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The Belgian FDI screening mechanism will enter into force on 1st July 2023

1. Introduction

On 1st July 2023, the Cooperation Agreement of 30 November 2022 of the Belgian Federal State, the Regions, and the Communities implementing a screening mechanism of foreign direct investments (hereafter, the "Cooperation Agreement") in Belgium will enter into force. The Cooperation Agreement provides an *ex ante* screening mechanism of foreign investments in sensitive sectors that are relevant for public order and for the security or strategic interests in Belgium. The screening mechanism aims at preventing investors located outside the EU from gaining control, ownership, or management in the critical infrastructures in Belgium.

Under the Cooperation Agreement, "Foreign Direct Investments" agreements (FDI) signed on or after 1st July 2023 that fall within the scope of the Cooperation Agreements have to be notified to the Interfederal Screening Commission (ISC) and authorized before being implemented.

2. What falls within the scope of the screening mechanism?

The screening mechanism provided in the Cooperation Agreement will apply to FDI which can have an impact on security or public order in Belgium, or on the strategic interests of the federated entities, and which aim to establish or maintain lasting direct relations between the foreign investor and the undertaking to which the capital is made available with a view to carrying out an economic activity in the EU, including investments which allow effective participation in the management or control of an undertaking carrying out an economic activity.

The notion of "control" is defined by reference to the EU merger control law, *i.e.*, "*the possibility of exercising, directly or indirectly, in fact or legally, a decisive influence on the activity of an undertaking by means of ownership or usage rights in relation to the undertaking's assets or components thereof, or the composition, voting behaviour or decisions of one or more corporate bodies*."

The screening mechanism applies to direct investments made by a "foreign investor", *i.e.* (i) a natural person whose primary residence is located outside the EU, (ii) a company established or organized under the legislation of a non-EU country, or (iii) a company that has its ultimate beneficial owner residing outside the EU.

3. What are the sectors covered by the Cooperation Agreement?

Not every FDI should be notified and authorized before being implemented. The screening mechanism at least applies to two types of FDI.

First, the screening mechanism applies to foreign investment directly or indirectly resulting in the acquisition of at least 25% of the voting rights in companies or entities that are established in Belgium and with activities in one of the following sectors: (i) critical infrastructure (both physical and virtual) for energy, transport, water, health, electronic communication and digital infrastructures, media, data processing and storage, air- and aerospace and defense, electoral and financial infrastructures and sensitive facilities, as well as land and real estate critical to the use of such infrastructure; (ii) technologies and raw materials that are essential to the state's security (including health safety), defense or the enforcement of public order, military equipment subject to the "Common Military List" and national control, dual use goods; technologies of strategic importance (including any related intellectual property); (iii) supply of critical inputs, including energy or raw materials and food security; (iv) access to sensitive information, and personal data, or the possibility to control such information; (v) private security; (vi) media freedom and pluralism; and (vii) technologies of strategic importance in the biotechnology sector, provided that the target's turnover in the preceding year exceeded EUR 25 million.

Secondly, the screening mechanism applies to foreign investment which directly or indirectly results in the acquisition of at least 10% of the voting rights in companies or entities that are established in Belgium and with activities linked to defense, energy, cyber security, electronic communication, digital infrastructure, and where the target's turnover in the preceding year exceeded EUR 100 million.

Moreover, foreign investments, which directly or indirectly result in the acquisition of less than 10% of the voting rights in companies or entities that are established in Belgium and with activities in one of the sectors listed above with regards to the first type of FDI, could also be notifiable under certain circumstances. For example, these foreign investments could be notifiable if they lead to the acquisition of veto rights with respect to strategic decisions (*a.o.,* the business plan, the budget, major investments or the appointment of senior management). These veto rights must go beyond the veto rights normally accorded to minority shareholders in order to protect their financial interests as investors. The obligation to notify or not such foreign investments will be further clarified in the future case-law of the ISC.

4. When is the notification procedure due?

The notification of the FDI must be made after signing the agreement related to the direct investment but before the performance of the contract, the disclosure of the offer to purchase or exchange, or the acquisition of a controlling share. Parties may also notify a draft agreement, provided that all parties confirm their intention to conclude an agreement that shall not significantly differ from the draft agreement.

The parties cannot implement the transaction before the FDI has been approved (*i.e.,* there is a similar suspension obligation under EU and Belgian merger control rules).

5. What is the screening mechanism procedure?

FDI must be notified to the ISC before the implementation of the transaction. The ISC is composed of representatives from both the Federal government and the governments of the Regions and Communities. A member of the ISC is only competent when there is a territorial link and a potential impact on its substantive competences.

The review procedure of FDI consists of three phases: the pre-notification phase, the assessment phase and the screening phase.

During the "pre-notification phase", the Secretariat of the ISC will perform a preliminary review of the notification and can send requests for information to the parties concerned by the transaction and third parties. The Secretariat of the ISC will decide whether the notification file is complete after pre-notification exchanges with the parties. The pre-notification phase has no statutory time-limit.

Once the Secretariat of the ISC informs the parties that the notification file is complete, the review procedure has to comply with strict deadlines.

During the "assessment phase", the ISC will review whether (i) control acquired on the basis of the FDI or significant changes in the ownership structure resulting therefrom or (ii) the main characteristics of the FDI could potentially impact the public order, national security, or strategic interests of Belgium or the federated entities.

If no concerns are identified, the case will be closed and the ISC will issue a positive decision whereby the transaction is approved. If it considers that the FDI has such a potential impact, the ISC will open the screening phase (see below).

The decision to approve the FDI or to initiate the screening procedure will be notified to the parties within 30 days from the date on which the notification file is deemed complete.

If the 30-day period is exceeded, the FDI is deemed to be approved and the transaction can thus be implemented.

The "screening phase" consists of an additional risk analysis. The screening phase lasts at least 28 days (it can be extended up to three months).

If one of the competent members of the ISC concludes that the FDI has a possible impact on national security, public order, or strategic interests, it will serve, via the Secretariat of the ISC, a draft opinion to the concerned foreign investor and the Belgian target company who may comment within 10 days. Following such comments, the foreign investor or the target company may request a hearing, or the ISC can organize one on its own initiative.

Within 20 days after the notification of the decision to initiate the screening procedure to the notifying parties, the competent members of the ISC provide the relevant minister(s) with their opinion on the FDI. This period can be extended up to several months, in case of oral hearings, mitigating measures, or requests for additional information.

Each minister takes, within his/her own competences and based on the opinions of the competent members of the ISC, a provisional decision about the potential admissibility of the FDI. Within six days of the reception of the opinions of the competent members of the ISC, the ministers sent the provisional decisions to the Secretariat of the ISC. Within two days, the Secretariat of the ISC processes the provisional decisions into a combined decision.

If these time-limits are exceeded, the FDI is deemed to be approved and the transaction can thus be implemented. In order to approve the FDI, the ISC may propose measures to mitigate the possible impact of the FDI on public order, national security, or strategic interests. If so, the foreign investor and the company in which the investment is made must demonstrate by means of a binding agreement that they will comply with the mitigating measures within a specific timeframe. Examples of mitigating measures are the adoption of a code of conduct for the provision or exchange of sensitive information or requiring one or more administrators to obtain a security clearance.

The final decision can be either to approve the FDI (with possible mitigating measures) or to prohibit the FDI. An appeal against the ISC's decision can be lodged before the Brussels Court of Appeal (Market Court) within 30 days. In principle, an appeal before the Brussels Court of Appeal (Market Court) has no suspensory effect. If the Brussels Court of Appeal (Market Court) annuls the decision, the ISC should proceed with a new screening procedure.

6. Can the ISC open an ex officio investigation?

At the request of one of its competent members, the ISC can also open an *ex officio* investigation of envisaged direct investments falling under the scope of the Cooperation Agreement, if considered necessary in light of public order, national security or strategic interests or in case of non-compliance with the notification requirement. In case of an *ex officio* investigation, structural modifications and other measures can be imposed after the acquisition of the control by the foreign investor.

7. What are the sanctions?

If the foreign investor fails to notify the FDI or implement the transaction before obtaining the clearing from the ISC, it will be fined up to 10% of 30% of the value of the investment, depending on the nature of the violation.

8. Take aways

Foreign investors and Belgian companies active in the above-mentioned sectors should now be very cautious when they contemplate to proceed with foreign direct investments in Belgium. They should analyse whether the investment falls within the scope of the Cooperation Agreement, and, if so, proceed with the notification to the ISC. The parties are obliged to accommodate the timeline and the documentation of their transaction accordingly. The Cooperation Agreement provides heavy fines in case the transaction is implemented before obtaining the clearance of the FDI.

Given that there are no examples yet of the application of the Cooperation Agreement, uncertainties remain as to how the screening mechanism will apply to FDI in Belgium. On 31 May 2023, the ISC published a proposal for Guidelines to give some indications on the scope and procedure of the Belgian FDI screening mechanism. The progressive development of the case-law of the ISC will help to clarify the scope of the Cooperation Agreement.

The Cooperation Agreement aligns with the EU's approach to protect the Union's economic security set out in 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 (*O.J.* L 79I, p.1).

On 14 June 2023, the European Commission launched a public consultation on the current EU Regulation. All stakeholders with first-hand experience of investment screening (*e.g.*, companies, law firms, public authorities of EU Member States) are invited to contribute. The consultation is part of the evaluation mandated by the EU Regulation. Based on the outcome of the evaluation, the European Commission will adopt an evaluation report by the end of 2023.

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