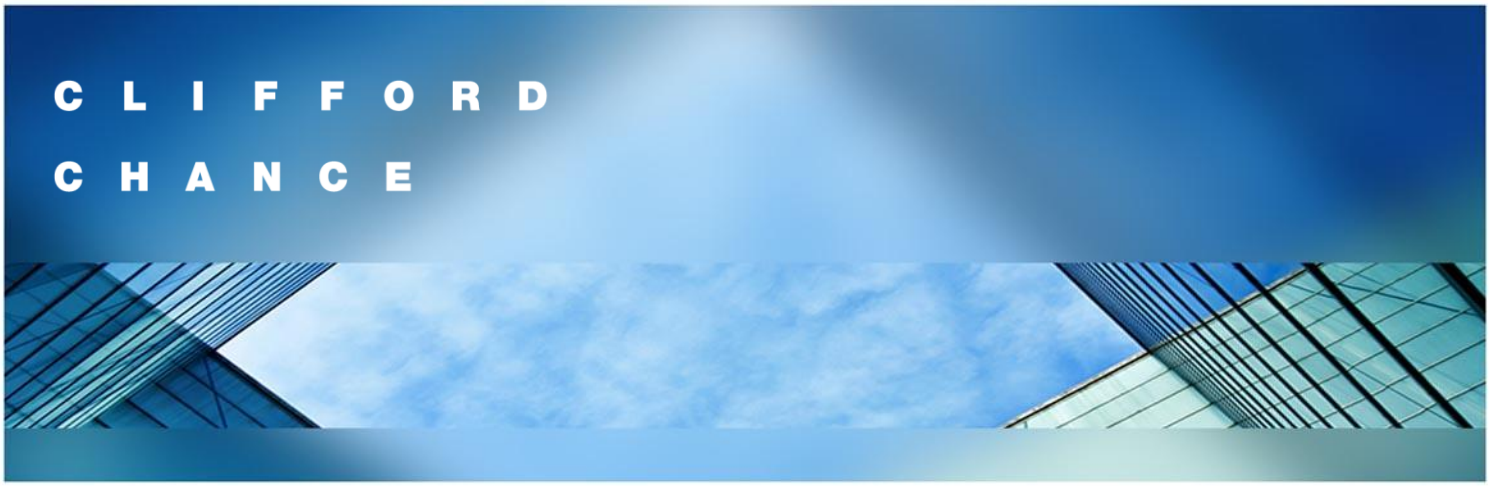

BELGIUM'S NEW FOREIGN DIRECT INVESTMENT NOTIFICATION REQUIREMENT HAS POTENTIALLY SIGNIFICANT TIMING IMPLICATIONS FOR INTERNATIONAL TRANSACTIONS

On 1 July 2023, the new Belgian foreign direct investment ("FDI") screening mechanism enters into force. The new screening procedure, which potentially applies to transactions involving the acquisition of 25% or 10% of a Belgian undertaking active in a wide range of sectors, includes a notification requirement on foreign investors subject to a standstill obligation, relies on a broad definition of "foreign investor," and features extendable deadlines. It also has limited retroactive effect.

WHY THE NEW BELGIAN FDI REGIME MATTERS

- **The scope of the regime is broad** covering ten sectors (including, *e.g.*, access to sensitive personal data and technologies such as artificial intelligence, robotics, semiconductors, cyber security, and energy storage) and is not precisely defined.
- **The screening regime would include a suspensory notification requirement** that would prevent closing of the transaction from anywhere between 30 calendar days and three months if a Phase II is opened -- or more, as no deadline applies to declaring a notification complete, the statutory deadlines only apply as of the declaration of completeness of the notification, and the procedure includes open-ended clock-stopping events. In the case of an international transaction, the duration of the review process could extend beyond the term of merger control or other foreign direct investment reviews applicable to the transaction.
- Heeding to the division of competences among multiple Federal, regional and community governments in Belgium**, the screening mechanism provides for a complex structure** involving a contact point (called the Interfederal Screening Committee or ISC) that will receive the notifications and forward them to the competent Federal, regional or community government(s). Each affected government will conduct its own investigation based on its competence, and multiple governments could review the transaction in parallel.
- **If no notification is made or if the standstill obligation is not observed, the foreign investor faces an administrative fine of up to 30% of the**

Key issues

- Belgium will adopt a suspensory FDI screening mechanism that will enter into force on 1 July 2023.
- Transactions of many sizes will potentially be caught by a notification obligation.
- Federal and regional entities will have a say in the Assessment of the foreign investment
- Administrative fines of up to 30% of the value of the investment can be imposed in case of failure to notify or gun-jumping.
- An *ex-officio* investigation will be possible up to five years after the unnotified acquisition of control, even if it took place before the entry into force of the new regime.
- The new screening mechanism could prove time-consuming.
- Once the regime is in place, parties to a transaction involving foreign investment in Belgian qualifying assets will be well advised to account for the risk profile and timing uncertainties of the Belgian FDI regime in their transaction timing and regulatory filing strategy.

value of the investment. However, if the parties to the transaction spontaneously inform the ISC of a notifiable FDI within 12 months of its completion, the foreign investor will only be liable for an administrative fine of up to 10% of the value of the investment. The transaction involving a foreign investment in Belgium could also face an *ex-officio* investigation in the context of which structural and corrective measures can be imposed.

- **The screening mechanism would have (limited) potential retroactive effect**. An *ex-officio* investigation can be initiated up to two years (or up to five years if there are indications of bad faith) after the unnotified acquisition of control, even if it took place before the entry into force of the new regime, if it is found necessary to safeguard Belgium's public order and national security and Belgium's strategic interests.
- **Practical consequences** could include additional costs, delays, and disclosure requirements for transactions that are caught, often in addition to already lengthy review processes by competition authorities and sectoral regulators. The legislation could also put non-EU investors at a disadvantage in competitive auction processes involving qualifying Belgian assets. In addition, given the broad definition of "foreign investor" under the new legislation, even European companies with a complex ownership structure and Belgian qualifying assets will need to monitor their ownership structure changes.

Although the language of the new regime is final, substantial uncertainty remains around the interpretation of a variety of aspects of the screening mechanism. The ISC is expected to issue guidelines in its first months of operation, which are hoped to provide clarification.

TO WHICH TRANSACTIONS WILL THE NEW BELGIAN FDI REGIME APPLY?

Transactions will fall within the scope of the cooperation agreement, and therefore be notifiable to the ISC, where the following four cumulative conditions are met:

1. **Investment by a "foreign investor."** Investors are "foreign" if they are (i) a physical person with residence outside of the EU, (ii) an undertaking incorporated under the laws of, or having its statutory seat in, a non-EU jurisdiction, or (iii) an undertaking one of the Ultimate Beneficial Owners ("UBO") of which has his/her main residence in a non-EU jurisdiction. If there is no individual with a 25% stake, a legal entity's senior management will be regarded as its UBO. This implies that any EU incorporated entity with a dispersed ownership and control structure (such as a widely-held fund) can be considered a "foreign" investor if one of its members of senior management has his/her main residence in a non-EU jurisdiction. Investments by an EU investor and greenfield investments are in principle exempted.
2. **Investment in an entity established in Belgium**. No criteria are provided to determine whether a target undertaking is "established in Belgium", but a significant economic presence will likely be sufficient. Whether a mere statutory seat will suffice is as yet unclear.
3. **The target undertaking is active in a relevant sector**. Relevant sectors covered by the legislation include (1) critical physical or virtual infrastructure and sensitive installations, including the land and real estate crucial for the use of such infrastructure or installations, whether

or not as part of a going concern, in the following sectors: energy, transport, health, communications, data processing, aerospace, defence, and electronic and financial infrastructure; (2) essential technology or resources for (i) security (including health security), (ii) defence or maintaining public order, (iii) military equipment, (iv) dual use products, and (v) technologies of strategic importance such as artificial intelligence, robotics, semiconductors, cyber security, quantum, nano and nuclear technologies, defence, military, space and aerospace, and energy storage; (3) supply of critical inputs, including energy or raw materials, as well as food security; (4) access to sensitive information, including personal data; (5) the private security sector; (6) freedom and pluralism of the media; (7) technologies of strategic interest in the biotechnology sector (where the target's revenue in the last financial year exceeded EUR 25 million); (8) defence (including dual use items); (9) energy; or (10) cyber security, electronic communication or digital infrastructures. To qualify the investment must "relate to" one of the relevant sectors. This imprecise wording introduces uncertainty and could in light of the sanctions and risk of an *ex-officio* investigation lead foreign investors to err on the side of caution and report, unless and until the ISC issues interpretative guidance or establishes a decisional practice.

4. **Acquisition of either control, or 10% or 25% of the voting rights of the target undertaking, regardless of structure or form of the investment**. The foreign direct investment must consist of (i) the acquisition of: control over a target undertaking active in a relevant sector within the meaning of the EU Merger Regulation; or the acquisition of at least 25% of the voting rights of a target undertaking, except in the case of targets in the sectors of defence, energy, cyber security, electronic communication or digital infrastructures, in which case the threshold is 10%, provided the target's revenue in the last financial year exceeded EUR 100 million. The parties to the draft cooperation agreement can by decree decide to decrease the 25% threshold to 10% or to increase the 10% threshold to 25%.

WHY DOES THE REGIME POTENTIALLY INVOLVE SIX GOVERNMENTS OPINING ON AN FDI?

Belgium is a federal country with a bifurcated federal structure in which the Federal government, the Flemish, Walloon and Brussels Region and the Flemish, French-speaking, and German-speaking Community share competences, each potentially implicating an aspect of Belgium's public order, national security, and/or strategic interests. Each has its own government, although the Flemish region and Flemish community are represented by a single merged government. Belgium's federal structure requires that each competent government can have a say in the decision over the impact of the foreign investment on public order, national security, and/or strategic interests of the region or community.

WHEN SHOULD TRANSACTIONS BE NOTIFIED?

Foreign investors must notify their foreign investment to the ISC between signing and closing or, in case of a public bid on a listed company, prior to the announcement of the bid. Notification of a draft agreement will be possible provided all parties involved demonstrate a good faith intention to conclude an agreement that does not significantly differ from the notified draft.

HOW WILL THE NEW BELGIAN FDI REGIME WORK?

The Belgian FDI legislation provides for a two-stage procedure following notification:

- **Phase I.** In the Phase I verification procedure, each competent ISC member (Federal Government, regions and/or communities) assess whether the transaction will have an impact on Belgium's public order, national security, and/or strategic interests. ISC members will be able to ask the notifying parties for additional information (via the Secretariat). The ISC will have the power to impose a fine on the foreign investor of up to 10% of the value of the FDI where the notifying parties do not provide the additionally requested information within the time limit put forward in the information request. If the notifying parties were to provide incorrect or misleading information, the foreign investor would be liable for a fine of up to 30% of the value of the FDI. At the end of the Phase I verification procedure, the ISC either approves the FDI or opens a Phase II screening procedure.
- **Phase II.** Upon opening of a Phase II screening procedure, the EU Member States and the European Commission are provided with the information required by the EU Foreign Direct Investment Screening Regulation, and they will have 35 calendar days from receipt to share their comments and advice, or to ask for additional information. In the Phase II screening procedure, the notification will be reviewed based on the same information and subject to the same standard of review as in the Phase I verification procedure. If one or more competent ISC members are of the view that the FDI may have consequences for Belgium's public order or national security and/or for Belgium strategic interests, the ISC's Secretariat will notify a preliminary draft advice to the notifying parties. The notifying parties will then have the possibility to access the ISC's file, which will include the notification, non-confidential versions of the advice of the competent ISC members, and any other non-confidential information collected by the ISC in the framework of its investigation. The notifying parties have an opportunity to submit comments and request a hearing. At the end of the Phase II procedure, the competent ministers of the ISC members take a preliminary decision which is then consolidated by the ISC into one decision unconditionally approving, conditionally approving, or prohibiting the transaction. If more than one Region or Community government is competent over the transaction, the competent ministers of the ISC members must agree in order to prohibit. However, a negative preliminary decision of the federal minister will always result in a negative combined decision.

WHO MUST FILE THE NOTIFICATION?

The duty to notify rests on the foreign investor. There is no obligation on the seller or any entity acquired.

IN WHICH LANGUAGE SHOULD THE NOTIFICATION BE?

The notification should be prepared in the official language of the location of the statutory seat or principal place of business of the target. This could be Dutch, French or German. Annexes to the notification can be drawn up in a different language (including English).

HOW LONG WILL THE NEW BELGIAN FDI REVIEW TAKE?

The greatest impact of the new Belgian screening mechanism on most qualifying transactions could derive from the duration of the review. The Phase I decision is subject to a 30-calendar day deadline following receipt of the complete notification and the Phase II decision is subject to a deadline of 20 calendar days extended up to three months. However, (1) there is no deadline on the declaration of the completeness of the notification. Under FDI regimes in other jurisdictions, the absence of a deadline on the declaration of completeness has at times led to slow notification approvals due to workload, or has even been used as an apparent resource management mechanism significantly to delay review of the transaction (*e.g.,* by requesting significant additional information even though that information might not appear material to the FDI review of the transaction). Moreover, (2) there are stop-the-clock events during the course of the Phase I and Phase II procedures that potentially indefinitely add to the duration of the procedure, such as requests for information to the notifying party and comments from the European Commission or from screening authorities of other EU member states.

Given the number of interests that are involved, a Phase II decision could also end up being triggered more easily: a Phase II investigation could be triggered to satisfy a concern of any of the regional or community governments, even if there are no concerns at the Federal level. Once the regime is in place, parties to a transaction involving foreign investment in Belgian qualifying assets will be well advised to account for the risk profile and timing uncertainties of the Belgian FDI regime in their transaction timing and regulatory filing strategy.

WILL THE FOREIGN INVESTMENT REVIEW DECISIONS BE APPEALABLE?

The foreign investor and/or the Belgian target undertaking will be able to appeal the ISC's negative combined decision before the Market Court. The appeal is non-suspensory, and successful appeals lead to a new review before the ISC. The decision to open a Phase II screening process is in contrast not appealable.

WHAT ARE THE SANCTIONS FOR FAILURE TO NOTIFY?

If no notification is made or if the standstill obligation is not observed, the foreign investor faces an administrative fine of up to 30% of the value of the investment in Belgium. However, if the parties to the transaction spontaneously inform the ISC of a notifiable FDI within 12 months of its completion, the foreign investor will only be liable for an administrative fine of up to 10% of the value of the investment. The transaction involving a foreign investment in Belgium could also face an *ex-officio i*nvestigation in the context of which structural and corrective measures can be imposed.

There are no criminal sanctions for failure to notify, unlike in some other EU jurisdictions.

AUTHORS

Jonathan Blondeel
Associate

T +32 2 533 5065
E Jonathan.Blondeel
@cliffordchance.com

Gillis Waelkens
Associate

T +32 2 533 5947
E Gillis.Waelkens
@cliffordchance.com

CONTACTS

Dieter Paemen
Partner

T +32 2 533 5012
E Dieter.Paemen
@cliffordchance.com

Xavier Remy
Partner

T +32 2 533 5902
E Xavier.Remy
@cliffordchance.com

Niek De Pauw
Partner

T +32 2 533 5072
E Niek.Depauw
@cliffordchance.com

Milena Robotham
Partner

T +32 2 533 5074
E Milena.Robotham
@cliffordchance.com

Anastasios Tomtsis
Partner

T +32 2 533 5933
E Anastasios.Tomtsis
@cliffordchance.com

Emily Xueref-Poviac
Counsel

T +33 144 055 343
E Emily.XuerefPoviac
@cliffordchance.com

Georgios Yannouchos
Counsel

T +32 2 533 5054
E Georgios.Yannouchos
@cliffordchance.com

Katharine Missenden
Counsel

T +32 2 533 5913
E Katharine.Missenden
@cliffordchance.com

Celine Feys
Associate

T +32 2 533 5011
E Celine.Feys
@cliffordchance.com