

Global Rules on Foreign Direct Investment

Belgium

Belgium has introduced its first foreign investment screening regime of general application. In November 2022, the Belgian federal State and the various regions and communities agreed on a draft cooperation agreement to set up a screening mechanism for foreign direct investments in sensitive sectors that are relevant for the country's national security, public order, and strategic interests. The new draft agreement reflects the issues flagged in the opinion of the Council of State issued in October 2022 regarding the initial draft established in June 2022. The new screening regime enters into force on 1 July 2023¹. On 31 May 2023, the Belgian Ministry of Economy (*SPF Economie*) published guidelines on the application of the cooperation agreement².

Notification Requirements

Mandatory prior notification will be required for investments by foreign investors in Belgian entities active in certain sectors of strategic importance, to establish or maintain a direct and lasting relationship between the foreign investor and the company. A "foreign investor" is either a natural person with its main residence outside of the EU, a company from a third country, established under the laws of a non-EU country, whose statutory seat or main activity is located in a non-EU country, or a company whose beneficial owners have their main residence outside of the EU.

A notification will be required where a foreign investor directly or indirectly acquires³:

1. at least 10% of the voting rights in an existing Belgian enterprise, active in the defence (including dual-use items), energy, cybersecurity, electronic communications or digital infrastructure sectors, and whose annual turnover during the financial year preceding the investment was over €100 million; or
2. at least 25% of the voting rights in an existing Belgian enterprise that is active in the following sectors:
 - (a) 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;
 - (b) 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;
 - (c) supply of critical inputs, including energy or raw materials, as well as food security;
 - (d) access to sensitive information, including personal data, or the ability to control such information;

¹ All the acts of assent (federal, regionals, communities and community commissions) to the cooperation agreement have been adopted and published, therefore the entry into force will not be delayed.

² <https://economie.fgov.be/sites/default/files/Files/Commercial-policy/screening-richtlijnen-filtrage-lignes-directrices.pdf> (last visited on 15 June 2023).

³ According to the proposed guidelines published of the *SPF Economie*, a notification will be required if an investor previously owns 20% in a Belgian entity and acquires subsequently 5% in that entity thus exceeding the threshold.

- (e) the private security sector;
- (f) the freedom and pluralism of the media; or
- (g) technologies of strategic importance in the biotechnology sector, if the company's turnover in the financial year preceding the acquisition was greater than €25 million.

Review process

The screening will be performed by the Interfederal Screening Committee (**ISC**), composed of representatives of the various government bodies and with the administrative support of the Federal Public Service Economy.

Notified transactions will first be checked for completeness by the ISC Secretariat, after which the notification file will be forwarded to the competent ISC members, and to the Intelligence and Security Coordination Committee (**CCRS**). The review procedure by the ISC will consist of two phases: the assessment phase and the screening phase.

1. In the assessment phase, the ISC will determine whether the investment may have a potential impact on public order, national security or the country's strategic interests. At the end of this phase, the ISC may either authorise the transaction or, where concerns are raised, open an in-depth (screening) phase. The decision to clear the transaction or open a screening phase must be taken within 30 calendar days (potentially extended by requests for additional information, which pause the review timetable), following the reception of the full notification by the Secretariat.
2. During the screening phase, the proposed investment will be subject to a more in-depth risk analysis by each of the competent members of the ISC. The members of the ISC will have an initial period of 20 calendar days to prepare and submit their opinion to the ministers they represent. In the meantime, as soon as the ISC considers that the investment will generate a harmful impact it communicates a draft opinion to the foreign investor and to the concerned Belgian company. They have 10 calendar days to present their written observations (a meeting with the ISC may also be convened).

The ISC may negotiate corrective measures that would enable it to issue a positive opinion. The negotiations suspend the time limit by one month (or longer if mutually agreed). Upon receipt of the ISC's opinion, the ministers concerned will have a period of 6 calendar days to render their preliminary individual decisions on the proposed transaction. The secretariat of the ISC will then notify the combined decision to the notifying party within 2 calendar days after the reception of the preliminary decisions. For complex cases, the procedure may be extended by two months. The competent federal minister has the right to veto the eligibility of an investment.

In the absence of a notification, an ex officio investigation may be initiated where the ISC considers it necessary for the protection of public order and national security, and/or strategic interests. Furthermore, an ex officio investigation may be initiated retroactively against an investment finalised before the entry into force of the Cooperation Agreement, up to two years after the acquisition of unnotified control, and up to five years in the case of indications of bad faith.

A negative decision may be subject to an appeal in front of the Market Court (a division of the Brussels Court of Appeals), within 30 days following the notification of the decision.

Penalties

A foreign investor may be sentenced to an administrative fine up to 10% of the investment where no data or incomplete data is provided to the authority and where the time limit for the request for information is not respected.

The failure to notify a reportable transaction (unless a spontaneous notification is made within twelve months of the realisation of the investment), the provision of inaccurate, misleading or deceptive information, the non-compliance with corrective measures, and the realisation of the investment in violation of the standstill obligation may result in an administrative fine of up to 30% of the value of the transaction.

The authors wish to thank Julien Haverals, International Trainee at Norton Rose Fulbright LLP Brussels for his contribution.

Authorised by



Wilko van Weert
Partner, Brussels



Violetta Bourt
Counsel, Brussels