

The free movement of capital is one of the four basic freedoms of the EU, but as evidenced by the anti-money laundering regime, that freedom is not absolute. Restrictions on transfer of funds may be imposed for protection of a range of values, with 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, effective as from October 11, 2020. Its purpose is to establish measures for advance approval, or the so-called screening, of investments while guaranteeing the freedom of establishment and movement of capital as provided under the Treaty on the Functioning of the EU.

The Regulation provides an opportunity for Member States to create mechanisms for screening of foreign direct investments for reasons of protecting their own security and public order. Such mechanisms should be transparent and non-discriminatory with regard to any particular third country outside of the EU. Therefore, the Regulation requires the existence of clear grounds for invoking the screening procedure, as well as of procedural rules, including for consulting other Member States for which a specific investment may be of relevance. Guarantees are also provided for the investors themselves: any trade secrets supplied by them will need to be protected, and the state's rulings passed in the course of the screening procedure may be appealed against in a court of law.

The most significant aspect of the Regulation are exactly the measures allowing coordination between Member States with respect to the screening. Each decision to restrict foreign investment runs against the grain of the EU's underlying freedoms of movement of goods, services, and capital. On the other hand, certain investments – or the banning thereof – generate risks of a nature that may, in a great many cases, transcend the boundaries of an individual state. Therefore, the coordination of policies in that respect is a key element of the procedure of investment screening.

Explicitly listed under article 4(1) of the Regulation are some of the criteria that must be considered in an investment screening procedure. Firstly, when deciding whether such investments affect national security or public order, the initiating party must consider whether the investment in question is likely to impact critical infrastructure (energy, water, transport, health, etc.); critical technologies (artificial intelligence, robotics, semiconductors, aerospace and defense technologies or the like); the supply of critical inputs (energy, raw materials); food security; media freedom and pluralism. Paragraph 2 of the same article outlines considerations regarding the investor that must be weighed: whether said investor is

directly or indirectly controlled by the government; whether the foreign investor has already been involved in activities affecting national security or public order in another Member State; whether there is a risk that the foreign investor engages in illegal or criminal activities. Bulgaria is one of the few EU Member States that still lack legislation in harmony with Regulation 2019/452. Currently, the National Assembly is reviewing a **Bill on Amending and Supplementing the Investment Promotion Act** ; if enacted, said Bill will introduce an investment screening procedure.

The proposed Bill provides for the creation of an Inter-departmental Board for screening foreign direct investments that would issue authorizations for investments in the areas as per article 4(1) of Regulation 2019/452, where such investments exceed EUR 1 million. In accordance with the definition of a foreign investor adopted by the Bill, the proposed regime will apply solely to investments made by individuals and legal entities from third, non-EU countries or, respectively, EU-based legal entities controlled by entities based in non-EU countries. Investments below that threshold may also be subjected to screening wherever deemed necessary for the protection of national security and public order.

The procedure of granting an investment permit is launched subject to an application filed by the would-be investor, which is reviewed by the competent authorities within 45 days from the date of submission. The Inter-departmental Board may either approve the investment at face value, or make such approval conditional upon certain obligations to be assumed by the investor; or altogether deny an investment permit. The ruling of the board may be appealed against in accordance with the Administrative Procedure Code.

For submission of false information in support of an application, or for effecting an investment without prior authorization, an investor is liable for a fine of 5 percent of the total value of the investment. The Inter-departmental Board will be authorized to also impose additional liabilities on the investor whenever deemed necessary for the protection of national security and public order.

The proposed bill raises a lot of questions without providing satisfactory answers. At structural level, the Inter-departmental Board for Screening Foreign Direct Investments is slated to comprise representatives of several government ministries and agencies of relevance to national security, with a clear leading role assigned to the Ministry of Innovation and Growth (the Board is to be chaired by a deputy minister of that ministry; its deputy chair will be a representative of the Bulgarian Investment Agency, which reports to it). For a

meeting of the Board to be valid, it must be attended by a majority of its members (a total of 12); a majority of all members will be required to pass a ruling. Thus, any ruling can be passed without the participation of representatives from, e.g., the Ministry of the Interior, or the State Agency for National Security, or the State Intelligence Agency but with votes coming from the Ministries of Health, Tourism, Energy and the like. This immediately highlights the need for rules governing the process of reviewing applications for investment permit while emphasizing the role of the ministry in whose sphere of competence the proposed investment falls. For the time being, no such rules have been proposed, which raises the risk of the Board making decisions that are out of touch with the specificities of the sector targeted by the investment.

The Bill also does not provide criteria for granting a permit, for issuing a conditional approval or for denying a permit altogether. There is a reference to article 4 of Regulation 2019/452, but it only contains an indicative list, so there is no clarity as to how the Inter-departmental Board will arrive at one decision or another. In addition, there are no clear-cut mechanisms of ex-post control, especially when a conditional approval is granted for an investment. No option has been provided of imposing behavioral or structural measures in the event of breach of legal requirements; the Bill only states that such measures can include change of control over, or changes in, or termination of, a business operation. It remains unclear what control mechanisms the Inter-departmental Board will have at its disposal and what will be their legal nature – e.g., whether they will constitute coercive administrative measures and whether they will be subject to appeal.

Another issue that remains legally outstanding in the proposed Bill is that of protection of trade secrets. In the process of applying for, and being granted, an investment permit, the applicant will need to disclose detailed information about its business intentions, but – contrary to the requirements of Regulation 2019/452 – the Bill provides no measures for its protection. In this case, the relevant provisions of the Trade Secret Protection Act are inapplicable as the disclosure of information for purposes of enabling public authorities to exercise their powers is explicitly excluded from the scope of application of that Act.

The issues raised are of exceptional importance inasmuch as the proposed bill creates obstacles to foreign direct investments related to infrastructure, high technology or raw materials. The legislation provides insufficient legal assurances for transparency and predictability of the procedures from the perspective of the proposed Inter-departmental

Board. These issues may subsequently be dealt with at the level of secondary legislation, but their significance requires that they be discussed by the National Assembly and given a permanent place in the wording of the future law itself. The need for a debate on measures for attracting investments to Bulgaria, which lags behind other nations in Central and Eastern Europe in that respect, by means of a general overhaul of the Investment Promotion Act, is a separate matter.