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BULGARIA ESTABLISHES A FOREIGN DIRECT INVESTMENT SCREENING MECHANISM



Introduction

On 22 February 2024 Bulgarian Parliament adopted *the Law for Amendment and Supplementation of the Investments Promotion Act* (the “**Law**”) establishing a foreign direct investment (“**FDI**”) screening mechanism (“**FDI Screening**”) in line with *Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union* (the “**Regulation**”). The Bulgarian legislator however expanded the application of the screening mechanism by among others, setting a low non-control threshold of investment and broadening the scope of entities whose investment is subject to FDI Screening.

The Law was promulgated in State Gazette on 8 March 2024 and entered into effect on 12 March 2024. FDI Screening however shall become effective only after specific implementing legislation (“**Implementing Regulation**”) is adopted by the Council of Ministers. The Implementing Regulation should be adopted no later than 12 September 2024.

The Law applies to *foreign investors* who intend to make a foreign *direct investment to Bulgaria and* introduces its own definitions for “Foreign Investor” and “Foreign Direct Investment” (“**FDI**”).

Who is a Foreign Investor

“Foreign Investor” within the meaning of the Law is any person who has made, or intends to make, an FDI in Bulgaria, provided such person (each, a “**Non-EU Person**”):

- is not a national of an EU Member State; or
- has its seat is outside an EU Member State.

In addition, “Foreign Investor” is any

- legal entity seated in an EU Member State and controlled by a Non-EU Person or by a non-incorporated person existing under the laws of a non-EU Member State;
- legal entities and non-incorporated persons seated in an EU Member State whose internal rules of governance or existing agreement(s) allow a Non-EU Person to have direct or indirect control over the specific investment;
- legal entities and non-incorporated persons seated in an EU Member State whose investment, although made in their own name, appears, based on an agreement or multi-stage transaction, to be made for the account of (i) a Non-EU Person, or (ii) an

EU-seated legal entity which is controlled by a Non-EU Person or by a non-incorporated person existing under the laws of a non-EU Member State.

What is a Foreign Direct Investment

“Foreign Direct Investment” or “FDI” is an investment of any kind made by a foreign investor aimed at establishing or maintaining lasting and direct links between the foreign investor and the entrepreneur or enterprise to which or to which the capital has been made available to carry on business in Bulgaria, including an investment which enables effective participation in the management or control of a company carrying on business. FDI is also the expansion of an existing investment, including the expansion of the capacity of an existing enterprise, the diversification of the production of an enterprise with products that have not been produced before, and the establishment of a new place of business.

The definition of FDI clarifies that a portfolio (passive) investment is not a foreign direct investment. “Portfolio (passive) investment”, however, is not specifically defined.

FDI Screening

The Law provides that any Foreign Investor who intends to make a FDI must file for prior clearance by an inter-agency council (the “**Screening Council**”). The Law introduces a standstill obligation so that a Foreign Investor may not proceed with implementation of an FDI until it obtains a clearance decision from the Screening Council.

The Screening Council may, by way of exception, commence an FDI Screening in respect of an investment that is possibly covered but in respect of which the investor did not file a clearance application, if the Screening Council:

- has become aware of new circumstances that justify the opening an FDI Screening investigation, it being understood that this option is open to the Screening Council within three months of becoming aware of such new circumstances; or
- has received:
 - an opinion from the European Commission; or
 - a notification from an EU Member State which contains sufficient information and such investment has been made no more than 2 years prior to the receipt of the opinion or the notification as the case may be.

Types of FDI Subject to Review

In order to qualify for FDI Screening, the FDI’s subject-matter should fall within the areas covered by Article 4, para. 1 of the Regulation, and should meet at least one out of the following three conditions:

- the investment results in the acquisition of at least 10% of the capital of an undertaking which operates in Bulgaria, or the amount of the investment exceeds the threshold of EUR 2,000,000;
- the investment results in the acquisition of at least 10% of the capital of an undertaking which operates in Bulgaria and performs high-tech activities (regardless of its turnover, the number of its employees or the investment amount);
- the investment classifies as a “new investment” (initial investment in tangible and intangible assets related to the start of activity of a new enterprise, expansion of the capacity of an existing enterprise, diversification of an enterprise's production through products not previously produced, or a significant change in the general production process of an existing enterprise) and the amount of such investment exceeds EUR 2,000,000;

In addition, certain FDIs, which may not meet the criteria described above, will nevertheless trigger the FDI Screening requirement where:

- the FDI is made by a Foreign Investor from Russia or Belarus;
- the FDI is in the production of oil-derived energy products and other oil-derived products at critical infrastructure facilities which are strategically important for the national security;
- a member of the Screening Council competent in the relevant area in which a new investment will be implemented proposes that such FDI should undergo FDI Screening. Such proposal should be coordinated with the State Agency for National Security and the State Intelligence Agency;
- the State Agency for National Security or the State Intelligence Agency has submitted to the Screening Council a motivated request that an FDI should undergo FDI Screening because of indications suggesting that the relevant FDI may have an impact on security and public order.

Finally, the Law provides that where a state outside the EU (a “**Non-EU State**”)

- is a direct or indirect shareholder in a Foreign Investor (whether majority or minority), or
- has provided, including through a state organ, significant financing to a Foreign Investor,

such a Foreign Investor’s in-scope investment must be screened irrespective of its quantitative dimension (i.e., regardless of whether the relevant FDI reaches the applicable 10% or EUR 2,000,000 threshold or not). As a result, even “small” investments of such Foreign Investors will put in motion FDI Screening.

Certain Non-EU States are exempted from the above requirements (“**Exempted Non-EU States**”) so that their shareholding in, or provision of significant financing to, a Foreign Investor will not by itself trigger FDI Screening of “small” investments.¹ That said, the full implications of the concept of Exempted Non-EU States for the scope of FDI review are far from clear. The Law also provides that such states will be subject to the same FDI Screening rules as EU Member States. The difficulty here is that it is unclear whether the rule is meant to apply only to investments made by Exempted Non-EU States as such or more broadly to investments made by Foreign Investors which are nationals of or seated in Exempted Non-EU States. It may be the case that the preferential treatment of Exempted Non-EU States merely translates in FDI Screening not being triggered by “small” investments of Foreign Investors with Exempted Non-EU States presence in their capital. The Implementing Regulation will hopefully provide clarity on the exact scope of the exemption in question.

Scope of the Review

The Law does not set out specific criteria based on which the Screening Council must decide on a clearance application; it merely includes a cross-reference to Article 4 of EU Regulation 2019/452. The Law, however, provides that the Screening Council will apply the Article 4 criteria in accordance with the terms and procedures to be introduced by way of the Implementing Regulation. Accordingly, it may not be excluded that such future regulations will flesh out the applicable criteria.

Review Process, Timeline and Closure

FDI screening applications shall be submitted to the Bulgarian Investment Agency (the “**Agency**”) in the Bulgarian language with an English language translation. It should contain as a minimum the information and documents specified in Article 9, para. 2 of the Regulation. A template application shall be made available on the web page of the Agency.

Once an application is submitted, the Agency has 3 days to check whether the application is complete. If it is incomplete or otherwise not in compliance with the applicable formalities, the Agency has 7 days to notify the applicant that the latter must provide additional information or documents. Pursuant to the Law, there is no deadline within which such additional information should be submitted, however the review process does not start until

¹ There are two groups of Non-EU States that are exempted: those that are already listed in the Law (United States, United Kingdom, Canada, Australia, New Zealand, Japan, South Korea, United Arab Emirates and Saudi Arabia) and those that parliament may designate in the future as “low-risk” Non-EU States.

an application is deemed completed. Once the application is complete, the Agency would forward it for substantial review to the Screening Council.

Once the application is considered complete and it is forwarded to the Screening Council, it has 45 days to issue a decision. The deadline may be extended by 30 additional days.

If the Screening Council does not deliver a decision within the statutory deadline, the relevant FDI is deemed to have been cleared.

If a FDI is likely to affect a project or a program of interest to the EU, the Screening Council shall request an opinion of the European Commission provided in compliance with Article 8 of the Regulation. In such a case, the review period shall be stopped until an opinion of the European Commission is received.

The Screening Council may adopt the following decisions:

- an unconditional clearance;
- a conditional clearance, whereby the foreign investor may implement the FDI after having complied with such restrictive measures as the Screening Council may have determined; or
- a refusal to grant the clearance.

The Law provides for the following restrictive measures:

- restriction on the shareholding that the foreign investor may acquire in the target: up to 20% (or up to 10% if the target is involved in high-tech industries);
- implementation of measures aimed at the protection of personal data, the security of information, or otherwise (upon proposal by a relevant regulator);
- special rights in favor of the state within the shareholders meeting and/or the management of the target (applicable in the context of privatizations only).

In case the FDI requires additional permit, license or registration, the FDI Screening application should be submitted simultaneously with any other application for regulatory approval. The FDI screening procedure does not affect, neither may postpone other administrative procedures related to the implementation of the FDI, unless there is an explicit statutory rule to that effect.

Penalties

Where a qualifying FDI has been implemented without a prior clearance, the Screening Council may impose a fine to the respective Foreign Investor equal to up to 5% of the amount of the investment, but not less than BGN 50,000 (approx. EUR 25,000). In such cases, the Screening Council may also impose appropriate corrective measures such as unwinding of control, termination of activity, termination of the FDI, or other measures that may be deemed appropriate.

The Screening Council may also impose pecuniary fines of up to 5% of the amount of the investment where the Foreign Investor:

- has provided inaccurate, incomplete or misleading information;
- has not implemented corrective measures imposed by the Screening Council with an approval or a fining decision.

Appeals of FDI Screening Decisions

The decisions of the Screening Council are individual administrative acts, which are subject to two instance judicial review – first before the competent administrative court and then before the Supreme Administrative Court.

As a general rule of the Bulgarian law, the appeal of individual administrative acts suspend their implementation. Thus, if a decision of the Screening Council is appealed, it will become effective only after closure of the appeal process. Nevertheless, the Screening Council may, on motion of the Foreign Investor, grant immediate effect of its decision thus allowing implementation of a FDI notwithstanding potential judicial appeals.

FDIs Started Before Enactment of the FDI Screening Mechanism

The transitional provisions of the Law provide that FDIs started before adoption of the Implementing Regulation shall not trigger the FDI filing requirement. While an investor is relieved of the filing obligation in such circumstances, the Screening Council's power to commence an FDI Screening investigation on a different basis (e.g., an opinion of the European Commission, a notification of an EU Member State or a request from one of the relevant Bulgarian national security agencies) is not apparently excluded.

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