A NEW NATIONAL SCREENING MECHANISM FOR FOREIGN DIRECT INVESTMENTS

A new law dated 14 July 2023 establishing a national screening mechanism for foreign direct investments that may undermine security or public order for the purpose of implementing Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for screening foreign direct investments in the Union, as amended, has been published in Memorial A411 on 18 July 2023.

Its entry into force is scheduled for 1 September 2023. The government announced that a page dedicated to the screening of foreign direct investments will be published on Guichet.lu in the coming weeks to help concerned investors in complying with this process.

In a nutshell, the new law defines 12 critical sectors for which notification to the Ministry of Economy is mandatory prior to effecting a foreign direct investment leading to a controlling stake. The Ministry has then up to 2 months to either give a green light or to go into a second phase of an additional 2 months for deeper screening, leading either to a final green light or a prohibition. For all the other non-listed sectors, which form the vast majority, there will be no notification obligation for foreign investors, and nothing changes from the present situation.

Regulation (EU) 2019/452 has three main objectives to better protect the Union's critical infrastructure and technologies.

One of them empowers the Commission to issue opinions on foreign direct investments (FDI) which may affect projects or programmes of interest to the Union, or which constitute a threat to the security or public order of more than one Member State. This first objective concerns Luxembourg only insofar as projects financed by the European Union are planned in Luxembourg. The annex to Regulation (EU) 2019/452 contains a list of EU projects and programmes that may be affected by FDI based on security and public order.

Above all, however, Regulation (EU) 2019/452 creates a mechanism for intra-European cooperation, allowing for the exchange of information and concerns regarding FDI. In short, the regulation allows one Member State to approach another Member State when the latter is planning to host or has hosted an investment that the former considers potentially harmful to its own strategic interests.

This cooperation mechanism distinguishes between FDI that is screened by Member States and that which is not. Unlike the cooperation mechanism for screened FDI, which provides for automatic notification to other Member States and the Commission, a Member State that does not screen a given investment will not be obliged to inform others that an FDI is taking place on its territory. However, such a Member State may, at any time, be subject to a request for information on an FDI planned or already carried out within the last 15 months and must, without undue delay, make the information available to applicants. In both scenarios, Member States and the Commission will be able to provide comments and opinions in relation to an FDI planned in another Member State and the latter will have to take due account of them. They may request information on the investment and any other information deemed relevant. Such

requests for information will have to be duly justified, limited to the information necessary to make comments, proportionate and not unduly burdensome for the Member State in which the investment is made or envisaged.

Finally, Regulation (EU) 2019/452 provides the appropriate legal basis for the establishment of national screening mechanisms and sets out some ground rules.

Accordingly, this law not only contains provisions relating to the intra-European cooperation mechanism but also establishes a national screening mechanism in the form of an inter-ministerial structure under the joint chairmanship of two Ministers. It was decided to give this responsibility to the Minister having the Economy in his attributions, in charge of the economic policy of the country and the Minister having Finance in his attributions, in charge of the policy regarding the financial sector and the development of the financial center. This structure includes the establishment of an inter-ministerial investment screening committee, which will present its opinion to both Ministers for decision. This committee will be set up by Grand-Ducal decree and should include representatives of the Ministry of State, the Ministry of Foreign and European Affairs, the Ministry of Finance, and the Ministry of the Economy. Representatives of the ministries responsible for the sectors concerned by the planned investments should be invited on an ad hoc basis. Thus, any ministry concerned by an investment falling within its competence should be fully involved in the file concerning it, in the same way as the permanent members of the inter-ministerial investment screening committee. A group of experts appointed to bring together knowledge in their respective fields of expertise will prepare the decisions of the inter-ministerial investment screening committee. Its composition will reflect the composition of the inter-ministerial committee for each specific case and will therefore vary according to the sectors affected by the investment projects.

I. Scope

The national screening mechanism applies to FDI (other than portfolio investments), which are likely to be detrimental to security or public order, in an entity incorporated under Luxembourg law carrying out critical activities in Luxembourg.

The law defines FDI as "*an investment of any kind made by a foreign investor, and which establishes or maintains lasting and direct relations between the foreign investor and an entity governed by Luxembourg law for which the funds are intended, thereby enabling the foreign investor to participate alone, in concert or through an intermediary, in the control of this entity carrying on, in the Grand Duchy of Luxembourg, an activity listed in Article 2*". A portfolio investment is defined as "*an acquisition of securities of an entity governed by Luxembourg law made with the intention of making a financial investment, and which does not enable the foreign investor to exercise, directly or indirectly, control of the entity governed by Luxembourg law*".

As mentioned above, the law also defines the 12 critical sectors for which notification is mandatory: some aspects of export controls, energy, transport, water, health, communications, data processing and storage, aerospace, defence, finance (central bank), media, and food-processing.

II. Procedure

The procedure is divided in three steps:

1) Notification

The foreign investor shall provide the Minister with the following information:

- the ownership structure of the foreign investor and of the Luxembourg-registered entity prior to the realisation of the FDI or as a result of events that have changed the distribution of capital in accordance with Article 5, paragraph 3, including information on the beneficial owner (as defined in Article 1, paragraph 7 of the amended Act of 12 November 2004 on the fight against money laundering and terrorist financing), and the capital holding;
- the approximate value of the FDI;
- the products, services and commercial operations of the foreign investor and the Luxembourg entity;
- the countries in which the foreign investor and the Luxembourg entity conduct business activities;
- the financing of the FDI and its source; and
- the date on which the FDI is planned or has been made.

The Minister shall decide whether the FDI shall be subject to a screening procedure. This decision shall be taken within 2 months from the date of the acknowledgement of receipt of the original notification from the foreign investor.

2) Screening

In determining whether a FDI is likely to affect security or public order, consideration shall be given to its potential effects on:

- the integrity, security and continuity of supply of critical infrastructures, whether physical or virtual, linked to the activities referred to in this law;
- the sustainability of activities related to critical technologies and dual-use goods within the meaning of Article 2(1) of Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, as amended;
- supply of essential inputs, including raw materials, and food safety;
- access to sensitive information, including personal data, or the ability to control such information; and
- freedom and pluralism of the media.

The following may also be considered, especially the facts that:

- the foreign investor is directly or indirectly controlled by the government of a third country, including public bodies or the armed forces;
- the foreign investor has already been involved in activities that undermine security or public order in a Member State; and
- there is a serious risk that the foreign investor is engaged in illegal or criminal activities.

The duration of the screening procedure must not exceed 60 calendar days after its initiation.

3) Authorisation

The screening decision is taken by the Minister on the advice of the inter-ministerial investment screening committee which will be set up by Grand-Ducal decree. The foreign investor shall be notified in writing of the screening decision before expiry of the 60 calendar day period.

Authorisation of a FDI may be subject to conditions, which are determined in the light of the screening factors and are designed to ensure that the planned FDI does not undermine security or public order. In that case, the foreign investor must report on the implementation of these conditions.

III. Sanctions

If a FDI has been made without a notification or without authorisation obtained under the screening decision, the Minister may suspend the exercise of voting rights attached to the FDI and conferring control of the Luxembourg law entity until the position has been regularised, and the Minister may order the foreign investor to modify the transaction or to have the previous position restored at its expense.

Where voting rights of such an entity governed by Luxembourg law have been exercised notwithstanding a suspension of their exercise resulting from the law, the Tribunal d'Arrondissement sitting in commercial matters, within the jurisdiction of which the entity governed by Luxembourg law has its registered office, may, at the request of any person justifying an interest, declare the ity of all or part of the decisions of a general meeting if, without the illegally exercised voting rights, the quorums or majority required for the said decisions would not have been met.

If the conditions attached to the authorisation are not complied with, the Minister may:

- enjoin the foreign investor to comply with the conditions set out in the authorisation within a time limit set by them;
- enjoin the foreign investor to perform, within a time limit they set, requirements in substitution for the unfulfilled obligation, including the restoration of the position prior to the non-compliance with this obligation or the transfer of all or part of the activities;
- suspend the exercise of the voting rights attached to the FDI and conferring control of the Luxembourg-registered entity until compliance and implementation of the aforementioned conditions; and
- withdraw the authorisation.

Except in the case of an imminent threat to security or public order, the Minister shall inform the foreign investor in advance in writing of the facts which have been ascertained and of which it is accused and shall warn it that the Minister is considering adopting one of the above-mentioned measures.

The foreign investor shall have a period of 15 calendar days to submit its comments in writing. It may also, within the same period, request a hearing and, if necessary, be assisted by a counsel of its choice. Within 30 calendar days of the expiry of this time limit, the Minister shall, if necessary, take the measure warned of and notify the foreign investor in writing of the decision taken. This decision takes effect from the date of notification.

If the foreign investor fails to comply with an injunction within 1 month of notification, the

Ministers may impose a fine of up to €1,000,000 if the foreign investor is a natural person and up to €5,000,000 if it is a legal entity.

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