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Regulation of Foreign Direct Investments in Belgium

Overview of the regulatory framework



The Belgian foreign direct investment screening mechanism entered into force on 1 July 2023. Under the regime, proposed investments into certain strategically important sectors must be notified for prior clearance to the Interfederal Screening Commission (“ISC”). In addition to outlining the most important principles behind the relevant legal framework, this brochure provides a step-by-step explanation of the Belgian FDI screening procedure.

Substance of the Belgian FDI regime

The Belgian FDI regime is laid down in a Cooperation Agreement between the Belgian federated entities (the “**Belgian FDI Act**”). It introduces a screening mechanism for foreign direct investments that may have an impact on public order, national security and strategic interests.

The Belgian FDI Act applies to direct investments by non-EU investors that lead to the acquisition of control in a Belgian target entity, or the acquisition of at least 10 or 25% of the voting rights in such an entity (the thresholds are sector-dependent). The Act only applies to investments in specific sectors.

When a proposed investment is covered by the Belgian FDI Act, the investor must notify the proposed investment to the ISC and obtain prior clearance before implementing the investment. The FDI screening is carried out by the ISC, which is composed of representatives of the Belgian federated entities.

On receipt of a notification, the secretariat of the ISC will verify the completeness of the notification. Once the file has been declared complete, the ISC secretariat transmits it to the relevant ISC members, i.e. the members representing one or more Belgian federated entities that may be impacted by the proposed investment. Time limits start to run as from that date.

The review process starts with a verification phase and may be followed by an in-depth screening phase.

- **Verification procedure:** This phase consists of a preliminary assessment of the potential impact of the investment by the relevant ISC members. If there are no indications of a negative impact on public order, national security and strategic interests, the file is closed and the decision is notified to the investor. In the opposite case, the screening procedure will be initiated.
- **Screening procedure:** The screening procedure consists of an in-depth investigation of the impact of the proposed investment on Belgian public order, national security and strategic interests. It also triggers the EU cooperation procedure. The procedure culminates in either (i) an unconditional clearance decision, (ii) a clearance decision subject to conditions or obligations (“remedial measures”) or (iii) a prohibition decision.

The Belgian FDI Act provides that the verification procedure must be completed within thirty (30) calendar days after receipt of a complete notification. The time-limit for the screening procedure is in principle twenty-eight (28) calendar days. However, time limits may be subject to suspension, interruption or extension. The procedure can therefore take significantly more time.

Undertaking or entity?

The Belgian FDI Act applies in general to “investments” in certain critical sectors. The investment targets can be any ‘entity’ carrying on economic activities, thus including companies, non-profit organisations or public law entities. Even pure asset deals may fall under the scope of the Belgian FDI regime. For convenience, the term ‘entity’ is used in this brochure.

Checklist for proposed investments in Belgium

The following checklist provides guidance for non-EU investors considering investments in Belgium:

1. The **first step** is to determine the nature of the investment. Some types of investment are exempt from notification.
2. The **second step** is to determine whether the target entity is active in one of the sectors mentioned in the Belgian FDI Act.
3. The **third step** is to determine whether the investment meets relevant voting rights and turnover thresholds and/or leads to control in the target entity.
4. The **fourth step** applies if the conclusion regarding the previous three steps is that a notification obligation applies. A notification triggers the investigation by the ISC.

Step 1: Is the investment exempt from notification under the Belgian FDI Act?

Certain types of investment lie outside the scope of the Belgian FDI Act. For instance, greenfield investments are not notifiable. The same applies to investments in entities which have sales in Belgium but are not based in Belgium.

Guidelines

Check the ICS's guidelines when assessing your notification obligation under the Belgian FDI Act. They are updated on a regular basis.

Step 2: Is the target entity active in a sector mentioned in the Belgian FDI Act?

The Belgian FDI regime only applies to entities active in specific sectors. Note that the sectors and activities are broadly defined.

- **Is the investment aimed at key Belgian security interests?**

In this context, the Belgian FDI Act lists any defence-related activity, including:

- Dual-use goods
- Energy
- Cybersecurity
- Electronic communications
- Digital infrastructures

- **Does the target entity operate a vital infrastructure?**

The vital infrastructure can be physical or virtual and relate to a wide range of sectors, including:

- Energy
- Transport
- Water
- Healthcare
- Electronic communications and digital infrastructures
- Media
- Data processing and/or data storage
- Aviation, aerospace and defence
- Electoral infrastructure
- Financial infrastructure
- Sensitive installations, including land and real estate of crucial importance for the use of such infrastructure.

- **Is the target entity active in any of the following sectors?**

Finally, the Belgian FDI Act lists the following sectors:

- Technology and raw materials of essential importance to:
 - Safety, including 'health safety'
 - National defence or the maintenance of public order
 - Military equipment subject to the Common Military List and national control
 - Dual-use items as defined in Regulation 2021/821
 - Technologies of strategic importance (and correlated intellectual property rights), such as: AI, robotics, semiconductors, cybersecurity, air and space travel, defence, energy storage, quantum and nuclear technologies and nanotechnologies
- Supply of critical inputs, including energy or raw materials and food security
- Access to sensitive information, including personal information, or the possibility to monitor such information
- Private security
- Freedom and pluralism of media
- Technologies of strategic importance in the biotechnology sector

Step 3: Does the investment establish control or meet voting rights and/or turnover thresholds?

The third step is to determine whether the investment meets the minimum thresholds for notification.

- **Does the investor acquire control over the target entity?**

A proposed investment has to be notified if the investor acquires control over the

target entity. The Belgian FDI Act defines control in the same way as the EC Merger Regulation and thus uses the criterium of decisive influence.

Control can be acquired both through active investments and through passive means. The latter concept is not further defined in the Belgian FDI Act but includes situations in which control and/or voting rights are acquired through means other than an active investment, such as inheritance or changes in the positions of the other shareholders.

- **Does the investment meet the relevant voting rights and/or turnover thresholds?**

The Belgian FDI Act does not only apply to acquisitions of control but it also applies to acquisitions of minority interests. Such interests are defined in terms of voting rights, i.e., depending on the sector, at least 10% or 25% of the voting rights in the target entity. Both direct and indirect voting rights need to be taken into consideration, as do previous transactions.

The threshold of at least 10% applies to entities active in the first category listed in step 2 above, i.e. defence-related sectors. In addition, in that case, the target entity must have a turnover of at least € 100 million in the financial year preceding the acquisition.

The threshold of at least 25% applies to all other sectors listed in the Belgian FDI Act. In addition, in the case of the last sector listed above, i.e. technologies of strategic importance in the biotechnology sector, a turnover threshold of at least € 25 million applies (turnover in the financial year preceding the acquisition).

If the target entity does not fall under any of the abovementioned sectors, does not meet the minimum thresholds or is otherwise exempted, the Belgian FDI Act does

not apply and there is no notification obligation based on this Act. However, the investment might still need to be notified to the Belgian Competition Authority based on Belgian merger control provisions.

Temporal scope

The notification obligation applies to any transaction that falls within the scope of the Belgian FDI Act signed on or after 1 July 2023. Furthermore, *ex officio* assessments are possible for investments concluded no more than two years before 1 July 2023 (or five in case of bad faith). No proactive notification obligation exists for these transactions, and the parties involved will not be fined for not notifying a prior investment. Remedial measures against the investment may still be imposed, however.

Step 4: Investigation by the ISC

Proposed investments covered by the Belgian FDI Act must be notified to the ISC. Pending the investigation, a standstill obligation applies. The ISC investigation starts when the notification has been declared complete. It consists of a verification phase, potentially followed by a screening phase.

All time limits mentioned below are expressed in calendar days. As they may be subject to suspension, interruption or extension, they are merely indicative.

The **verification phase** (Phase I) gives the ISC thirty (30) days to determine whether the investment might impact the public order, national security and strategic interests of Belgium. In this assessment, the ISC may take into account whether:

- i.* the non-EU investor is under direct or indirect control of a non-EU government;
- ii.* the non-EU investor has been involved in activities which impact the public order or national security of an EU Member State or a third country;
- iii.* there is a serious risk that the non-EU country investor might engage in illegal or criminal activities.

The verification procedure has two possible outcomes, i.e. a clearance decision or a decision to open the screening procedure (Phase II). The latter will be the case if at least one of the ISC members has concrete indications that the investment might pose risks to Belgian public order, national security and strategic interests. In the absence of a decision within the time limits, the proposed investment will be deemed permissible.

The **screening procedure** builds upon the conclusions drawn in the verification phase and entails at least a concrete risk assessment. The screening procedure also triggers the EU cooperation mechanism, which can lead to suspensions of the time limits.

The risk assessment culminates in a draft opinion, which will be sent to the investor and the target entity for comments. The investor and the entity have ten days to comment on this draft opinion in writing. They can also ask for a hearing. During this part of the procedure, the time limits are suspended.

The ISC has, in principle, twenty (20) days from the opening of the screening procedure to send its finalised opinion to the competent minister(s). Based on the advice of the ISC, the competent minister(s) adopt a provisional decision on the proposed investment, each within their respective sphere of competence. It is at this stage that the relevant ISC members can initiate discussions with the investor and target entity on possible remedial measures which could be part of a positive decision.

Such measures may include the adoption of a code of conduct, reporting obligations, or more structural measures.

The provisional positions are the basis for a combined final ISC decision. The decision can be (i) positive, (ii) positive but subject to remedial measures, or (iii) negative. Negative decisions are made when the investment has a non-remediable impact on, for example, national security. If no decisions are made within the applicable time limits, the proposed investment will be deemed permissible.

Decisions of the ISC are subject to appeal to the Market Court.

Notification procedure

Three notification forms must be completed, i.e. the notification form, a summary form, and the form used in the context of the EU cooperation mechanism.

In the notification form, the investor needs to provide, inter alia, the following information:

- i.* The ownership structure of the investor and of the target entity
- ii.* The approximate value of the transaction
- iii.* The products, services and business operations of the investor and target entity
- iv.* The EU Member States and third countries in which the parties are active
- v.* The funding and source of the funding of the investment
- vi.* The date of or planned date for completion of the transaction

If parties fail to notify an investment that falls within the scope of the Belgian FDI Act, if they violate the standstill obligation, or if they provide incorrect or misleading information, fines can be imposed. Maximum fines range from 10% to 30% of the proposed investment.

Key contacts

If you have any questions about the application of the Belgian FDI regime to your proposed investments in a Belgian entity, please do not hesitate to contact AKD's FDI specialists identified below.



Koen Platteau

Expertise: EU & Competition Law | Regulatory

M: +32 4 9557 2803

T: +32 2 629 42 40

E: kplatteau@akd.eu



Joost Houdijk

Expertise: EU & Competition Law | Regulatory

M: +32 477 88 5571

T: +31 88 253 5079

E: jhoudijk@akd.eu

akd

T: +31 88 253 5000

E: info@akd.eu

akd.eu