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Luxembourg Newsflash - 16 June 2023

Luxembourg adopts a Foreign Direct Investments screening regime

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On 13 June 2023, the Luxembourg Parliament adopted a law (the "**Law**") introducing a Foreign Direct Investment ("**FDI**") screening mechanism in Luxembourg. Like its European neighbours, the Luxembourg Ministry of the Economy ("**Ministry**") will now review foreign takeovers of critical assets before any implementation of a FDI, in order to safeguard national security interests.

The Law implements Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 ("**FDI Screening Regulation**"), which empowers Member States to review investments within its scope on the grounds of security or public order, and to take measures to address specific risks.

A FDI is an investment that allows a Foreign Investor to take control of a Luxembourg Entity

Pursuant to the Law, a FDI is an investment, made by an investor from a third country outside the EU/EEA ("**Foreign Investor**"), which enables the foreign investor to participate – alone, in concert or through an intermediary – in the control of an entity incorporated under Luxembourg law ("**Luxembourg Entity**").

The Foreign Investor is deemed to exercise control if it, directly or indirectly:

- holds the majority of the voting rights of the shareholders or partners in the Luxembourg Entity;
- has the right to appoint or remove the majority of the members of the directors, management, or supervisory boards of the Luxembourg Entity, and, at the same time, is a shareholder or a partner;
- is a shareholder/partner in the Luxembourg Entity and controls, by virtue of an agreement with other shareholders or partners, a majority of the voting rights of its shareholders or partners; or
- crosses the threshold of holding 25% of the voting rights of the Luxembourg Entity.

This means that portfolio investments – i.e. acquisitions of securities made with the intention of making a financial investment without effectively enabling the Foreign Investor to exercise control over the Luxembourg Entity – are excluded from the scope of the Law.

The Luxembourg Entity carries out critical activities

For investments leading to a Foreign Investor taking control, the screening mechanism applies if the Luxembourg Entity carries out **critical activities** (“Critical Activities”).

The Law defines several activities per sector as Critical Activities, including the production/exploitation/sales of dual-use goods^[1] and activities in the energy, transport, water, health, communications, data processing or storage, aerospace, defence, financial, media and agri-food sectors.

The Law also extends the definition of Critical Activities to (i) research and production activities directly related to Critical Activities and (ii) linked activities likely to allow access to sensitive information directly related to Critical Activities or to premises where such activities are carried out.

Standstill obligations for Foreign Investors who must receive clearance prior to making the FDI

The Law provides for a mandatory *ex-ante* notification regime. The Foreign Investor must notify the FDI to the Ministry and receive its authorisation before making/implementing the FDI.

The Law provides a derogation for transactions in which the Foreign Investor crosses the threshold of 25% of the voting rights of a Luxembourgish Entity (as a result of events modifying the distribution of the capital). In this situation, the Foreign Investor will have a 15-day period in which to notify the transaction.

The Ministry must notify its decision within 2 months following the notification by the Foreign Investor, unless it asks for additional information during the review period (in which case, the procedure will be suspended until it receives the requested information).

The Ministry will assess if the FDI in question would be likely to affect security or public order

The Law sets out a series of screening factors (“Screening Factors”).

To determine whether a FDI is likely to undermine security or public order, the Ministry will consider the FDI’s potential effects on *inter alia*:

- the integrity, security and continuity of the supply of critical infrastructures, whether physical or virtual, linked to Critical Activities;
- the sustainability of activities related to critical technologies and dual-use goods;^[2]
- supply of essential inputs, including raw materials, and food safety;
- access to sensitive information, including personal data, or the ability to control such information;
- freedom and pluralism of the media.

Based on its assessment of the proposed FDI, the Ministry can either authorise the FDI, prohibit it, or authorise it subject to conditions.

In the latter case, the conditions are determined in light of the Screening Factors and must be designed to ensure that the proposed FDI does not undermine security or public order. The Foreign Investor will also have to report on the implementation of the conditions.

The Law enables the Ministry to impose measures and sanctions for non-compliance

The Ministry can impose administrative measures and sanctions where (i) a FDI has been implemented without prior notification or clearance, or (ii) a Foreign Investor does not comply with the conditions imposed by the Ministry or the timeline to implement them.

Except in the event of an imminent threat to security or public order, the Ministry will contact the Foreign Investor in writing first and warn them that it intends to take administrative measures. The latter will then have 15 days to submit its observations. The Ministry will take the measures communicated within 30 days after that, if deemed appropriate.

Administrative measures include suspending the exercise of the voting rights relating to the FDI until the situation is regularised (if the Foreign Investor exceeds the threshold of 25% of the voting rights of the Luxembourg Entity) and ordering the Foreign Investor to modify the transaction or restore the previous situation at their own expense. The Ministry can also rescind an authorisation if the conditions of the screening procedure are not complied with.

If the Foreign Investor fails to comply with these requirements within a month, the Ministry can also impose a fine of up to EUR 1,000,000 if the Foreign Investor is a natural person and up to EUR 5,000,000 if the Foreign Investor is a legal entity (to be paid within 30 days of the date of notification of the decision). The amount of the fine will be tailored to the circumstances, taking into account, among others, the gravity of the infringement and its duration, the degree of responsibility of the Foreign Investor and its financial situation, the advantages received, the damages incurred by third parties, and/or any prior infringements committed.

A Foreign Investor who receives a decision imposing a fine can lodge an administrative appeal against the decision within one month of receiving the decision. The Law does not indicate whether lodging an appeal suspends the 30-day period in which the Foreign Investor must pay the fine imposed.

Next steps

The Law should enter into force on **1 August 2023** (first day of the second month after its publication in the Official Journal of the Grand Duchy of Luxembourg).

The notification requirements will start from this date, which means that Foreign Investors contemplating a FDI likely to affect security or public order from this date onwards should include in their timetable the deadlines for preparing any notification, for the Ministry to review the FDI and for the possibility of conditions being imposed by the Ministry.

Other recent and future related developments

Besides the Law, Regulation (EU) 2022/2560 of 14 December 2022 on foreign subsidies distorting the internal market ("**FSR Regulation**") must also be taken into account. The FSR Regulation allows the European Commission and the Luxembourg Competition Authority to monitor companies active in the EU/EEA and notably in Luxembourg which have been granted financing by non-EU/EEA States in the context of mergers, public tenders or generally. This Regulation will apply from 12 July 2023 and the notification obligations it imposes will apply from 12 October 2023. [See our previous newsflash for the entering into force of the FSR Regulation_](#)

A new trend towards greater control of entities from non-EU/EEA countries by the EU institutions and the EU Member States is clear.

Regarding taking control over Luxembourg entities, either by non-EU/EEA or EU/EEA entities, it is also likely that Luxembourg will introduce a national merger control in the coming months.

FDI, FSR and merger control, whether at EU or Luxembourg level, may have to be combined and applied cumulatively to some operations.

Our expertise

Contact our experts, **Philippe-Emmanuel Partsch** and **Achet-Billa Saleh** in the **EU Financial & Competition Law practice** for assistance in understanding this new Law and how it could potentially impact your activities.

This Newsflash has been published before the publication of the Law in the Official Journal of the Grand Duchy of Luxembourg and is based on the last version of the Bill that was submitted to the vote.

[1] Within the meaning of Article 2(1) of Council Regulation (EC) No 428/2009, as amended.

[2] Within the meaning of Article 2(1) of Council Regulation (EC) No 428/2009, as amended.

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