



TRANSLATION

To: Mrs. Zinaida GRECEANÎ
President of Parliament of the Republic of Moldova

To: Mr. Vladimir GOLOVATIUC
Head of the Committee for Economy, Budget, and Finances

To: Mr. Igor VREMEA
Head of the Committee on Foreign Policy and European Integration

To: Mr. Alexandru JIZDAN
Head of the Committee for Defense, Public Order, and National Security

To: Mr. Sergiu LITVINENCO
Member of the Parliament

To: Mr. Igor GROSU
Member of the Parliament

To: Mr. Radu MARIAN
Member of the Parliament

Copy: Mr. Ion CHICU
Prime Minister of the Republic of Moldova

Copy: Mr. Sergiu RAILEAN
Minister of Economy and Infrastructure

Copy: Mr. Ion LUPAN
Head of the Secretariat
Economic Council to the Prime Minister of the Republic of Moldova

Copy: H.E. Mr. Dereck J. HOGAN
Ambassador Extraordinary and Plenipotentiary of the United States of America to the Republic of Moldova

Copy: H.E. Mr. Peter MICHALKO
Ambassador, Head of the European Union Delegation to the Republic of Moldova

No. 96 as of 17 August 2020

Ref.: The comments of the American Chamber of Commerce in Moldova on the Draft Law no. 7/2020 on the amendment of certain legislative acts

Dear Mrs. President of the Parliament,
Dear Members of the Parliament,



I salute you on behalf of the Business Association „American Chamber of Commerce in Moldova” (hereinafter „AmCham Moldova”).

Through this letter, I would like to bring to your attention the comments of AmCham Moldova on the Draft Law no. 7/2020 on the amendment of certain legislative documents (Law no. 81/2004 on investments in entrepreneurial activity; Law no. 121/2007 on the management and privatization of public property; Law no. 179/2008 on public-private partnership; Law No. 121/2018 on the works concession and service concession).

The business community has reviewed the Draft Law in terms of the quality of the proposed provisions, the impact on the business environment, and the risks it might generate.

Previously, in the letter no. 72 as of June 18, 2020¹, AmCham Moldova commented on an initiative with a similar purpose to the one pursued by promoting the Draft Law, **several of the previously stated arguments being applicable in this case, as follows below.**

In our opinion, the establishment of any additional control/verification mechanism must be assessed from all the perspectives, in particular from the point of view of protecting investments and building a favorable investment climate, legality and predictability, as well as the positive obligation of the state to safeguard the right to ownership and the freedom of entrepreneurial activity (art. 46 and 126 of the Constitution), as well as the compliance with the international treaties (including bilateral treaties on the investment protection).

Following these principles, AmCham Moldova would like to draw your attention to the following:

On the imminent risks of the Draft Law

1. The Draft Law is unclear in terms of the enforcement of the rules in time

The Draft Law regulates the regime of the change of control clause, establishing that such **clause shall be presumed** if is not stipulated in the investment agreements and the contracts covering the goods of importance for the state security.

The Draft Law content does not make it clear whether its provisions shall apply only to forthcoming contracts or to the ongoing ones as well.

In this regard, the Law no. 100/2017 establishes that the legal acts shall have effects only as long as being in force and, as a rule, they cannot be retroactive.

The obligation imposed on economic operators practicing activities and/or managing/administrating objects in the area of importance for the state security to comply with the provisions of the Law within three months as of its entry into force, is absolutely unclear including in terms of the way and the concrete provisions to be complied with, on the understanding that in this respect an *ex-post* control is established without a time limit.

¹ <https://amcham.md/st_files/2020/06/19/072.%20Aviz%20AmCham%20-%20infrastructura%20esentiala.pdf>.



2. The Draft Law does not contain express regulations on the mechanism for appealing the decisions of national authorities

In accordance with Art. 3 para. (5) of (EU) Regulation no. 2019/452, the states implementing mechanisms for screening foreign investments shall be obliged to provide the possibility to seek recourse against screening decisions of the national authorities.

Furthermore, the Draft Law does not clearly establish the legal effects of a potential decision by the Government to refuse an already concluded transaction, especially when the right to ownership or possession/use of an asset of importance for the state security which was alienated or encumbered based on such a transaction has been registered as provided for by the law before the entry into force of the Draft Law.

3. The Draft Law does not expressly regulate the rights and obligations of investors regarding the proposed mechanism.

4. The Draft Law does not establish the governance system of the investment screening decision-making process.

5. The Draft Law is unclear regarding the obligation to sign investment agreements in areas of importance for the state security between the investor and the Government.

The proposal in the Draft Law regarding the obligation to sign investment agreements in areas of importance for the state security concluded between the Investor and the Government creates a lack of integration of this provision with those in the art. 12¹ of the Law no. 81/2004 on investments in entrepreneurial activity, creating confusion for the business community.

Thus, art. 12¹ of the Law no. 81/2004 regulates investment agreements as a measure of protection and reduction of the investment risks for the investor and the obligations of the Government in this regard. At the same time, according to art. 13¹ of art. I of the Draft Law, it is proposed to complete the Law no. 81/2004 and to regulate the investment agreements in areas of importance for the state security, but in the absence of the Government support for the investor, which, given the existing regulatory framework, is inexplicable and could be considered discriminatory.

On the correlation of the Draft Law with the current regulatory framework

The Draft Law establishes that the list of jurisdictions not implementing international transparency standards within the meaning of the Draft Law, shall be approved by Government decision, at the proposal of the Office for Prevention and Combating of Money Laundering, according to the Methodology on establishing the jurisdictions not implementing international transparency standards approved by it.

It shall be mentioned that the national legislation contains certain regulations applicable to the relations that are proposed to be regulated by the Draft Law, such as:

1. Law no. 308/2017 on preventing and combating money laundering and terrorism financing establishes in art. 10 para. (6) that the list of high-risk jurisdictions shall be drafted, updated and published by the Office for Prevention and Combating of Money Laundering;
2. Law no. 82/2017 on the Integrity establishes in art. 41 para. (3) that the Office for Prevention and Combating of Money Laundering shall publish the list of jurisdictions not implementing the



- international transparency standards in the Official Gazette of the Republic of Moldova and on its website;
3. Decision of the Board of Directors of the NBM no. 91/2013 establishes the list of jurisdictions not implementing the international transparency standards, in view of enforcing the Law no. 550/1995 on the financial institutions (partially repealed);
 4. Decision of the National Commission for Financial Markets no. 42/5 as of 12.08.2016 establishes the list of jurisdictions not implementing the international standards of transparency and with a high-risk, in view of enforcing the Law no. 407/2006 on insurance.

Accordingly, it is understood that the new regulations could overlap or contradict the already existing regulatory framework. In the light of promoting the Draft Law at issue, it is required to revise the entire relevant legal framework to exclude any dual interpretations.

On the economic substantiation of the Draft Law

Regarding the entire Draft Law, we would like to draw your attention to the fact that it contains provisions regulating the entrepreneurial activity (within the meaning of art. 3 of the Law no. 235/2006) and, according to the provisions of art. 25 of the Law no. 100/2017 and of art. 13 of the Law no. 235/2006, the Draft Law must be accompanied by the regulatory impact analysis.

Furthermore, given that this Draft Law provides regulations impacting the budget and/or provides for reorganizations and structural or institutional reforms, as a research study the analysis of the initiative to develop the normative act is performed, according to the *ex ante* analysis methodology approved by the Government (art. 25 para (2) of the Law no. 100/2017).

Therefore, the lack of a comprehensive analysis reflecting the identified problem, setting the objective, identifying options for the solution, statistical data as grounds for identifying the problem, cost-benefit analysis, substantiating the need for additional regulations and economic and financial foundation, could lead to the inconsistency thereof with the provisions of the Law no. 100/2017.

For comparison, please see the document accompanying the Regulation no. 2019/452 which substantiated the solutions proposed in the Regulation².

On the method of transposing the Regulation no. 2019/452

It is understood that by means of the Draft Law, the authors seek the partial transposition of (EU) Regulation no. 2019/452, regulating a mechanism for screening foreign investments in the national legislation.

In this regard, the (EU) Regulation no. 2019/452 aims at building a favorable framework for the Member States already having a screening mechanism or willing to set it up, and to ensure that any such screening mechanism would meet certain basic requirements, such as the possibility to seek recourse against decisions, non-discrimination between different third countries and transparency.

This conclusion follows both from the information note accompanying the Draft Regulation³, as well as from the text of the art. 3 para. (1) of the Regulation, providing that the Member States may maintain,

² <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017SC0297&from=EN>

³ <https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:52017PC0487&from=EN>



amend, or adopt on their territory mechanisms for screening foreign direct investment for reasons regarding the security or public order.

Having analyzed the document accompanying the Draft Regulation, it is observed that according to the data from 2017, 12 states members of the European Union have established mechanisms for screening foreign direct investment⁴.

Therefore, it is clear that mostly, the wording of the provisions included in the Draft Law can be perceived as an own legislative creation, implying the need for the author to present additional arguments and explanations regarding the proposed regulations and their wording.

On the international commitments to which the Republic of Moldova is party

In addition to the provisions of the Community *acquis* to be transposed by the authors, while reviewing the opportunity of elaborating the Law at issue, account shall be taken of the relevant requirements for imposing restrictive measures for security and public order reasons set out in the WTO Agreements (such as General Agreement on Trade in Services (GATS)), but also the provisions of international treaties on the promotion and mutual protection of investments to which the Republic of Moldova is party.

Given the current wording of the Draft Law and the shortcomings identified, it is considered that the Draft Law may pose several risks for the economic operators, the management of which could be difficult considering the proposed legal framework, especially lacking the economic and legal argumentation.

Thank you for your cooperation and please do not hesitate to contact us for any additional information.

Yours faithfully,

Mila Malairău
Executive Director
AmCham Moldova

⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017SC0297&from=EN>