

Steven Callens & Maroun Hobeika | June 2023

As from 1 July 2023, foreign (i.e. non-EU) investors will have to notify the Interfederal Screening Commission ('ISC') about their investment plans in certain sectors in Belgium.

Targeted are investments in sectors considered to be highly sensitive, or that could impact national security, public order, or the strategic interests.

For these investments, prior approval of the ISC is required, which means that the investment cannot be completed until it receives clearance from the ISC. A decision on clearance should in principle not take longer than two to three months.

Below, the new screening mechanism, a so-called 'FDI' or 'Foreign Direct Investment' screening is explained in more detail.

SCOPE

A notification to the ISC must be filed:

- i. When the investor acquires **25%** or more of the voting rights, directly or indirectly, in an already established Belgian company engaged in the following activities:
 - Critical infrastructures encompassing physical and virtual systems related to energy, transport, water, health, telecommunications, media, data processing or storage, aerospace, defence, electoral and financial infrastructures, sensitive facilities, as well as land and property critical to the use of such infrastructure;
 - Technologies or raw materials essential for security (including health safety), defence and the maintenance of public order, military equipment, dual-use products, as well as technologies of strategic importance such as AI, robotic, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies;
 - Basic goods supply related to energy, raw materials and food security;
 - Access or possibility to control sensitive information or personal data;
 - Private security sector investments;
 - Freedom and pluralism of the media; and
 - Biotechnology sector (only if the target's turnover in the preceding financial year exceeded EUR 25 million).

**NEW SCREENING
MECHANISM
OF FOREIGN
INVESTMENTS
IN BELGIUM**

STARTS ON 1 JULY 2023!

- ii. When the investor acquires directly or indirectly **10%** or more of the voting rights in target companies established in Belgium with activities linked to:
- Defence;
 - Energy;
 - Cybersecurity;
 - Telecommunications, and digital infrastructures.

This shall however only apply where the target's turnover in the preceding financial year exceeded EUR 100 million.

- iii. Investments aimed at setting up new economic activities by a foreign investor, without taking over existing economic activities in the process (so-called '**greenfield investments**'), do **not** fall within the scope.

PROCEDURE

After a preliminary procedure, during which the ISC's secretariat will check if the notification is complete, and, in some cases, request additional information before forwarding the file to the ISC, the procedure will unfold in 2 steps consisting of (i) the Assessment Phase and (ii) the Screening Phase.

i. Assessment Phase:

The ISC, composed of experts of all federated entities, analyse and assess whether the notified investment could impact national security, public order, or the strategic interests of the Belgian State and its Regions and Communities.

The assessment, which can take up to 30 calendar days, will lead to either the authorisation of the transaction or to a further examination in the Screening Phase.

If no position is taken by the ISC within the deadline of 30 calendar days referred to above, the investment is deemed eligible.

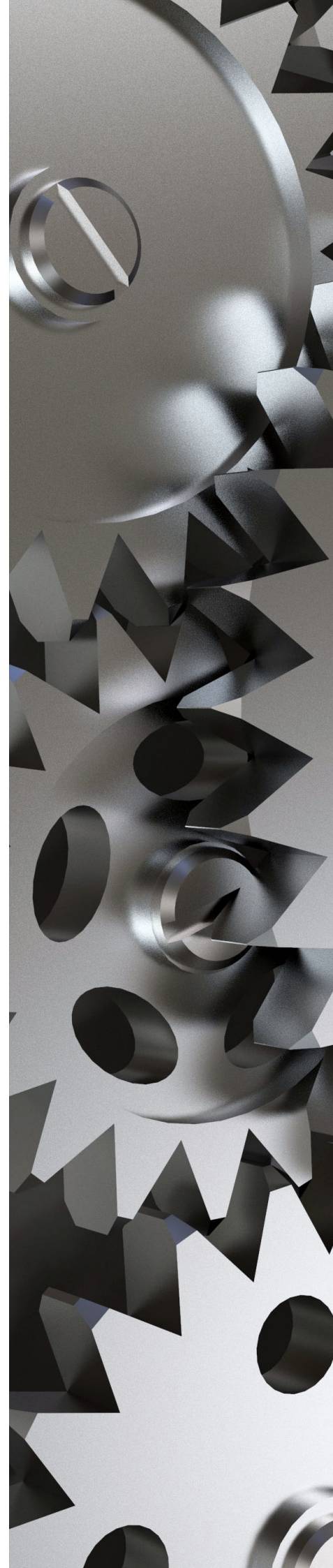
ii. Screening Phase:

In the screening phase an additional and in-depth risk analysis is made.

In case the ISC determines that the foreign investment has implications on national security, public order or on the strategic interest of Belgium, it shall send a **preliminary negative opinion** to the investor and the Belgian target and give them the opportunity to consult the file and give their comments in writing and – as the case may be – present their case during a hearing.

Furthermore, after issuing a preliminary negative opinion, the ISC can - in consultation with the investor and the target - propose **corrective measures** limiting the negative impact of the investment and making the investment acceptable.

At the end of the Screening Phase, the ISC will issue its **final opinion** to the relevant Ministers of the Belgian State and/or relevant Ministers of the Regions and Communities.



iii. Decision

Finally, the relevant Ministers of the Belgian State and/or relevant Ministers of the Regions and Communities can take one of the following decisions:

1. a positive decision on the foreign direct investment; or
2. a positive decision on the foreign direct investment subject to imposed corrective measures; or
3. a negative decision.

iv. Appeal

Both the foreign investor and the Belgian target company have a period of 30 calendar days to challenge the decision before the Market Court after the notification of the decision.

v. *Ex officio* procedure

The ISC possess significant *ex officio* powers to examine investments that have not been notified. If deemed necessary, the ISC can impose structural changes and corrective measures to an investment that already occurred but was not notified.

The ISC can proceed with such *ex officio* procedure up to two years following the transaction, and, in some cases of bad faith, up to five years after the transaction.

Also, while they are exempt from the notification to the ISC, transactions executed prior to 1 July 2023 can also be subject to the *ex officio* procedure within two years up to five years in cases of bad faith.

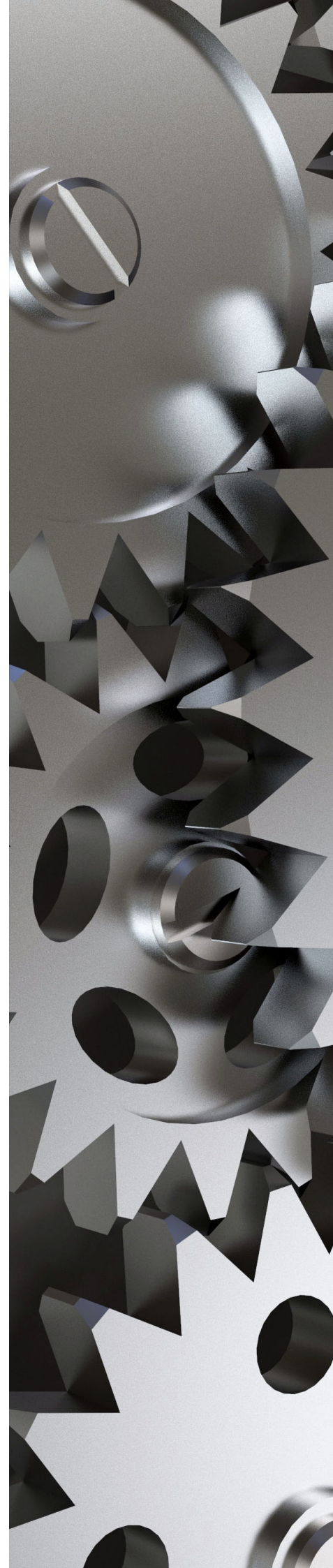
SANCTIONS

An administrative fine up to **maximum 10% of the investment** if:

- i. no data or incomplete data have been provided, leading to a decision based subsequently on the incomplete data;
- ii. further information is not provided by the foreign investor within the deadline set in the request for information;
- iii. spontaneous notification of a non-notified investment is made within 12 months of its realisation or when the ISC initiates a screening procedure *ex officio* within less than twelve months of the date of realisation of the investment.

The administrative fine will amount to **maximum 30% of the investment** if the foreign investor:

- i. fails to comply with the obligation to notify;
- ii. inaccurate, misleading or deceptive information is provided in a notification or a response to a request for information;
- iii. fails to comply with the obligation to cease the realisation or finalisation of the foreign direct investment;
- iv. fails to implement the corrective measures within the deadline.



CONCLUSION

The new FDI screening mechanism has the potential to have a substantial impact on investments in the Belgian market.

Since the criteria are vague and/or broad, a lot of investments fall into the scope of notification and screening.

A consistent and efficient approach by the relevant authorities (ISC and Market Court) will be crucial to avoid legal uncertainty as much as possible and to minimise the detrimental effect on the appetite for dealmaking in Belgium.

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Should you have any further questions, please do not hesitate to contact the members of Simont Braun's Corporate Department, who have been closely monitoring the implementation process and will happily guide you through your internal assessments | corporate@simontbraun.eu

This article is not a legal advice or opinion. You should seek advice from a legal counsel of your choice before acting upon any of the information in this article.

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