Luther.

Newsflash | 01.2022

A step closer to screening foreign direct investments in Luxembourg

Over the past several years the European Union has become a leading destination for foreign direct investments (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, 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 was adopted in 2019 and is applicable as of 11 October 2020.

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

A bill of law in Luxembourg

Following the steps of other European states, Luxembourg is planning on establishing a national FDI screening mechanism. As a matter of fact, on 15 September 2021, Bill of Law No. 7885[1] was submitted to the Chamber of Deputies proposing, on the one hand, a screening mechanism, its operation and related provisions (including the establishment of an interministerial FDI screening committee and a group of experts), and, on the other hand, an intra-European cooperation mechanism, as provided for by Regulation (EU) 2019/452.

A case-by-case procedure with a wide application scope

The envisaged mechanism would be a so-called ex ante[2] procedure, which would take place before the investment is made. As a first step, a foreign investor[3] must notify his intention to invest in a Luxembourg entity to the Ministry of Economy by specifying:

- the intention to make a foreign direct investment[4] in a Luxembourg entity that carries out one of the critical activities defined by Article 2 of Bill of Law No. 7885, such as, 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 therefore have both civilian and military use but also research activities, production activities related to critical activities, and related activities that may allow access to the premises where the critical activities are carried out (such as a cleaning or security company that has access to the premises of a company that itself has a critical activity) or to sensitive information related to the related activities and
- that the FDI allows it to have control over the concerned Luxembourg entity or to cross, directly or indirectly, a threshold of 25% of its share capital.

A procedure regulated by law and similar to what exists in other European countries

The notified FDI will be examined by the competent authorities to determine whether it would constitute a threat to security or to public order.

Further to this initial review, which is set to last two months from the date of the introduction of the full notification, the competent authorities would then decide whether or not to initiate a screening procedure. If a screening procedure is triggered, the Ministers, following the advice of the Interministerial FDI screening committee, will determine if the investment is detrimental to security or public order and if it should be refused or authorised subject to certain conditions.

As mentioned above, the Bill of Law No. 7885 also provides for the establishment of an intra-European cooperation mechanism allowing the Member State in which the screening procedure is triggered to notify the European Commission and the other Member States so that they can issue opinions, notifications or comments which should be examined by the interministerial FDI screening committee assisted by a group of experts.

Finally, it should be noted that the Bill of Law No. 7885 precisely sets out this procedure, related deadlines, administrative measures, and sanctions (refusal of the investment or authorization subject to conditions, power to order the foreign investor to modify the operation or to have the previous situation restored at his own expense, fines of up to EUR 1 million for a natural person and EUR 5 million for a legal person) that could be taken against a foreign investor who does not comply with the screening procedure.

---

[1] Bill No. 7885 establishing a national screening mechanism for foreign direct investments that may affect 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 the screening of foreign direct investments into the Union.

[2] Procedure in place in Member States such as Germany, Austria, Finland and France.

[3] According to Article 3 of the bill No. 7885, 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”.

[4] According to Article 3 of the bill No. 7885, 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”.

The adoption of this law will necessarily lead to a more thorough analysis of the target's activities in case a foreign non-EU purchaser wishes to invest in Luxembourg and will imply adjustments to relevant contractual documentation to take into account the new constraints. However, it is currently difficult to assess the concrete impact of the envisaged new measures (which already exist in other countries such as Germany and France), as it will heavily depend on the competent ministerial departments' interpretation of the future law.

For more information and to stay up to date on this topic, please feel free to reach out to the contacts listed on this article or your usual Luther S.A. contact.

Your contacts at Luther

Anna Gassner
Avocat à la Cour, Partner
Luther S.A. Luxembourg
T +352 27484 1
anna.gassner@luther-lawfirm.com

Victor Pauly
Avocat, Associate
Luther S.A. Luxembourg
T +352 27484 1
victor.pauly@luther-lawfirm.com