

The new law on foreign direct investment screening and its impact on Chinese investment

- With a link to a Chinese translation of the Law



Introduction

Since 1 September 2023, the Grand Duchy of Luxembourg has had a new law establishing a national screening mechanism for foreign direct investment.

This is the Law of 14 July 2023, which applies to foreign direct investment likely to be detrimental to security or public order in an entity incorporated under Luxembourg law and carrying out critical activities in Luxembourg (hereinafter the 'Law').

Conditions of application

As clearly indicated in its title, the Law does not cover all investments made by foreign investors but only those which would give the latter 'control' of a Luxembourg entity carrying out activities considered as 'critical'.

The term 'control' encompasses several hypotheses, namely: 1) either having the majority of the voting rights of the shareholders or associates of an entity governed by Luxembourg law; 2) or having the right to appoint or dismiss the members of the management bodies and at the same time being a shareholder or associate of the Luxembourg entity; 3) or being a shareholder or associate of an entity governed by Luxembourg law and controlling it by virtue of an agreement concluded with other shareholders or associates the majority of the voting rights, 4) or still holding more than 25% of the voting rights of an entity governed by Luxembourg law.

However, it is not sufficient for the foreign investment to exercise 'control' in the above sense over a Luxembourg entity. It is also necessary for the activities concerned to be considered 'critical' within the meaning of the Law, which lists twelve sectors of activity concerned, such as energy, transport, health, defense or the media, as well as directly related activities such as research or production.

It should be noted that portfolio investments are excluded from the scope of the Law.

Finally, the critical activities in question must also be operated in the Grand Duchy of Luxembourg. Otherwise, the Law will not apply either.

Prior notification

Foreign direct investments covered by the Act are subject to prior notification to the Ministry of the Economy, which will then decide, within two months of the date of acknowledgement of receipt, whether or not the notified foreign direct investment should be subject to a screening procedure.

Screening procedure

If the screening procedure is initiated, the foreign direct investment may not be made until a screening decision authorising the foreign direct investment in question has been taken. The decision is taken by the Ministry of the Economy and the duration of the screening procedure may not exceed sixty calendar days after it is triggered. In addition, the decision to authorise a foreign direct investment may be subject to conditions.

Measures and penalties

The Law sets out the administrative measures and penalties applicable in the event of a foreign direct investment being made without notification or authorisation and in the event of failure to comply with the conditions attached to an authorisation. These include the suspension of voting rights or an injunction to comply with the conditions. An administrative fine may be imposed if the foreign direct investor fails to comply with the injunctions issued by the Minister.

Impact on Chinese investment

The Law, which came into force on 1 September 2023, will have significant impact on foreign direct investment from third countries, particularly from China.

The first impact we can anticipate will probably be increased sensitivity to any Chinese takeover in Luxembourg, particularly those affecting strategic sectors.

For these foreign investors, access to certain strategic sectors will be conditional or may even be banned altogether, particularly in sectors linked to critical infrastructure, critical technologies, security of supply of critical inputs and access to sensitive information.

Secondly, the complexity and uncertainty of investment projects affecting strategic sectors will certainly increase. In addition to the traditional takeover stages, a complex, uncertain and lengthy foreign direct investment screening procedure may be added.

In addition, post-closing control cannot be ruled out. Here in particular, we expect the uncertainty to become greater and to weigh on these transactions for a long time after they have closed.

Finally, the transaction cost of such projects falling within the scope of the Act will obviously be higher than before.

In order to facilitate Chinese companies to keep abreast of the details of Luxembourg's latest legislation on foreign investment review, EURAALLEX Law Firm has translated the above mentioned legal provisions from French into Chinese and published them on our firm's official website for free enquiry by Chinese companies.

Link: www.euraalex.com

Contact us :

Dr. Shaohui Zhang

Founding Partner – Avocat à la Cour – Mediator

Lecturer at University of Luxembourg

20, rue Louvigny

L-1946 Luxembourg

sz@euraalex.com

Tel: +352 27 76 81 42

Fax: + 352 27 99 81 44

www.euraalex.com

References

Leading individual in Corporate/Commercial (Foreign Experts) in Luxembourg and in Corporate/M&A (International Firms) in China (Chambers Global 2013), “M&A specialist Shaohui Zhang” (Tier 2 in IFLR1000 2019 in Financial and Corporate), Tier 2 for Commercial, Corporate and M&A, “Shaohui Zhang heads the office's China desk” (The Legal 500 – 2019), and “Shaohui Zhang” advised WELLE on the acquisition of EuRec in Germany and on the restructuring of its management team (Chambers Global Guide 2023)