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CELIS Issue Note

on

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by

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Abstract

Since January 2021, a 'Working Mechanism' has been established as the successor of the 'Joint Ministerial Conference', and is the official review agency of China's national security review regime. The Working Mechanism is an inter-ministerial agency led by the National Development and Reform Commission and the Ministry of Commerce, which coordinate and undertake investment screening and impose sanctions on non-compliance of investors. Other authorities may be involved on a case-by-case basis, however the composition of the Working Mechanism for a specific transaction largely depends on which sector the acquirer and target are concerned. There is no indication that the Working Mechanism would consult or cooperate with authorities of foreign jurisdictions, and there is no statutory procedure governing the consultation and cooperation mechanism. The investors' level of involvement during a review or influence to the proceedings and outcome also remain unknown.

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1. Interagency responsibility for screening investments

Pursuant to the Measures for the National Security Review of Foreign Investment, promulgated by the National Development and Reform Commission and Ministry of Commerce in December 2020, and effective as of January 2021, a 'Working Mechanism' is established to organize, coordinate, and undertake investment screening.¹

The Working Mechanism is an inter-ministerial agency led by the National Development and Reform Commission and the Ministry of Commerce and involves other ministries on a case-by-case basis. A permanent office of the Working Mechanism is set up within the National Development and Reform Commission as the liaison between applicant and the Working Mechanism.

There is no further specification in law with regard to which ministries constitute the Working Mechanism (except the mentioned two lead agencies) and how the constitution of the Working Mechanism is decided. In practice, the composition of the Working Mechanism for a specific transaction largely depends on which sector the acquirer and target are involved.

2. Consultation and Cooperation

The law does not specify whether and how the Working Mechanism may consult or cooperate with other authorities. In practice, the Working Mechanism may either invite other relevant ministries to be a constituent member of the Working Mechanism pursuant to the nature of the deal on a case-by-case basis, or consult with other relevant authorities, such as the Ministry of Agriculture, the Ministry of Industry and Information Technology, or People's Bank of China,

¹ Measures for the National Security Review of Foreign Investment (外商投资安全审查办法), Article 3. An unofficial translation of the law from baker & McKenzie can be found at: https://www.bakermckenzie.com/-/media/files/insight/publications/2021/01/foreign_investment_security_review_measures.pdf?la=en, last accessed 28 June 2024.

on the substantive evaluation of a transaction.² There is no indication suggesting that consultation or cooperation would take place with authorities of foreign jurisdictions.

3. Procedure governing the consultation and cooperation mechanism

As there are no provisions in law specifying inter-agency consultation and cooperation, the procedure governing this mechanism remain absent or internal.

One exception to this regard is in the event of a possible ex officio review, where a third party may be involved in initiating a review procedure. If a relevant government authority, a business, a social group, or a general member of the public deems that national security is or could be affected by a foreign investment project, such an individual or entity may propose to the Working Mechanism a national security probe.³ It is then up to the Working Mechanism to determine if a review is warranted. The individual or entity proposing to the Working Mechanism does not need to be a stakeholder to the investment, who is somewhat in a role similar to a 'whistle-blower'.

4. Informal working procedures

To the best of the authors knowledge, there are no informal procedures that may influence the outcome of the review.

5. Investor's influence of the proceedings

Before an investor and/or a target makes a formal filing for a review with the office of the Working Mechanism, an informal consultation on any relevant issues may be held between the parties.⁴ It is not known whether and how the investor and/or the target may be given an opportunity to present arguments or explanation such as in a hearing during the formal review process.

² King & Wood Mallesons, 统筹对外开放与国家安全：中国外商投资安全审查制度详解 (Integrating openness with national security: A detailed analysis on China's national security review of foreign investment), 12 March 2024, <https://www.kwm.com/cn/zh/insights/latest-thinking/china-s-national-security-review-system-for-foreign-investment.html>, last accessed on 27 June 2024.

³ Measures for the National Security Review of Foreign Investment, *supra* note 1, Article 15.

⁴ *Ibid*, Article 5.

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The CELIS Institute is an independent non-profit, non-partisan research enterprise dedicated to promoting better regulation of foreign investments in the context of security, public order, and competitiveness. It produces expert analysis and fosters a continuous trusting dialogue between policymakers, the investment community, and academics. The CELIS Institute is the leading forum for studying and debating investment screening policy. More about the Institute's activities under www.celis.insitute.

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CELIS Country Reports (hereafter "Report") are produced by leading experts for any European and select non-European jurisdiction following an elaborate model, allowing for comparison and evaluation across jurisdictions. The project's aim is to identify and suggest best practice and to propose a common European (model) law on investment screening.

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