualification has little practical effect, since it prohibits Cuba from purchasing defence goods and services (which it had not been doing), it could be the prelude to its inclusion in the list of countries sponsoring terrorism, a list from which Obama removed it in 2015. This would mean, among other things, the persecution of financial transactions between Cuba and banks in third countries, with the imposition of multimillion-dollar fines, as was the case of BNP Paribas in 2014, and further cooling down foreign investments and business.

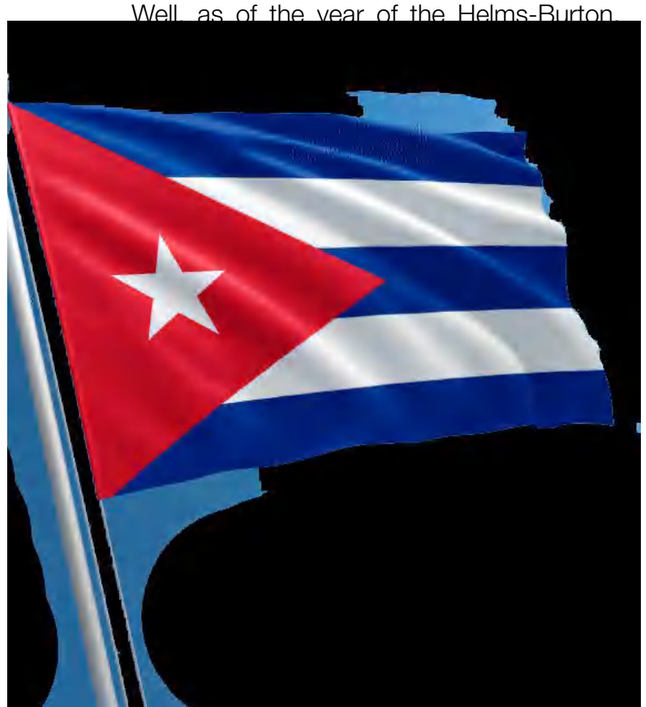
It has undoubtedly been a complicated year for Cuba, and the unforeseen consequences of COVID-19 on the world and Cuban economy, with its heavy dependence on tourism, are still to be added up.

Quantifying the direct impact of Helms-Burton on Cuba is a complicated thing to do. What can be concluded, in view of the statistics, is that this year there has not been the barrage of lawsuits that the State Department predicted.

According to the numbers provided by the U.S.-Cuba Economic and Trade Council, only 0.15% of the 5,913 claimants who once obtained a certified claim from the U.S. Foreign Claim Settlement Commission (FCSC) have sued on Helms-Burton grounds.

Although it is not only possible to sue based on a certified lawsuit, it would be these "certified" claimants who would a priori best be able to justify their entitlement. Let us remember that the FCSC has been aware of lawsuits by U.S. citizens against foreign governments over the years. The programs against Cuba heard a total of 8,821 claims, of which 5,913 were considered compensable ("certified").

Well, as of the year of the Helms-Burton



200,000 potential defendants were expected to be involved in claims that had already been certified and those that had not.

Another fact to keep in mind is that almost half of the defendants are American companies and only two Cuban companies are still being sued. Among the U.S.-based defendants were Amazon, American Airlines, Carnival Corporation, Expedia, Mastercard, Norwegian Cruise Lines, Orbitz, Royal Caribbean Cruises, Tripadvisor and Visa.

However, Amazon has ended up being excused (pending appeal) in the proceedings by Daniel A. Gonzalez for trading in coal from the farm confiscated from his predecessor, because of two issues that are being alleged in a very recurrent way: the difficulty of proving the legitimacy to sue (property title or inheritance right over the property), and that the trafficking has been carried out, as required by Helms-Burton, in a conscious and intentional way (knowingly and intentionally).

Spain is the European Union country with the most companies being sued (NH, BBVA, Meliá and Iberostar) and, in total, outside the U.S., nine other countries have been affected: Germany, Canada, Chile, France, the Netherlands, the United Kingdom, the Republic of Cuba, Switzerland and Thailand.

In view of this uncertainty, the EU's reaction cannot be said to be effective. Regulation 2271/96 protects its nationals from the effects of Helms-Burton on European territory, but this protection does not extend to the assets or interests that the affected parties may have on U.S. territory.

In conclusion, the assessments of the lawsuits under Helms-Burton this year will not have been what Trump expected and the political price paid will have to be analysed. However, we will have to wait for events, the outcome of the lawsuits, the next steps taken by the U.S., as well as the outcome of the U.S. elections which may mark another milestone in U.S.-Cuba relations.

Force Majeure Clauses and the COVID-19 Pandemic: The Portuguese Case

João Valbom Baptista - Associate
Andersen in Portugal
Member Firm of Andersen Global

The COVID-19 pandemic is an event with very significant economic impacts on the agreements concluded by companies, especially because it calls into question the ability of contractual parties to satisfy contractual obligations. Although it is not possible to understand, at this moment, all the consequences that may arise from the pandemic crisis, it is already possible to verify the multiplication of cases that can be studied.

The analysis of this problem must be framed within two limits: both the contractual regulation (the force majeure clause itself) and the legal rules established by the Portuguese governmental entities approved in the context of COVID-19 pandemic (e.g. the declaration of a state of emergency, moratorium concerning loan agreements, moratorium regarding lease agreements, etc…).

The establishment of a force majeure clause in commercial agreements is common practise, namely, in context of international commercial agreements. The first and more significant step to approach the problem is the interpretation of the clause itself in order to verify if the COVID-19 pandemic (strictly speaking, any pandemic) is listed as force majeure event. This matter may give rise to interpretation challenges given the nearly unprecedented nature of the COVID-19 pandemic and the governmental measures, through the passing of various laws. Even considering the importance of these measures, it is doubtful that contractual parties are protected from the consequences of contractual breaches (in definitive or temporary, total or partial terms).

In this article we will have the chance to also briefly highlight situations in which the contractual relationship established between the parties does not provide for a force majeure clause, which implies the application of the Portuguese Civil Code.

The Situations of Application of the Force Majeure Clause

(i) The concept of force majeure

A force majeure event constitutes an unpredictable, irresistible and beyond the control of the debtor situation, which makes the obligation impossible to be performed, even if temporarily. It must be understood that the impediment is beyond the control of the debtor, that is, this contractual party could not reasonably foresee that the event would occur at the moment of the conclusion of the agreement. Also, it must be concluded that the effects of the event could not be avoided or overcome by the debtor.

It should be noted that the situations included in the force majeure clause are situations of impossibility and not situations where it can be verified a significant increase (even if excessive) of the efforts that the debtor has to incur to perform the contractual obligation, under the terms initially established. In abstract, these last situations can also be prevented by the parties through hardship clause (or even be subjected to the general institute of the change of circumstances); however, these clauses are situated in a different field from force majeure. The situations to be addressed in this article relate to circumstances of unpredictable impossibility that are beyond the control of the parties and, in particular, the debtor. As in the case of the COVID-19 pandemic, the discussion will always take place having as background an extraordinary event that determines situations of physical or legal impossibility.

As a consequence, the party that foresees a situation in which there is a risk of not performing the contractual obligation due to shortening of staff due to quarantines self-imposed or imposed by governmental instructions or due to a significant break in the supply chain, must, respectively, if legally possible, seek for more labour force, and look for alternative ways to acquire the assets/materials needed to guarantee the performance of the obligations. This conclusion is applicable even if it implies a significant increase in costs. Such situation may lead to the application of a hardship clause or the legal regime of the change circumstances, however, this hypothesis is not the subject of this article.

As we will approach below, force majeure clauses may allow parties to not be liable for failures or delay in performance of their obligations caused, directly or indirectly, by circumstances beyond their reasonable control.

(ii) The interpretation of the clause

When the parties have established a force majeure clause, the analysis of the problem must be performed on a case by case basis, namely, to understand whether, based on the clause drafting, a pandemic is foreseen as force majeure event.

The drafting of force majeure clauses may have several configurations.

Apart from situations where the clause combines a specific list of force majeure events and an element that suggests the non-exhaustive nature of the events listed or that allows for a comprehensive interpretation, parties may opt solely to establish a list of specific events. This list may be intended to be exhaustive or non-exhaustive and normally includes events such as earthquakes, fires, floods, wars, civil or military disturbances, acts of terrorism, sabotage, strikes, riots, power failures, etc. One of the commonly foreseen force majeure events listed in the clauses are epidemics and/or pandemics. In these cases, the interpretation of the clause is easily achievable. In simple terms, the interpretation can only have two results: either the pandemic or some effect resulting from it are foreseen and the force majeure clause is applicable; or not, and in the latter case it is difficult to argue that it can be applied.

In case the events listed are not exhaustive through the inclusion of a word suggesting it or when undetermined concepts are used (“events beyond parties’ reasonable control”), the difficulties in interpreting the clause increase significantly. In these cases, it is essential that an interpretation of the clause is made taking into account the

object of the agreement to understand if the hypothetical will of the parties includes or not an event such as the COVID-19 pandemic, which will always be dependent on the nature and object of the obligation. Furthermore, the application of force majeure clause requires a demonstration that the failure to comply is a consequence of the effects of the pandemic.

In summary, the party claiming the occurrence of a force majeure event must demonstrate three assumptions:

- The occurrence of the event has a causal connection with a situation of permanent or temporary impossibility to perform the obligation;

- The event is not / could not be controlled by parties; and

- No measures could have been taken to prevent or mitigate the effects of the event.

Thus, in the abstract, it is plausible to consider that the SARS-CoV-2 viral outbreak may be a force majeure event. On the other hand, although the pandemic is the primary cause of situations where it is impossible to perform obligations, the clause must be assessed to determine whether there are any effects arising from the existence of the pandemic which, itself, are already force majeure events (e.g. cancellation of transport, closing of borders due to travel restrictions, mandatory quarantines, etc.).

(iii) Accessory obligations arising from the lawful application of the force majeure clause

In case a force majeure clause is applicable, the party that benefits from it (that is, the party that cannot perform the obligation), maintains some typical obligations in order to ameliorate the effects of the failure or delay on the counterparty legal situation.

These obligations typically include the obligation to notify the counterparty of the

particular event that has taken place, due to the pandemic, so that the pandemic causes the least possible loss related to the non-compliance with an obligation that it legitimately expected.

(iv) Typical effects of the application of the force majeure clause

The typical effect of applying the force majeure clause is to discharge the obligation (even if temporarily) from the obligation of the debtor.

Thus, a distinction must be made as to whether the COVID-19 pandemic or its effects, regarding the compliance with the contractual obligation, are temporary or definitive. In the first case, typically, there will be a suspension of contractual execution during the impediment period. The debtor is only obliged to perform the obligation when the event that generated the impediment ceases.

On the other hand, if the impossibility is definitive, the question arises whether the contract can be terminated. In any case, being a case of impossibility, the debtor will not be obliged to indemnify the creditor due to contractual default.

(v) Non-application of the force majeure clause

If the assumptions aforementioned are not verified, the first remedy should be found in the contractual regulation.

One of the routes may be the application of a hardship clause. Unlike what happens in the case of force majeure, the matter to be addressed is not a situation of impossibility. In fact, the question to be discussed is whether the performance of the obligation has become excessive, given the contractual equilibrium, as it appears to be disproportionate to require the debtor to comply with the obligation under the agreed terms.

(vi) Non-establishment of the force majeure clause

On the other hand, if the agreement does not provide express regulation on this issue, the applicable law will have to be applied. The applicable rule depends on the particular contractual regulation and the impact that the COVID-19 pandemic had on the contractual legal relationship.

In abstract, there are two legal regimes that can be applied: i) the force majeure / impossibility of performance (articles 790 and ff. of the Civil Code); and the regime of the change of circumstances.

Regarding the first case, the applicable rules relate to situations of permanent and temporary impossibility and absorb the assumptions related to the application of force majeure clauses mentioned before.

However, there may be reasons to apply articles 437 and ff. of the Civil Code. This solution is reserved for situations when the circumstances in which the parties based the decision to conclude an agreement have experienced an abnormal change. The debtor may have the right to terminate the agreement, or to modify it according to a fairness criterion, provided that the performance of the obligation in cause seriously affects the principle of good faith and is not covered by the agreement inherent risks.

This magazine provides an overview, compiled by the member and collaborating firms of Andersen Global, of the restrictions on foreign investment implemented in specific European countries in response to the COVID-19 crisis.

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