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Regulation of Foreign Direct Investments in Luxembourg

The regulatory framework in a nutshell



On 1 September 2023, the Luxembourg FDI Act entered into force, marking a significant milestone in the regulation of (foreign) direct investment in the Grand Duchy of Luxembourg. With the Luxembourg FDI Act, proposed investments in undertakings carrying out critical activities in the Grand Duchy of Luxembourg must be notified to the Interministerial Investment Screening Committee (Comité interministériel pour le filtrage des investissements) before the proposed transaction can take place. This brochure provides a step-by-step explanation of the FDI screening procedure in the Grand Duchy of Luxembourg and outlines the most important principles behind the relevant legal framework.

Substance of the Luxembourg FDI regime

On 1 September 2023, the law introducing a foreign direct investment screening mechanism, or “**Luxembourg FDI Act**” entered into force. The Luxembourg FDI Act aims to minimise the risks to Luxembourg national security and public order by introducing a notification obligation and a subsequent screening mechanism for certain categories of proposed concentrations (such as acquisitions and mergers) and of minority shareholder investments. Specifically, the Luxembourg FDI Act aims to prevent investments that may lead to strategic dependency, erosion of the continuity and resilience of vital processes, or the loss of the integrity and exclusivity of knowledge and information of critical or strategic importance to the Grand Duchy of Luxembourg.

The Luxembourg FDI Act applies to investments permitting a foreign investor acting alone or in concert with others to participate in the direct or indirect control of Luxembourg target undertakings exercising a critical activity in the Grand Duchy of Luxembourg. Such activities include the production/exploitation/sale of dual-use goods and activities in the energy, transport, water, health, communications, data processing or storage, aerospace, defense, media and agri-food sectors. In the financial sector, critical activities involve the

activities of the central bank as well as the infrastructures and systems for the exchange, payment and settlement of financial instruments.

The FDI screening is carried out by the Interministerial Investment Screening Committee (*Comité interministériel pour le filtrage des investissements*).

Foreign direct investments falling within the scope of the Luxembourg FDI Act must be notified to the Minister of the Economy, who shall acknowledge receipt of the notification and decide within two months thereafter whether an assessment decision is required.

Before the assessment decision is made (or it is decided that no decision is required), a standstill obligation applies to the parties involved. This means that the investment must be suspended until the Ministry of the Economy has issued a final decision. If an investment poses a risk to the country’s national security, the Minister of the Economy may opt to allow a notified investment provided certain conditions are met or to prohibit the transaction if potential conditions do not sufficiently mitigate the risk. Whenever a notifiable acquisition activity is not reported, the Minister of the Economy may impose an order to prevent the undesirable consequences of the activity or annul the investment. In addition, investments in breach of the Luxembourg FDI Act may result in the suspension of any control rights obtained by the acquiring entity.

The assessment whether national security or public order is at risk focuses on undertakings performing critical activities relating to:

- Dual-use goods
- Energy
- Water
- Transport
- Health
- Communications
- Data processing or storage
- Aerospace
- Defence
- Finance
- Media
- Agri-food

Checklist for proposed investments in the Grand Duchy of Luxembourg

The following checklist may provide useful guidance for companies considering investments in the Grand Duchy of Luxembourg:

1. The **first step** is to determine whether the investment is made by a foreign investor.
2. The **second step** is to determine whether the target undertaking carries out a critical activity in the Grand Duchy of Luxembourg.
3. The **third step** is to determine whether the investment leads to a participation in the control of the Luxembourg target company.
4. If the result of the three steps is that a notification obligation applies, the **fourth step** is then to submit a notification to the Interministerial Investment Screening Committee (*Comité interministériel pour le filtrage des investissements*). The Minister of the Economy will decide whether it is necessary to take an assessment decision and, if so, may (conditionally) approve or prohibit the investment.

Step 1: Is the investment made by a foreign investor?

Under the Luxembourg FDI Act, a foreign investor is defined as a natural person or an entity governed by foreign law that is not a national of a Member State of the European Union or of a State party to the European Economic Area (EEA).

Step 2: Does the target undertaking carry out a critical activity in the Grand Duchy of Luxembourg?

The following activities in the Grand Duchy of Luxembourg, together with related research and production activities, as well as ancillary activities that may grant access

to (i) sensitive information directly connected to the following activities or (ii) premises where the following activities are carried out, are deemed critical:

- The development, operation and trade of **dual-use goods** (within the meaning of article 2, paragraph 1) of Regulation (EC) No 428/2009);
- In the **energy** sector: the production and distribution of electricity, the packaging and distribution of gas, and storage and trading of petroleum, and the quantum and nuclear technologies;
- In the **transport** sector: land, water and air transport;
- In the **water** sector: the collection, treatment and distribution of water, the collection and treatment of wastewater, and the collection, treatment and disposal of waste;
- In the **health** sector: activities related to health care and laboratories, medical analyses, and nanotechnology and biotechnology;
- In the **communications** sector: wired telecommunications, wireless telecommunications, satellite telecommunications, and postal and courier services;
- In the **data processing or storage** sector: the installations of data processing, hosting information services and internet portals, and technologies relating to artificial intelligence, semiconductors, and cybersecurity;
- In the **aerospace** sector: space operations and the exploitation of space resources;
- In the **defense** sector: activities related to national defense and the production and trade of weapons, ammunition, powders and explosive substances intended for military purposes or materials of war;
- In the **finance** sector: the activities of the central bank, as well as the infrastructures and systems for the exchange, payment and settlement of financial instruments;
- In the **media** sector: publishing, audiovisual and broadcasting activities;
- In the **agri-food** sector: activities related to food safety.

Step 3: The effect of the investment on the control situation within the target undertaking

The Foreign Investor is deemed to exercise control in the target undertaking carrying out a critical activity as described in step 2 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.

If the answers to the questions above are affirmative, the investor should continue to step 4. If the answer to this question is negative, the investment does not have to be notified.

Step 4: Notification and Investigation by the Interministerial Investment Screening Committee (*Comité interministériel pour le filtrage des investissements*)

Proposed investments falling under the Luxembourg FDI Act must be notified by the foreign investor to the Interministerial Investment Screening Committee (*Comité interministériel pour le filtrage des investissements*) and may not be implemented prior to the completion of the notification procedure. An exception to this standstill obligation is made for the acquisition of share capital. Foreign investors that obtain 25% of the share capital of an entity carrying out a critical activity in the Grand Duchy of

Luxembourg must notify the Minister of the Economy of this fact within fifteen (15) days after the completion of the transaction.

Upon receipt of the notification, the Ministry of the Economy has two months (Phase 1) to notify to the foreign investor whether a screening procedure is activated.

Should the screening procedure be activated (Phase 2), the Ministry of the Economy will then assess whether the foreign direct investment in question would be likely to affect security or public order.

To determine whether a foreign direct investment is likely to undermine security or public order, the Ministry of the Economy will consider the foreign direct investment's potential effects on inter alia:

- (i) ownership structure the integrity, security and continuity of the supply of critical infrastructures, whether physical or virtual, linked to critical activities;
- (ii) the sustainability of activities related to critical technologies and dual-use goods;
- (iii) supply of essential inputs, including raw materials, and food safety;
- (iv) access to sensitive information, including personal data, or the ability to control such information; and/or
- (v) freedom and pluralism of the media.

Additionally, authorities may take into account:

- (i) that a foreign investor is either directly or indirectly held or under control of the government of a third country;
- (ii) that the foreign investor in question has already participated in activities undermining security and public order in an EU Member State;

(iii) the fact that there is a serious risk that the foreign investor will carry out illegal or criminal activities.

Based on its assessment of the proposed foreign direct investment, the Ministry of the Economy can either authorise the foreign direct investment, prohibit it, or authorise it subject to conditions.

Temporal scope

In principle, the Luxembourg FDI Act only applies to investments made after its entry into force on 1 September 2023.

Notification procedure

Both Phase 1 and Phase 2 are subject to an eight-week time limit. If additional information is required, the investigation is suspended. The decisions of the Ministry of the Economy are subject to appeal.

Notifications are to be submitted using the prescribed notification form (accessible in French via this [Link](#)). This notification form inter alia requires information regarding the proposed investment, the companies involved and their ownership structure.

The following information must be included in the notification:

- the ownership structure of the foreign investor and of the relevant Luxembourg entity before completion of the foreign direct investment or following events that have modified the breakdown of capital, including information on the beneficial owner, and the shareholding structure;

- the approximate value of the foreign direct investment;
- the products, services and commercial operations of the foreign investor and of the Luxembourg entity;
- the countries in which the foreign investor and the Luxembourg entity carry out commercial activities;
- the financing of the foreign direct investment and its source; and
- the date on which the foreign direct investment is planned or has been carried out.

Sanctions

If the foreign investor fails to notify an investment that falls within the material scope of the Luxembourg FDI Act, or if it fails to comply with the injunctions from Minister of the Economy, it may receive a fine of up to € 1,000,000 if the foreign investor is an individual or up to € 5,000,000 if the foreign investor is a legal entity. All the more reason for market parties to properly check whether an FDI notification obligation applies to proposed investments in Luxembourg companies and, if so, to ensure that the whole procedure is completed correctly.

Key contacts in the event of a possible screening

If you have any questions about the application of the Luxembourg FDI regime to your proposed investments in a Luxembourg company or undertaking, please do not hesitate to contact AKD's FDI specialists named below.



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