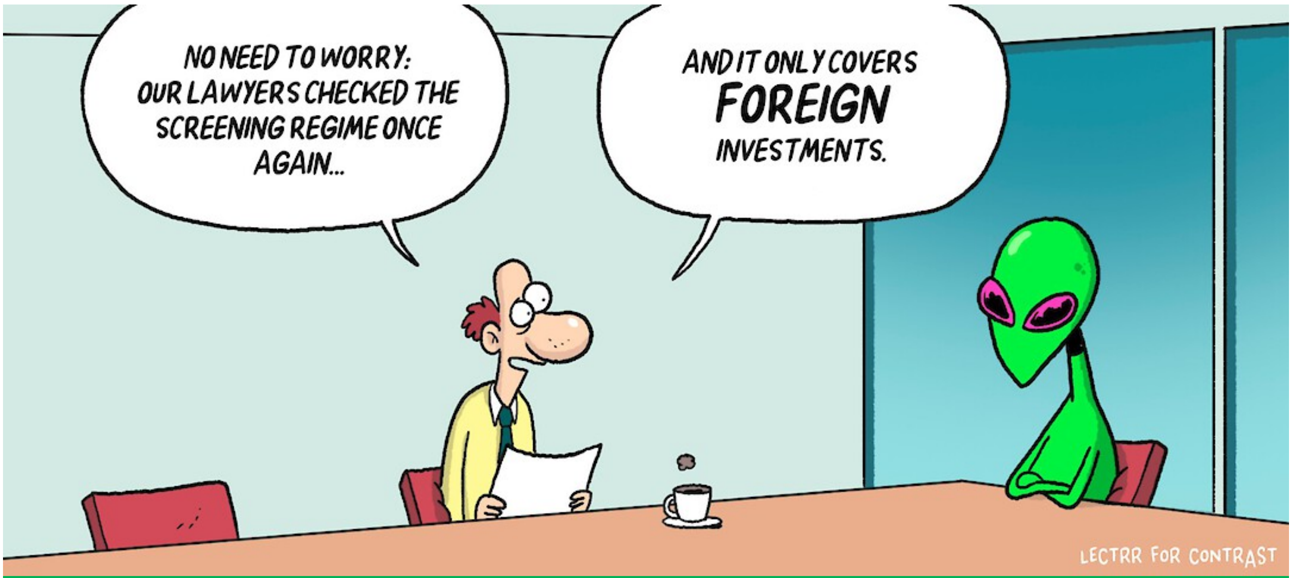

Safety first! Screening of foreign direct investment in the European Union

September 2022

Imagine...

You are the chief legal officer of a well-established internet service provider in the Benelux. Your company wants to roll out a brand new, state-of-the-art mobile network and is looking for a lot of capital to do so. The search for suitable investors goes smoothly, and relatively quickly an agreement in principle is reached with a Chinese telecom juggernaut to acquire a 32% stake in the company.

You are on cloud nine. Since the investor is not acquiring control, there is no merger review by the competition authorities, and nothing seems to stand in the way of the rapid implementation of the investment. Yet you have heard talk about “screening regimes” for foreign investments in EU Member States. Surely this investment does not fall under such a regime? Or does it?

A brief clarification.

In 2019, the European Commission took a first step towards harmonising the screening of foreign direct investments in the EU. This was done by adopting Regulation 2019/452, the so-called EU FDI Regulation. This regulation does not introduce an EU screening mechanism, but establishes a framework for screening foreign direct investment at the level of the EU Member States. This screening aims to protect national security and public order by controlling the acquisition of interests in strategic undertakings in the EU by investors from non-EU countries. The regulation applies to lasting and direct investments. Thus, investments in strategic infrastructure are covered, while portfolio investments are excluded from the scope of the regulation.

EU Member States are not required by the regulation to screen foreign direct investment. However, if an EU Member State decides to introduce a screening mechanism, it is subject to certain minimum requirements. For example, the screening mechanism must be applied in a predictable, transparent and non-discriminatory manner, and the confidentiality of business information must be guaranteed. An appeal procedure must also be available, and measures must be taken to detect and prevent circumvention. If, after going through the procedure, an EU Member State considers that the investment may have a negative impact on national security or public order, it can prohibit or impose conditions on the transaction.

The regulation also provides for a cooperation mechanism allowing EU Member States and the Commission to issue comments and opinions on investments that take place in the territory of another EU Member State. The EU Member State in question must *'duly take into account*' these comments and opinions. In the case of investments deemed to be of EU interest, the EU member state must take *'utmost account*' of the Commission's opinion and provide an explanation if the opinion is not followed.

Most EU Member States have now introduced a screening instrument for foreign direct investment. Exceptions include Belgium, Luxembourg, Croatia and Sweden. Belgium may soon be removed from this list, as the governments recently reached a cooperation agreement to introduce a mandatory, suspensive screening regime in sectors related to the public order or national security of Belgium or the strategic interests of the regions and communities. The screening mechanism is expected to apply to transactions from 1 January 2023.

The EU FDI Regulation is part of a broader Commission initiative to protect EU Member States' economies and the internal market from disruptive foreign interference. In this context, the Council and the European Parliament recently reached a political agreement concerning a regulation on foreign subsidies distorting the internal market. This regulation proposes new tools for tackling foreign subsidies causing distortions and undermining the level playing field in the internal market. These new instruments will be discussed in greater detail in a forthcoming In the Picture.

Concretely.

- The EU FDI Regulation imposes certain minimum requirements for the screening mechanisms of EU Member States for foreign direct investment and establishes a cooperation mechanism between EU Member States and the Commission.

- An increasing number of EU Member States have introduced a screening mechanism based on this regulation. This allows EU Member States to screen investments by third-country investors for the protection of national security and public order.
- Belgium is the most recent EU Member State with concrete plans for a screening mechanism, which is expected to enter into force on 1 January 2023.
- The screening of foreign direct investments is part of a wider Commission effort to protect the EU and its Member States from disruptive foreign intervention. In this respect, a political agreement was recently reached about a regulation on foreign subsidies distorting the internal market.

Want to know more?

- Regulation 2019/452 establishing a framework for the screening of foreign direct investments into the Union.
- More information on EU Member States' screening mechanisms and general trends in foreign direct investment in the EU can be found here.
- The draft cooperation agreement concluded in Belgium can be consulted here.
- Lastly, more information on the status of the regulation on foreign subsidies distorting the internal market can be found here.