

Looking ahead

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What can 2021 bring for screening foreign direct investments in Belgium?

Belgium has not yet adopted a formal FDI screening mechanism to implement the EU FDI Regulation, but the debate on how to protect certain critical industries remains very relevant, as becomes clear upon assessing the 16 December 2020 proposal for a directive on the resilience of critical entities¹. In this contribution, we will take a fresh look at the FDI screening mechanism designated in the FDI Regulation, and look ahead at what this may bring for Belgium in 2021.

¹ Proposal for a Directive of the European Parliament and of the Council on the resilience of critical entities of 16 December 2020, COM(2020) 829 final.

The EU FDI screening regulation may have a major impact on (future) transactions

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 European Union (the **FDI Screening Regulation**) became applicable on 11 October 2020. The FDI Screening Regulation aims to preserve the benefits of foreign direct investments (**FDI**) while protecting security and public order both at EU and national level from certain non-EU direct investments.

The FDI Screening Regulation adopts common principles for the screening of foreign investments at national level (for Member States choosing to have a national review system) and an EU framework for multilateral cooperation between Member States and with the European Commission although it does not introduce a one stop-shop principle comparable to the EU merger control system and it does not introduce a centralised review by an EU agency comparable to CFIUS in the U.S. The Commission will obtain a new competence to review certain FDI and to issue a non-binding opinion in order to protect projects and programmes which serve the Union as a whole and represent an important contribution to its economic growth, jobs and competitiveness.

The EU FDI Regulation covers any investment aiming to establish or maintain lasting and direct links between the foreign investor and the undertaking to which the capital is made available in order to carry on an economic activity in a Member State. Relevant factors in assessing the FDI that may be taken into account by Member States and the Commission are: (i) control by a foreign government (including state bodies or armed forces); (ii) prior involvement in activities affecting security or public order in a Member State; or (iii) serious risks that the foreign investor may engage in illegal or criminal activities.

If and when implemented in national legislation, the FDI screening mechanism will have a major impact on transactions and investments.

Member States must ensure there will be no discrimination between non-EU Member States, and must set out in detail the triggering events, thresholds, and grounds for screening, and must adopt detailed procedural rules and timeframes, which protect confidential/commercially sensitive information. A right to seek recourse against screening decisions must also be made available. Member States' screening mechanisms must focus on protecting security and public order, rather than mere threats of an economic nature, but the Member States may opt to provide a specific national list.

Sectors that Member States typically may consider – depending on their own conception of national interests – may include:

- Critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure;
- Critical technologies and dual use items, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies, as well as nanotechnologies and biotechnologies;
- Supply of critical inputs, including energy or raw materials, as well as food security;
- Access to sensitive information, including personal data, or the ability to control such information; or
- Freedom and pluralism of the media.



Belgium has not yet adopted a federal general FDI screening mechanism – so are there no limitations with regard to critical industries in Belgium?

Currently, only a scheme for FDI in Flemish governmental entities and agencies exists in the Flemish Region, which only relates to transactions by which a foreign investor obtains control or decision-making powers in Flemish governmental entities or agencies of the Flemish Government and by which the strategic interests of the Flemish Community or Region are ‘threatened’.

Apart from this regime, transactions involving Belgian entities are not yet subject to a Belgian screening mechanism, but are covered by the cooperation mechanism of the FDI Screening Regulation if they threaten the security or public order of other Member States and/or affect projects or programmes of Union interest (see below). This does not mean that Belgium is completely unable to take (pre-emptive) measures to protect certain critical industries or sectors.

In 2015 the National Security Council (the **NSC**) was created. The NSC does not have a defined role in relation to FDI, but it could, on an ad hoc basis (eg in the area of telecoms), play a role through its advice practice, which could be picked up by the regulator (or, as the case may be, the legislator) to address one or more specific sectors – this is, for instance, currently the case in the area of telecommunications regulating the way in which operators of 5G networks must obtain an authorisation to roll out a 5G network; this will be denied if an operator relies on “high risk vendors” for certain critical elements of the network.²

Additionally, alternative measures to an FDI-screening mechanism exist – although they do not require a pre transaction screening mechanism – such as the requirements for compulsory licences on patented medicines in case of a national emergency such as a pandemic or reliance on ‘golden shares’. The ‘golden shares’ scheme is a company-specific measure allowing governments to retain special rights in certain undertakings and to block or limit certain types of investments therein.

Golden shares have been applied (in limited cases) in Belgium (eg for Synatom – the company responsible for activities upstream and downstream in the nuclear fuel cycle (excluding the production phase carried out by Electrabel and nuclear plant decommissioning) and Fluxys – the gas storage and transport operator). However, the use of ‘golden shares’ has been challenged, and the European Court of Justice has repeatedly found that ‘golden shares can entail a restriction to the free movement of capital under Article 63 of the TFEU and to the freedom of establishment under Article 49 of the TFEU, insofar as they are liable to discourage investments by other Member States’. In addition, the rights conferred by golden shares must be necessary and proportionate to achieve a legitimate public policy objective, in particular, on the grounds of public policy, public security and public health if there is a genuine and sufficiently serious threat to a fundamental interest of society.

² On the website of the Belgian Institute for Postal Services and Telecommunications there currently is a public consultation running regarding a draft law and royal decree regarding the security of fifth-generation mobile networks (5G) (<https://www.bipt.be/operators/publication/consultation-on-the-bill-and-draft-royal-decree-introducing-additional-security-measures-for-the-provision-of-mobile-5g-services>).





Can transactions taking place in Belgium give rise to scrutiny by other EU Member States or the European Commission?

Irrespective of the existence of an FDI screening mechanism in Belgium:

- other Member States and the European Commission may *request information* from Belgium;
- another Member State may provide *comments* to Belgium where it finds that an FDI may affect its national security or public order, or has relevant information in relation to that FDI; and
- the European Commission (**EC**) may issue *opinions* to Belgium where it considers that an FDI may affect security or public order in more than one Member State, affect projects or programmes of Union interest, or it has relevant information in relation to that FDI.

The right to comment and provide opinions, respectively, applies whether or not an FDI screening mechanism is in place in the host Member State.

The requirement to provide information when requested by another Member State or the European Commission also applies to Belgium as a consequence. For example, if a foreign investor is planning an investment in Belgium or France (or any other Member State) and it becomes aware of the planned FDI, it may request Belgium for information (or provide Belgium with information) and/or issue comments to Belgium if it considers that the planned FDI could impact France's (or its) national security or public order. However, France cannot block the planned transaction by providing its comments.

When receiving comments from Member States or opinions from the EC, the Belgian authorities will have to give these "*due consideration*"³ in accordance with the duty of sincere cooperation. According to the Commission's FAQ, this means that the Belgian authorities must ensure that the comments are assessed "*before a decision on the FDI is taken*" – but it remains unclear what Belgium would need to do with such comments in the absence of a screening mechanism.

Where FDI are likely to affect projects or programmes "*of EU interest*", Belgium will need to take into "*utmost account*"⁴ the Commission's opinions, ie it "*must follow the opinion, or must provide reasons for not doing so*".⁵

Programmes of EU Interest involve a substantial amount or a significant share of EU funding, or are covered by Union legislation regarding critical infrastructure, critical technologies or critical inputs, and include programmes such as the European global navigation satellite systems (GNSS) programmes (Galileo and EGNOS) or the Trans-European Networks for Energy (TEN-E), Trans-European Networks for Transport (TEN-T), or the so-called key Enabling Technologies funded under Horizon 2020 (and/or its successor Horizon Europe) such as artificial intelligence, robotics, semiconductors and cybersecurity (please see Annex I to the FDI Screening Regulation for the list of projects or programmes of Union Interest as defined under the FDI Screening Regulation).

It is not entirely clear how Member States that do not have a screening mechanism in place, such as Belgium, will fulfil these obligations; the recitals to the FDI Screening Regulation state that Member States "*where the foreign direct investment is planned or completed*"⁶ remain solely responsible for any measure in relation to an FDI. Importantly, there are no redress mechanisms for non-compliance under the FDI Screening Regulation, and the EC has unequivocally stated that "*the final decision on whether a foreign investment is authorised remains with the Member State where the investment takes place*", while other Member States and the Commission "*cannot block or unwind the investment*"⁷. Even if Belgium did receive comments from other Member States or an opinion from the EC, the risk that Belgium would then block an investment in light of these comments or opinion is purely theoretical at this point in time.

³ Article 7, paragraph 7 of the FDI Screening Regulation.

⁴ Article 8, paragraph 2, (c) of the FDI Screening Regulation.

⁵ Memo – Frequently asked questions on Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union, section 21.

⁶ Recital 17 of the FDI Screening Regulation

⁷ Memo – Frequently asked questions on Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union, section 17.

What if Belgium is concerned about FDI taking place in another Member State?

Belgium may provide *comments* to another Member State (ie the host Member State) where it finds that an FDI may affect its national security or public order, or has relevant information in relation to that FDI.

As a matter of fact, the Belgian authorities will be notified through the national contact points of FDI undergoing screening in Member States that have a screening mechanism in place. In Member States that do not have

a mechanism in place, Belgium will need to become aware of an FDI through other means (eg business and/or media sources). As with other Member States, the Belgian authorities will be able to request information and issue comments to raise concerns if they consider an FDI planned in another Member State to threaten Belgium's national security or public order. Belgium will not be able to block or unwind a transaction in the host Member State.

What lies ahead?

It is clear from the most recent activities in the European Institutions – eg the recent proposal for a directive on the resilience of critical entities⁸ – that FDI, security, public order and critical infrastructure and technologies will remain a firm focus on the agenda of the EU for the years to come. In March 2020 the European Commission launched a call to its Member States to fully apply or, if not yet available under national law, implement a national FDI screening mechanism in line with the FDI Screening Regulation.⁹ In addition, the Social-Economical Council of Flanders published a report and advice in May 2020 urging the adoption of a national

FDI screening mechanism, stating that the urgency for adopting such a mechanism is exacerbated by the current COVID-19 pandemic.¹⁰ The Federal Government also included a reference to the introduction of a national FDI screening mechanism, in cooperation with the Regions, in its coalition agreement of 30 September 2020. It would appear that the FDI Screening Regulation, the COVID-19 pandemic and the EC's call have (re)inspired Belgian lawmakers to take action in this regard and we believe it is highly likely that draft legislation will be published in 2021 in this regard.

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⁸ Proposal for a Directive of the European Parliament and of the Council on the resilience of critical entities of 16 December 2020, COM(2020) 829 final

⁹ Communication for the Commission dated 25 March 2020 Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation), p. 2.

¹⁰ Report and advice available on <https://www.vlaanderen.be/publicaties/vlaamse-screening-buitenlandse-directe-investeringen-rapport-en-advies-serv>