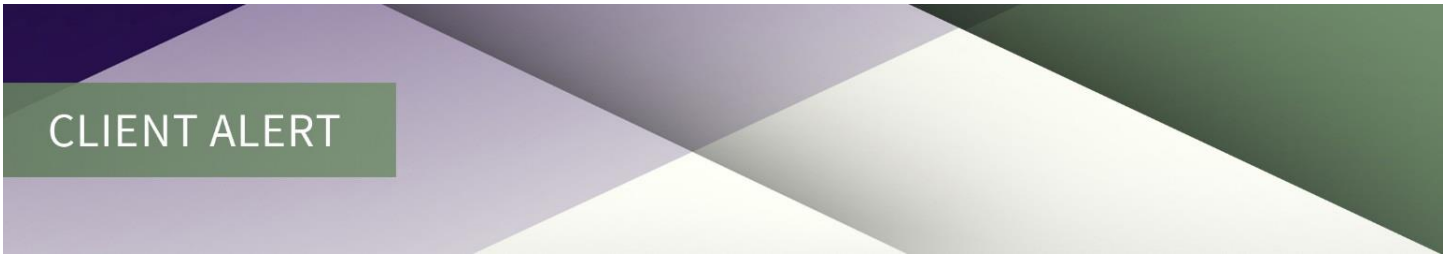

Belgium to Introduce Foreign Direct Investment Regime

June 22, 2022

AUTHORS

Jean-Quentin De Cuyper | Sylvain Petit | Zoé Janssen

On 1 June 2022, the federal government and the federated entities (Regions and Communities) of Belgium agreed on a legislative text that will introduce a foreign direct investment ("***FDI***") screening regime for sensitive and strategic sectors (the "***Proposed Belgian FDI Regime***").

This initiative is part of a continuing process of tightening FDI access across Europe, and follows the implementation of European Regulation No. 2019/452, dated 19 March 2019, which establishes a framework for the screening of FDI in the European Union ("***EU***").

According to a Willkie source close to the initiative, the Proposed Belgian FDI Regime is still subject to numerous consultations and to the approval of federal and federated parliaments. Therefore, the specific technicalities set out below are subject to change.

Notwithstanding, foreign entities doing business in Belgium should start monitoring these developments closely and assess the implications of the contemplated regime for both present and future deals as regards timeline, legal documentation and deal certainty. It is currently expected that the Proposed Belgian FDI Regime will enter into effect on 1 January 2023.

One-stop-shop principle

The contemplated regime will institute an Interfederal Screening Committee ("***ISC***") (*Comité de Filtrage Interfédéral*; *Interfederale Screeningscommissie*) composed of nine members. The federal government, the Regions, and the Communities of Belgium, will each be represented by three members.

The ISC will be in charge of reviewing the notifications made in the context of the future regime, coordinate the relationships between the federal state, the Regions, and the Communities, and be the single point of contact for the notifying foreign investors throughout the process.

Transactions captured by the Proposed Belgian FDI Regime

The regime provides three cumulative criteria to determine whether a contemplated transaction falls within its scope. These criteria relate to (*i*) the origin of the investor, (*ii*) the type of transaction, and (*iii*) the type of activity of the target company.

With respect to criteria (*ii*) and (*iii*), the Proposed Belgian FDI Regime establishes general thresholds for notification for a broad range of sectors but also specific thresholds for some particular sectors.

Origin of the investor – Pursuant to the Proposed Belgian FDI Regime, a foreign investor is defined as, (*i*) any natural person that has its main residence outside the EU, (*ii*) any undertaking that is established outside the EU, or (*iii*) any undertaking of which the ultimate beneficial owner has its main residence outside the EU.

Unlike some other EU regimes, such as the French one, investors based in other EU Member States will not be considered foreign investors and thus will not be captured by the contemplated regime.

General thresholds and sectors captured – The regime would apply to transactions, irrespective of the parties' size and turnover, that result in ownership of voting rights in a legal entity established in Belgium, whether direct or indirect, exceeding a threshold of 25%, that is involved in the following activities:

- **critical infrastructure,** including energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructure, as well as sensitive facilities and investments in land and real estate crucial for the use of such infrastructure;
- **technologies and raw materials** that are of essential importance to:
    - safety (including health safety);
    - defense and public order;

  - military equipment subject to multilateral or European export control;
  - dual-use goods as defined by Regulation No 428/2009 dated 5 May 2009;
  - technologies of strategic importance such as AI, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, nuclear and quantum technologies;
- supply of **critical inputs**, including energy and raw materials, as well as relating to food security;
- access to, or the ability to control **sensitive information**, including personal data;
- **private security**; and
- **media freedom and pluralism**.

Specific thresholds – First, transactions that result in ownership of voting rights in a legal entity established in Belgium that is involved in the **biotechnology sector**, whether direct or indirect, exceeding a threshold of 25% would also be captured by the regime, provided that the target has achieved a revenue of more than 25 million euros during the last financial year.

Second, the regime would also capture transactions that result in ownership of voting rights in a legal entity established in Belgium that is involved in activities related to **defense**, including dual-use goods, **cybersecurity**, **electronic communications** and **digital infrastructure**, whether direct or indirect, surpassing a threshold of 10%, provided that turnover of the target exceeds 100 million euros.

Regulatory clearance would be required prior to closing of the transaction

Under the regime, foreign investment transactions that fall within the scope of the regulation would have to be notified and approved before implementation (*ex-ante* suspensory filing). The responsibility for obtaining the necessary approval lies with the investor.

The parties will be able to submit the contemplated transaction once the transaction documents have been signed or on the basis of a draft agreement, provided that the parties explicitly state that they intend to conclude an agreement that does not differ significantly from the notified draft.

The fine for a failure to notify can amount to up to 30% of the investment value.

Contemplated procedure to obtain ISC clearance

Pursuant to the Proposed Belgian FDI Regime, a three-stage process would apply:

- A pre-notification phase, which will not be subject to any statutory timetable and during which the secretariat of the ISC will analyze the notification and determine whether it is complete or not.

- An assessment phase (*procédure de verification; toetsingsprocedure*), at the end of which the ISC will issue a decision stating that the transaction is either (*i*) authorized or (*ii*) requires further investigation and will be the subject of a screening phase. Such a decision shall be issued within 40 calendar days following receipt of the complete formal notification (i.e., upon confirmation of the ISC at the end of the pre-notification phase), unless the ISC requests the parties to provide additional information, which will pause the review process.

- A screening phase (*procédure de filtrage; screeningsprocedure*), at the end of which the ISC will either issue a decision (*i*) granting the necessary authorization without conditions, (*ii*) granting it with conditions or (*iii*) refusing to authorize the transaction.

Statutory deadline for the screening procedure will require further clarification but such phase could last between one to five months.

Ex-officio investigation powers to review foreign investments that were not notified will also be granted to the ISC. Such *ex officio* investigation could be open, for up to five years after the closing of the transaction, if the ISC deems it necessary to (*i*) safeguard public order and national security or (*ii*) for strategic interests.

Types of remedies contemplated by the Proposed Belgian FDI Regime

The Legislative Proposal identifies 17 remedies that may eliminate the possible impact of the transaction on public order and national security or on strategic interests, among them: (*i*) the elaboration of codes of conduct and/or the appointment of compliance officer(s) when dealing with sensitive information; (*ii*) the obtaining of security clearance by certain administrators; (*iii*) the elaboration of security protocols and/or the notification to the government of visits of the company by non-European residents; (i*v*) the separation of sensitive activities into distinct entities to which access is limited; (*v*) the appointment of a separated supervisory board; (*vi*) the limitation of the number of shares that can be acquired; and (*vii*) the elaboration and notification of reports on a regular basis.

The fine for a failure to implement the remedies on time can amount to up to 30% of the value of the investment.

Key practical implications

As is generally the case with new FDI regimes, the regulatory authority will likely adopt a broad interpretation of the sectors that are captured by the Belgian FDI legislation. Therefore, in the first months of implementation of the regime, it is expected that many transactions will be notified. It remains to be seen if the future ISC will give prompt guidance where there is doubt about the implementation of the new regime.

It is noteworthy that the Belgian regime will likely add another layer of complexity compared to other more streamlined regimes, as several federal entities may need to be consulted by the ISC.

Companies wishing to invest in Belgium will need to determine with their external legal counsel whether a notification is required and the sensitiveness of such transaction. If it is concluded that a notification is required, timing of the notification will need to be factored into the transaction documents, which documents should include specific provisions for establishing a clear framework for the fulfillment of conditions precedent. In light of this, companies will have to include appropriate risk allocation provisions and determine a longstop date.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

Jean-Quentin De Cuyper
+32 2 290 18 20
jdecuyper@willkie.com

Sylvain Petit
+32 2 290 18 20
spetit@willkie.com

Zoé Janssen
+32 2 290 18 20
zjanssen@willkie.com