

Belgium: Screening of foreign direct investments

In brief

In June 2022, the governments of Belgium's nine federated entities agreed on the text of a cooperation agreement (**Cooperation Agreement**) implementing a screening mechanism of general application for foreign direct investments into Belgium. The screening mechanism is expected to enter into force on 1 January 2023.

While the text is still subject to change¹, the fact that an agreement on a screening mechanism of general application has been reached is a milestone, since Belgium has traditionally been an open economy with hardly any restrictions on incoming foreign investments. As the competence for review of foreign investments in Belgium is scattered among the various federated entities, a cooperation agreement was required to have a single, uniform, screening procedure for inbound foreign direct investments.

The Cooperation Agreement is inspired by EU Regulation 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a general framework for the screening of foreign direct investments into the Union (**FDI Regulation**). Belgium is now set to become the 19th EU Member State with a screening mechanism for foreign direct investments.

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Scope

The provisions of the Cooperation Agreement apply to foreign direct investments by foreign investors that can have effects in Belgium on (i) **security**, (ii) **public order**, or (iii) **the strategic interests of the regions and communities**².

A "**foreign investor**" is (i) a natural person with its main residence outside of the EU, (ii) an undertaking constituted or organized under the laws of a non-EU country, or (iii) an undertaking who has an ultimate beneficial owner (UBO) with its main residence outside of the EU. The regime therefore does not apply to investors from other EU Member States.

"**Foreign direct investment**" is defined in line with the FDI Regulation as an investment of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in a member state of the EU, including investments which enable effective participation in the management or control of a company carrying out an economic activity.

¹ The Cooperation Agreement has been submitted to the Council of State (*Raad van State / Conseil d'État*) for advice.

² Meaning their interest to - in the context of their respective powers - protect critical processes, prevent that certain strategic or sensitive knowledge falls into foreign hands and ensure strategic independence



Considering that the definition of foreign direct investment is quite open-ended, the Cooperation Agreement sets out that the following transactions by a foreign investor are deemed to be in scope of the screening procedure, *i.e.*, the direct or indirect acquisition of:

Minimum 25% of the voting rights of entities in Belgium and whose activities touch on:	Minimum 10% of the voting rights of entities in Belgium with a turnover of more than EUR 100 million in the preceding year and whose activities touch on:
<ul style="list-style-type: none"> critical infrastructure (including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, and also the land and real estate crucial for such infrastructure) technologies and resources of essential importance for security, national defence or public order (including military equipment subject to multilateral and European export control regimes, dual use goods and technologies of strategic importance) supply of critical inputs including energy or raw materials, as well as food security access to sensitive information, personal data or the possibility to control such information private security freedom and pluralism of the media technologies of strategic importance in the biotech sector, provided a min. turnover of EUR 25 million in the preceding year 	<ul style="list-style-type: none"> the defence sector (including dual use goods) energy cybersecurity e-communication digital infrastructure

When assessing a foreign direct investment, the Investment Screening Commission (**ISC**) and its members will specifically need to evaluate whether the following risks are present:

- prejudice to the continuity of the critical processes that if disturbed or if shut down could lead to severe issues for society and form a threat to national security, the strategic interests and the quality of life the Belgian population;
- prejudice to the integrity or exclusivity of knowledge and information connected to vital processes and the sensitive high-technology required to that end; or
- the creation of strategic dependencies.

Process

Investment Screening Commission

The new regime will create the Investment Screening Commission, composed of nine members representing the respective federated governments plus a chairman without voting powers.

Notification

Foreign direct investment transactions that are in scope of the screening mechanism cannot close until the foreign investor is notified that no further screening procedure is required or the foreign direct investment is permitted. The foreign investor will have to submit a file to the ISC immediately following signing of the transaction documentation, or even in draft form prior to signing of the transaction documentation. The notification will need to contain information on:

- the ownership structure of the foreign investor, as well as the target company (including the UBO)
- the approximate value of the foreign direct investment, and notably also an indication of the elements underlying such valuation
- the products, services and activities of the foreign investor (and its affiliates) as well as the target company (and its affiliates)
- the EU and non-EU countries in which the foreign investor (and its affiliates) as well as the target company (and its affiliates) have activities



- the funding of the investment and the sources of such funding
- the anticipated date of completion of the transaction

The secretariat of the ISC will analyse whether the file is complete and can request additional information.

Assessment phase

The screening procedure itself can consist of two phases (the assessment phase and the screening phase). In the assessment phase, the relevant members of the ISC will review amongst other things whether the main characteristics of the foreign investor or the change of control over the target company pursuant to the proposed foreign direct investment can have a potential impact on public order, security, or strategic interests of the relevant regions or communities. If one of the competent members identifies specific circumstances that can give rise to a potential impact, the ISC will proceed to the actual screening phase. The assessment phase can take up to 40 calendar days as from the date on which the file is deemed complete by the ISC.

Screening phase

The screening phase is intended to build further on the findings in the assessment phase (such as additional risk analysis) and should result in an advice by the relevant ISC member to the respective ministers of the competent federated entities. If the relevant ISC member has concerns, the foreign investor has the opportunity to provide written comments on the draft opinion by the ISC member and a hearing can be organized. The relevant ISC member can also suggest negotiations on mitigating measures that would allow it to issue a positive advice. The advice can either be positive, positive subject to mitigating measures being implemented by the foreign investor, or negative. The relevant ISC member has a term of in principle 14 calendar days to prepare and deliver its advice to the relevant minister. This term can however be extended substantially in numerous ways (written comments, oral hearing, term(s) for negotiating mitigating measures, additional terms in case of complexity of the file, requests for additional information).

Upon receipt of the advice, the relevant ministers have 6 calendar days to decide each in respect of their own powers and notify their decision to the ISC. Within 14 calendar days from the submission of the advice(s) to the relevant ISC members, the ISC will combine the various decisions (if multiple federated entities are competent) and notify the foreign investor of the combined decision. If the foreign investment falls within the jurisdiction of more than one of the federated entities, a unanimous decision must be reached in order to prohibit the foreign investment notwithstanding the possibility of the federal minister to (within its powers) decide to prohibit the foreign investment.

A foreign investor can launch an appeal against a negative decision of the ISC with the Market Court (*Marktenhof / Cour des Marchés*) in Brussels.

Mitigating measures

The relevant ISC members can choose from a range of 17 measures that it can suggest to the foreign investor in order to mitigate the expected impact of the foreign direct investment and enabling it to issue a positive advice or take a positive decision. These mitigating measures generally relate to

- increased governance and compliance requirements
- limiting the flow of information / IP rights from the target company to the foreign investor
- ensuring that information / IP rights remain available for use in Belgium
- the structure of the proposed transaction itself (e.g., prohibiting that certain parts/subsidiaries of the target company are part of the transaction, limiting the number of shares that can be transferred or the certification of all shares)



Sanctions

Non-compliance with the requirements of the screening procedure can be sanctioned by administrative fines of up to 10% of the total deal value, and in some cases³ even up to 30% of total deal value.

Expected impact on M&A processes

- Following the entry into force of the Cooperation Agreement, transaction documentation for transactions that fall within the scope of the screening mechanism should include appropriate provisions relating to foreign direct investment screening (e.g., condition precedent, risk allocation, cooperation obligations and long stop dates).
- However, parties in ongoing deals that are to be signed still in 2022 and that do not close simultaneously, should anticipate that they may become subject to the screening procedure in the event closing only occurs after the entry into force of the Cooperation Agreement (expected 1 January 2023). The transaction documentation should take this into account.
- In competitive auction processes relating to target companies that fall within the scope of the screening mechanism, candidate purchasers from non-EU member states are potentially at a disadvantage (in terms of deal certainty and speed of execution) compared to candidates from the EU, as the latter will not be subject to the screening procedure.
- As the powers of the ISC and its members are very broad and no established practice exists on how the screening and the possible mitigating measures will play out, there will be substantial deal uncertainty for several years to come.

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³ Fines of 30% of the deal value can be imposed in the event of a failure to notify the foreign direct investment or non-execution of the mitigation measures before the deadline.