

# ATOZ NEWS

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## Luxembourg to introduce a national mechanism for the screening of foreign direct investments

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*Luxembourg intends to introduce a national mechanism for the ex-ante screening of each foreign direct investment (“FDI”) into critical activities. Foreign, direct and controlling investments into critical infrastructure (energy, transport, water, public health) and into critical technologies (artificial intelligence, robotics, nanotechnology, biotechnology) in Luxembourg, that are likely to endanger the security or public order, will be subject to the screening process. The legislative proposal is the result of the government’s will to strike a balance between protecting the country’s best interests and maintaining its attractiveness and openness for FDIs, while simultaneously ensuring the transparency of the rules, procedures and timelines of the FDI screening process.*

While recognising the beneficial effects of foreign direct investments on growth, job creation and innovation, Luxembourg is also vigilant towards some investors linked to foreign governments that might not acquire an entity for purely economic reasons, but to obtain a significant influence over an entity of strategic importance operating in Luxembourg. Thus, the government has tabled a bill<sup>1</sup> for the introduction of the first national mechanism for the screening of foreign direct investments into entities governed by Luxembourg law carrying out critical activities in Luxembourg. The range of critical sectors is vast and it includes energy production and distribution, transportation, water management, public health, nanotechnology, biotechnology, telecommunications, data processing and storage, AI, cybersecurity, aerospace, defence, financial infrastructure, media, double-use goods, supply of essential inputs and food security, to name a few. Stemming from the Regulation (EU) 2019/452<sup>2</sup>, the bill also lays out the Luxembourg framework for the cooperation mechanism between EU Member States and the European Commission for the screening of FDIs into the European Union (“EU”).

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<sup>1</sup> Bill n° 7885 for a law establishing a national screening mechanism of foreign direct investments likely to undermine security or public order for the purposes of the implementation of 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 in the Union, as amended.

<sup>2</sup> 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, as amended.

**Not all FDI in Luxembourg will be subject to a mandatory notification and potential screening.** In fact, the scope of the FDI is narrowed to an investment (i) made by a **foreign investor** (ii) which serves to create or maintain long-lasting and direct relations between the foreign investor and the entity governed by Luxembourg law to which the funds are intended, thus allowing the foreign investor to participate effectively in the **control** of this entity (iii) with a view to exercising a **critical activity** in the Grand Duchy of Luxembourg that is specifically covered by the bill.

Crucially, **portfolio investments** (defined as an acquisition of securities made with the intention of a financial investment, without taking control of the entity governed by Luxembourg law) will be **exempt** from the FDI screening mechanism.

In order to prevent the circumvention of the screening mechanism, the bill captures **the investments of any kind** made by a **foreign investor**. Foreign investor (“FI”) can be either an individual who is a national of neither an EU Member State nor a European Economic Area (“EEA”) Member State (i.e. Iceland, Liechtenstein and Norway) or an entity governed by a foreign law that is domiciled neither in an EU Member State nor in an EEA Member State, whether the FI is **acting alone, in concert or by interposition**. The threshold that will trigger the mandatory notification obligation is the **control** of the Luxembourg entity, which can be embedded in (i) the majority of voting rights, (ii) the right to appoint or dismiss the majority of the members of the management or supervision boards or (iii) a participation exceeding 25% of the capital of the Luxembourg entity. To inhibit investments from within the Union by means of artificial arrangements that do not reflect the economic reality and the genuine beneficial ownership, the bill brings under the remit of the FDI screening mechanism both the majority of voting rights granted by virtue of an agreement with the other shareholders and a direct or indirect participation to capital exceeding a 25% threshold.

For an FDI to be notified, the investment needs to be made into the **critical activities** in sectors of strategic national importance, such as dual-use goods, energy, transportation, water, health (including nano and biotechnologies), telecommunication, data processing or storage, aerospace, defence, finance, media, robotics, AI, etc. Investments in research and production activities directly linked to the critical activities might also be scrutinised, as well as related activities that are likely to allow access to sensitive information directly related to the critical activities (e.g. surveillance and security services) or to places in which the critical activities are exercised (e.g. cleaning services).

Three different governmental structures will be involved during the FDI screening process, namely: (i) the **ministers** responsible for the Economy and for the Finances, entrusted with decision making powers with regards to the FDI; (ii) an **inter-ministerial committee** made up of four members from the departments of Foreign and European Affairs, the Economy, the Finances and the State Intelligence Services, that will issue opinions to and advise the two ministers; and (iii) a **group of experts** made up of representatives of the four departments mentioned above, of the departments having the relevant critical activities within their remit, as well as external advisers, that will gather the various information and prepare the FDI files.

The Luxembourg screening mechanism for FDI will consist of **three distinct steps**:

### 1. Mandatory notification

The FI has the ultimate responsibility to determine if its planned investment qualifies as an FDI and, if so, to notify the Minister responsible for the Economy before the investment is made or within the 15 days of exceeding the 25% participation threshold. The bill lays out the detailed information to be provided. The notification is not suspensive and the FI is not prevented from completing the preliminary stages of the investment process.

### 2. Pre-screening

The inter-ministerial committee reviews the file and it is entitled to request any missing or additional information, in order to issue an opinion to the ministers. At the earliest two months after receiving the notification, the ministers must inform the FI if they decided to initiate a screening procedure (in which case the FI must suspend the investment) or not (in which case the investment can be realised).

### 3. Screening

In order to determine if an FDI is likely to endanger security or public order in Luxembourg, the ministers will assess the FDI's potential effects on a varied range of screening factors (such as the integrity, security and continuity of the supply of critical infrastructures, whether physical or virtual). They will also assess the FI's suitability, probing its links with foreign governments, its past involvement in undermining activities or the serious risk of carrying out illegal or criminal activities). 60 days after triggering the screening process, the ministers need to notify the FI of their screening decision, which can be to decline or to authorise the FDI (with or without conditions).

The bill provides for a series of **administrative sanctions and fines** of up to €5 million, to be applied when the FDI is realised prior to notification or authorisation, when it breaches the authorisation conditions or when it is undertaken despite a prohibition decision. The FI will have the right to an administrative recourse against the screening decision or the administrative sanctions.

In addition to the national mechanism of FDI screening, the bill sets out Luxembourg's role in the **cooperation mechanism** between EU Members States and the European Commission established by the Regulation (EU) 2019/452 and the minister of Foreign and European Affairs is appointed as the national point of contact for the EU FDI screening mechanism.

The bill is currently undergoing the legislative process and it is expected to be adopted next year.

### Key takeaway

The foreign investor has the ultimate responsibility for assessing whether its planned investment must trigger the FDI screening process or not, and failure to do so might expose it to fines.

Once the bill becomes law, any foreign Venture Capital investor, Private Equity Fund or Infrastructure Fund wishing to make investments in Luxembourg will need to scrutinise the list of critical activities and determine whether the planned investment will allow it to control a Luxembourg entity carrying out the critical activity.

### Do you have further questions?



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