

Application of the law on a national screening mechanism for foreign direct investments in Luxembourg

Executive Summary

- On 18 July 2023, the Luxembourg law on foreign direct investment screenings (the “**FDI Law**”) implementing the Regulation (EU) 2019/452 on foreign direct investment screening (“**FDI Regulation**”) has been published in the Luxembourg Official Journal.
- The FDI Law marks a shift in the legal framework of the acquisition of companies in Luxembourg, following in the footsteps of Regulation (EU) 2022/2560 on foreign subsidies. The FDI Law introduces a national screening procedure for direct investments made by investors from a third country outside the EU/EEA seeking to gain control of Luxembourg entities operating in activities considered critical for **national security or public order**.
- The new regime applies to all transactions in the scope of the FDI Law which have not been completed before 1 September 2023.

On 19 March 2019, the European Parliament and Council approved the FDI Regulation, marking a new attitude of the EU towards foreign direct investments originating from third countries outside the EU/EEA. The FDI Regulation sets out minimum requirements for FDI screening within the European Union and thus aims to strengthen coordination and cooperation among Member States in the field.

By implementing the FDI Regulation and introducing a screening procedure for impactful investments in critical sectors, the Grand Duchy of Luxembourg aims to ensure the protection of national security and public order while maintaining an attractive investment environment.

This GSK Update briefly outlines the main features of the screening mechanism introduced by the FDI Law.

I. Scope and Definition

The FDI Law applies to: (i) direct investments made by **foreign investors** and (ii) aimed at acquiring **control** over a Luxembourg entity, which (iii) operates in **critical activities** within the Grand Duchy of Luxembourg.

(i) Direct investment by a foreign investor

A **foreign investor** is a natural person or a legal entity residing outside the European Economic Area (“**EEA**”).

A **foreign direct investment** (“**FDI**”) is defined as any investment which is made for the purposes of establishing or maintaining an ongoing and direct relationship between the foreign investor and an entity incorporated under Luxembourg law allowing the foreign investor to participate alone, in concert or by way of an intermediary in the control of that entity.

(ii) Acquisition of control over the Luxembourg entity

Control is considered to be obtained when the foreign direct investor: (i) holds a majority of the voting rights in the target entity; or (ii) has the right to appoint or dismiss the majority of the members of the administrative, management, or supervisory body of the target while also being a shareholder of that entity; or (iii) controls the majority of the voting rights as a shareholder pursuant to an agreement with other shareholders; or (iv) directly or indirectly, holds



more than 25% of the voting rights of the target entity.

(iii) Critical activities in Luxembourg

The FDI must relate to critical activities in Luxembourg. Critical activities include the development, operation, and trade of dual-use goods¹, activities in the sectors of energy, transportation, water, healthcare, communications, data processing and storage, aerospace, defense, finance, and media. Linked activities which involve research, production, access to sensitive information or premises where the aforementioned activities are conducted also fall in the scope.

While the FDI Law is limited to activities within Luxembourg, investors might also need to pay attention to FDI regulations in other EU/EEA countries if the Luxembourg vehicle holds businesses with critical activities within the EU/EEA.

The FDI Law does not apply to "portfolio investments", which are defined as acquisitions of securities for the purposes of completing a financial investment without gaining control over a Luxembourg legal entity. In this context, the Luxembourg legislator refers to the jurisprudence of the European Court of Justice for further clarification of the term.

II. First step: Notification

Foreign investors contemplating an FDI falling in the scope of the FDI Law must notify the Luxembourg Ministry of the Economy before completion of the relevant transaction.

The notification should include information about the ownership structure of the foreign investor, the investment value and the financing sources, the business activity of the parties involved (such as products, services,

business operations and countries of business activity) and the planned completion date of the investment. A notification requirement is also provided for foreign investors which occur to hold more than 25% of the corporate capital of a Luxembourg legal entity following events that modify the capital allocation.

FDI notifications will be initially examined by a screening ministerial committee, which will conduct an initial assessment of the FDI and advise the Ministry of Economy and the Ministry of Finance (the "Ministries") on whether a screening process is necessary. Within two (2) months following the notification, the decision whether to activate the screening procedure is delivered to the foreign investor.

III. Second step: Screening procedure

Upon triggering of the screening process, the Ministries shall assess whether the FDI may adversely affect national security or public order in Luxembourg within sixty (60) calendar days.

To determine if an FDI poses a potential threat to national security or public order, the Ministries will take into consideration certain factors such as the integrity, security and continuity of the supply of critical infrastructures, the sustainability of activities related to critical technologies and dual-use goods, the supply on essential inputs, raw materials and food security, the access to sensitive information, including personal data, and the freedom and pluralism of the media.

Moreover, the Ministry of Foreign and European Affairs must inform the European Commission and other Member States that an FDI is subject to a screening process in the Grand Duchy of Luxembourg, which could provide comments or request additional information.

The Ministries can either authorise or refuse the FDI. An authorisation can also be issued subject to one or more conditions.

¹ These are goods, software and technology that can be used for both civilian and military applications.



IV. Entry into force

The FDI Law entered into force on 1 September 2023. It shall apply to all relevant transactions which have not been completed (*avant la réalisation de l'investissement*) before that date. Foreign investors seeking to close a significant FDI transaction after this specified date must therefore ensure compliance with the newly-introduced FDI screening regime and be aware of the specific provisions and obligations to fulfill the notification requirements.

V. Sanctions

If an FDI is made without prior notification or in spite of a refusal of the Ministries, foreign investors may be required to modify or unwind the FDI at their own expense. The Ministries may also impose alternative obligations or revoke the authorization in cases where the FDI fails to meet the specified conditions to the authorization.

Failure to comply with these injunctions may lead to penalties of up to EUR 1,000,000 for individuals and EUR 5,000,000 for legal entities.

VI. Conclusion

The screening mechanism under the FDI Law is meant to protect Luxembourg from any security or public order risks in relation to investments made by investors from outside of the EU/EEA into businesses conducting critical activities. Especially in multi-jurisdictional deals within the EEA, the FDI Law should be considered in context of the national FDI legislation applicable in other EEA jurisdictions. Concerned investors might be able to benefit from the exemption of portfolio investments, e.g. by considering alternative structuring options.

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