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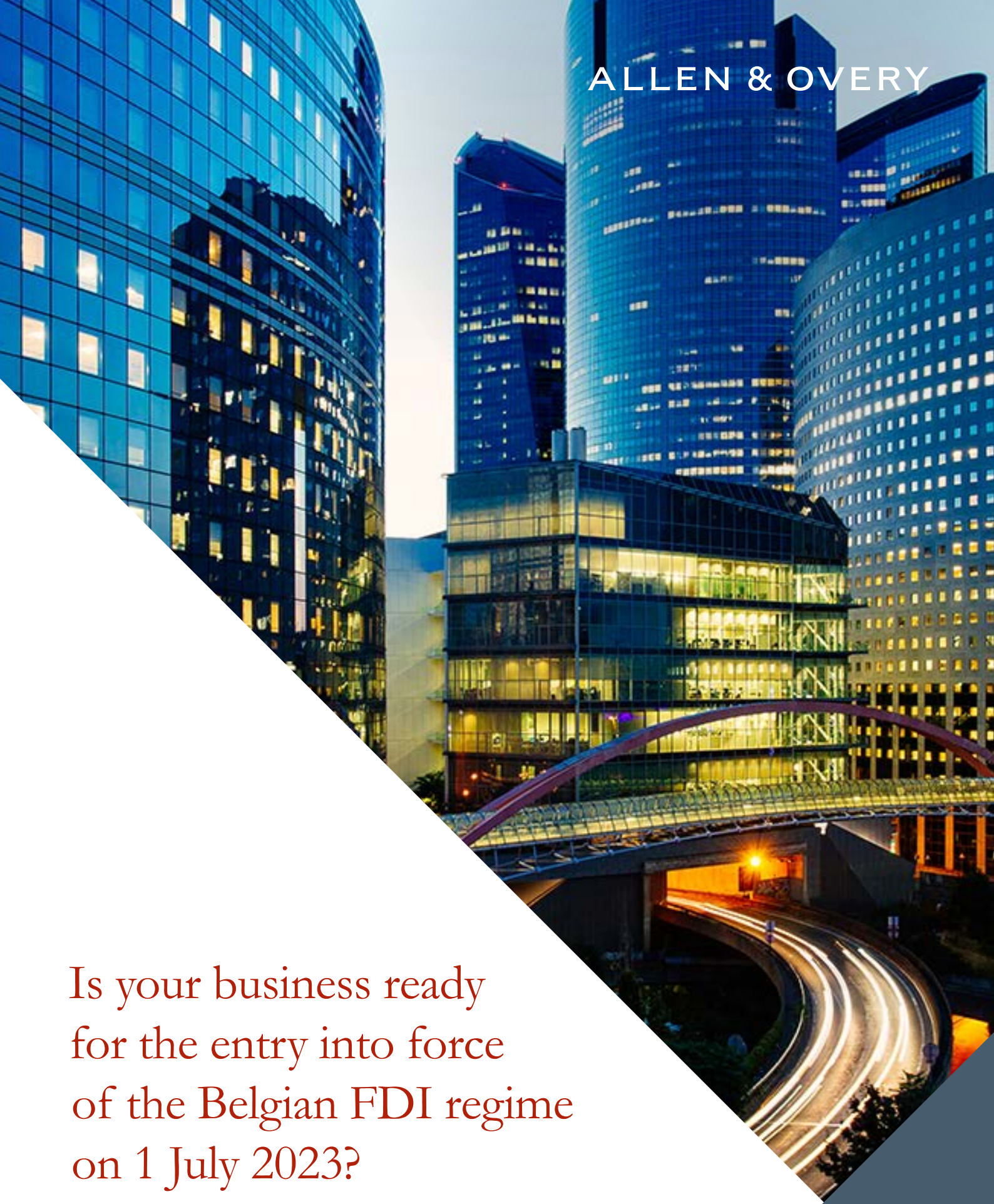

Is your business ready for the entry into force of the Belgian FDI regime on 1 July 2023?

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5 practical tips and tricks for navigating this new regime

1. Consider the scope of the new FDI regime

Given the imminent date of the entry into force of the Cooperation Agreement on 1 July 2023, parties that are currently negotiating deals involving a foreign investor need to act cautiously and need to carefully anticipate the scope and application of the FDI notification requirements as of that date. Particular points of attention are how the entry into force of the Belgian FDI regime will affect deals that are currently being negotiated or have already been signed.

(Impact on) timelines

The Cooperation Agreement makes a distinction between the conclusion of an agreement (*la conclusion de l'accord / de sluiting van de overeenkomst*), which in Belgian law corresponds with signing, and the performance of the agreement (*la réalisation de l'accord de uitvoering van de overeenkomst*), which in Belgian law corresponds with closing. The Cooperation Agreement states that a foreign investment that falls within the scope of the FDI regime which is signed on or after 1 July 2023 must be notified to the Screening Commission between its conclusion and its performance, whereas a foreign investment which is signed before 1 July 2023 (but may be closed after this date) will not have to be notified.

For deals that are currently being negotiated, it is important to check the timeline to see whether they will be caught by the entry into force of the Belgian FDI regime and to plan accordingly if the deal's signing date risks slipping beyond 30 June 2023.

For deals that have already been signed before 30 June 2023, but will close on or after 1 July 2023, no filing will in principle be required as a matter of Belgian law[1].

If signing is due to occur on or after 1 July 2023, consideration will need to be given to the timings associated with working out whether the Belgian FDI regime is applicable, drafting/preparing the notification and the timing associated with the screening process itself.

On the basis of the timing provided for under the Cooperation Agreement, an FDI filing will most likely take 30 days (if a preliminary procedure is carried out and no full-fledged screening procedure is initiated) or 78 days (if screening is initiated and the parties provide comments and are heard, but otherwise no extensions are requested). However, theoretically, a combined preliminary + screening procedure can take anywhere between 30 and 190 days, which can be subject to (multiple) extensions e.g. if the Screening Commission requests additional information.

Check applicable laws

If an agreement relating to an investment in a Belgian company is subject to the laws of a jurisdiction other than Belgium, a notification under the Belgian FDI Regime may be required even if it is signed before 1 July 2023, depending on the exact impact of signing, the conditions precedent and the closing mechanism under that jurisdiction.

It is worthwhile checking whether such mechanisms tie in with the concepts of "conclusion" of the agreement" and 'performance of the agreement", as these are the key milestones for the applicability of the Belgian FDI regime *ratione temporis*.

[1] As a matter of Belgian contractual law, conditions precedent (*conditions suspensives/ opschortende voorwaarden*) do not suspend the conclusion or existence of the agreement itself, but suspend its performance until the conditions have been fulfilled. As a result, the Belgian FDI's impact on pending deals that are subject to Belgian law can be summed up as follows: only agreements signed on or after 1 July 2023 will have to be notified (between signing and closing), whereas agreements signed before 1 July 2023 will not have to be notified (even if closing is after 1 July 2023). This is also confirmed in the Screening Commission's draft guidelines, item 17, stating that the notification obligation is triggered by the signing of the investment agreement (*"l'obligation de notification naît à la signature de l'accord d'investissement / de verplichting om aan te melden ontstaat bij de ondertekening van de investeringsovereenkomst"*). Item 18 of these guidelines confirms that this is regardless of closing occurring after 1 July 2023 (*"Les accords d'investissement signés avant le 1er juillet 2023 mais dont la "closing" - le moment où toutes les conditions sont remplies - intervient après le 30 juin 2023 doivent-ils être notifiés ? Non. Ces investissements ne doivent pas être notifies/Moeten investeringsovereenkomsten die ondertekend worden voor 1 juli 2023 maar waarvan de 'closing' – het moment waarop alle voorwaarden vervuld zijn – valt na 30 juni 2023 aangemeld worden? Neen. Dergelijke investeringen moeten niet aangemeld worden*)".

2. Prepare yourself upfront, and think beyond 1 July 2023

Consider FDI in your (initial) due diligence

The earlier national FDI regimes – including the Belgian FDI regime – and local sensitivities are mapped, the better you can take them into account in your deal's timeline. Such early mapping exercise will also inform your negotiation position and strategy. In the (early) diligence phase, foreign investors may consider raising targeted questions tailored to the relevant target/business (eg are dual-use items or technologies involved? Are there any contracts with government entities at stake? Are any technologies involved that may be indicative of public order, national security or strategic interests?). Such questions will differ per jurisdiction and per sector, meaning that a "one-size-fits-all" may not be fit for purpose.

Be aware of and prepared for ex officio screenings

The Screening Commission may, at its own initiative, start a screening procedure if at least one of its members deems it necessary for reasons of public order, national security, or strategic interests (even if no notification has been served by the foreign investor or its mandated entity), and may impose structural modifications and additional measures after the foreign investor acquires control (for up to two years, which may be extended to five years in the case of bad faith).

As a result, even if a foreign investment might fall within the scope of application of the Belgian FDI Regime *ratione materiae*, but no notification was required to the Screening Commission due to signing occurring before 1 July 2023, it may still be worthwhile to assess more closely whether the investment may risk an *ex officio* screening. In particular, it should be examined whether the Belgian company is active in any of the strategic sectors, and if so, whether there are any indicators (such as noteworthy media attention or political attention) that could increase the risk of a transaction being subjected to an *ex officio* screening.

Prepare a common position and allocate responsibilities

Based on this assessment, the foreign investor and the Belgian company may wish to consider aligning on a rebuttal (or at least, consider counter-arguments) in the event that an *ex officio* screening is initiated (for example, arguments why the activities of the Belgian company fall outside of the strategic sectors covered by the Belgian FDI regime).

In addition, the foreign investor and Belgian company may already agree on the allocation of responsibilities in case an *ex officio* screening is imposed, and take into account practical considerations such as: what documents could be required in such case and what documents are readily available.

This is especially important for the foreign investor: the Belgian FDI regime provides for sanctions (up to 30% of the value of the investment) which may be imposed on the foreign investor in the event that false or misleading information is provided to the Screening Commission. However, much of the required information will be reliant on input from the Belgian company.

An unexpected *ex officio* screening procedure may throw a spanner in the works in the early period after closing (when the foreign investor may be familiarising itself with the acquisition and potentially (re)structuring the Belgian business it acquired). Conversely, it may be difficult to quickly respond to an ex officio screening years after the investment, as the relevant documents and information may be archived or otherwise difficult to find, and the relevant persons may have moved on with their careers. Already aligning on broad principles and collecting useful documents can save time and stress in the long run.

Consider a voluntary notification

If the uncertainty caused by the risk of an *ex officio* screening is a serious hindrance to your deal, it may also be worthwhile to consider a voluntary notification on or after 1 July 2023, even if a notification is strictly speaking not required. This way, you can bite the proverbial bullet and take into account the FDI notification procedure in your deal's timeline.

Consider your audience and do take into account national characteristics

The Belgian FDI regime does not dovetail with merger notification obligations (notwithstanding some cross-references in the Cooperation Agreement). Contrary to merger filing rules, the Cooperation Agreement instead takes into account the Belgian constitutional divisions of powers, and the assessment grounds differ for the federal state (namely, national security and public order) and for the Regions and Communities (namely, strategic interests, which may differ per Region or Community depending on its precise constitutional competences). The Cooperation Agreement also contains specific rules on which federated entities are competent to assess the investment, depending on the place of establishment and offices of the Belgian company in which an investment is being made. It is therefore important to clearly identify the competent authorities, and zone in on their potential assessment grounds, and how these can be addressed in the investment and notification/filing procedure.

Explore informal discussions or pre-notifications

Another element to consider is whether the FDI regulators may be open to pre-notifications or informal discussions. At this stage, it remains to be seen how the Screening Commission will approach this, but the (future) head of the Screening Commission has already emphasised that, during a filing procedure, the Screening Commission is keen on taking an investor-friendly and transparent approach, where it will avoid imposing remedies or blocking investments without first attempting to find mutually agreeable solutions with the investor. In the absence of guidance on the topic, it remains to be seen how the Screening Commission will handle informal (pre-)discussions as part of its broader policy.

If an investment could be particularly politically contentious or difficult, it may also be important to consider how the FDI strategy will fit into the broader government relations strategy of the foreign investor, and whether any local government relations consultants should be involved from an early stage.

Think outside the box, and (try to) think like a Government

Sometimes, the Belgian company's activities could intersect with national security, public order or strategic interests in surprising ways, and these concerns could also change over time. For example, before February 2022, how many jurisdictions would have considered a foreign investment in a manufacturer of consumer drones as potentially problematic? This assessment may well have shifted due to the conflict in Ukraine, where off-the-shelf consumer drones are filling an increasingly important military niche.

In that respect, it is important to note that the Belgian FDI regime does not only apply to Belgian companies whose main activities relate to the strategic sectors, but also auxiliary or ancillary activities may be relevant. Some of these activities could fall within strategic sectors that are not immediately obvious. For example, the definition of security activities which are subject to a permit under the Belgian Law of 2 October 2017 on private security (*Loi réglementant la sécurité privée et particulière/ Wet tot regeling van de private en bijzondere veiligheid*) is surprisingly broad and also includes protecting an ATM, or organising internal security at an event. The activities of a Belgian company, such as a hotel or an event venue, which carries out such activities in-house may fall within the scope of application of the Belgian FDI regime that also applies to Belgian companies active in the private security sector.

Based on the information gathered during the initial due diligence phase, parties may wish to have a more detailed analysis carried out as to whether their deal is likely to fall within the current scope of the Cooperation Agreement. As the FDI screening mechanism pertains to matters of "public order, national security or strategic interests" *à la belge*, parties need to take into account and understand the importance of regional differences, and, for example, make sure that they understand and anticipate how each federated entity assesses the concept of "strategic interest".

3. Streamline the documentation phase

An assessment of national FDI filing requirements at Member State level is nowadays standard on cross-border deals. Notwithstanding the existence of an EU regulation[2] providing for information-sharing amongst EU Member States during FDI screening procedures, the FDI regimes in the respective Member States remain sensitive to national concerns and the requirements as well as assessment grounds can vary greatly between Member States. It will be important for parties to consider these local particularities to streamline the documentation phase, and mitigate potential impacts.

Consider language requirements

On the basis of a draft implementing decision (currently subject to review by the Belgian State Council), filings under the Belgian FDI regime would have to be submitted in Dutch or in French (depending on the Region where the Belgian company is established)[3]. This means that the location where the Belgian company is established will inform your decision to draft one or more documents in a specific language. This also means that English-language documents may have to be translated so they can be used for FDI filing purposes. If so, this should be taken into account during your deal and its anticipated timeline.

Consider cooperation mechanisms and agree on a "hell or high water clause" upfront

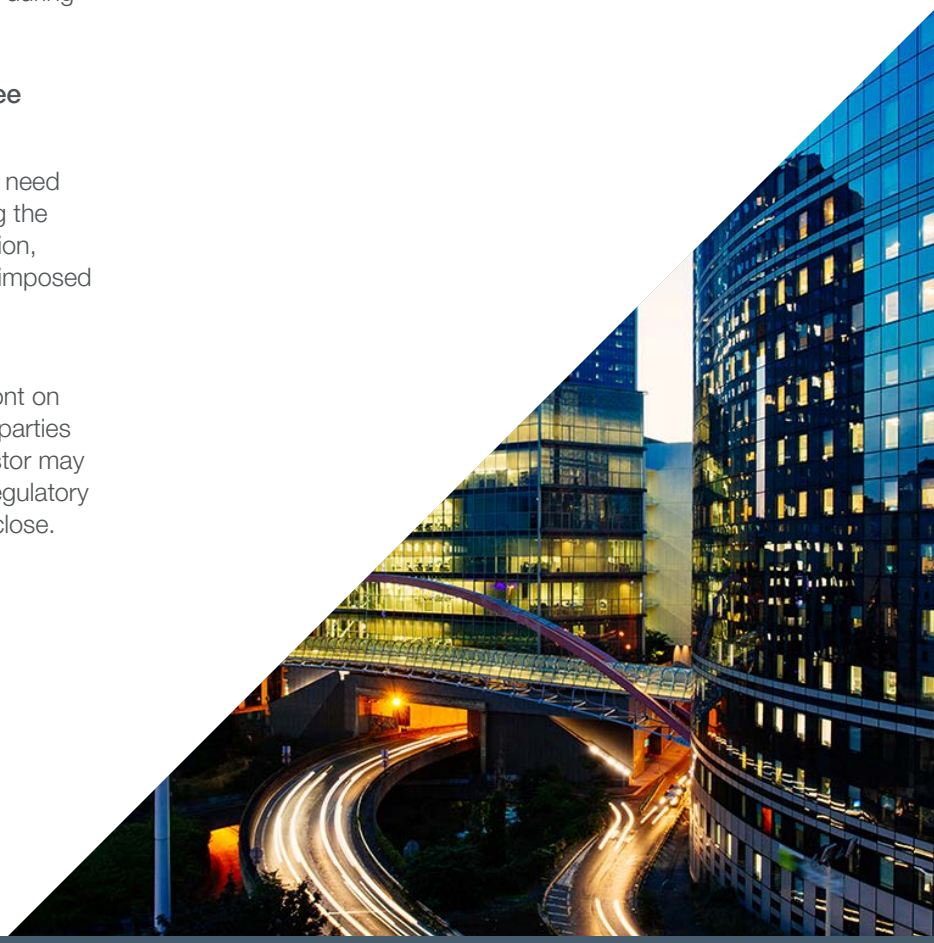
If an FDI filing requirement is triggered, parties will need to agree on cooperation mechanisms, both during the filing and screening phase, but also post-transaction, in order to satisfy potential remedies that may be imposed by the competent authorities to make the foreign investment acceptable.

In this regard, parties may consider to agree upfront on some sort of "hell or high water clause", whereby parties agree on obligations or remedies the foreign investor may need to satisfy in order to satisfy governmental, regulatory requirements for the FDI process to successfully close.

Consider acceptable remedies

The types of remedies that could be imposed by FDI regulators differ from jurisdiction to jurisdiction. The Cooperation Agreement provides the Screening Commission with broad powers to negotiate remedies with the foreign investor that could suffice to make the investment permissible in the light of national security, public order or strategic interest concerns, without imposing a limitative list of remedies. Such remedies may include inter alia the obligation for parties to notify the government of certain (future) transactions and the ability for the government to impose conditions for such transactions, the duty to allocate certain vital processes or services in a separate (daughter) company, a restriction to offer certain services or goods by the Belgian target company[4].

Given the wide range of remedies that may be applicable, foreign investors and the Belgian company may wish to already consider what types of remedies would be acceptable to them during the negotiations phase, as this may be of particular importance for the scope of conditions precedent relating to FDI filings.



[2] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

[3] Announced as part of the Ministerial Council's decisions of 21 April 2023, available here.

[4] Article 21 of the Cooperation Agreement includes a very broad, non-exhaustive list of potential remedies.

4. Consider the impact of the Belgian FDI regime outside of private M&A deals

Although much attention is dedicated to the impact the Belgian FDI regime will have on private M&A transactions, it should be borne in mind that its scope of application is broader.

Consider the impact on the acquisition of free-float shares in publicly listed companies

Specific rules apply in the case of publicly listed companies that own or control a Belgian company active in one of the strategic sectors. In particular, the Belgian FDI regime also triggers a notification duty in the event that free-float shares are acquired by a foreign investor, after which such investor holds shares with voting powers above the relevant thresholds. In such a case, all non-financial rights (such as the voting rights) of the acquired shares are suspended until a notification is made and the foreign investment is approved.

Consider the impact on public bids

A notification duty is also triggered by a takeover bid by way of tender offer or exchange offer. In these cases, the notification must be made before the publication of the offer to purchase or exchange (*na de sluiting en voor de openbaarmaking van het aanbod tot aankoop of ruil / Après la conclusion et avant la publication de l'offre d'achat ou d'échange*).

Consider other transactions such as internal restructurings and refinancing deals

The Cooperation Agreement does not unequivocally state whether internal group restructurings may trigger FDI notification requirements after 1 July 2023. The Screening Commission's draft guidelines confirm that this may be the case, if the other applicability criteria for the notification requirements are met[5].

(Re)financing deals will also have to take into account the Belgian FDI regime's triggers, as the thresholds are quite low for some sectors (these can be as low as acquiring 10% of voting rights) and especially (future) enforcement rights of securities may have to be examined in the light of the Cooperation Agreement.

Consider other ways in which you may acquire control

A notification obligation is not only triggered by acquiring voting rights in a Belgian company above the specified thresholds, but also more generally by acquiring "control" (*contrôle/ zeggenschap*) over the Belgian company active in one of the strategic sectors. In that respect, the Cooperation Agreement defines "control" as the possibility of exercising, directly or indirectly, *de jure or de facto*, decisive influence on an undertaking as reflected in the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

As a result, while there is no automatic relation between merger filings under competition law and FDI filings under the Belgian FDI regime, the Belgian FDI regime does create a link between the two areas of law in this definition, as acquiring control over a Belgian company also subjects the investor to FDI notification obligations.

Consider the risk of "passively" triggering the Belgian FDI regime

Finally, the Belgian FDI regime also provides for a notification duty if a foreign investor "passively" acquires control over, or voting rights above the 10% or 25% thresholds in, a Belgian company active in one of the strategic sectors. How this trigger will apply in practice (and, especially, at which point in time the notification will have to be made) is not yet clear, and the Screening Commission's draft guidelines do not yet address this point. In the meantime, it could be useful to check whether your company is at risk of passively acquiring voting rights or control over a Belgian company active in a strategic sector (by contractual arrangements or otherwise), and considering whether an FDI filing may be required or desirable on a voluntary basis.

[5] Item 12 of the Screening Commission's draft guidelines state: « Les restructurations internes au sein d'un groupe d'entreprises, lorsque la société belge reste détenue ou contrôlée en dernier ressort par la même société non-UE, entrent-elles dans le champ d'application de l'accord de coopération ? Oui, pour autant que les conditions générales de l'accord de coopération soient remplies. L'accord de coopération ne prévoit aucune exception pour les restructurations internes/Vallen interne herstructureringen binnen een bedrijfsgroep, waarbij de Belgische onderneming uiteindelijk eigendom blijft of gecontroleerd blijft door dezelfde niet-EU onderneming, binnen het toepassingsgebied van het samenwerkingsakkoord? Ja, voor zover de algemene voorwaarden uit het samenwerkingsakkoord vervuld zijn. Er is in het samenwerkingsakkoord geen uitzondering voorzien voor interne herstructureringen".

5. Consider your negotiation position and strategy

Finally, it is important to face this fact: the Belgian FDI regime will inevitably create some friction and may even create a competitive disadvantage for foreign investors, notwithstanding the Belgian federal and federated entities (announced) best efforts to ensure the Belgian FDI regime remains investor-friendly and frictionless.

For an EU-based investor, the FDI assessment will enable you to provide comfort to the Belgian company in which you are investing, and play to this strength.

For a foreign investor, mapping the FDI situation clearly and early allows you to take this into account and provide a clear plan and strategy, comforting the Belgian company, and giving you an advantage over other foreign competitors looking to invest in the same company who have not prepared well in advance.

For a Belgian company looking for an investor, it will be key to be able to provide comfort to foreign investors on the Belgian FDI regime's scope of application and particular policy concerns in Belgium, potentially broadening the pool of interested parties.

In summary, no matter who you are, it is important to know your position, and prepare an FDI strategy to play to your strengths and mitigate any concerns.

Our FDI experts continue to closely monitor developments in relation to the Belgian FDI regime, and remain available for any questions you may have in this regard.

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