ALLEN & OVERY

Belgian summer brings foreign direct investment screening regime to Belgium

For many years, Belgium was one of the very few EU Member States that did not have a national foreign direct investment (**FDI**) screening mechanism in place, but this is about to change. On 30 November 2022, the Federal, Regional and Community governments reached consensus on a draft cooperation agreement on FDI screening in Belgium (the **Cooperation Agreement**), and this was lodged with the Federal Chamber of Representatives on 9 January 2023 for approval.

While the draft Cooperation Agreement must still be approved, (and similar acts must still be adopted by the Regional and Community parliaments), this is an important step towards the adoption of a full-fledged, national FDI screening mechanism[1].

Though it was initially anticipated that the Cooperation Agreement would enter into force at the beginning of 2023, it is now anticipated that it will enter into force on 1 July 2023[2]. What the main features of the Cooperation Agreement are, and how can you anticipate and prepare for the new regime, is set out below.

1. To date, no such fully-fledged FDI screening mechanism exists in Belgium. Only a limited post-factum screening mechanism exists at Flemish level, but its scope is limited to foreign (ie non-EU) investments in certain Flemish government entities.
2. The current draft text states that the Cooperation Agreement will enter into force on the date of publication of the last act approving the Cooperation Agreement in the Official Belgian Gazette (no automatic retroactive effect is currently foreseen).

1. Main features of the cooperation agreement

1.1 Scope

The Cooperation Agreement establishes the procedure and modalities for FDI screening in Belgium and puts in place a cooperative framework between the Federal State, the Regions and the Communities.

The Cooperation Agreement applies to FDI that (i) may have consequences in Belgium for the security, public order or for the strategic interests of the federated entities, and (ii) seeks to establish or maintain direct and lasting relations between the foreign investor and an entrepreneur or company (iii) to whom capital is made available for the purpose of carrying out an economic activity in a Member State including investments that enable effective participation in the management of or control over a company that exercises an economic activity.

For the purposes of the Cooperation Agreement:

– a "**foreign investor**" means (i) a natural person whose main residence is outside the EU, (ii) a company constituted or organised under the laws of a non-EU country, or (iii) a company where the ultimate beneficial owner's (UBO's) main residence is outside the EU[3]. Although mere EU investors will not qualify as foreign investors, this is a broad definition (and the new regime does eg not provide for an intra-group exemption).

– "**foreign direct investment**" means any kind of investment by a foreign investor that is aimed at establishing or maintaining lasting and direct links between the foreign investor and the entrepreneur or company, including investments that enable effective participation in the management of or control over a company.

– "**control**" means the possibility of exercising, directly or indirectly, in fact or legally, a decisive influence on the activity of an undertaking[4] by means of ownership or usage rights in relation to the undertaking's assets or components thereof, or the composition, voting behaviour or decisions of one or more corporate bodies.

There are two ways in which FDI could fall within the scope of the Cooperation Agreement[5]. The Cooperation Agreement defines FDI as:

– Foreign investment directly or indirectly resulting in the acquisition of **at least 25% of the voting rights** in companies/entities that are based in Belgium and whose activities touch on (at least) one of the following sectors:

  – vital infrastructure (both physical and virtual) for energy, transport, water, health, electronic communication, digital infrastructure, media, data processing and storage, air- and aerospace and defence, elections or financial infrastructure and sensitive installations (including land and real estate) that are crucial for the use of such infrastructure;

  – technology or resources of essential importance for security (including health security); defence or the enforcement of public order whose disturbance, failure, loss or destruction would have significant consequences for Belgium, an EU Member State or the EU; military equipment subject to export control rules and national controls; dual use goods; and technology with strategic importance such as artificial intelligence, robotics, semi-conductors, cyber security, air- and aerospace, defence, energy storage, quantum and nuclear technologies and nano-technologies;

  – the supply of critical inputs including energy or resources and the security of food supplies;

  – access to sensitive information, and personal data or the ability to control such information;

  – the private security sector;

  – media freedom and plurality; and

  – technologies of strategic importance in the biotechnology sector, on the condition that the enterprise's turnover[6] – in the financial year prior to the acquisition of **at least 25% the voting rights** – consisted of **more than EUR25 million**[7].

– Foreign investment directly or indirectly resulting in the acquisition of **at least 10% of the voting rights** in companies/entities that are based in Belgium whose activities touch on the defence sectors (including dual use goods), energy, cybersecurity, electronic communication, digital infrastructures, and whose turnover consisted of **more than EUR100m** in the financial year prior to the acquisition of such voting rights.

The parties to the Cooperation Agreement are granted the power to lower the 25% threshold to 10% or to increase these thresholds in a subsequent, implementing cooperation agreement.

Investments aimed at setting-up new economic activities without acquiring existing economic activities, are excluded from the scope of the Cooperation Agreement.

3. This includes (but is not limited to) governments, government institutions, government entities and private companies and entities that wish to acquire control over a Belgian-based entity or whose main seat is located in Belgium.
4. To this effect, reference is made to the European Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.
5. In case investments fall under both categories, the most stringent category will apply.
6. The Cooperation Agreement merely refers to "turnover" (*chiffre d'affaire/omzet*) without specifying at what level this turnover must be generated/assessed (eg at the Belgian level only).
7. No such *de minimis* threshold is foreseen in relation the sectors above, other than the biotechnology sector.

1.2 Process

(a) Screening Commission

The Cooperation Agreement establishes a Screening Commission (*Commission de Filtrage Interfédéral/ Interfederale Screeningscommissie*), which will consist of (i) members representing the respective governments/ governmental bodies and (ii) a chairman without voting rights. The purpose of the Screening Commission is to coordinate and conduct an **assessment** of FDI and if necessary, a **screening**.

After coordinating and conducting an assessment and/or screening, the Screening Commission must advise the relevant ministers in charge of making the final decision on the proposed FDI.

(b) FDI procedure

The FDI procedure consists of (i) the notification of the proposed FDI, (ii) an assessment and (iii) potentially a screening.

(i) Notification

FDI transactions that are in scope of the Cooperation Agreement must be notified by the foreign investor or its mandated entity to the Screening Commission. Such notification must be made after the signing of the purchase agreement, but prior to its implementation. The notification requirement also applies to other situations such as the publication of an offer or swap, the acquisition of a controlling interest (*participation de contrôle/ zeggenschapsdeelneming*), and the acquisition of shares on the stock exchange[8].

The notification requirement applies to agreements signed **on or after 1 July 2023** (or as of the first day of the month following the date of publication of the last act confirming the Cooperation Agreement in the Belgian Official Gazette, if such publication occurs after 30 June 2023)[9].

The notification must include, *inter alia*, the ownership structure of the foreign investor and the target (including the UBO), the approximate value of the FDI and details on the valuation, products, services and activities of the foreign investor and the target company (including their affiliates), the countries in which relevant activities are carried out, the funding of such investment and its source, and the anticipated date of the completion of the transaction.

After the notification, the Secretariat of the Screening Commission will analyse the completeness of the file and may request additional information.

(ii) Assessment phase

During the assessment phase, the members of the Screening Commission conduct separate investigations in relation to the notification (within the boundaries of their respective competences). They will verify whether the FDI could have an impact on public order, national security or strategic interests. While "public order" and "national security" are not defined in the Cooperation Agreement, "strategic interests" are defined as "the interests of the federated entities, within the framework of their competences to: (i) guarantee the continuity of vial processes; (ii) prevent certain strategic or sensitive knowledge to fall into foreign hands; or (iii) to ensure strategic independence.

If any member considers that the FDI has such an impact, then the Screening Commission will initiate a screening procedure (see further below). As there does not need to be a majority or a consensus between the members, this implies that the federated entities will have an important role to play, and it remains to be seen how each of the different federated entities will interpret the concept of 'strategic interests" in practice.

The decision of the Screening Commission to approve the FDI or to initiate a screening procedure will be notified to the notifying parties within 30 days after receiving the (complete) notification dossier. If a screening procedure is initiated, the Screening Commission will share the information it receives with the EU Member States and the European Commission who may then submit their comments or their advice.

If the Screening Commission has not initiated a screening procedure within 30 days (or interrupted or extended such deadline), the FDI is considered approved, unless the Screening Commission's failure to act timeously can be attributed to the registrant (eg if the registrant provided insufficient or misleading information).

8. The Cooperation Agreement also allows for the notification of a draft agreement to the Screening Commission, provided that all parties expressly confirm that they have the intention to sign an agreement that is similar to the draft agreement. However, at this stage, lacking any guidance, it is still to be seen how an actual notification would work in practice.

9. In this regard, the Cooperation agreement refers to the "*la conclusion/de sluiting*" of the agreement. In line with general contract rules, agreements are binding as of the date that they are entered into, ie signed between parties, even if they only executed between parties as of the realisation of any conditions precedent. See in this regard the preparatory works in relation to Book V of the New Civil Code, available **here**. This means that, for share purchase agreements, the moment of "signing" of the agreement will determine the applicability of the new FDI rules, and not the moment of "closing" of the transaction.

(iii) Screening

The screening procedure builds on the research conducted during the assessment phase and consists of a risk analysis. The screening is conducted separately by the members of the Screening Commission in accordance with their respective competences. The purpose of the screening procedure is to advise the relevant ministers.

If a member of the Screening Commission concludes that the FDI will or may entail a threat to public order, national security or strategic interests[10], then the investor/Belgian enterprise is given the opportunity to consult the file. The foreign investor and/or the target may also request a hearing, or the Screening Commission may organise such a hearing at its own initiative.

The members of the Screening Commission provide, after having heard the foreign investor and/or the target as the case may be, the relevant ministers with their opinion on the proposed FDI within 20 days after notifying the registrants of the start of the screening procedure[11]. Such opinion may consist of an approval of the FDI, an approval subject to conditions or a rejection.

In order to approve the FDI, the Screening Commission may propose certain measures that could mitigate any risks for public order, national security or strategic interests[12]. If such measures are imposed, the foreign investor and the company in which the investment is made must demonstrate that they have concluded a binding agreement to comply with the measures proposed by the Screening Committee within a specific timeframe.

The relevant ministers each make a provisional decision on the FDI, in accordance with their competences and based on the opinions of the Screening Commission members, taking into account any comments or advice they have timeously received from other Member States and the European Commission. The provisional decisions are forwarded to the Screening Commission Secretariat, which bundles them together into a combined decision, which either approves the FDI (subject to conditions, if necessary) or rejects it.

The Screening Commission Secretariat serves the registrants with the combined decision within two days after receiving the provisional decisions from the relevant ministers.

(iv) Screening at the initiative of the Screening Commission

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).

1.3 Sanctions

The Cooperation Agreement lists sanctions for non-compliance with the screening requirements which vary depending on the offence, and range from an administrative fine of 10% of the FDI to 30% of the FDI.

1.4 Appeal

An appeal against an FDI decision may be brought before the Market Court. The Market Court's procedural operations are similar to summary proceedings. It is only competent to annul the contested decision, unless the contested decision relates to an administrative fine (which may also be lowered, increased or waived).

Recourse before the Market Court does not in principle suspend the contested decision.

If the Market Court annuls the decision then the case will be returned to the Screening Commission, who must review the FDI again in accordance with the procedure described above.

10. The cooperation agreement refers to "susceptible de causer une atteinte/ een mogelijk gevaar vormen", without further specifying or defining how these concepts should be interpreted.

11. Such deadline may be suspended (eg pending discussions on measures proposed by the Screening Commission) or extended (eg due to the complexity of a file).

12. According to the Cooperation Agreement, such measures must be proportionate in order to mitigate the risk for the public order, national security or strategic interests to a level that is deemed to be acceptable. In this respect, the Cooperation Agreement includes a non-exhaustive list of measures that may be imposed by the Screening Committee, including inter alia the establishment of a code of conduct for the distribution or exchange of sensitive information in order to guarantee the public order, national security or strategic interests; the designation of one or more compliance officers to process sensitive information relating to intellectual property; the use of certain technologies, source coding or the depositing of knowhow with a third party in Belgium that can only be (temporarily) made available in the case of acute risks for vital processes or security interests.

3. Forewarned is forearmed: some practical considerations

Even though the Cooperation Agreement still needs to be formally approved, parties that are negotiating deals involving a non-EU investor may wish to act cautiously and anticipate the adoption of the FDI screening mechanism.

As a first step, parties may consider raising targeted questions during the due diligence phase (eg are dual-use items or technologies involved? Are there any contracts with government entities at stake? Are any technologies concerned that may be indicative of public order, national security or strategic interests?).

Based on the information gathered during the due diligence phase, parties may want local counsel to carry out an assessment 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 eg make sure to understand and anticipate on how each federated entity assesses the concept of "strategic interest".

If the transaction is likely to fall within the scope of the Cooperation Agreement, parties may want to include appropriate conditions precedent with respect to a notification, as well provisions dealing with risk allocation and notification mechanisms/strategies, or serve (as of the entry into force of the Cooperation Agreement), an actual notification.

So far, the Screening Commission has not yet issued any guidance as to how an actual FDI filing must be made, and/or how the main concepts referred to in the Cooperation Agreement must be interpreted. It is expected that the Screening Commission will issue practical guidance on how to submit an FDI filing in the course of April 2023. However, actual guidance on how to interpret the Cooperation Agreement is only expected to be issued towards the end of Q2 of 2023 (so rather close to the date of the Cooperation Agreement's entry into force).

Even if it is anticipated that such guidance will be published prior to the Cooperation Agreement's entry into force, it is important to bear in mind that the Screening Commission's Secretariat will have a rather limited function in a sense that it will have a coordinating role and will act as a single point of contact, but will not have decisive powers as to how to interpret key concepts, nor he ability to initiate a screening procedure (as this will be a prerogative of the Screening Commission's members). In addition, some triggers such as "one or more UBOs being non-EU" may require further clarification, for example in the context of private equity owned companies. Filing a voluntary notification may be a strategy in case of doubt, but foreign investors should be aware that early movers would also be guinea pigs for emerging practices.

Finally, if a FDI notification is filed, and a subsequent screening were required, this would have a significant impact on the timing of the deal, which will need to be factored in.

Key contacts

Gauthier van Thuyne
Partner, Brussels
Tel +32 27 80 25 75
gauthier.vanthuyne@allenovery.com

Fee Goossens
Counsel, Brussels
Tel +32 27 80 26 01
fee.goossens@allenovery.com

Frederiek Adams
Partner, Brussels
Tel +32 27 80 24 46
frederiek.adams@allenovery.com

ROW
CS2304_CDD-72454