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The More the Merrier – New FDI Control Regimes in the EU

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Introduction

This publication provides an overview of important additions and changes to foreign direct investment ("FDI") control regimes in Europe, which impose regulatory obligations on M&A transactions: Belgium, Ireland, the Netherlands, Slovakia and Sweden.

The number of new and revised FDI control regulations across many jurisdictions has been increasing in response to geopolitical tensions and recent disruptions, such as Russia's invasion of Ukraine, and the COVID pandemic. These controls are accompanied by new policy efforts to secure key domestic industries and supply chains, which are viewed as essential to national public security and public order. The new and revised FDI control regimes are not limited to foreign government controlled investments, but have a broad scope capturing many transactions involving private foreign investors in defined sensitive sectors. Importantly, these new FDI control regimes are imposing notification and approval obligations on transacting parties. Consequently, it is becoming increasingly important to consider and scrutinize FDI filing obligations at the earliest stages of the transaction, to stay on top of the evolving and oftentimes untransparent regulatory landscape across different countries.

Belgium

In November 2022, the Governments of the Belgian regions and the Belgian Federal State agreed on a cooperation agreement to establish a uniform screening mechanism for FDI (the "**Cooperation Agreement**"), which is expected to enter into force on July 1, 2023.

The scope of the FDI regime includes non-EU investments leading directly or indirectly to the acquisition of voting rights, whereby the sector of activity of the Belgian based target company or entity defines the notification threshold:

- At least 10 percent of the voting rights of companies and entities active in the sectors of defense (including dual-use goods), energy, cybersecurity, electronic communications or digital infrastructures with an annual turnover exceeding EUR 100 million in the financial year preceding the acquisition;
- At least 25 percent of the voting rights of companies or entities whose activities relate to the following areas: critical infrastructure (physical or virtual, such as energy, transport, media, finances); technologies and resources essential to security and defense of Belgium or the EU; military or dual-use equipment; and strategic technologies (such as AI, robotics, energy storage, nuclear or nano technologies); supply of vital inputs such as energy and raw materials and avoiding food shortages; access to or control of sensitive information and personal data; private security sector; freedom and pluralism of the media;
- At least 25 percent of the voting rights of a target company in the strategic biotechnology sector with an annual turnover of at least EUR 25 million.

Investments fulfilling these criteria are subject to a notification obligation to be submitted to the Secretariat of the Screening Committee ("**ISC**"), which consists of members of the respective Belgian governments and their bodies. The Cooperation Agreement may be amended to raise the 10 percent or lower the 25 percent thresholds.

The notification is followed by a submission of relevant documentation, upon which the ISC starts a preliminary investigation procedure. During this procedure the ISC examines whether there are indications that the implementation of the notified FDI will potentially affect Belgian public order, national security or strategic interests. If this is the case, a second stage screening procedure is initiated. Otherwise, the ISC investment qualifies as permissible. Both the decision to declare the investment permissible and the decision to initiate screening proceedings must be notified to the applicants by the Secretariat of the ISC within 30 days from the date of receipt of the complete file.

The second stage screening procedure is somewhat complex given the multitude of relevant Belgian Governments and can consist of oral hearings and negotiations to conclude with a (conditional) approval or a rejection. The time limit for the screening procedure is 28 days but can be extended depending on the necessary screening measures. If no decision is made within the time limits of either the investigation or screening procedure, the investment shall be deemed permissible.

The contract may be concluded before the notification, but during the period of the preliminary investigation procedure and the screening procedure, performance of the transaction is prohibited. The transaction may only be closed when the notifying party is notified of the decision that no further review procedure will be initiated or that the investment is permissible (standstill obligation).

Fines of up to 30 percent of the investment in question may be imposed on an investor who fails to comply with its notification obligation, provides incorrect, misleading and deceptive information, or acts in violation of the standstill obligation.

Ireland

In Ireland, FDI is the bedrock of the Irish economy and Ireland is among a minority of EU members that does not screen foreign investment. However, prompted by the EU Screening Regulation, this will change with the Screening of Third Country Transactions Bill which is currently under review by the Irish legislator. Although the Bill remains subject to amendment by the legislator, it is expected to come into force in Q3 2023.

The new FDI regime will likely apply to transactions which directly or indirectly relate to critical infrastructure, technologies and dual use items, supply of critical inputs, access to sensitive information and the freedom and pluralism of the media. It applies where:

- the value of the transaction is equal to or greater than €2 million;
- and as a result of the transaction, a third country undertaking or a connected person to that undertaking either (a) acquires control of an asset in Ireland or (b) changes the percentage of voting rights it holds in an Irish undertaking from (i) 25% or less to more than 25%, or (ii) 50% or less to more than 50%.

If a proposed transaction meets the above criteria, it is notifiable on a mandatory basis. Notifiable transactions cannot be completed until a screening decision has been made. A non-notifiable transaction may be required to undergo screening where there are reasonable grounds for believing that it affects or is likely to affect the security or public order of Ireland. The review period is 90 days which may be extended by an additional 45 days if required. Failure to notify can in certain circumstances be a criminal offence, punishable by a fine of up to €2,500 and/or up to six months imprisonment upon a summary conviction, or a fine of up to €4 million and/or up to five years imprisonment upon conviction on indictment.

Slovakia

The Slovak full FDI screening regime has been in force since March 1, 2023. While the previous regime only encompassed FDI in specific sectors, it is now more comprehensive by differentiating between compulsory pre-screening for critical FDI and voluntary pre-screening for non-critical FDI, as well as an ex officio post-screening mechanism.

The FDI regime applies to foreign (direct or indirect non-EU) investments into Slovak target entities that enable the investor to

- Acquire at least part of the target entity;
- Acquire effective participation in the target entity through shareholding or voting rights, whereby the threshold depends on whether it is a critical FDI: at least 25 percent for non-critical, and at least 10 percent critical;
- Increase effective participation, again with a differentiated threshold of at least 50 percent for non-critical, 20 percent for critical and again at 33 percent or 50 percent;
- Acquire control over the target entity, meaning the possibility to exercise decisive influence over its activities;
- Acquire ownership rights or rights to substantial assets of the target entity in a critical FDI, meaning sufficient assets to carry out the target entity's activities.

Critical FDIs, which trigger the compulsory pre-screening mechanism, are assumed in cases of an investment into a target entity that is essential to maintaining the functionality of the state, and thus increases the risk of a negative impact on security and public order in the Slovak Republic. The risk assessment thus depends on the specific sector of the target entity's activities.

The sectors are specified in the legislation, e.g.: weapons, dual-use goods, information security encryption services, digital service providers or press agencies.

The compulsory screening is conducted by the Ministry of Economy within 130 days after being notified by the investor and concludes with the Ministry deciding to (conditionally) approve or prohibit the FDI. In the case of a prohibition, the Ministry must first submit an opinion to the Government and may only prohibit the investment in agreement with the Government. If the period lapses without a decision the investment is deemed as permissible.

Voluntary pre-screening is possible in cases of non-critical FDI. After filing, the Ministry has 45 days to conduct a risk assessment and may initiate the compulsory screening procedure if it determines a risk. If the period expires without a decision of the Ministry, the investment is deemed as cleared. Investors may choose to initiate the voluntary screening procedure to pre-empt the ex officio post-screening.

A standstill obligation only arises during compulsory screening, pending the clearance decision. During a voluntary screening, the transaction may be carried out, but with the risk of any subsequent prohibition or conditions.

With the introduction of the ex officio post-screening mechanism, the Government has reserved its right to assess any FDI that it presumes to threaten or disrupt security and public order in the EU. For non-critical FDIs, the Government must initiate screening within 2 years after closing, while the screening right concerning critical FDIs does not expire.

A breach of the standstill obligation may result in a fine of at least the total value of the investment or 1 percent of the annual turnover of the foreign investor.

Other jurisdictions with recent developments

In Sweden, a law introducing a general screening mechanism for direct investments is expected to come into force by the end of 2023. Notifiable investments are sector-specific and must lead to 10 percent or more of the total number of voting rights in the company, or influence on the management of the company (e.g. according to the articles of association, shareholders' agreement, etc.). The screening-relevant sectors with sensitive activities include; essential services, critical raw materials, metals and minerals, sensitive personal or location data, emerging technologies and other strategic protected technologies, dual-use goods and military equipment. The screening procedure consists of a first stage assessment, either concluding in a permission or a second stage investigation. The procedure foresees a standstill obligation as well as fines in case of violations.

In the Netherlands, a new investment control regime (*Wet veiligheidstoets investeringen, fusies en overnames* – "**Wet Vifo**") entered into force on the 1 June 2023. The law will apply exclusively to investments in essential service providers and in companies that are involved in sensitive technology, including strategic goods (dual-use and military goods). Investments must be notified and approved if control or significant influence is gained over the management of the target company, which is further specified in the Wet Vifo.

Again, the procedure may consist of two phases and is accompanied by a standstill obligation, a breach of which, may be a fine.

Conclusion

While the different FDI regimes show many similarities, such as a two-stage process, standstill obligations, sanctions for failure to file, and waiting periods (a time lapse without a decision results in the assumption of the approval of the transaction), there is no EU coordinated approach to the products and industries covered. Companies have to assess each EU Member State on its own merits when it comes to FDI controls.

Our global team has significant experience dealing with Ministries and Agencies in FDI procedures around the globe. We are represented in key FDI filing jurisdictions with a fully integrated team serving our clients' needs, i.e. US, UK, France, Germany, Italy, Spain, Ireland, Poland, Czech Republic, Slovakia as well as Australia, China and Japan, with trusted local counsels partners in most other jurisdictions. Our global integrated team can quickly determine when respective filing requirements are triggered, assess the implications for the deal structure, and handle all aspects of the filing and approval process. We pride ourselves in being pragmatic and responsive, taking into account our client's business goals and timetable. Our client portfolio, consisting of long-standing clients, demonstrates our leading practice and highly ranked services.

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