FDI Screening in Belgium: It Is Complicated

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Abstract

Belgium's foreign direct investment (FDI) screening mechanism entered into force on 13 June 2023. Transactions in scope of the new mechanism will have to be notified as of 1 July 2023. The genesis of this mechanism was slowed down by the complex institutional landscape in Belgium. A scenario in which various levels of government would have created their own separate screening procedure was fortunately avoided. The newly adopted cooperation agreement between the federal state and eight 'federated entities' aims to establish a single inter-federal screening mechanism. While policymakers should be commended for this effort, there are reasons for concern. First, the scope of the mechanism is broad, much broader than many domestic parties and foreign investors probably anticipate and remains unclear on a number of aspects. We expect that a substantial number of transactions will be notified, if only for reasons of legal security. Second, we fear rather lengthy and unpredictable proceedings, injecting considerable transaction uncertainty into the Belgian investment climate. Finally, the single mechanism exists more in appearance than in reality. In practice, multiple procedures will often run side by side, with all the political complications that will entail. We are thus not optimistic that the mechanism will result in a seamless, predictable and legally secure FDI screening mechanism in Belgium.

Keywords: FDI, Belgium, M&A, public order, security.

1 Introduction

General. In 2019, the European Union (EU) created a legal framework for the regulation of foreign investment screening. By adopting Regulation (EU) 2019/452,[1] the European legislator provided clarity on how Member States can screen foreign investments and possibly intervene for reasons of public order or security. In doing so, the EU seeks a balance between its traditional market-oriented openness, as enshrined in the four fundamental freedoms and the protection of its strategic assets.[2] Most European Member States have since established or are preparing such a screening mechanism.[3]

Belgium. Belgium took a while to act on the regulation. After a slow start, the Concertation Committee, a body in which the federal government as well as the governments of the federated entities are represented, reached a final agreement on an inter-federal screening mechanism for foreign investments on 30 November 2022, which was subsequently approved by all competent parliaments in the course of 2023.[4] The screening mechanism entered into effect on 13 June 2023, with investments to be notified as from 1 July 2023. In addition, a first batch of Draft Guidelines have been published on 31 May 2023.[5] The broad outlines of the screening mechanism as determined in the Cooperation Agreement (CA) as well as the Draft Guidelines, are described in the following pages.

Structure. In this contribution, we first briefly turn to some background on the genesis of the Belgian screening mechanism, including Belgium's complex institutional landscape (2). We then analyse the scope of the proposed FDI screening mechanism (3) and the standard of review (4). We proceed to discuss the composition and role of the new body, the Inter-federal Screening Commission (5). We also identify the main features of the screening procedure (6). Moreover, we explain the possible sanctions and possibilities of judicial review (7). Finally, we provide concluding remarks (8).

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1 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 investment into the Union ('Regulation 2019/452').

2 M. Wyckaert, 'Takeover bids in Europe in Times of a World-wide Pandemic Threat: A Delicate Balance Between the Fundamental Freedoms and the Protection of Europe's and the Member States' Strategic Assets,' 3-4 *European Company and Financial Law Review* 353, at 355 (2020).

3 For the latest, *see* COMMISSION STAFF WORKING the document REPORT FROM DOCUMENT of 1 September 2022, Screening of FDI into the Union and its Member States Accompanying THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Second Annual Report on the Screening of Foreign Direct Investments into the Union, SWD (2022) 219 final.

4 Cooperation Agreement of 30 November 2022 establishing a mechanism for the screening of foreign direct investments, *Belgian Gazette* 7 June 2023. The Cooperation Agreement exists in Dutch, French and German. For the purpose of the present contribution, the authors chose to provide only free translations of cited provisions.

5 Proposal of guidelines, 31 May 2023, posted on https://economie.fgov.be/sites/default/files/Files/Commercial-policy/screening-richtlijnen-filtrage-lignes-directrices.pdf (last visited 15 June 2023) (hereinafter referred to as 'Draft Guidelines'). According to the document, the Draft Guidelines are a proposal while awaiting the entry into force of the CA and their formal adoption by the Inter-federal Screening Commission. Moreover, the text is to be considered as a "*dynamic document that can be adapted at all times, in function of a.o. modifications to the regulatory texts, new questions of undertakings and their representatives or the acquired experience by the members of the [Inter-federal Screening Commission]*". These Draft Guidelines (and their changes) will have to be adopted by consensus by the members of the Inter-federal Screening Commission.

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2 The Genesis of the Belgian Screening Mechanism

2.1 Some Background

Eandis – State Grid. Belgium is traditionally an open economy and Belgian politics are, compared to some neighbouring countries, not very prone to backlash in connection with 'foreign takeovers'. Nevertheless, in 2016, the topic suddenly featured prominently on the Flemish political agenda, following an impending investment by the Chinese state-owned company State Grid in Eandis.[6] This caused quite some political fuss, given the key infrastructure involved. The Flemish local municipalities were (indirectly) the most important shareholders of Eandis,[7] and more than 2,000 Flemish municipal councillors were advised to vote against the Chinese capital investment.[8] The investment did not go through in the end.

Even though there was no comparable case on the Walloon side of the country, the Walloon government's opposition to CETA, the trade treaty between the EU, the EU Member States and Canada, can be seen as symbolic of the same increased political sensitivities. Admittedly, that was in part a different debate, but it is evidence that scepticism about ever-more liberal international trade and investment has been growing in Belgium also.

The topic has since then continued to stir politically. The protection of enterprises from 'foreign interference' frequently received political and press attention.[9]

Limited mechanism in Flanders. The Eandis case demanded some form of political answer. In 2018, Flanders opted for a limited mechanism in Articles III.59 and III.60 of the Flemish Administrative Decree.[10] The review mechanism allows the Flemish government to perform an *a posteriori* check of legal acts of (Flemish) public authorities leading to decision-making power in or control of that same public authority by natural persons or legal persons established outside the European Economic Area. The government can annul, suspend or declare inapplicable any such acts that threaten the strategic interests of Flanders. The public authorities falling under the scope of this mechanism include (i) the Flemish public authority,[11] (ii) local public authorities and (iii) other institutions with legal personality that have been created to fulfil needs of general interest, upon the condition that either (a) that institution falls under the authority of a public authority within the scope of the screening mechanism or (b) such public authority has more than half of the votes in the board of directors of that institution. As such, this *ex post* mechanism has a rather limited scope. To our knowledge, it has never been used.

Additional momentum with the outbreak of COVID. With the outbreak of COVID, the topic gained momentum again. Following encouragement from the European Commission,[12] the federal government took the initiative to set up a screening mechanism. That initiative however collided with Belgium's complex institutional structure in this matter (see Section 2.2). The initiative foundered after a highly critical opinion from the Council of State's legislation section, based on issues with the division of powers within Belgium.[13] A number of opposition parliamentarians submitted a bill to introduce a screening mechanism,[14] which met with the same criticism from the Council of State.[15]

New governments and ultimate breakthrough. Following the elections of 2019, both the federal and Flemish governments set out the ambition to create a broader FDI mechanism.[16] Even so, more than two years lapsed before clarity emerged on how that would be fleshed out given the aforementioned institutional critique of the Council of State. As the conclusions of the Council of State's opinions sank in, it became clear that a federal initiative would be insufficient and that a so-called cooperation agreement between the various Belgian levels

6 Eandis has since merged with Infrax to form the unified network company Fluvius System Operator, responsible for electricity and natural gas distribution in Flanders. Its activities extend to sewerage, cable networks and public lighting. For a non-exhaustive list of press articles on these events, please contact the authors.

7 The local municipalities are members of entities (*opdrachthoudende verenigingen*) that hold the shares of Eandis CVBA (now Fluvius System Operator CV).

8 'Gemeenteraadsleden moeten Chinees geld voor Eandis afkeuren', *De Standaard*, 1 September 2016.

9 *See e.g.*: 'Voka waarschuwt voor anti-Chinees protectionisme', *De Standaard*, 3 August 2020; 'De comeback van het dirigisme', *De Standaard*, 2 March 2019; ''De echte vraag is: door wie willen we afgeluisterd worden?'', *De Standaard*, 22 December 2018; 'Geel gevaar? Nog maar één Chinese investering afgeblokt', *De Standaard*, 31 July 2018; 'Duitsland blokt Chinezen af bij Elia-dochter', *De Standaard*, 20 July 2018; 'Chinezen slaan weer toe in Duitsland', *De Standaard*, 20 July 2018; 'Wie heeft geen trek in het Chinese manna?', *De Standaard*, 14 May 2018; ''Alles op de Chinezen afwentelen, is erover'', *De Standaard*, 11 January 2018; *De Standaard*, 'Vlaanderen beschermt zich tegen inmenging China', 11 January 2018; 'Eigen bedrijven eerst', *De Standaard*, 24 February 2017; 'China koopt recordaantal westerse bedrijven (maar houdt zelf de deur op slot)', *De Standaard*, 11 January 2017; 'Chinezen niet welkom in outback', *De Standaard*, 2 November 2016; 'Griekse netbeheerder wél in zee met Chinezen', 31 October 2016.

10 For a commentary, *see e.g.* S. Van Garsse and A. Verschave, 'De vrijwaring strategische belangen van de Vlaamse Gemeenschap en het Vlaamse Gewest' (sic) in S. Van Garsse, S. Hennau and D. Fransen (eds.), *Het Bestuursdecreet in perspectief* (2021), 279. Note, however, that the mechanism was since amended by the Flemish Decree of 2 July 2021, amending the Administrative Decree of 7 December 2018. For more information on the political debate on the subject, *see* Concept note for new regulations by Peter Van Rompuy, Robrecht Bothuyne, An Christiaens and Sonja Claes concerning the anchoring of prosperity in Flanders, *Parl. St.* Vl. Parl., 2018-2019, 1748/1.

11 As defined by the Flemish Administrative Decree.

12 Communication from the Commission of 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, C(2020) 1981.

13 Council of State, Legislation Section, Opinion 67.887/1 of September 28, 2020 on a preliminary draft law 'to establish a mechanism for screening foreign direct investment'.

14 Bill amending the Code of Economic Law, regarding the introduction of a screening mechanism for foreign direct investment affecting our security interests and strategic sectors, *Parl. St.* Chamber, 2020-2021, 55-1804/1.

15 *Parl. St.* Chamber, 2020-2021, 55-1804/2.

16 General Policy Declaration. Economic Affairs, 4 November 2020, *Parl. St.* Chamber, 2020-2021, 55-1580/13, at 19; Flemish Coalition Agreement 2014-2019, at 43 and 115.

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of government would be required to institute a coordinated screening mechanism.[17]

After several discussions, the representatives of the federal government and the governments of the federated entities signed a draft cooperation agreement on 30 November, 2022.[18] The Cooperation Agreement entered into force on 13 June 2023.[19] Investments have to be notified as from 1 July 2023.

2.2 Complex Institutional Landscape

Introduction. In this section, we briefly outline Belgium's institutional complexity on which the screening mechanism rests. This might seem a bit arcane to non-Belgian readers but will prove necessary to understand key features of the Belgian screening mechanism that we will discuss later.

Complex, exclusive division of powers. The matter of foreign investment is rather complex in terms of the division of powers within Belgium as a federal state. Simplified (and only taking into account the aspects that are relevant for FDI), Belgium has different parallel levels of power that need to be considered, that is the federal state, the regions, the communities and the community commissions.[20] Belgium operates a system of 'exclusive' and 'vertical' division of powers whereby, in principle, only one government level has jurisdiction over a given matter, implying that the competent government is the only one that can rule on the matter and execute, finance and uphold it.[21] No precedence rule – comparable to for example, the German *Bundesrecht bricht Landesrecht*[22] – applies in Belgian federalism.

'Foreign investment' is however not a competence in and of itself, and therefore other connecting factors are required to determine which government level has the power to adopt and implement the screening mechanism.

Competition law and company law are reserved federal matters.[23] However, several economic matters including important aspects of export policy are a regional matter.[24]

Also, many matters that may just stop a transaction from being carried out on grounds of public order, security or 'strategic interests'[25] sometimes fall within the jurisdiction of the federal government,[26] other times within the jurisdiction of either the regions or the communities.[27]

Council of State Opinion 2020. It is therefore not surprising that in 2020 the Council of State already hinted in its advice on the first bill on this subject[28] that, in view of the interwoven nature of the matter, a cooperation agreement between these various government levels

17 A cooperation agreement can be compared to a treaty between the different governments within Belgium. For a detailed analysis, *see* Y. PEETERS, *De plaats van samenwerkingsakkoorden in het constitutioneel kader* (2015).

18 Council of State, Legislation Section, Opinion 71.881/VR of 19 October 2022 on a preliminary draft law 'holding the approval of the cooperation agreement of 1 June 2022 between the federal state, the Flemish Region, the Walloon Region, the Brussels Capital Region, the Flemish Community, the French Community, the German Community establishing a mechanism for the screening of foreign direct investments'.

19 The parliamentary approvals of the CA are published in the *Belgian Gazette* editions of 3 May 2023 (the French Community), 7 June 2023 (the federal state, Flanders, the Brussels Capital Region, the Walloon Region, for its regional competences, the German speaking Community and the French Community Commission of the Brussels Capital Region), and 13 June 2023 (the Walloon Region, for the competences transferred according to Article 138 of the Constitution).

20 The Community Commissions (*gemeenschapscommissies/commissions de communauté*) exercise specific powers in Brussels. We do not discuss the powers of the Community Commissions any further in an attempt to simplify the text for non-Belgian readers, as the authority and powers of the three Community Commissions are asymmetric. Going into detail would lead us away from our purpose to give a general overview of Belgium's review mechanism.

21 J. Vanpraet, 'De algemene beginselen van de bevoegdheidsverdeling' in B. SEUTIN and G. VAN HAEGENDOREN (eds.), *Transversale bevoegdheden in het federale België* (2017), at 28-29 and at 48-49.

22 Art. 31 Grundgesetz.

23 Art. 6, § 1, VI, fifth paragraph, 4° and 5°of the Special Institutional Reform Act of 8 August 1980 (hereinafter referred to as 'SIRA').

24 Art. 6, § 1, VI, first paragraph, 1° and 3° SIRA.

25 *See* Arts. 2, 6° and 4, § 1 CA. (*See also* Section 5 under *Composition and chairmanship*).

26 Accordingly, preventive protection in the areas of public security, national security, state security (including intelligence and security services, critical infrastructures and civil protection), maintenance of public order and the police, defence, the regulation of the possession and use of weapons and telecommunications of a confidential nature are residual federal competences. (*See e.g.* Council of State, Legislation Section, Opinion 63.130/3 of 16 May 2018 on a preliminary draft administrative decree of the Flemish Community and the Flemish Region, 53-54 with reference to Council of State Opinion 48.989/VR of 9 December 2010 on a preliminary draft that led to the Security and Protection of Critical Infrastructure and Facilities Act of 1 July 2011, *Parl. St.* Chamber 2010-11, No. 1357/00; K. Reybroeck and S. Sottiaux, *De federale bevoegdheden* (2020), at 215-99). In addition, aspects of *inter alia* health policy, food safety, financial policy and the protection of savings, including the regulation and control of credit institutions, energy (including nuclear energy), as well as mobility (including *inter alia* rail, Brussels Airport, etc.), are matters reserved for the federal state (*see* the exceptions to the powers of the federated entities in *inter alia* Arts. 5 and 6 SIRA).

27 In 2018, the Council of State acknowledged that the communities and regions are competent to safeguard strategic interests within their material powers, including by taking action against decisions of bodies for which they are competent and which go against important policy objectives pursued by the communities and regions. Therefore, despite the principle federal competence for public security, the communities and regions also have relevant material powers. For example, according to the Council of State, the importance of the continuity of vital processes, preventing certain strategic or sensitive knowledge from falling into foreign hands, as well as ensuring strategic independence can qualify as relevant motives that fit within those material powers. (Council of State, Opinion 63.130/3 of 16 May 2018 on a preliminary draft administrative decree of the Flemish Community and the Flemish Region, 57.2.).
In this context, it is to be noted that the regions have wide-ranging powers in matters such as environmental, water and waste policy, housing, agriculture, and economic policy (including e.g. the mining of natural resources, the import, export and transit of weapons and ammunition), important aspects of energy policy, public works and transportation (including e.g. the regional roads and their appurtenances, the waterways and their appurtenances, the ports and their appurtenances, the sea defences, the seawalls, the equipment and operation of airports and public airfields – with the exception of Brussels Airport-, the common urban and regional transport services, the piloting and beaconing services to and from ports, as well as the sea rescue and towing services), employment policy, animal welfare and public legal entities (including participations of local authorities/public welfare agencies). (Art. 6 SIRA). The communities in turn have important powers over health policy (Art. 5 SIRA), education (Art. 127, § 1, 2° Constitution) and the media and press (Art. 4, 6° and 6bis° SIRA).

28 Council of State, Legislation Section, Opinion 67.887/1 of 28 September 2020 on a preliminary draft act 'establishing a foreign direct investment screening mechanism.'

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might be necessary. The Constitutional Court has already inferred a duty to cooperate on intertwined matters from the principle of federal loyalty in the past.[29] The Council of State, nonetheless, also recognised that, in the current state of the distribution of competences, it is also theoretically possible for parallel mechanisms to coexist. That would mean that each government level could devise its own screening mechanism within its sphere of competence, and hence Belgium could see multiple screening mechanisms running in parallel. For example, as a consequence, a given transaction might have to be notified to multiple authorities, each with its own procedures and notification and screening criteria.

Choice of a single mechanism. Fortunately for all parties involved, not to mention the Belgian investment climate more broadly, parallel mechanisms (in which case Belgium could have had as much as nine parallel mechanisms) were avoided. Policymakers at various government levels worked towards a single integrated mechanism. The CA establishes a single inter-federal screening mechanism for foreign investment in Belgium, involving the federal state and all competent federated entities.[30] Transactions in scope will have to be notified to a newly created inter-federal commission.

The choice for one screening mechanism, rather than parallel mechanisms at the various governmental levels, is certainly a good thing. At the same time, as discussed in more detail in the following text, in some ways the unity of the mechanism is more appearance than reality. A cooperation agreement only allows for the 'joint exercise' of individual powers, not for the transfer of powers to a central mechanism. For a transfer of powers, the special majority laws or the Constitution would need to be amended, which is not in the cards politically, and would be even more tedious than concluding a cooperation agreement. Nevertheless, as we will explain, questions remain as to how the system will work in practice, given the many actors and government levels involved. It also remains uncertain whether Flanders will abolish its existing limited mechanism.[31] The choice for a cooperation agreement also means that any ulterior changes to the texts, even if purely technical, must go through an arduous political approval process involving all government levels concerned. We can only hope that at that time, policymakers will continue along the cooperative path that has led to this agreement.

29 *See e.g.* Constitutional Court no. 76/2012 of 14 June 2012, B.11.2; Constitutional Court no. 37/2018 of 22 March 2018, B.7.2 and B.10.2 ff.; Constitutional Court no. 36/2019 of 28 February 2019, B.13. *See also* Y. Peeters, *De plaats van samenwerkingsakkoorden in het institutioneel bestel* (2016), at 100-115.

30 The Flemish Community, the French Community, and the German speaking Community, the Flemish Region, the Walloon Region and the Brussels Capital Region, the French Community Commission and the Common Community Commission.

31 *See* Arts. 34 and 35 CA.

3 Scope of the Screening Mechanism

3.1 Overview

Structure. In the following text we discuss two key elements of the scope of the new screening mechanism, that is, the definition of 'foreign investor' (Section 3.2) and the type of investments that are at issue (Section 3.3).

3.2 Which Investors?

Definition. The mechanism affects transactions involving a foreign investor.[32] This concept is rather broadly defined in Article 2, 4° CA. It includes (i) natural persons having their principal residence in a third country;[33] (ii) undertakings incorporated or otherwise organised under the law of a third country where the undertaking's registered office or principal activity is in a third country and (iii) undertakings with ultimate beneficial owners (UBOs) having their principal residence in a third country. The text clarifies that governments, government institutions and state-owned enterprises are included.

EU citizens. A first point of caution is that natural persons with EU citizenship can be considered as foreign investors if they have their principal residence outside of the EU. For example, a Belgian expat with principal residence in the United States, is considered as a foreign investor according to the CA.

Legal persons: check your UBO's. Legal persons will, in addition, have to pay special attention to their UBO's, given that undertakings having a UBO with principal residence outside the EU are considered a foreign investor.[34] For companies, this means essentially the natural person(s) who hold more than 25% of the voting rights or otherwise have control.

Under that definition, for example, a Belgian company with principal activity in Belgium, but having a 25% shareholder who is a Belgian with principal residence in the UK, would be considered a foreign investor.[35]

32 Arts. 2, 3°, 3, § 1 and 4, § 1 CA.

33 Any country outside the EU. (*See* Draft Guidelines, at 2).

34 Art. 4, 27° Law of 18 September 2017 on the prevention of money laundering and the financing of terrorism and limitations of the use of cash.

35 This corresponds to the interpretation of the scope of 'foreign investor' given by the FAQ of the European Commission, stating
'The status of being established in the European Union … is based, under Art. 54 TFEU, on the location of the corporate seat and the legal order where the company is incorporated, not on the nationality of its shareholders … There is one exception to this rule. Investments by EU entities may nevertheless come within the scope of the Regulation when they fall under the anti-circumvention clause. Circumvention is not defined by the Regulation as such; however, its Recital 10 specifies that anti-circumvention measures "should cover investments from within the Union by means of artificial arrangements that do not reflect economic reality and circumvent the screening mechanisms and screening decisions, where the investor is ultimately owned or controlled by a natural person or an undertaking of a third country".'
Frequently asked questions on Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union, at 8, posted on https://policy.trade.ec.europa.eu/enforcement-and-protection/investment-screening_en (last visited 16 June 2023).

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3.3 Which Type of Investments?

3.3.1 General

Investments aiming to 'establish or maintain lasting direct links'. The general approach used in Regulation 2019/452 to specify the scope of investments concerned is copied in het Belgian screening mechanism, and covers *investment[s] of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in a Member State*.[36]

To cut through the complexity of some of the drafting snags in the CA, we focus on the two most important transaction types in scope, that is the investments leading to the acquisition of 25% or more of the voting rights (Section 3.3.2) and the investments leading to the acquisition of 10% or more of the voting rights (Section 3.3.3), while recognising that the reality is a bit more complex (Section 3.3.4).

3.3.2 Investments Leading to the Acquisition of 25% or More of Voting Rights

General. All investments by a foreign investor resulting directly or indirectly in the acquisition of 25% or more of the voting rights in undertakings or entities established in Belgium, engaged in certain specified fields of activities, fall within the scope of the review mechanism.[37]

25% or more. The mechanism is triggered when an investor, as a result of the acquisition, directly or indirectly reaches the threshold of 25%, including any previous acquisitions. For example, an investor who already holds, directly or indirectly, 24% of the voting rights will be subject to screening if he acquires an additional 1% of the voting rights.[38] Once an investor has reached (directly or indirectly) the 25% threshold, subsequent acquisitions will, it seems, not lead to new notification obligations.[39] We note that this is different from the rules on disclosure of large shareholdings by issuers whose shares are admitted to trading on a regulated market, where a new notification requirement arises each time a threshold (by default of 5 percentage points of the total existing voting rights) is reached or exceeded.[40]

The threshold is defined in terms of voting rights. This is important when multiple voting rights' shares are present: a lower equity stake than 25% can lead to a duty to notify while a higher stake can escape screening, depending on the votes acquired.

Directly or indirectly. For the calculation of the thresholds, not only are the voting rights held directly by the investor to be considered, but those held indirectly also. These terms are not defined in the CA, which means that questions may rise as to their exact interpretation.

'Undertakings' and 'entities'. The legal form of the target is irrelevant, as not only 'undertakings' but also 'entities' fall under the scope of the review mechanism.[41] The term 'undertaking' is not defined, which may lead to debate, as the Code of Economic Law contains several definitions thereof.[42] However, since 'entities' is a far broader concept in any case, the relevance of that discussion is limited. Companies, not-for profit associations, public law entities et cetera, are all captured.

Activities. The list of activities captured by the 25% investment threshold is inspired by Article 4 of Regulation 2019/452, but is noticeably broader, with considerable overlap and ambiguity. Moreover, the screening mechanism applies if the activities of the undertakings or entities concerned 'touch upon' the sectors listed, which is a rather loose formulation. Without going into detail, the list includes:

a. Critical infrastructure relating to, for example, energy, transport, water, health, media, aerospace and defence;
b. Technology and raw materials critical to, for example, security and technology of strategic importance (such as artificial intelligence, robotics, semiconductors and nuclear technology);
c. The provision of critical inputs including energy, raw materials or food security;
d. Access to or control of sensitive information, including personal data;
e. The private security sector;
f. Freedom and pluralism of the media;
g. Technologies of strategic importance in the biotechnology sector, but only if the turnover of the undertaking concerned exceeds €25 million in the preceding financial year.

The list of activities as set out in the CA is exhaustive.[43]

No safe harbours. The threshold of 25% of voting rights applies to all investments satisfying the criteria described earlier. With the exception of the biotech sector,[44] that means that no thresholds apply with respect to the size of the target in terms of turnover, and so on.

36 Art. 2(1) Regulation 2019/452; Art. 2, 3° CA.
37 Arts. 4, § 2, 2° and 5, § 1 CA.
38 Draft Guidelines, at 3 (question 8) and at 4 (question 10).
39 Even if it could be argued that if the first investment reached 25% of the voting rights, but did not yet lead to control, a subsequent investment leading to control, could trigger a new notification obligation.
40 Art. 6, § 2 of the Act of 2 May 2007 on the disclosure of major shareholdings in issuers whose shares are admitted to trading on a regulated market and containing various provisions.
41 The wording of the CA is not consistent regarding the legal form the targets must have to fall under the scope of the mechanism. A first provision only refers to 'undertakings' in the delimitation of the scope (Art. 4, § 1 CA) whereas another refers to 'undertakings *or entities*' (emphasis added) (Art. 4, § 2 CA).
42 For example, Book XX of the CEL is subject to a different definition than the 'general' definition in Article 1.1, 1° CEL. However, in the absence of other clarification, we presume that the general definition of Article I.1, 1° CEL applies.
43 Draft Guidelines, at 2, question 1.
44 Investments in biotech companies with a turnover lower than €25 million in the preceding financial year do not entirely fall out of scope. Investments leading to control of such companies will still be subject to screening. *See* Section 3.3.4 under *Investments enabling control*.

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Even very small companies will be covered by the screening mechanism.

Intra-group transactions. Intra-group transactions are also in scope, even if the operation results in the same non-EU company controlling or owning the Belgian entity.[45]

3.3.3 Investments Leading to the Acquisition of 10% or More of Voting Rights

Specific sectors. For undertakings or entities whose activities 'touch upon' some extra sensitive sectors, such as defence (including dual-use products), energy, cybersecurity, electronic communications and digital infrastructures, a lower acquisition threshold of 10% or more of voting rights applies.[46] However, the annual turnover of the target in the preceding financial year needs to exceed €100 million.

It is not difficult to spot that there is some overlap between the 10% and the 25% lists. This is intentional,[47] and will lead to investments in certain sensitive sectors being screened at lower investment stakes in larger companies.

3.3.4 Some Additional Wrinkles

Investments enabling control. Investments that do not reach the acquisition thresholds of 10% or 25% of the voting rights may still be subject to review if they enable the foreign investor to 'control' the target.[48,49]

The definition of 'control' is virtually copied from Article 3.2 of the EC Merger Regulation, and therefore quite broad.[50,51] Certain traditional minority protection or joint control rights[52] will trigger control even in case of minority investments. The CA also refers to the Commission Consolidated Jurisdictional Notice under the EC Merger Regulation, which will without a doubt prove useful for interpretation matters.

Note however that, based on the literal text of the CA (and unlike the merger control rules), there does not seem to be any additional threshold regarding the turnover of the target. In other words, investments enabling control in all sectors listed earlier will be notifiable regardless of turnover, also in sectors where the 25%/10% criterion mentioned earlier does come with a turnover threshold. If, for example, a foreign investor acquires control over a company in the biotech sector, that would be notifiable regardless of turnover, at least in this reading. The same would hold for a 24% investment resulting in control over an energy company with a turnover of € 95 million in the preceding financial year. The text in this regard does seem at odds with the intent of the legislator when defining these turnover thresholds, that is, to provide safe harbours.

'Passive' acquisition. A *passive* acquisition (of control or voting rights) also falls within the scope of the screening mechanism. The concept of a passive acquisition is not further defined, which leaves room for questions regarding its exact scope. Presumably all situations are covered in which a foreign investor acquires control or 10%/25% of voting rights by any means other than a positive act of investment (inheritance, cancellation of shares, attribution of multiple voting rights, share puts, etc.).

Investments enabling 'effective participation in management'. For completeness' sake, we note that Article 4, § 1 of the CA sets out a general introductory rule, which states that its provisions are applicable to investments that enable 'effective participation in management'. This criterion, stemming from Regulation 2019/452, was transcribed into the CA.[53] One may wonder whether this provides a separate criterion, in addition to 'control' and the 10%/25% of voting rights thresholds. Most likely, this was not the intention of the drafters. It is not repeated in Article 5, §1, which triggers the notification duty.[54] Neither the CA, nor the memorandum to the CA nor the Draft Guidelines provide further guidance on the subject.

'Greenfield' investments. Investments aiming at the creation of new economic activities by a foreign investor without taking over existing economic activities – also referred to as greenfield investments[55] – are excluded from the screening mechanism.[56] The memorandum opines that these investments do not pose an immediate threat to national security, public order or strategic interests.[57] However note that, according to the FAQ of the European Commission, greenfield investments do fall within the scope of Regulation 2019/452, implying that such investments *can* pose a threat to public order

45 Draft Guidelines, at 4, question 12.

46 Art. 4, § 2, 1° CA. The CA provides a mechanism to raise the threshold from 10% to 25% of the voting rights in the future (Art. 4, § 3 CA).

47 Following a question of the Council of State's legislation section, a representative of the government clarified that in case of an overlap, the strictest rule must be applied. (Council of State, Legislation Section, Opinion 71.881/VR, above n. 18, at 18.) This was confirmed in Art. 5, § 2 CA and the Draft Guidelines, at 4, question 9.

48 Arts. 4, § 1 (copying Art. 2.1 Regulation 2019/452) and Art. 5, § 1 CA. *See also* the memorandum to the CA.

49 We do not discuss some of the snags of the CA about the limits regarding the activities or the legal form for this rule.

50 Art. 2, 1° CA.

51 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings. *See also* Art. IV.6, §§ 3-4 Code of Economic Law.

52 For example, a 20% investment paired with joint control rights in a shareholder's agreement (e.g. director appointment rights, veto rights at shareholder and/or board level, etc.).

53 Art. 2(1) Regulation 2019/452; Arts. 2, 3° and 4, § 1 CA.

54 Art. 5, § 1 CA.

55 This terminology was used in earlier versions of the texts as well as in the federal and Flemish parliamentary proceedings regarding the formal approval of the CA (*Parl. St.* Chamber 2022-2023, 55-3079/2, 12; *Parl. St.* Vl. Parl. 2022-2023, 1582/2, 5.). *See also* Draft Guidelines, at 2, question 4.

56 Art. 4, § 4 CA.

57 Note that the French version of the memorandum goes even further than the Dutch and the German versions and states that such investments 'cannot' pose an immediate threat to national security, the public order or the strategic interests'.

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or strategic interests.[58] This may raise issues of equal treatment and non-discrimination.[59]

4 Standard of Review

National security, public order and strategic interests of the federated entities. Transactions in scope must be notified for screening. The key question then is what are the authorities looking for? What concerns could support government interference with a foreign direct investment (FDI)? What is the standard of review? In short, the screening mechanism may only take into account concerns related to safeguarding national security and public order on the one hand, and strategic interests of the federated entities on the other hand.[60] The CA refers to a number of relevant interests and risks in that regard, by reference to the legislation on security classification of information, data or materials, including, for example, (i) the defence of the inviolability of the national territory, (ii) the fulfilment of missions of the armed forces, (iii) the internal and external security of the state, (iv) the international relations, (v) the country's scientific and economic potential, (vi) the functioning of the decision-making bodies of the state and (vii) any other fundamental interest of the state.[61] The text also refers to specific risks which would be detrimental for national security, public order or strategic interests, such as impairment of the continuity or integrity of vital processes and the emergence of strategic dependencies.

Which 'strategic interests'? The standard of review only includes strategic interests of the federated entities and does not refer to the strategic interests of the federal state.[62] The strategic interests of the federated entities denote the interests of those entities, within their substantive powers, to (i) ensure the continuity of vital processes, (ii) prevent certain strategic or sensitive knowledge from falling into foreign hands, or (iii) ensure strategic independence.[63]

The reference to the strategic interests of the federated entities as an additional standard of review in the CA demonstrates that the terms 'national security or public order' have a different and more restrictive meaning in the context of Belgian federalism than in EU law. Under Regulation 2019/452 the terms 'national security or public order' are undefined,[64] but according to its Article 4.1, when determining whether an investment is likely to affect security or public order, Member States may, *inter alia*, consider potential effects on for example (i) critical infrastructure, (ii) critical technologies, (iii) supply of critical inputs, such as energy, and (iv) pluralism of the media. When used in the Belgian federal context of separation of powers between the federal state and the federated entities, the concepts of 'national security and public order' refer to (essentially) federal powers, whereas other grounds that could justify an impact on a transaction under Regulation 2019/452, such as for example, energy or the pluralism of the media, fall within the powers of the federated entities. In Belgian federalism, the federated entities have wide-ranging powers, with the powers of the regions including for example, housing, environment, agriculture, large swathes of economic policy, energy policy, employment policy and public works and the powers of the communities including for example, education and important matters relating to health care. The strategic interest of a federated entity in each of these domains may warrant interference with a foreign investment as long as they relate to the three points cited above: continuity of vital processes, strategic or sensitive knowledge and strategic independence

58 Frequently asked questions on Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union, at 6, posted on https://policy.trade.ec.europa.eu/enforcement-and-protection/investment-screening_en (last visited 16 June 2023).

59 The Council of State explicitly warned that the draft should provide a justification in light of the Constitutional principle of equal treatment and non-discrimination. (Council of State, Legislation Section, Opinion 71.881/VR of 19 October 2022, above n. 18, at 15-16).

60 Art. 11 CA.

61 Art. 11, paragraph 3 CA, referring to Art. 3 of the Classification and Security Clearances, Security Certificates and Security Opinions Act of 11 December 1998.

62 The Council of State indicated that one could reasonably consider that the strategic interests of the federal state are part of the national security and public order, but advised to clarify this point. (Council of State, Legislation Section, Opinion 71.881/VR, above n. 18, at 15). Note the broader formulation in Art. 1, § 2 of the CA (*The purpose of this cooperation agreement is solely safeguarding national security, public order and the strategic interests of the parties to this cooperation agreement*. free translation) as well as in the recitals of the CA (*Whereas the establishment of a screening mechanism will enable the various authorities to safeguard national security and their strategic interests as well as the possibility of obtaining a better overview of incoming foreign investment flows;* free translation).

63 Art. 2, 6° CA. Regarding the strategic interests of the federated entities, *see also* footnote 27, where we pointed out that in 2018 the Council of State already recognised that despite the principle federal competence on public security, the federated entities also have relevant substantive powers. According to the Council of State, the importance of the continuity of vital processes, preventing certain strategic or sensitive knowledge from falling into foreign hands, as well as ensuring strategic independence can qualify as relevant reasons that fit within those material powers. Irrespective of whether the Council of State intended this to be an exhaustive list, which is unclear, the enumeration acquires an exhaustive character through the listing of these three elements in Art. 2, 6° CA.

64 The FAQ to the Regulation 2019/452 merely indicates that these terms should be interpreted in accordance with (i) the General Agreement on Trade in Services, (ii) the EU's trade and investment agreements concluded with third countries as well as (iii) the Treaty on the Functioning of the European Union provisions on the free movement of capital from third countries. *See* Frequently asked questions on Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union, at 9, available at https://policy.trade.ec.europa.eu/enforcement-and-protection/investment-screening_en (last visited 16 June 2023)

5 Composition and Role of the Inter-federal Screening Commission

Composition and chairmanship. The screening process will be coordinated by a newly established body, the Inter-federal Screening Commission (ISC). The ISC is composed of up to twelve members representing the federal state and the federated entities.[65] The federal state can appoint up to three representatives, whereas the federated entities can each appoint one representative.[66] The representatives are appointed by the respective executive branches of each entity. The members representing the federated entities do not automatically participate in all matters handled by the ISC. A member of the ISC is competent only if there is a potential impact on its material powers and there is a territorial link with the federated entity it represents, such as the undertaking's registered office or place of business, economic activity or the presence of specific infrastructure.[67,68] The ISC is chaired by a representative of the Federal Public Service Economy, SMEs, Self-employed and Energy, a 'thirteenth' member of the ISC.[69] The Chair is however not entitled to vote.

Operation. Although all investigations are conducted 'within the ISC', the various government levels (federal state and federated entities) conduct their investigations separately,[70] and each is bound only by the limits of its substantive powers.[71] This is probably the most common misconception to avoid, and the most peculiar feature of the new 'Belgian' screening mechanism for foreign audiences: rather than being a single review procedure before a single new body, it is technically more like a bundling of individual parallel procedures that each of the competent members of the ISC, and subsequently the authorities at their respective government level, will conduct.[72]

For example, an investment in an energy company with a territorial presence both in Flanders (e.g. the statutory seat) and in Wallonia (e.g. important activities and key infrastructure), may trigger the competence, within the ISC, of the federal state (national security), the Flemish Region (economic policy) and the Walloon Region (energy policy). Within the ISC, only the members representing these entities will have jurisdiction (the 'competent members'). And these members, and the entities they represent, will essentially conduct their own parallel assessment, based on their own substantive powers. It is an open question how that will work in practice, despite the coordination that is intended at the ISC level. The Secretariat of the ISC should see to the coordination between the various procedures and, in consultation with the competent authorities, conduct contacts with foreign direct investors.[73] That seems to indicate that all communications with investors should go through the Secretariat. This would give reason to some optimism that the Secretariat of the ISC should be the only interlocutor. However, it remains unclear whether, for example, negotiations regarding remedial measures will also be coordinated by the ISC's Secretariat.[74]

No decision-making by the ISC. As a logical corollary of all this, decisions are not taken by the ISC as such, but rather by the individual members of the ISC and/or the competent ministers at the government level concerned. The CA intentionally denies the ISC any autonomous decision-making power.[75] For example, the final decision on a screened transaction is a combination of the individual decisions of the competent ministers involved, who each make their decision after having received the opinion of their respective members of the ISC, each of them having conducted their own investigation.[76] The power to publish additional guidelines is entrusted to the ISC's Secretariat, deciding by consensus with all members of the ISC with voting power.[77] Screening procedures and e*x officio* reviews are opened at the request of a single competent member of the ISC.[78] Likewise, advisory opinions are requested and experts are appointed by individual members of the ISC.[79] Also, fines are not imposed by the ISC, but by the parties to the CA.[80]

6 Procedure

6.1 Initiation of the Procedure

6.1.1 The Foreign Investor's Notification Requirement

Notification requirement and time limit. The 'foreign investor who acquires by means of an investment or passively, control in one of the sectors referred to in Ar-

65 Art. 3, § 2 CA.

66 An exception applies for the Flemish Community that can appoint an additional representative for the competences of the Flemish Community Commission in Brussels.

67 Art. 7, § 1 CA.

68 We infer from the general terms of the provision that it is intended to have a general scope, although it as figures under the 'notification' section, rather than under the common provisions of the CA.

69 Art. 3, § 3 CA.

70 Art. 10, § 1 CA.

71 Art. 8, § 2 CA.

72 To simplify the reading, we only use the term 'Minister' throughout this article to indicate the competent representatives designated by the respective executive branches of the parties to the agreement. (The members of the executive branch of the communities' commissions in Brussels are called 'members of the College' of the respective commissions rather than 'Ministers').

73 Art. 9 CA. Along the same lines, *see* Art. 16, § 2 CA on requesting additional information from undertakings.

74 Art. 23, § 3, 2° CA states that the remedial measures are 'negotiated by the ISC'. The wording of art. 21 CA seems to imply that the negotiations are conducted by the competent members of the ISC, rather than the ISC's Secretariat.

75 The CA was amended after a remark of the Council of State on the matter (Council of State, Legislation Section, Opinion 71.881/VR, above n. 18, at 14-15).

76 Art. 10, § 2, 2° in conjunction with Art. 10, § 3, Art. 22, § 2, and Art. 23 CA.

77 Art. 1, § 4 CA.

78 Art. 24 CA. Regarding the competence of the members, *see* Section 4.

79 Arts. 13 and 14 CA.

80 Art. 28, § 3 CA.

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ticle 4 or acquires directly and/or indirectly cumulatively 10% or 25% of the voting rights in this entity as the case may be,' is required to notify the acquisition to the ISC.[81]

The notification needs to be filed after signing and before closing of the agreement. The parties may also opt to notify a draft agreement provided that they all expressly declare their intention to enter into an agreement that does not significantly differ from the notified draft in all relevant respects.[82] Public tender offers may be notified once the parties have publicly announced their intention to make a (voluntary or mandatory) offer.[83] Acquisitions on the stock exchange must be notified no later than the time of acquisition.[84] The notification can be submitted electronically, by letter or on site to the Secretariat of the ISC.[85] The screening procedure is not subject to the payment of a fee.[86]

Only agreements signed on or after 1 July 2023 have to be notified.[87]

Suspensive effect. Notified agreements may no longer be executed or closed while the screening is in progress until the decision is served on the notifying parties that no further screening procedure will be initiated or that the investment will be authorised.[88] For acquisitions of equity interests on the stock exchange, the notification suspends all associated rights, except financial rights, by operation of law until the decision is rendered.[89] In other words, the investor may collect dividends on the shares acquired, but not exercise the voting rights.

File. The CA defines the documents and information that must be submitted.[90] This includes *inter alia* (i) the ownership structure of the investor and the target, (ii) the (approximate) value and valuation method of the investment, (iii) the products, services and business activities of the investor and the target, (iv) the countries in which the investor including its controlling or controlled entities and the target intend to conduct business activities (v) the financing of the investment and its source and (iv) the intended date of completion. If additional information is required, the undertakings concerned must transmit it '*without delay, under penalty of administrative fines'* to the ISC at its request.[91] Additional information may also be requested from investors.[92]

The EU published a 'request for information' document, inviting Member States where the investment is planned or has been completed to request that information from investors in order to facilitate the cooperative mechanism of Regulation 2019/452.[93] That form does not affect the ability of Member States to request additional information. It is unknown at this point whether the EU's document will be used in Belgium's FDI screening procedure.

6.1.2 Ex Officio Screening

Initiation and time limit. The CA also allows *ex officio* investigations of investments falling under the scope of the agreement. A single member of the ISC can request the opening of an *ex officio* screening procedure.[94] The procedure follows the same steps as if it were opened after a notification. Structural adjustments and remedial measures may be imposed up to two years after the acquisition of non-notified control. This period is extended to five years in the event of indications of bad faith.[95]

Agreements signed before 1 July 2023. Agreements signed before 1 July 2023 can still be subject to *ex officio* review. Remedial measures can be imposed up to two years after the acquisition. Here also, this period is extended to five years in the event of indications of bad faith.[96] If parties hurried to sign agreements before the entry into force of the notification obligation that saves the parties the administrative burden of the notification but unfortunately does not grant them the total certainty of avoiding screening.

6.2 Screening Procedure

Phases. The screening procedure officially distinguishes two phases, that is, an assessment phase (phase 1) and a screening phase (phase 2). In practice, we consider it likely that these would be preceded by a preliminary phase (phase 0).

6.2.1 Preliminary Phase

Purpose. The ISC will upon notification first review the file for completeness. Any additional information requests to the undertakings concerned suspend the term for the assessment or screening procedure until the ISC receives the requested information.[97] This fact, together with the political complexities of determining the competent government levels/entities that will be involved in the ensuing process, will likely result in the ISC Secretariat taking its time before declaring a filing complete. Parties should, we are afraid, expect a rather lengthy 'phase 0' as a result.

Proceedings. Once the Secretariat of the ISC has received all the information and documents for the review, the Secretariat will inform the notifying parties that it considers the file to be complete and admissible.[98] That

81 Art. 5, § 1 CA.
82 Art. 5, § 2 CA.
83 Art. 5, § 2 CA.
84 Art. 5, § 3 CA.
85 Arts. 5, § 1 and 6, § 1 CA. The Federal Public Service Economy, SMEs, Self-employed and Energy is acting as the Secretariat of the ISC (Art. 3, § 3 CA).
86 Draft Guidelines, at 9, question 26.
87 Art. 5, §1, al. 2 CA. Agreements signed before 1 July 2023, but not closed before 30 June 2023 do not have to be notified. Draft Guidelines, at 6, question 18.
88 Art. 12 CA.
89 Art. 5, § 3 CA.
90 Art. 6, § 2 CA.
91 Art. 16, § 1 CA.
92 Art. 28, § 1, 2° CA.
93 Request for information, available at https://policy.trade.ec.europa.eu/enforcement-and-protection/investment-screening_en (last visited 16 June 2023).
94 Arts. 24 and 25 CA.
95 Art. 26 CA.
96 Art. 27 CA. Draft Guidelines, at 6, question 19.
97 Art. 16, § 1 CA.
98 Art. 7, § 2, al. 1 CA.

notification serves as the start date for the assessment and screening deadlines.[99] The file is then shared with the competent members of the ISC.[100]

Further information. Note that even if a file has been declared complete and admissible, several provisions of the CA allow for additional information to be requested during the ensuing phases of the procedure.[101]

6.2.2 Assessment Phase

Purpose. During an initial assessment phase (*toetsingsprocedure/procédure de vérification/Voruntersuchungsverfahren*), the competent members of the ISC assess whether they have tangible indications that the completion of the notified transaction may have implications that threaten the public order, national security or strategic interests.[102] If so, the transaction will be subject to further analysis during the screening phase.

Assessment. The members of the ISC assess *inter alia* whether (i) the control acquired through the FDI or the resulting significant changes in ownership structure or (ii) the main characteristics of a foreign investor, could have a potential impact on the public order, national security or strategic interests.[103]

In assessing whether to open a screening procedure, the competent members of the ISC may consider:[104]

i. whether the foreign investor is directly or indirectly controlled by the government of a third country;
ii. whether the foreign investor has already been involved in activities affecting the national security or public order of an EU Member State or third country, or
iii. whether there is a serious risk that the foreign investor is engaged in illegal or criminal activities.

Advisory opinions and experts. The members of the ISC may seek advice from a whole host of bodies.[105] The members of the ISC may also appoint natural persons as experts.[106] The advisory opinion of the Intelligence and Security Coordination Committee is mandatory.[107] The members submit their requests for advisory opinions to the ISC's Secretariat that coordinates the requests. The time limit for the receipt of the requested advisory opinions is set by the Secretariat of the ISC in consultation with the ISC members, and is normally a maximum of twenty-five days.[108]

Outcome. The assessment phase ends either with (i) the initiation of a screening phase or (ii) closure of the proceedings, leading to admissibility of the transaction.

Two situations trigger the initiation of a screening phase. First, a screening phase is opened when a competent ISC member has tangible indications that the transaction under assessment could potentially threaten the public order, national security or strategic interests.[109] Second, if the Intelligence and Security Coordination Committee requests an extension of its term to render an opinion on the transaction, and that request is granted, this automatically opens a screening phase.[110] The extension request of the Intelligence and Security Coordination Committee can only be denied by consensus of the competent members of the ISC. If a screening procedure is opened, the European Commission and members of the EU are notified by the Secretariat of the ISC.[111]

If none of the competent ISC members have tangible indications that the completion of the investment may threaten the public order, national security or strategic interests, the ISC closes the procedure and the transaction is deemed to be authorised.[112]

Time limit. The decision to proceed to screening or to close the procedure favourably and allow the transaction must be served on the notifying parties within thirty days of receipt of the complete file. After the lapse of the thirty-day term, no screening procedure can be initiated, except if the decision to close the procedure favourably was based on incomplete or misleading information.[113] The thirty-day term is suspended in several cases, for example, in the case of a request for additional information from another Member State or negotiations regarding remedial measures.[114] Requesting advisory opinions or appointing experts[115] does not suspend this timing. However, the timing is suspended each time additional information is requested by the ISC,[116] on the initiative, it seems, by the competent members handling the file. We suspect that in practice this will prove a popular ground for suspension.

The CA does not clearly define the deadline for the competent ISC member to notify the Secretariat of their view that a phase 2 screening procedure is required. Theoretically, a member could notify the ISC up to the thirtieth day. This may, however, lead to problems for the Secretariat to serve the decision in due course. Additionally, neither the manner of service, nor the time limits within which service is deemed to have taken place (e.g., in the case of mailing) are stipulated.

6.2.3 Screening Phase

Purpose. The screening phase (*screeningsprocedure/procédure de filtrage/Überprüfungsverfahren*) builds on the findings of the assessment procedure and consists at least of a specific risk analysis.[117] The phase culminates in each competent ISC member submitting an opinion on the investment to the competent minister at the respective government level.

99 Art. 7, § 2, al. 2 CA.
100 Art. 7, § 1 CA.
101 *See e.g.* Arts. 16 and 20, § 5 CA.
102 Art. 17, § 2 CA.
103 Art. 17, § 1 CA.
104 Art. 17, § 2 CA.
105 Art. 13 CA.
106 Art. 14 CA.
107 Art. 13, § 1, al. 1 CA.
108 Art. 13, § 2 CA.
109 Art. 17 § 2 CA.
110 Art. 17 § 2, al. 3 CA.
111 Art. 18, § 1, al. 2 CA.
112 Art. 17, § 3 CA. Unlike the rest of the agreement, this particular wording of the Agreement suggests that this requires a decision of the ISC.
113 Art. 18 CA.
114 Arts. 20, § 5 and 21, § 2 CA.
115 *See* the text under *Advisory opinions and experts*.
116 *See* Section 6.2.1.
117 Art. 19 CA.

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Advisory opinions and experts. During the screening phase, the members of the ISC may still request external advice[118] or appoint natural persons as experts.[119] The time limit for the receipt of the requested advisory opinions is set by the Secretariat of the ISC in consultation with the ISC members, and is normally a maximum of fifteen days.[120] If the screening procedure is extended, new requests for advisory opinions can be lodged and the ISC has until five days before the end of the new deadline to render its advisory opinion. The requests for advisory opinions or the appointment of experts do not suspend the time limits of the procedure.

Draft opinion and hearing. If an ISC member finds that the transaction threatens to have potential consequences for the public order, national security or the strategic interests, the draft opinion is sent to the other competent ISC members on the one hand and the investor and the Belgian undertakings involved on the other hand.[121] The latter gain access to the non-confidential elements of the file and have ten days to submit written comments to the ISC.[122] At the request of the investor or one of the Belgian undertakings concerned, the ISC organises a hearing.[123] The procedures to allow written comments and the hearing suspend the time limits within which the members of the ISC must render their opinions to their ministers.

Remedial measures. The members of the ISC may also negotiate with the notifying parties and suggest remedial measures to reach a positive opinion.[124] Such negotiations suspend the time limits of the procedure. A non-exhaustive list of potential measures is included in the CA. These range from, for example, drawing up an additional code of conduct in the context of providing or exchanging sensitive information to safeguard the public order, the national security and strategic interests to, for example, prohibiting certain parts or subsidiaries of the target from being part of the transaction or, for example, limiting the shareholding in the proposed investment. The remedial measures must be proportionate to the aim of limiting the risk for the national security, public order or strategic interests to such level as to deem the investment permissible.

Outcome. The opinions of the members of the ISC are rendered to their respective competent ministers.[125] The opinions can take three forms: (i) a positive opinion, (ii) a report containing the investor's agreement on the remedial measures imposed so as to obtain a positive opinion (see also the text under *Remedial measures*), or (iii) a negative opinion.[126] In addition, a report is drafted, containing the non-confidential elements for the purpose of the annual report.

118 Art. 13 CA.
119 Art. 14 CA.
120 Art. 13, § 2 CA.
121 Art. 20, § 1 CA.
122 Art. 20, § 3 CA.
123 Art. 20, § 4 CA.
124 Art. 21 CA.
125 Art. 19, § 2 CA.
126 Art. 22, § 2 CA.

Time limit. The members of the ISC are bound by a twenty-day time limit to submit their opinion to their competent ministers from the moment when the opening of the screening procedure was served to the notifying parties.[127] Even though the term for written comments of the undertakings and investors on the draft opinion and the potential hearing suspend this time limit, the timing remains rather ambitious. Requesting advisory opinions or appointing experts[128] does not suspend this timing. Note, however, that the term for the opinions of the members of the ISC can be extended with up to three additional months upon request by the Intelligence and Security Coordination Committee for an extension of the term to render its advisory opinion.[129] It is also suspended each time additional information is requested by the ISC,[130] on the initiative, it seems, of the competent members handling the file. We suspect that in practice this will prove a popular ground for suspension.

6.3 Decision on the Transaction

'Combined decision'. The screening phase culminates in a 'combined decision'. The fact that this is called a 'combined decision' rather than just a 'decision' is again an illustration of the complex institutional background. Concretely: at the conclusion of the screening procedure, the competent ministers at the various government levels receive an opinion from the respective member of the ISC.[131] The period to adopt a preliminary decision is (only) six days after receipt of the opinion. The ISC Secretariat has to be notified of this decision. The ISC Secretariat then compiles the decisions into a 'combined decision' and serves it to the parties within two days of the receipt of the preliminary decisions.[132] The decision can be (i) positive and allow the transaction, (ii) positive, provided that there is a binding consent of the investor with the imposed remedial measures or (iii) negative and prohibit the transaction.

Veto-powers? The federal state, if competent, always has the power to veto a transaction.[133] Logically, if only one federated entity has jurisdiction, that entity can also veto the transaction. However, if several federated entities have jurisdiction over the transaction, they can only block the investment by mutual consent.[134] Accordingly, the negative decision of one federated entity can be overturned if the other competent entity or entities do not object to the transaction, due to the fact that if no decision is taken within the time frame determined by the CA, the transaction will be deemed allowed.[135] Al-

127 Art. 20, § 5 CA.
128 *See* Section 6.2.2.
129 Art. 22, § 3 CA.
130 *See* Section 6.2.1.
131 *See* the text under *Outcome* in Section 6.2.3.
132 Art. 23, §§ 1 and 2 CA.
133 Art. 23, § 1, al. 2 and § 4 CA.
134 Art. 23, § 4 CA.
135 In Flanders, the Flemish Socio-Economic Council criticised that point of the agreement (https://beslissingenvlaamseregering.vlaanderen.be/document-view/638E528FC2B90D4571CF70E3, last visited 2 January 2023, at 6). The Flemish Government countered the criticism by stat-

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though searching for consensus is in principle commendable, the political complexity that this may inject into the system is worrying.

7 Sanctions and Judicial Review

Fines. Investors who fail to comply with the requirements of the screening mechanism may incur a fine of up to 10% and, in certain cases, as much as 30% of the relevant FDI.[136] Targets may also incur such penalties, but only if they fail to provide additional information to the ISC in due course.[137] In line with the broader institutional set-up, the power to impose fines falls on the individual government entities that are a party to the CA. If one of the parties intends to impose a fine, the Secretariat of the ISC will inform the undertakings or natural persons involved. Those undertakings or natural persons then have one month to submit written comments. Upon receipt of these comments, the government concerned will decide whether or not to impose a fine. The decision must state the grounds underpinning the decision. Half of the proceeds of the fine will go to the federal state, and the other half to the federated entities involved.

Judicial review. Annulment claims against final decisions regarding the admissibility or inadmissibility of an FDI as well as actions for full judicial review against decisions imposing fines must be brought before the Market Court (*Marktenhof/Cour des Marchés*).[138] The claim must be addressed against the parties to the CA, failure of which will render the application inadmissible. If this rule is followed to the letter, this would mean that the claim must always be brought against all nine government entities that are a party to the CA, even those that had no jurisdiction over the transaction and hence were not involved in the proceedings. Obviously, that makes little sense and will lead to unnecessary costs and procedural complexities. But given the sanction of inadmissibility prescribed by law, we see little alternative than to do so for the time being. The application must be brought before the court within thirty days of the receipt of the official notice of the decision that is being appealed and must comply with the minimum requirements laid out in the CA. Non-compliance with the minimum requirements will render the application void.[139] Actions before the Market Court have no suspensive effect.[140] In case of annulment of a decision, the transaction will be screened again, according to the procedure of the CA.[141]

8 Conclusion

New Belgian screening mechanism. On 1 July 2023 Belgium joins the ranks of countries that require certain transactions to be notified for FDI screening . As an open economy with a tradition of relatively little political upheaval over 'foreign' takeovers of domestic companies, it took the country a while to embark on the new path set out by Regulation 2019/452. One may lament the fact that we are now living in a world in which this new kind of protectionism is considered the reasonable thing to do, and that the surely significant economic costs are considered worth the price to pay, but this article is not the forum for that.

To be fair, the rather late adoption in Belgium also had an objective reason: our complex institutional landscape. The federal state and the various federated entities could have opted to devise their own screening mechanism. Through discussions and cooperation between the various government levels over several years, that scenario was avoided. The CA establishes a single inter-federal screening mechanism, bundling the federal government and eight federated entities in one procedure. The policymakers involved should be commended for this achievement.

Concerns. At the same time, there are several reasons for concern. First, the scope of review is broader than many domestic parties and foreign investors will expect. The standard of review is not limited to matters of security or public order, as in Regulation 2019/452, but extends to the strategic interests of the federated entities within their respective spheres of competence. Given the extensive powers of the federated entities on the one hand, and the lack of materiality thresholds or safe harbours in terms of turnover in most sectors on the other, we expect that the number of transactions notified will be larger than expected – if only for reasons of legal security. We would find the latter unfortunate. It also seems virtually certain that in many smaller transactions the parties will simply not realise that a notification may be required.

Second, while the time limits seem quite strict (thirty days for phase 1 assessment and twenty-eight days for phase 2 screening), we fear these will be largely theoretical. Considering the many tools for delay or extension, it is all but certain that proceedings will typically drag on for much longer. The experience with the Belgian Competition Authority is not comforting in this regard.

ing that such a rule was necessary to avoid the fact that *entities that lack territorial jurisdiction* could block the investment (*see* Explanatory Memorandum to the Draft Flemish Decree holding the approval of the cooperation agreement, at 4, posted on https://beslissingenvlaamseregering.vlaanderen.be/document-view/6391C474C2B90D4571CF7AC4 (last visited 2 January 2023). That last statement seems moot, as entities that lack territorial jurisdiction have no say over the transaction (Art. 7, § 1 of the CA).

136 Art. 28 CA.

137 Art. 16, § 1 CA

138 Art. 29, § 1-2 CA. The Draft Guidelines also indicate that the decision to open a screening procedure cannot be brought before court, and that only the final decision can be appealed. (Draft Guidelines, at 9, question 27).

139 Art. 29, § 5 CA.

140 Art. 29, § 3 CA.

141 Art. 29, § 8 CA.

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This will inject considerable transaction uncertainty into the Belgian investment climate.

Finally, the single mechanism exists more in appearance than in reality. In practice, depending on the sectorial and territorial links of the transaction with the various government levels in Belgium, multiple procedures will *de facto* run side by side. Much will hinge on how the ISC Secretariat will perform its coordinating role, and whether the governmental parties involved will give it sufficient latitude to do so. The ISC Secretariat has little to no actual legal tools at its disposal to ensure seamless coordination. In addition, the entire procedure is essentially conducted at the political level. This is neither unusual for FDI screening around the world nor wrong *per se* given the often political nature of the trade-offs involved. But the difference in Belgium is that in any given case, multiple political levels may be involved. Governments that in the public sphere regularly fight each other – if only because they are now more often than not composed of different political parties – are all part of the same 'single' mechanism. The political realities in Belgium are such that this will not necessarily run smoothly. It is likely that FDI cases will at times be misused for political grandstanding directed at other political parties and other government levels.

Final thought. Based on these concerns, we are not optimistic that the proposed arrangements will result in an integrated, predictable and legally secure FDI screening mechanism in Belgium.

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