VAN BAEL & BELLIS

Foreign Direct Investment Screening in Belgium

30 June 2023

Tomorrow, 1 July 2023, the Belgian foreign direct investment (FDI) screening mechanism (the mechanism) will enter into force. This mechanism introduces a mandatory notification requirement for a large number of transactions involving foreign investors and grants a broad range of powers to a new public agency, the Inter-federal Screening Committee (ISC). The ISC has been created to oversee the mechanism's application and will act as a contact point for notifications. It will play a coordinating role between the foreign investor and the federal government, regional governments and communities that are the ISC's members.

The mechanism introduces a new important dimension to acquisitions by foreign investors of stakes in Belgian companies and companies with Belgian subsidiaries. Below, we share some key thoughts about the new mechanism. A more detailed overview can be found here.

Scope of application

The mechanism has a broad scope of application. As no generally applicable turnover threshold is provided for, these will include smaller transactions as well. ISC staff expects the number of FDI notifications to be almost double the number of Belgian merger control notifications. Parties are thus well-advised to assess whether their transaction is caught by the mechanism in the early stages of the due diligence process.

Low notification thresholds and wide range of protected sectors – The following transactions are subject to mandatory prior notification:

- acquisitions of 10% or more of voting rights in, or of control of, Belgian businesses which have an annual turnover exceeding EUR 100 million and the activities of which relate to defence (including dual use products), energy, cybersecurity, electronic communications and/or digital infrastructure, and
- acquisitions of 25% or more of voting rights in, or of control of, Belgian businesses, the activities of which relate to certain sectors, including critical infrastructure or inputs, technology and raw materials of crucial importance, private security, freedom and media pluralism, biotechnology and/or access to, or the capability to control, sensitive information (including personal data). These acquisitions are not subject to any turnover threshold (except for specific biotechnology acquisitions, which require an annual turnover of EUR 25 million).

Broad range of acquisitions – Not only third-party acquisitions but also internal group restructurings are covered by the mechanism. By contrast, greenfield investments are not covered.

Broad notion of foreign investor – A foreign investor whose acquisitions may be subject to the mechanism is:

- a private individual whose principal residence is outside the EU,
- a business incorporated under the laws of a non-EU Member State or having its registered office or principal activities outside the EU, and
- a business with an ultimate beneficial owner whose principal residence is outside the EU.

Governments and government institutions can also qualify as foreign investors under the mechanism. EFTA States (Norway, Iceland, Liechtenstein and Switzerland) are considered foreign countries and no particular foreign country qualifies as a "safe haven". Also the UK qualifies as a foreign country.

The identification of an investor's ultimate beneficial owner(s) will require a detailed review of the investor's ownership structure while the determination of "principal residence" and "principal activities" may also be challenging. This is likely to put foreign investors at a disadvantage in auction processes and with respect to deal certainty.

Broad substantive test – The mechanism applies to foreign investments that may affect national security and/or public order but also to foreign investments that may affect the strategic interests of Belgium's regional governments and communities. Parties will thus need to assess whether regional differences could impact the transaction.

Review process

The FDI review process involves the following steps:

1. *Notification* – As a rule, notification will have to take place following the signing but prior to the closing of the transaction. It will also be possible to notify the FDI on the basis of a draft agreement provided the parties confirm their intention to sign the draft agreement without material changes. As of notification and throughout the notification process, the investment will be subject to a standstill obligation and cannot be implemented.
2. *Pre-notification review* – The ISC will conduct a first review of the notification and can request for additional information. The purpose of this review will be to assess whether the notification is complete. There is no statutory time-limit for this stage of the review process.
3. *Verification* – During this phase, ISC members verify whether there are any indications that the transaction may affect national security, public order or the strategic interests of the regions or communities. If any ISC member identifies any such indication, the review process moves to the next phase (screening). If no such indication is identified or if no decision is reached on potential indications prior to the statutory deadline of 30 calendar days from the opening of the verification phase (subject to possible extensions), the FDI will be considered to be approved.
4. *Screening* – In the screening phase, ISC members each prepare a risk analysis and an opinion on the FDI impact of the transaction. The foreign investor can submit comments on a draft of the opinion in writing and during a hearing before the ISC. The investor can also negotiate remedies with a view to mitigate the FDI impact and secure approval. The final decision is taken by the competent ministers of the ISC members within 28 days from the opening of the screening phase (subject to possible extensions). Such a decision may be (i) an approval, (ii) an approval with remedies, or (iii) a prohibition of the FDI. An FDI may only be prohibited if it creates a risk that cannot be addressed through remedies. Remedies may involve the notification of future deals, special board requirements or government liaisons, mandatory local presence, supply or IP licensing or deal carve-outs. If various governments have jurisdiction over the review process, the FDI can only be prohibited by unanimous decision by those governments, save for certain veto powers of the federal government.

As the review process can be quite long, time-consuming and uncertain, parties should consider including in the transaction documents appropriate conditions precedent, realistic long-stop dates and provisions about notification strategies, cooperation mechanisms and risk-allocation.

Transitional regime

Investments signed on or after 1 July 2023 are subject to mandatory notification, provided they meet the applicable notification requirements. Investments signed prior to but closed after this date are not subject to the notification obligation. However, the ISC has the powers to engage in FDI screening on its own initiative and may apply these powers retroactively to investments closed two (or, in case of bad faith, five) years prior to 1 July 2023.

Outlook

While the general contours of the mechanism are clear, important issues regarding its scope of application and implementation remain open. The resulting uncertainty is exacerbated by the novelty of the mechanism and the general lack of established practice. While the ISC has issued draft guidelines, more guidance will be needed, which the ISC acknowledged. In the meantime, it is challenging to predict how exactly this new legal regime will impact transactions under its scope.

If you require any assistance navigating through the maze of the new Belgian FDI mechanism, please do not hesitate to contact us. VBB is available to advise and assist you on any aspect of this new regime.

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