ALERT MEMORANDUM

FDI Screening Mechanism Now Active in Belgium

July 13, 2023

1. Introduction

Transactions signed on or after July 1, 2023, involving Belgian entities active in sensitive sectors may now trigger notification under Belgium's comprehensive Foreign Direct Investment ("FDI") screening mechanism.

Belgium's recently implemented FDI rules include a mandatory and suspensory screening regime that aims to safeguard public order and national security in Belgium as well as the strategic interests of Belgium's federated entities. The regime applies to investments by non-EU investors in entities active in specific sectors in Belgium. It may well capture an unexpectedly large number of deals due to various ambiguities in the legal texts, in part resulting from Belgium's constitutional complexities.

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Key Takeaways

— The Belgian FDI regime is mandatory and suspensory. Parties may not close a deal pending FDI screening. A foreign investor that fails to comply with the FDI regime may be fined an amount equal to up to 10% or, in certain circumstances, 30% of the value of the relevant investment.

— Only deals signed on or after July 1, 2023, are subject to a potential mandatory FDI notification obligation, but the authorities also have broad ex officio powers to review older deals and to impose remedies up to two years after a deal has closed (five years in case of indications of bad faith). In addition, under the Belgian FDI regime non-EU investors may face remedial actions as a condition to have a transaction cleared, ranging from requiring a code of conduct to far-reaching structural remedies such as limiting the scope of the proposed investment. They may also see their investments blocked or the divestment of a previously closed investment ordered.

— The scope of the Belgian FDI regime is broad. While the regime focuses on acquisitions of voting rights of at least 25% (lowered to 10% for the most sensitive sectors) in Belgian targets by non-EU investors in an exhaustive list of sectors, the legal texts are broadly drafted and remain unclear on a number of aspects.

— Belgian FDI screenings may be lengthy and unpredictable. In theory, unproblematic deals could be cleared within 30 calendar days, but there are multiple possibilities to suspend or extend the procedure, so in practice we expect that it will take considerably longer.

— FDI screening is an inherently political process. While communications and decisions are coordinated through an inter-federal screening commission ("ISC"), the actual decisions on transactions will be taken independently by the various competent authorities at federal, regional and/or community levels. In addition, the Coordinating Committee on Intelligence and Security ("CCIS") will be involved in every filing. Each of these government entities will have different priorities and concerns when it comes to FDI screening. Proactive stakeholder management will therefore be key to a timely and successful outcome.

— All of the above will need to be taken into account early on in the transaction process and be reflected in the transaction agreement. We expect parties to negotiate fiercely over timing, risk allocation, the need for conditionality and the appropriate termination rights as well as control over the FDI process (including remedy negotiations).

— We still expect that the vast majority of notified transactions will be approved.

2. Scope: Covered Investments

The Belgian FDI screening mechanism is governed by a Cooperation Agreement of November 30, 2022 ("Cooperation Agreement")[1] and applies to direct and indirect investments by foreign (non-EU) investors seeking to "establish or maintain lasting and direct links" in an undertaking or entity established in Belgium (irrespective of whether the Belgian legal entity is the parent company or only a subsidiary of the group in which the investment is made)[2] whose activities relate to certain sectors exhaustively listed in the Cooperation Agreement.[3]

Foreign investors (including non-EU UBOs). Only investments by a "foreign investor" must be notified. This is broadly defined as (i) any natural person having their principal residence outside of the EU (irrespective of nationality), (ii) any undertaking incorporated or organized under the laws of a non-EU jurisdiction whereby the undertaking's statutory seat or its principal activity is located outside of the EU (so including companies incorporated in the UK) or (iii) any undertaking of which one of the ultimate beneficial owners ("UBOs")[4] has its principal residence outside of the EU.[5] In addition to private institutions and undertakings, this covers foreign governments, public institutions and government-owned companies. There is no exception for UK or EFTA investors, meaning, for example, that UBOs who are Belgian nationals, but have their principal residence in Switzerland or the UK, would be captured as foreign investors.[6]

Sectors covered. The Cooperation Agreement sets forth an exhaustive list of the sectors in which investments are subject to a notification obligation if 25% of voting rights is acquired (or, for some more sensitive sectors, if 10% of voting rights is acquired).[7] In addition, if control (see below) is acquired over a target whose activities relate to these sectors, a separate notification will also be required.[8] For investments involving a Belgian entity that is part of a broader group, only the activities of the group's Belgian legal entity will be relevant to determine whether the investment relates to one of these sectors.[9] However, to assess whether the €25 or €100 million turnover threshold is met (as applicable), the global turnover of this Belgian entity should be taken into account, including turnover generated outside Belgium for activities not related to the relevant sectors.[10]

1. The first threshold (the "25% list"):[11] Notification is triggered in case of acquisitions of 25% or more of a

[1] "*Samenwerkingsakkoord van 30 november 2022 tot het invoeren van een mechanisme voor de screening van buitenlandse directe investeringen tussen de Federale Staat, het Vlaamse Gewest, het Waals Gewest, het Brussels Hoofdstedelijk Gewest, de Vlaamse Gemeenschap, de Franse Gemeenschap, de Duitstalige Gemeenschap, de Franse Gemeenschapscommissie en de Gemeenschappelijke Gemeenschapscommissie / Accord de coopération du 30 novembre 2022 visant à instaurer un mécanisme de filtrage des investissements directs étrangers entre l'État fédéral, la Région flamande, la Région wallonne, la Région de Bruxelles-Capitale, la Communauté flamande, la Communauté française, la Communauté germanophone, la Commission communautaire française et la Commission communautaire commune*", *Belgian Official Gazette*, June 7, 2023 (the "Cooperation Agreement").

[2] Article 5, §1 Cooperation Agreement.

[3] Article 2, 3° Cooperation Agreement, which was aligned with the definition of "foreign direct investment" under Article 2, (1) of Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union (the "FDI Screening Framework Regulation"; *see* the separate Alert Memorandum on the framework regulation, available on our website.; *see also* Article 4, §1 Cooperation Agreement; A "foreign direct investment" for these purposes includes investments which enable effective participation in the management or control of the target undertaking.

[4] Within the meaning of Article 1:33-1:36 of the Belgian Code of Companies and Associations and the Belgian anti-money laundering law of September 18, 2017 (the "AML Law").

[5] Article 2, 4° Cooperation Agreement.

[6] Response to Question 2 of the draft guidelines issued by the ISC Secretariat on June 30, 2023, available in French and Dutch on the website of the ISC Secretariat (the "Draft Guidelines"); Iceland, Norway, Liechtenstein and Switzerland are members of EFTA.

[7] Response to Question 1 Draft Guidelines.

[8] Article 5, §1 Cooperation Agreement.

[9] Response to Questions 9 and 27 Draft Guidelines.

[10] Response to Questions 10 and 11 Draft Guidelines.

[11] Article 4, §2, 2° Cooperation Agreement.

Belgian undertaking and entity whose activities relate to critical infrastructure, critical technologies, critical inputs, access to sensitive information, private security, freedom of media or biotech. There is no size or turnover threshold applicable for these sectors (except for the biotech sector, which does require that the Belgian company's turnover exceed a certain threshold). This list is inspired by Article 4 of the FDI Screening Framework Regulation with a number of additions specific to Belgium (*e.g.*, the private security sector or raw materials essential to (health) security) and covers the following sectors:

— Critical infrastructures, whether physical or virtual, including energy, transport, water, health, electronic communications and digital infrastructures, media, data processing or storage, aerospace and defence, electoral or financial infrastructure, and sensitive facilities, whether or not part of an existing business, as well as land and real estate crucial for the use of such infrastructure;

— technologies and raw materials that are essential to:

  - security (including health security);
  - national defence or the maintenance of public order, the disruption, failure, loss or destruction of which would have a significant impact on Belgium, an EU Member State or the EU;
  - military equipment subject to the Common Military List and national control;
  - dual-use goods, which includes software and technology which can be used for both civil and military purposes;
  - technologies of strategic importance (and related intellectual property), including artificial intelligence (AI), robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies, as well as nanotechnologies;

— supply of critical inputs, including energy or raw materials, as well as food security;

— access to sensitive information, as well as personal data, or the ability to control such information;

— the private security sector;

— the freedom and pluralism of the media; and

— technologies of strategic importance in the biotechnology sector where the Belgian company's turnover exceeds €25 million in the financial year preceding the investment.

2. The second threshold (the "10% list") for the most sensitive sectors: Notification is also required for acquisitions of 10% or more of a Belgian undertaking or entity whose activities relate to certain strategic sectors of defence (including dual-use goods), energy, cybersecurity, electronic communications or digital infrastructures in Belgium provided it realized a turnover exceeding €100 million in the financial year preceding the investment.[12]

3. Acquisitions of control. In addition to the 10% and 25% voting rights thresholds, acquisitions of "control" over a target whose activities relate to the sectors covered by the 25% or 10% list also require notification.[13] Control for these purposes is defined as the possibility of exercising, directly or indirectly, in fact or in law, decisive influence over an undertaking within the meaning of EU (and Belgian) merger control.[14] This is, therefore, significantly broader than what would commonly be understood as "control" under Belgian company law and is consistent with how the term is interpreted and applied under FDI regimes in other countries, including, for example, the Committee on Foreign Investment in the United States

[12] Article 4, §2, 1° Cooperation Agreement.
[13] Article 5, §1 Cooperation Agreement.
[14] Article 2, 1° Cooperation Agreement, which refers back to EC Consolidated Jurisdictional Notice under Council Regulation (EC) 139/2004 on the control of concentrations between undertakings ("EUMR"); Article 3(2) of the EU Merger Regulation defines "control" as the possibility to exercise "decisive influence" over one or more other undertakings.

("CFIUS"). For example, certain customary minority shareholder protection rights may already cause an investment to cross the threshold of "control" and, therefore, trigger a notification obligation even if the 25% (or 10%) threshold is not met. Moreover, in that case, the turnover thresholds mentioned above do not appear to apply.

Points of Attention – Broad Application of the Belgian FDI regime

Broad interpretation of sectors covered. Since it is only required that the activities of the Belgian undertaking "touch upon" or "relate to" ("*raken aan*/*sont liées aux*") the sectors covered by the Belgian FDI regime, investments in undertakings that are not directly active in these sectors but are—for example—key suppliers of other undertakings active in these sectors also may be caught.

Share thresholds are applied cumulatively meaning share step-ups are also covered. Notification under the Belgian FDI rules is required for any investor that acquires additional voting shares after July 1, 2023, thereby (cumulatively) exceeding any of the 10%, 25% or control thresholds. So, a non-EU investor that holds 30% of shares prior to July 1 and acquires additional voting rights as of July 1 will, in principle, be required to notify if the target is active in any of the covered sectors. Similarly, a non-EU investor that holds 20% of shares and acquires an additional 5% of shares as of July 1 will be required to make a notification.[15]

"Passive" acquisitions also are in scope. Crossing the relevant voting rights thresholds does not require an "active" acquisition or investment on the part of the foreign investor. Even "passive" acquisitions are caught.[16] This could occur, for example, if the target implements a share buy-back program, introduces securities with multiple or double ("loyalty") voting rights or because the investor enters into an agreement with other shareholders of the target that gives rise to a concerted action or control over the target without any additional investment or acquisition.

Intra-group restructurings are in principle not excluded. Based on draft guidelines published on June 30, 2023[17], internal group restructurings may still require notification even if there is no change in the ultimate parent company or UBO of a group of companies. It remains to be seen, however, how this will be applied in practice.

Greenfield investments are explicitly excluded.[18] In line with the approach taken by most other EU Member States, the Belgian FDI regime excludes greenfield investments from notification and review. However, there is pressure to reconsider this point and we could expect Belgium to update its regime to

[15] Responses to Questions 14, 16 and 17 Draft Guidelines.
[16] Article 5, §1 Cooperation Agreement.
[17] Response to Question 23 Draft Guidelines.
[18] Article 4, §4 Cooperation Agreement; Response to Question 4 Draft Guidelines; According to the explanatory memorandum, such investments cannot pose an immediate threat to national security, public order or strategic interests. Note however that the OECD recognized that greenfield investment may result in the exposure of security or public order in similar ways as acquisitions of existing companies (OECD, *Framework for Screening Foreign Direct Investment into the EU*, November 2022, p. 56). Belgian administrations are also continuing to monitor how neighbouring countries and the EU are evolving in this regard.

include greenfield investments if, consistent with the recently broadened jurisdiction by CFIUS over greenfield investors, other Member States do the same.

Uncertainty around assets deals. Although some have questioned whether asset deals would be subject to the FDI screening mechanism, the draft guidelines and notification form published by the ISC Secretariat on June 30, 2023, suggest at least certain asset deals would be covered.[19] Without further specific guidance from the ISC to the contrary, and considering the broad definition of "control", structuring a transaction as an asset deal may not avoid a Belgian FDI screening.

3. Application in Time & *Ex Officio* Review

Only investments signed on or after July 1, 2023, are subject to the mandatory notification obligation. The timing of closing is irrelevant for the application (or not) of the FDI screening mechanism.[20]

Transactions signed before July 1, 2023 may still be called in for *ex officio* review for up to two years after the closing (up to five years in case of indications of bad faith) if a competent ISC member considers it necessary to safeguard public order, national security or strategic interests.[21] This type of *ex officio* review may also lead to the imposition of remedies for transactions that have already closed.[22]

4. Notification process

Timing of notification and standstill obligation. The notification must, in principle, be made to the ISC between signing and closing.[23] In line with Belgian merger control, a notification can be made based on a draft agreement provided all parties expressly declare their intention to conclude an agreement that does not materially differ on any relevant aspect from the notified draft.[24] In the event of a takeover bid, parties may notify an intention to bid that has been publicly announced in accordance with applicable takeover regulations.[25] Acquisitions of equity interests on the stock market must be notified at the latest at the time of the acquisition.[26]

Transactions that require Belgian FDI review are subject to a standstill obligation and cannot be closed

[19] Response to Question 6 Draft Guidelines dealing with the (asset) sale of a business division; Annex 14 of the notification form seems to apply specifically to acquisitions of a line of business by way of an asset deal.
[20] Article 5, §1 Cooperation Agreement; Response to Question 29 Draft Guidelines; Substantial amendments to transaction agreements signed before July 1, 2023, may still require notification according to the response to Question 30 of the Draft Guidelines.
[21] Articles 24, 26 and 27 Cooperation Agreement; Note the seemingly arbitrary distinction between the time limits set in the case of Article 24 *ex officio* review proceedings (where remedies must be imposed within two or five years after the closing) and Article 27 *ex officio* review proceedings (where the review procedure must be initiated within two or five years after the closing, but remedies can be imposed at the end of the procedure irrespective of how long after the closing the procedure is completed).
[22] Transactions which have already closed cannot be reversed, but structural remedies may include mandatory divestment.
[23] The obligation to notify arises in principle as from the signing. However, specifics of the investment can influence the exact timing of the obligation kick-in. For example, in instances where voting rights are obtained gradually, the obligation arises only as from the certainty that the relevant thresholds will be exceeded. For acquisitions of voting rights subject to certain condition(s), the obligation to notify only applies as soon as the relevant conditions are fulfilled (Response to Questions 18-19, 28 Draft Guidelines).
[24] Article 5, §2, first paragraph Cooperation Agreement.
[25] Article 5, § 2, second paragraph Cooperation Agreement.
[26] Article 5, §3 Cooperation Agreement.

until FDI clearance has been obtained.[27] Failure to comply with this standstill obligation may give rise to an administrative fine of up to 30% of the value of the investment.[28]

Formalities and use of languages. Notifications can be made through the ICS's website, by letter or email or (in person) on site by completing (i) the Belgian notification form, (ii) the accompanying summary and (iii) the EU Form.[29] Investors must provide information on their ownership structure and economic activities and describe the investment at issue (*e.g.*, its strategy, value, financing and date of intended completion). The detail that must be provided on the activities of the target is high (including turnover, profit, market share data, information on IP, an overview of access to (personal) and sensitive data, information on workforce, customers and competitors, *etc.*).[30] The forms will, therefore, introduce a burdensome obligation on foreign investors to provide detailed information (including on the target company).[31]

Failure to (timely) notify can give rise to administrative fines of up to 30% of the value of the relevant investment. Similar fines apply for gun-jumping and the provision of incorrect, distorted or misleading information in the notification or in response to a request for information. The provision of incomplete information as part of the notification, in turn, can give rise to fines of up to 10% of the value of the relevant investment.[32]

Notifications will have to be made in Dutch or French, depending on the location of the seat or establishment of the Belgian target.[33] A notification made in the wrong language will be null and void.[34] Annexes to the notification can, in principle, be submitted in other languages.[35]

Role and composition of the ISC. The ISC will be composed of maximum 12 members: maximum three representatives of the federal government, representatives of the three Regions (the Flemish Region, the Walloon Region and the Brussels-Capital Region), representatives of the three Communities (the Flemish Community, the French-speaking Community and the German-speaking Community), and the French and Common Community Commissions in Brussels.[36]

[27] Article 5, §1 and 12, §1 Cooperation Agreement; For acquisitions of equity interests on the stock exchange, all rights associated to the acquisition, except financial rights are suspended following a notification (Article 5, §3 Cooperation Agreement).
[28] Article 28, §2, 3° Cooperation Agreement.
[29] Articles 5, §1 and 6, §2 Cooperation Agreement; The notification forms are available in French and Dutch on the website of the ISC Secretariat. Currently, a notification can be made without the payment of a filing fee.
[30] The foreign investor will have to provide supporting documents for almost all information provided in the notification form, including a mandate of representation, organigrams setting out the chain of control of both the investor and target, list of clients and economic activities, lists of competitors, *etc*.
[31] Similar to merger notifications under competition law, the transaction agreement would typically require parties to cooperate in relation to the notification obligation. In a hostile transaction, where the target refuses to directly cooperate with the investor, the ISC Secretariat could, in consultation with the competent ISC members, request the target to provide additional information pursuant to Article 16 Cooperation Agreement.
[32] Article 28, §1 and 2 Cooperation Agreement. The "value of the relevant investment" in case of multi-jurisdictional transactions is the part of the investment relating to the undertaking or entity based in Belgium (Response to Question 48 Draft Guidelines).
[33] It remains to be clarified whether an investment in an undertaking located in the German-speaking linguistic area of the Walloon Region could be notified in German.
[34] Article 3, §1 and 2 upcoming law regulating the use of language regarding the FDI screening mechanism established by the Cooperation Agreement (Adopted text Chamber 55-3397/007) ("upcoming Law on Use of Language").
[35] Articles 3, §2 upcoming Law on Use of Language. In practice and depending on which ISC members are expected to be competent to review the notified investment, a translation in English, Dutch or French may be recommended to speed up the review process.
[36] The Governments will determine which ministers (and college members) are authorized to make decisions in the screening procedure (Article 10, § 3 Cooperation Agreement). At federal level, the ministers responsible for home affairs, foreign affairs and finance have been appointed to take such decisions (Article 3 of the Royal

The ISC is chaired by a representative of the Federal Public Service of Economy without voting rights.[37]

The secretariat of the ISC (within the Federal Public Service of Economy) will process the initial notification and take on a mostly coordinating role.[38] In principle, only competent members of the ISC (*i.e.*, where there is a territorial link and possible impact on its material competencies) will be informed and involved in the review of any given transaction.[39] These competent ISC members (to be determined on a case-by-case basis) will conduct an initial review on behalf of the federal or federated entity they represent and will play a largely advisory role.[40] In practice, a single investment will therefore likely trigger various separate parallel review procedures by multiple ISC members, with each member bound by its respective territorial and material competences and reviews being coordinated by the ISC Secretariat.[41]

Decisions will be made separately by the various competent authorities at federal, regional or community level.[42] It remains to be seen how these parallel procedures will be coordinated in practice, but there is a clear risk that different levels of government may diverge significantly which may lead to additional delays and complexities. Such a decision-making process could make it difficult to render reliable deal feasibility predictions.

Review process. The Belgian FDI review process consist of two phases: (i) an initial assessment phase ("*toetsingsprocedure/procédure de verification"*) and (ii) a more detailed screening phase ("*screeningsprocedure/procédure de filtrage"*). The European Commission and other EU Member States will only be informed of transactions that are subject to the more detailed screening.[43] The Coordinating Committee on Intelligence and Security ("CCIS") is involved as of the initial assessment stage and has an advisory role.[44]

During the initial assessment phase (Phase I), each competent ISC member and the CCIS will conduct its own separate verification to decide whether the investment can be cleared without a detailed risk assessment or whether further review is merited. The decision on the initial risk assessment must be notified to the notifying party/ies within 30 calendar days following the ISC's receipt of the complete file.[45] Absent notification of a decision within this timeframe, the investment is deemed to be approved unconditionally.[46] However, the 30-day time period is subject to "stop-the-clocks" and is – for example –

Decree of June 15, 2023). The federated entities each can appoint a single representative (with the exception of the Flemish Community, which can appoint an additional representative in files that concern a competence of the Flemish Community Commission in Brussels).

[37] Article 3, §2 Cooperation Agreement.

[38] *See, for example*, explanatory memorandum and Article 9 Cooperation Agreement.

[39] The Cooperation Agreement sets out that the place of the companies registered office, its economic activities and the existence of certain infrastructure can all, among other things, point towards the existence of a territorial link (Article 7, §1 Cooperation Agreement). An ISC member that considers to be competent can request the ISC Secretariat to receive the complete file in order to be involved in the review process (Article 7, §3 Cooperation Agreement).

[40] Article 10, §2 Cooperation Agreement.

[41] Articles 8 and 9 Cooperation Agreement.

[42] Articles 10 and 23, §1 Cooperation Agreement.

[43] Article 18, §1 Cooperation Agreement.

[44] The ISC Secretariat shall seek the opinion of the CCIS on each notified investment (Article 13, §1 Cooperation Agreement).

[45] This timeframe is extended until the next working day if its final day is a Saturday, Sunday, legal holiday or closing day of the ISC Secretariat (Article 32 Cooperation Agreement). On the same day the ISC's decision is notified to the parties, it is notified to the European Commission and other Member States under the EU foreign investment cooperation mechanism (Article 18, §1 Cooperation Agreement). The EU Regulation requires Member States to give *"due consideration"* to the comments of other Member States and to the opinion of the European Commission (Article 6(9) Regulation (EU) 2019/452). In case the foreign direct investment is likely to affect projects or programmes of Union interest, Member States shall take "*utmost account*" of the Commission's opinion (Article 8(2) Regulation (EU) 2019/452).

[46] Article 18, §2 Cooperation Agreement.

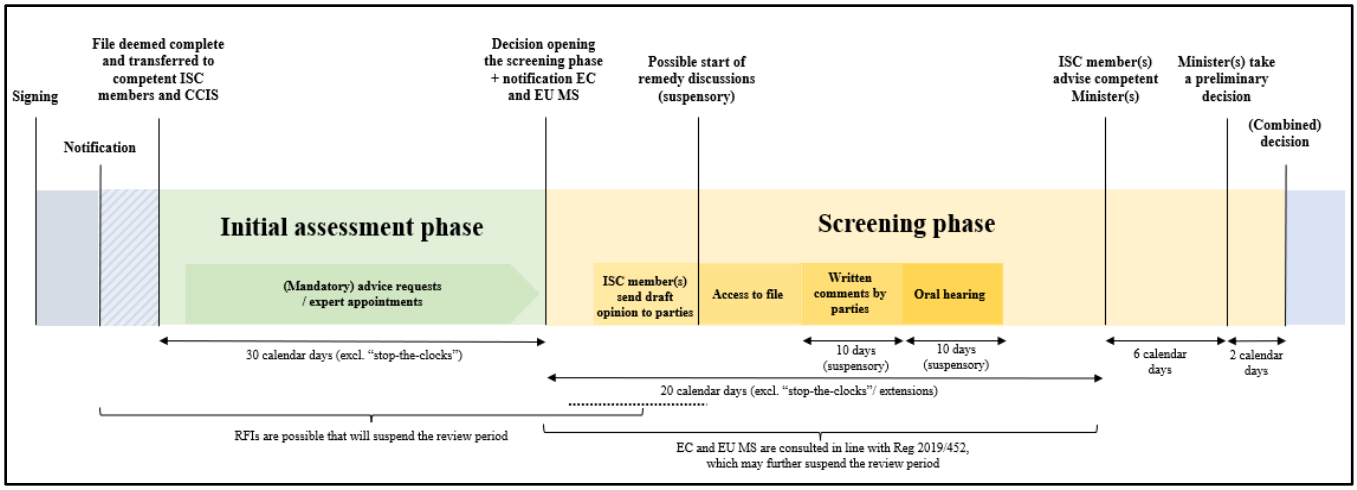
suspended when an ISC member requests additional information.[47]

If a subsequent screening phase (Phase II) is opened, a detailed risk assessment of the investment will be carried out. While Phase II is formally slated to last only 28 calendar days, in practice, the statutory deadlines in the screening phase can be suspended by various "stop-the-clocks" and there are various other mechanisms to extend the review including—for example—the involvement of the European Commission or other EU Member States, negotiations on remedies or an extension request by the CCIS.[48] This could extend the Phase II review by several months.

In addition, the actual review process will only formally commence—and the clock on the statutory deadlines will start to run—when the notification filed is deemed "complete" by the ISC Secretariat. In that regard, and contrary to what is common in merger control proceedings, the ISC Secretariat will not engage in any informal pre-notification discussions nor review informal briefing papers. In case of doubt, parties should submit a precautionary filing.[49] It will remain to be seen what the ISC's practice will be in declaring notifications complete and, accordingly, whether the Phase I and Phase II statutory review timelines will start shortly after filing or whether a period will lapse during which parties must work on completing the notification form based on feedback from the ISC.

Requests for information ("RFIs"). Following a (complete) notification, the competent ISC members may request through the ISC Secretariat any information necessary to complete the file, which must be provided without delay.[50] Failure to do so can give rise to fines of up to 10% of the value of the relevant investment.[51]

As illustrated by the simplified timeline for a private M&A transaction below, we expect the actual review timelines to extend beyond the initial statutory 30 and subsequent screening 28 calendar days, respectively. The current political intention of the ISC is to complete procedures within two to three months at most.[52] It remains to be seen whether the ISC will be able to live up to this intention. This will in all likelihood depend on the number of notifications the ISC receives, the resources allocated to the ISC (and the various levels of government performing the actual review), as well as the number of actors involved in a specific review.



[47] Article 16, §1 Cooperation Agreement.
[48] *See, for example,* Articles 18, §1, 20,§5, 22, §3 and 23, §2 Cooperation Agreement.
[49] Response to Question 21 Draft Guidelines.
[50] Article 6, §3 Cooperation Agreement.
[51] Article 28, §1, 2° Cooperation Agreement. The fine can be imposed both on the foreign investor as well as the target (Article 16, §1 Cooperation Agreement).
[52] Website FPS Economy, Inter-federal screening commission, available in French and Dutch.

Standard of review. During the assessment phase, each competent ISC member verifies whether the investment could impact (i) federal public order, (ii) federal national security,[53] or (iii) the strategic interests of any of the federated entities.[54] In addition to the competent ISC members' assessment, the ISC Secretariat will also obtain the opinion of the CCIS, which is shared with all competent ISC members and, if relevant, will also coordinate any requests from individual members for advice from other competent governmental bodies (*e.g.*, sector regulators).[55]

During the Phase I initial assessment stage, the competent ISC members and the CCIS will examine whether there are any concrete indications of a (possible) risk to public order, national security or strategic interests based on, *inter* alia, the following considerations: (i) whether the foreign investor is directly or indirectly controlled by a third country government; (ii) whether the foreign investor has previously been involved in activities that could affect national security or public order; or (iii) whether there is a serious risk that the foreign investor is involved in illegal or criminal activity. As soon as one competent member identifies such indications, a screening phase will be opened.[56] In case the CCIS requests an extension of the deadline for its opinion and this request is granted by the competent ISC members, this will also automatically start the screening phase.[57]

During the Phase II screening stage, competent ISC member(s) conduct a specific risk analysis of the foreign investment so as to advise the competent minister(s) to enable them to take a final decision on the investment.[58] In principle, the competent ISC member(s) must provide their final advice to the competent minister(s) within 20 days following the opening of the screening phase (extendable by one month for complex files).[59] If a negative advice is envisaged, a draft opinion must first be sent to the notifying party/ies and the target to enable them to review and comment on the advice.

[53] The notions "public order" and "national security" are based on Regulation (EU) 2019/452 and, even though they leave a significant margin of discretion to the authorities, are relatively well established concepts in the FDI space. While the Regulation does not define these notions, more guidance is provided by the European Commission (Question 13 in the FAQ on the EU Framework for FDI Screening, available in English on the EC website).

[54] Article 17, §1 Cooperation Agreement; Contrary to "public order and "national security," the notion of "strategic interests of the federated entities" is not based on EU Regulation and the Cooperation Agreement only provides a high-level definition referring to (i) ensuring the continuity of vital processes; (ii) avoiding that certain strategic or sensitive knowledge falls into foreign hands; and (iii) ensuring strategic independence (Article 2, 6° Cooperation Agreement). Further guidance on the specific risks and interests ISC members can take into account is set out in Article 11 Cooperation Agreement, which refers to: (i) the impairment of the continuity of vital processes which, in the event of failure or disturbance, will lead to serious social disruption and threaten national security, strategic interests and the quality of life of the Belgian population; (ii) the impairment of the integrity or exclusivity of knowledge and information linked to vital processes and the high quality sensitive technology required for such purpose; and (iii) the creation of strategic dependencies.

[55] Articles 13 and 14 Cooperation Agreement; The requests for advice are coordinated by the Secretariat of the ISC and the advice obtained is shared will all competent ISC members, not just the member who requested the advice. In principle, a delay of maximum 25 days is given to the governmental body whose advise is requested, but it remains to be seen if this delay is respected in practice.

[56] Article 17, §2, first paragraph Cooperation Agreement.

[57] Article 17, §2, second paragraph Cooperation Agreement.

[58] Article 19 Cooperation Agreement; Also in this phase, ISC members may request advice from other competent governmental bodies or appoint experts. The delay to provide advice is shorter in the screening phase, with a maximum of 15 days, when compared to the assessment phase (25 days) (Articles 13 and 14 Cooperation Agreement).

[59] Articles 20, §5 and 22, §3 Cooperation Agreement.

Focus – Remedies

Once the draft opinion has been notified to the parties, the competent ISC member(s) can propose remedies ("bijsturende maatregelen/mesures correctives") to the parties to mitigate the impact of the investment on public order, national security or strategic interests and therefore allow for approval of the investment. It currently remains unclear which files are likely to qualify for a conditional clearance.

The Cooperation Agreement provides an indicative list of potential remedies, including, inter alia, establishing a code of conduct on the provision or exchange of sensitive information, the appointment of a compliance officer with security clearance, the obligation to deposit technology or knowhow with a third party and limiting the size of the foreign investor's investment.[60]

Negotiations on remedies suspend the applicable time periods by one month (each time renewable by one more month, following an agreement between the competent ISC member(s) and the parties).[61] The Belgian regime currently does not provide for an opportunity to discuss or propose remedies during the initial Phase I assessment stage.

Once the competent ISC members send their advice to the relevant ministers, each competent minister takes a preliminary decision on the admissibility of the investment based on the received advice.[62] The preliminary decision(s) by the minister(s) is/are to be notified to the Secretary of the ISC within six days following receipt of the advice. If several preliminary decisions are received from different competent ministers, the Secretariat consolidates these into a so-called "combined decision" ("*gecombineerde beslissing*/ *décision combinée*").[63] The combined decision is notified to the parties by the ISC Secretariat within two days after having received the preliminary decisions. Combined decisions can result in unconditional clearance[64], conditional clearance[65] or a prohibition[66].

In principle, a negative decision of a single competent minister can suffice for a prohibition decision to be issued. However, if several federated entities are competent in the same file, the investment can only be vetoed by consensus of the relevant ministers. The federal minister, if competent, always remains able to block the transaction after consultation in the Council of Ministers.[67]

Failure to take a combined decision within the prescribed deadline will result in tacit unconditional approval.[68] It currently remains unclear whether the (combined) decision, or related press release, will be

[60] Article 21, §4 Cooperation Agreement.
[61] Article 21, §2 Cooperation Agreement.
[62] Article 23, §1 Cooperation Agreement; At the Federal level, a negative advice decision can only be taken following consultation in the Council of Ministers. Ministers must give due consideration to an opinion of the European Commission or Member States' comments received under the EU foreign investment cooperation mechanism.
[63] Article 23, §2 Cooperation Agreement.
[64] Article 23, §3, 1°.
[65] Article 23, §3, 2° Cooperation Agreement; Failure to implement remedies within the applicable time period can give rise to an administrative fine of up to 30% of the value of the relevant investment (Article 28, §2, 4° Cooperation Agreement).
[66] Article 23, §3, 3° Cooperation Agreement.
[67] Article 23, §1 and §4 Cooperation Agreement.
[68] Article 23, §7 Cooperation Agreement.

published.[69] This lack of transparency will also make it more difficult to advice with a sufficient degree of certainty on the approach the ISC would be expected to take in any individual file, as there will be no "case law" of precedents to rely on.

5. Judicial Review (Appeal to the Markets Court)

Only a final decision allowing (unconditionally or subject to remedies) or prohibiting a foreign direct investment, or any decision to impose an administrative fine, can be appealed by the foreign investor or the target with the Markets Court ("*Marktenhof/Cour des marchés*").[70] The appeal must be filed within 30 days following the notification of the challenged decision and has – in principle – no suspensory effect.[71] The Markets Courts has full jurisdiction when it comes to fines[72], however, on the merits, the Markets Court only has the ability to (partially or wholly) annul decisions. In case of annulment, the file is sent back to the ISC where a new screening phase will start.[73] This leaves significant leeway for the members of the ISC to decide what their "strategic interests" are and leaves questions as to the effectiveness of judicial review on the merits of a case.

6. Practical Takeaways for M&A Transactions

— It is key to keep the FDI regime in mind early on in the process, as it will impact planning and timing as well as preliminary due diligence, not just the negotiation of the deal documents and the post-signing / pre-closing period. Preliminary assessments of whether or not a transaction must be notified will be difficult in light of the broad definitions used and ambiguities that remain in various areas pending further guidance from the ISC. Deal dynamics may become particularly complex when FDI filings must be made in multiple jurisdictions or in combination with merger control or foreign subsidies regulation filings at various levels.

— When setting a "long stop date" in the transaction agreement, parties should be aware of the many possibilities to suspend the procedure, including potential involvement of other EU Member States and the European Commission in multi-jurisdictional deals, which can significantly delay the approval process.

— Bespoke "hell-or-high-water", "best efforts to close" or other contractual provisions with a comparable purpose (and related cooperation and consultation mechanisms as well as provisions that require parties to exchange information) may be required for FDI screening. Both the procedural framework and the type of remedies expected to be required by the FDI authority may vary significantly from what one would expect in a merger clearance process. Parties should consider during the negotiation phase what types of remedies may be acceptable and where the threshold should be for the buyer or investor to walk away from the deal.

— Finally, in a public M&A context, the FDI screening mechanism may prove particularly difficult to apply in practice. In the context of a

[69] Still, at the end of the screening phase a report will be drawn up setting out the non-confidential elements of the file to be included in the annual report that each Member State must submit to the European Commission pursuant to Article 5 of Regulation (EU) 2019/452 (Article 20, §6 Cooperation Agreement).

[70] Article 29, §§1, 2 and 4 Cooperation Agreement; The Markets Court is a specialized chamber part of the Brussels Court of Appeal which also rules on appeals against decisions of certain other regulators such as the Belgian Competition Authority, the Belgian Financial Services and Markets Authority (FSMA), and the Belgian Data Protection Authority. An (interim) decision to open the screening phase cannot be appealed (Response to Question 50 Draft Guidelines). Unlike in Belgian merger control, the Cooperation Agreement does not provide a possibility for interested third parties to appeal.

[71] Article 29, §3 Cooperation Agreement; Unlike in Belgian merger control proceedings (Article IV.79, § Belgian Code of Economic Law), the Cooperation Agreement does not provide for the possibility to request the suspension of the execution of the decision.

[72] Article 29, §2 Cooperation Agreement.

[73] Article 29, §8 Cooperation Agreement.

hostile takeover bid, the complexities of the procedure may even be instrumentalized by the target to delay or stop in its tracks the attempted takeover.

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