Changes to investment projects and state aid

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This article examines what happens to state aid when investors change their investment projects during implementation. We propose legislative changes to improve legal certainty for both the investors and the state.

A new investor in town
The selection of an investment destination sometimes resembles courtship; investors try to obtain the most favorable conditions and governments present themselves as attractive investment destinations. To make a project look good and in order to receive more support from the state, investors are sometimes over-optimistic about the size of their investment or the number of new jobs they will create.

Investors applying for investment aid in Slovakia must submit a business plan for the project. As with any plan, it will be full of estimates and assumptions about the future development of the project. However, when the investor is awarded a state aid package, the estimates from the business plan become conditions set out in a decision of a state authority (the Ministry of Economy) that is legally binding and enforceable. Suddenly, the power dynamics between the state and the investor change. A relationship between two equals turns into one where the state may enforce its interests with help from the courts and other authorities.

How many projects turn out exactly as planned?
It comes as no surprise that investment projects, even those prepared with impeccable care, may not evolve according to plan. Problems with the purchase of land plots, delays due to contractors, bureaucracy, labor shortages, market changes, and financial crises are just a few examples of problems that an investor may face. In light of all this, changes to investment plans are common and may be almost inevitable.

Lack of regulation prior to 2011
In Slovakia, investment aid is granted on the basis of a decision setting out the types and amounts of investment aid (e.g. cash grant of €5 million and tax relief of €10 million) and the conditions under which the aid is granted (e.g. the investor must invest at least €50 million and create 500 new jobs). Until 2011, the law did not expressly permit a change of an investment aid decision. Therefore, it was unclear what the investor should do if a project could not be implemented according to the plan and how the authorities should react.

Bad regulation: worse than no regulation
In 2011, provisions allowing the Ministry to change its investment aid decisions were finally introduced into the Investment Aid Act. Unfortunately, this seemingly positive change made the situation even worse as the new provisions stated that any significant change to a project meant that all investment aid must be returned.

The government realized that this was not the right way forward and amended the Investment Aid Act again in 2013. The 2013 amendment (currently in force) recognizes the following scenarios for dealing with changes to an investment project:

- If the changes have no impact on the conditions under which the investment aid was granted, the Ministry merely notifies the investor without issuing a decision.
- If the changes have an impact on the conditions under which the investment aid was granted and are in accordance with the regulations on the granting of investment aid, the Ministry allows these changes by issuing a decision amending the original decision on the approval of investment aid.
- If the changes have an impact on the conditions under which the investment aid was granted and are not in accordance with the regulations on the granting of investment aid, the Ministry issues a decision cancelling the original decision and the investor must return the entire investment aid provided.

> ” Investors have very little legal certainty as to what changes of their projects are allowed.

Uncertainty and open issues
The current version of the law is certainly an improvement, but still leaves a lot to be desired. For instance, it is unclear whether the Ministry may approve a change that has already been implemented. While it is understandable that the Ministry wants to be informed of changes before their implementation, in our opinion, there is no reason why the investor should lose all of the investment aid granted if the implemented change is in line with state aid rules.

Furthermore, the Investment Aid Act takes an ‘all or nothing’ approach, i.e., that the investor either keeps all of the granted state aid or loses everything. In our view, the rules should be much more flexible. For instance, if an investor creates 80% of the promised jobs, we see no reason why the investor should lose the entire amount of investment aid if its factory is operating and employing workers. It would make more sense if the investor returned only a proportional part of the aid and kept the rest.

Last but not least, investors have very little certainty as to what changes are allowed. The Investment Aid Act contains a list of changes that are prohibited, but in reality a much greater variety of changes does (and will) occur.

Inevitably, investment projects will always be subject to change. While the Investment Aid Act has been improved with each amendment, we believe that a fundamental change of the approach of the state authorities is desirable, so that the procedure for approving changes to investment projects becomes more flexible and predictable. The ideal scenario would entail signing an investment agreement with each investor. In most cases, this would mean that the rules would be clearly set out and tailored to the specifics of each project. However, since the transaction costs of negotiating so many investment agreements could be excessive, a more viable alternative would be for the government to prepare (ideally in cooperation with the industry and other stakeholders) detailed guidelines for an assessment of changes to investment projects. Such guidelines should cover a much larger number of potential scenarios than those currently stated in the Investment Aid Act, while remaining flexible by setting out principles applicable to situations that cannot be foreseen.