

Imminent entry into force of the law introducing the screening mechanism for foreign direct investment in Luxembourg

On 13 June 2023, the Chamber of Deputies voted Bill No. 7885, establishing a national screening mechanism for foreign direct investment (“FDI”) that may affect security or public order for the purposes of implementing Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019, establishing a framework for the screening of FDI in the European Union, as amended (“Regulation”).



This new law, dated 14 July 2023 (“law”), came into force on the first day of September 2023 – under this law, Luxembourg is putting in place a national mechanism that will enable the authorities to filter any FDI that gives a foreign investor control of an entity governed by Luxembourg law, carrying out a critical activity and which, as a result, may threaten Luxembourg’s security or public order.

A national screening mechanism enabling intra-European cooperation

The law provides, on the one hand, for a screening mechanism, its operation and related provisions (including the establishment of an inter-ministerial FDI screening

committee and a group of experts), and, on the other hand, for an intra-European cooperation mechanism, as provided for by the regulation.

Over the past several years, the European Union has become a leading destination for FDI. Although the various beneficial effects of FDI on, *inter alia*, the economy, growth, innovation and employment are well documented, new risks inherent in such investments have emerged: in particular, the critical risk that public companies in EU Member States become linked to and controlled by foreign governments.

To address this threat, which could affect the competitiveness of European businesses and the security and public order of EU Member States, the regulation was adopted in 2019 and has been applicable since 11 October 2020.

The European FDI screening framework does not replace the national screening mechanism of each of the EU Member States, but it simply provides them with the appropriate legal basis to establish their own FDI screening mechanism. EU Member States, in order to protect their security or public order, have the exclusive right to decide whether or not to screen a FDI, while complying with a number of provisions laid down in the above mentioned regulation.

An ex-ante procedure requiring support for foreign investors

In the same way as the procedure already in place in some EU member states, e.g. France, the law provides that the screening mechanism will take place before the investment is made. In other words, a foreign investor¹ will have to notify the Ministry of Economy of its intention to make a FDI² (i) if the contemplated FDI could allow such foreign investor to have control over the concerned Luxembourg entity or to exceed, directly or indirectly, a threshold of 25% of its share capital and (ii) the activity carried out by the concerned Luxembourg entity is considered as one of the critical activities defined by the law, i.e. activities in the energy, transport, water, health, communication, data processing or storage, defense, media finance or in the trade of so-called dual-use goods, which may

¹ According to Article 3 of the law, a “foreign investor” is defined as “a natural person or an entity under foreign law who is not a national of a Member State of the European Union or of a State party to the Agreement on the European Economic Area other than a Member State of the European Union and who intends to make or has made a foreign direct investment”.

² According to Article 3 of the law, a “foreign direct investment” is defined as “an investment of any kind made by a foreign investor, acting alone, in concert or by interposition and which serves to create or maintain lasting and direct relations between the foreign investor and the entity governed by Luxembourg law for which the funds are intended, thereby enabling the foreign investor to participate effectively in the control of this entity with a view to carrying out an activity in the Grand Duchy of Luxembourg listed in Article 2 of this law”.

therefore have both civilian and military use but also research activities, production activities related to critical activities, or to sensitive information concerning the related activities.

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