Upcoming legislation on Foreign Direct Investment in the Benelux: An overview of the latest developments in Belgium, The Netherlands and Luxembourg

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1. Introduction

1.1 Structure of this article and research question

Foreign direct investment regulation is here to stay in the Benelux (and far beyond). It will soon be an inseparable part of the assessment framework for acquisitions and investments in vital and sensitive technology companies in most part of the European Union – as is already the case in certain frontrunner states such as Germany. Many member states of the European Union ('*EU*') are developing protective rules that apply to (foreign) investors whose investments may impact national security or public order, and some of them already have such legislation in place. The Benelux countries belong to a group of EU member states in the middle of the pack that are on the verge of introducing 'Foreign Direct Investment' ('*FDI*') regulation in their national laws.

In this contribution we discuss the scope of the proposed foreign direct investment legislation in Belgium, the Netherlands and Luxembourg. We also explain how the FDI notification procedures in said jurisdictions work. We discuss potential remedies which FDI enforcement authorities may propose in order to resolve objections to an investment, as well as sanctions they can impose on parties that are in breach of notification or standstill obligations. We review each of these three subjects in separate sections for Belgium (**Section 2.1**), the Netherlands (**Section 2.2**) and Luxembourg (**Section 2.3**) Before we go into the material elements of the FDI screening mechanisms that are being set up in the three Benelux countries, we will first discuss the overarching European legislative framework (**Section 1.2** provides a description of the main features of EU Regulation 2019/452).

1.2 EU Regulation 2019/452 in a nutshell

EU Regulation 2019/452 establishes a framework for screening foreign direct investments in the European Union ('EU'), and it has served as an incentive for numerous EU member states to introduce a national screening mechanism for foreign investments in cases where this investment might affect security or public order in the member state or in the EU as a whole.[1] Regulation 2019/452 does not introduce a full-fledged screening mechanism at EU level. It leaves it up to the EU member states to decide if they want to put in place a national FDI screening mechanism within their own jurisdiction.[2] However, Regulation 2019/452 does set out a mechanism for cooperation and exchange of information between EU member

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 investments into the Union OJ L 79 I/1 ('Regulation 2019/452').
2. See, ie, Stephan W Schill, 'The European Union's Foreign Direct Investment Screening Paradox: Tightening Inward Investment Control to Further External Investment Liberalization' (2019) 2019-17 Amsterdam Law School Research Paper 1, pp 2-3; Wolf Zwartkruis and Bas J. de Jong, 'The EU Regulation on Screening of Foreign Direct Investment: A Game Changer?' (2020) 31-3 European Business Law Review 447, pp 447-449.

states regarding incoming foreign direct investment. Pursuant to this cooperation mechanism, EU member states must notify the European Commission and other member states of foreign direct investment occurring within their jurisdiction. The European Commission and member states must then be able to provide comments on the prospective investment.[3]

Regulation 2019/452 also provides a non-exhaustive list of examples of factors that may be taken into consideration when determining whether an investment is likely to affect security or public order.[4] Member states can choose to implement those factors when drafting their national FDI legislation. Moreover, the Regulation requires member states to not discriminate between non-EU countries when adopting an FDI screening mechanism. It also requires that they stipulate the circumstances and grounds triggering screening as well as the applicable procedural rules in a transparent manner. Parties to a transaction subject to screening must have the ability to seek recourse against screening decisions of national authorities.[5]

2. Benelux: the creation of new foreign direct investment screening mechanisms

2.1 Belgium

The new Belgian FDI Act amends the Belgian Code of Economic Law by adding a Book IV on the introduction of a screening mechanism for foreign direct investments that have an impact on national security and strategic sectors. The Act is currently expected to enter into force on 1 July 2023.[6] The new act is the first to introduce a screening mechanism for foreign investments at the federal level. The original proposal has since its creation been amended by a cooperation agreement between the constituent Belgian regions and communities and the federal state. The Flemish Parliament has previously adopted an *ad hoc* mechanism pursuant to which the Flemish Government may declare any legal act null and void if it results in the acquisition of control or decision-making power by a foreign natural person or legal entity in a Flemish public entity. In the remainder of this contribution, we shall focus exclusively on the new Belgian FDI Act, although it is worth noting that the Belgian FDI Act is set up quite differently from the Flemish Decree and that at the time of writing the Flemish Government is yet to use its powers under the Decree.

2.1.1 Scope

The Belgian FDI Act captures direct investments by third country investors aimed at establishing or strengthening a lasting link between a third country investor and an entity based in Belgium that carries out certain activities that are of (strategic) interest to public order and national security.[7] This includes any investment that allows a foreign investor to effectively participate in the management or control of an entity that carries out an economic activity.[8] The application of the proposed law therefore also extends to investors whose ultimate beneficial owner is a third country investor, and to (shareholder) agreements which allow foreign investors to exercise influence over a Belgian entity.[9] The term 'third country' is defined as a country that is not a member state of the European Union.[10]

2.1.1.1 Target entities/activities within scope

Foreign investors are obliged to notify a prospective investment in the following cases:

- The investment results in the acquisition of at least 10 % of the voting rights in an entity established in Belgium of which the activities affect the defence sector, which includes dual use goods, energy, cybersecurity, electronic communication or digital infrastructures, and of which the turnover was at least € 100 million in the financial year preceding the acquisition of 10 % of the voting rights[11];
- The investment results in the acquisition of at least 25 % of the voting rights in entities established in Belgium of which the activities concern[12]:
  - Vital infrastructures, both physical as well as digital, for energy, transport, water, healthcare, electronic communication, media, data processing and/or storage, aviation and aerospace, electoral infrastructure or financial infrastructure, and sensitive installations, whether or not part of an existing company. And also land and real estate of crucial importance for the use of such infrastructure, which includes critical infrastructures within the

3. Article 6 Regulation 2019/452.
4. Article 4 Regulation 2019/452.
5. Articles 3(3) and 3(5) Regulation 2019/452.
6. See Article 27 Samenwerkingsakkoord van 30 november 2022 tot het invoeren van een mechanisme voor de screening van buitenlandse directe investeringen [2022] DOC 55 3079/001 (**'Cooperation Agreement'**).
7. Proposed Article IV.96 Belgian Code of Economic Law (Wetsvoorstel tot wijziging van het Wetboek van economisch recht, wat de invoering betreft van een screeningsmechanisme voor directe buitenlandse investeringen die een invloed hebben op onze veiligheidsbelangen en strategische sectoren [2021] DOC 55 1804/01 ('Proposed Article … Belgian Code of Economic Law').
8. Proposed Article IV.96 Belgian Code of Economic Law.
9. Article 2 under 4° Cooperation Agreement.
10. Proposed Article IV.96 Belgian Code of Economic Law.
11. Article 4(2), sub 1, Cooperation Agreement.
12. Article 4(2), sub 2, Cooperation Agreement.

meaning of EU Regulation 1285/2013[13] and within the meaning of a Decree of 2 December 2011;
- Technology and raw materials of essential importance to safety, which includes public health, national defence or the maintenance of public order of which it can be said that its disruption, failure, loss or destruction has notable impact on Belgium, a member state of the European Union or the European Union itself;
- Military equipment subject to the 'Common Military List' and national control[14];
- Supply of critical inputs, which includes energy and raw material, as well as food security;
- Access to sensitive information, including personal data, or the ability to control such information;
- Private security sector;
- Freedom and pluralism of media;

– The investment results in the acquisition of 25 % of the voting rights in an entity established in Belgium of which the activities affect technologies of strategic importance in the biotechnology sector and of which the turnover was at least € 25 million in the financial year preceding the acquisition of 25 % of the voting rights.

2.1.1.2 *Investments caught*

In case an investment is caught by both the threshold of 10 % and the threshold of 25 %, the threshold of 10 % takes precedent in the notification of the transaction.[15] Transactions will be reviewed by the newly established 'Inter-Federal Screening Committee' ('ISC').[16] The ISC reserves the right to increase the current 10 % thresholds to 25 % and decrease the current 25 % thresholds to 10 %.[17] This would be done by way of an executive cooperation agreement of a later date.[18] Investments which serve to establish new operations by a foreign investor and which do not include the acquisition of existing activities, sometimes also referred to as 'greenfield' investments, are explicitly excluded from the scope of the Act.[19]

2.1.2 Notification procedure

Foreign investors are obliged to notify the ISC of an intended transaction that falls within the scope of the Act after either the signing of an agreement outlining the intended transaction, the publication of an acquisition offer, or the acquisition of a controlling interest.[20] Parties may, alternatively, submit a Letter of Intent as proof of their intention to invest in the Belgian target entity.[21] Parties to the intended transaction are subject to a standstill obligation, and must refrain from completing the transaction until the transaction has been cleared by the competent Minister.[22] In cases where the acquisition concerns the purchase of shares in a publicly traded company, the acquiring foreign entity is obliged to notify the transaction at the latest at the time the shares are acquired. The voting and participation rights in these shares will be suspended until such time as the investment is cleared by the competent Minister(s).[23]

2.1.2.1 *Required information in notification*

The notification must include the information listed in Article 9(2) Regulation 2019/452, meaning the investor must provide information on (i) the ownership structure of the foreign investor and of the entity in in which the foreign direct investment is planned, as well as the ultimate beneficial owner; (ii) the approximate value of the transaction; (iii) the products, services and business operations of the foreign investor and the target entity; (iv) in which member states of the EU and in which third countries the foreign investor and target entity are active; (v) the funding and source of the funding of the investment; (vi) the date of or planned date for completion of the transaction.[24] The ISC is entitled to request information it deems necessary to complete the file.[25]

The moment the ISC is of the opinion that the file is complete, it will inform the foreign investor and the target entity of this fact. The notification procedure commences once the ISC informs the parties to the intended transaction that the file is complete. There

13. Regulation (EU) No 1285/2013 of the European Parliament and of the Council of 11 December 2013 on the implementation and exploitation of European satellite navigation systems and repealing Council Regulation (EC) No 876/2002 and Regulation (EC) No 683/2008 of the European Parliament and of the Council [2013] OJ L 347/1, no longer in force, repealed by Regulation (EU) 2021/696 of the European Parliament and of the Council of 28 April 2021 establishing the Union Space Programme and the European Union Agency for the Space Programme and repealing Regulations (EU) No 912/2010, (EU) No 1285/2013 and (EU) No 377/2014 and Decision No 541/2014/EU [2021] OJ L 170/69.
14. Council Notice, 'Common Military List of the European Union' adopted by the Council on 17 February 2020 (equipment covered by Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment) (updating and replacing the Common Military List of the European Union adopted by the Council on 18 February 2019, 2020/C 85/01.
15. Article 5(1) Cooperation Agreement.
16. Article 2(5) and 3(2) Cooperation Agreement.
17. Article 4(3) Cooperation Agreement.
18. Article 4(3) Cooperation Agreement.
19. Article 4(4) Cooperation Agreement.
20. Article 5(1) Cooperation Agreement.
21. Article 5(2) Cooperation Agreement.
22. Article 12 Cooperation Agreement.
23. Article 5(3) Cooperation Agreement.
24. See also Article 6(2) Cooperation Agreement.
25. Article 6(3) Cooperation Agreement.

is no statutory limit in this preliminary phase, therefore in theory authorities may hold out indefinitely on commencing the formal notification procedure.

2.1.2.2 Two phases in the notification procedure and their duration

The notification procedure consists of two phases, 1) the assessment procedure and 2) the formal screening procedure.

The assessment procedure lasts thirty days, notwithstanding any suspensions, extensions or interruptions of the limitation period.[26] Potential suspensions of the statutory time limit may e.g. arise from requests for additional information from the authorities.[27] During the assessment procedure the ISC assesses whether there are any indications that the foreign investment negatively impacts public order, national security and strategic interests on the basis of the likelihood of the impairment of the continuity of vital processes which would lead to severe societal disruption; the impairment of the integrity and/or exclusivity of know-how and information associated with vital processes and high-tech; the increase or creation of strategic dependence.[28] Furthermore, the ISC will assess whether the acquisition of control or changes to the ownership structure or any characteristics of the foreign investor as such could have an impact on public order, national security and strategic interests.[29]

These potentially open-ended assessment criteria are supplemented by additional assessment criteria predominantly derived from Article 4(2) Regulation 2019/452, namely, (i) whether the foreign investor is linked either directly or indirectly to the government of a third country, be it through direct or indirect ownership or the receipt of considerable funding, whether (ii) it has previously been involved in activities affecting public order or security in an EU country, as well as in a third country, and whether (iii) there is a serious risk the foreign investor might engage in illegal or criminal activities.[30]

If it is found that none of these risks are present, or if the ISC fails to decide on the commencement of a screening procedure within the statutory time limit, the foreign investment will be deemed permissible.[31] If any of the risks and indicators mentioned are present, the ISC will commence a screening procedure during which the competent authorities will analyse the concrete and specific risks involved.[32] The ISC has an advisory role in this procedure, as the formal screening decision will ultimately be taken by the competent minister(s) or council of ministers at the federal level.[33]

The length of the screening procedure depends on the trajectory of the decision-making of the relevant authorities. The screening decision may be finalised within 28 days if the ISC's advises in favour of the investment. The ISC is subject to a statutory limit of twenty days within which it must inform the competent minister(s) of its advice. The competent minister or ministers then have six days to take a decision based on ISC's advice, after which the parties to the transaction will receive the combined decision of the competent minister or ministers within two days.[34] However, this initial statutory limit of 28 days in total may be extended by several extensions and potential suspensions of the statutory time limit.

If the ISC intends to advise against clearing the investment, the parties to the intended transaction will receive the draft advice and will have ten days to respond in writing to the draft advice.[35] After the receipt of the parties' written comments, parties may request an oral hearing or ISC may plan an oral hearing of its own accord, leading to an additional ten-day suspension.[36]

Moreover, if, pursuant to Article 6(6) Regulation 2019/452, the European Commission decides to comment on the intended transaction, the screening procedure will be suspended for 25 days.[37] The statutory limit may be suspended indefinitely if, pursuant to Article 6(8) Regulation 2019/452, the ISC receives a request for additional information from another EU member state. In this case, the suspension of the statutory time limit will last until such time as the requested information has been provided.[38]

Additionally, a suspension of the statutory time limit of one month may arise out of negotiations on potential remedies between ISC and the parties. This one-month suspension is renewable upon agreement between the parties to the transaction and ISC.[39]

26. Article 18(1) and (2) Cooperation Agreement.
27. Article 16 Cooperation Agreement.
28. Article 11 Cooperation Agreement.
29. Article 17(1) Cooperation Agreement.
30. Article 11 and 17 Cooperation Agreement.
31. Article 17(3) and 18(2) Cooperation Agreement.
32. Article 19(1) Cooperation Agreement.
33. Article 19(2) Cooperation Agreement.
34. Articles 20(5), 23(2) and 23(6) Cooperation Agreement.
35. Article 20(3) Cooperation Agreement.
36. Article 20(4) Cooperation Agreement.
37. Article 20(5) Cooperation Agreement.
38. Article 20(5) Cooperation Agreement.
39. Article 21(2) Cooperation Agreement.

2.1.2.3 Outcome of notification procedure: three possible decisions

Ultimately, the notification procedure results in one of three decisions. Firstly, a positive decision, clearing the investment. Secondly, a decision clearing the investment subject to remedies agreed upon between the parties and the ISC, and thirdly: a negative decision prohibiting the transaction.[40] Failure to take a decision within the prescribed statutory time limits will lead to the presumption that a transaction is permissible.[41] While it would appear from the amount of possible suspensions and extensions that there is no clear time line within which foreign investors can expect a decision on their investment, the combined effect of the suspensions point to a timeline of approximately two months within which investors can expect a decision in cases where clear risks have been identified. Once a final decision has been taken and parties to the transaction have been informed of the final decision, they can appeal the decision before the Market Court (*Marktenhof/Cour des Marchés*) within thirty days of receipt of the final decision.[42]

2.1.3 Remedies and sanctions

2.1.3.1 Remedies

While the initial proposal did not specify any specific remedies, the amended proposal, as also set out in the Cooperation Agreement, has considerably fleshed out the potential remedies that may be agreed upon between the ISC and the parties to the transaction, and are ultimately made binding upon the parties to the transaction.[43] Members of the ISC may propose so-called 'corrective measures' (*bijsturende maatregelen/mésures correctives*) designed to mitigate the impact of a foreign direct investment on public order, national security or strategic interests to a level considered acceptable by the competent authorities.[44] The proposed remedies must be proportionate and necessary to achieve the desired mitigation of the impact on public order, national security and strategic interests.[45]

The Cooperation Agreement includes a non-exhaustive list of seventeen potential remedies that may be agreed upon, including behavioural remedies and commitments such as *inter alia* the imposition of an obligation to place a specific technology, source code and/or know-how in the custody of a third party in Belgium, licensing of certain patented know-how or other intellectual property rights to the Belgian State or certain entities, bundling and transferring of certain vital processes in Belgium or services provided to Belgian authorities in/to a separate entity, prohibition of the acquisition of certain of the target entity's assets or subsidiaries.[46]

2.1.3.2 Sanctions

Authorities may impose fines of up to either 10 % or 30 % of the value of the foreign direct investment in question on the foreign investor.[47] A fine of up to 10 % of the value of the foreign direct investment can be imposed in cases where (i) no or insufficient information has been provided and authorities based their decision on the information provided, or (ii) additional information was not provided within the time limits set out in an information request.[48] A fine of up to 30 % of the value of the transaction may be imposed in case the information provided is misleading or incorrect.[49]

Moreover, if a foreign investor fails to notify a transaction it has since completed, it may be fined up to 10 % of the value of the investment if it proceeds to notify the transaction of its own accord within twelve months of completion of the transaction, or if the ISC commences an *ex officio* screening procedure within twelve months of completion of the transaction.[50] This fine can increase to an amount up to 30 % of the value of the investment in cases where no notification is submitted within 12 months, or the ISC commences an *ex officio* screening procedure after the initial 12-month period.[51]

Authorities may also impose a fine of up to 30 % of the value of the investment if the measures proposed as remedies (or corrective measures) have not been put in place within the time frame set out in the binding agreement between the ISC and the parties to the transaction.[52]

2.2 Netherlands

In May 2022 the Dutch legislator finalised an Act that introduces a screening mechanism for investments, mergers and acquisitions on grounds of national security ('*Wet Veiligheidstoets voor investeringen, fusies en*

40. Article 23(3) Cooperation Agreement.
41. Article 23(7) Cooperation Agreement.
42. Article 29 Cooperation Agreement.
43. See: Article 21 Cooperation Agreement.
44. Article 21 Cooperation Agreement.
45. Article 21(5) Cooperation Agreement.
46. Article 21(4) Cooperation Agreement.
47. Articles 28(1) and (2) Cooperation Agreement.
48. Article 28(1), 1° and 2° Cooperation Agreement.
49. Article 28(2), 2° Cooperation Agreement.
50. Article 28(1), 3° Cooperation Agreement.
51. Article 28(2), 1° and 3° Cooperation Agreement.
52. Article 28(2), 4° Cooperation Agreement.

overnames'), which we hereinafter will also refer to as the Dutch Investment Screening Act.[53] To refer to the Act as the Dutch FDI Act would be a misnomer, since, as will be explained below, the Act does not merely regulate foreign direct investment. Nonetheless, as the legislator states in the Act's explanatory memorandum, the Act should still be seen against the backdrop of Regulation 2019/452 as it is designed with the minimum requirements for FDI regimes laid down in the Regulation in mind and also takes inspiration from the Regulation.[54] The Act is expected to enter into force in the first half of 2023, as at the time of writing certain aspects of the Act's application are still being worked out at an executive level.

The Act will be the first to introduce a multisectoral investment screening mechanism. Currently sectoral regulation applies in the gas[55], electricity[56], telecommunications[57], water[58] and financial sector.[59] It is beyond the scope of this article to delve into these sectoral investment screening mechanisms. It is worth noting, however, that the special sectoral screening mechanisms provided for in these acts, when applicable, take precedence over the general screening mechanism laid down in the Dutch Investment Screening Act.[60]

2.2.1 Scope

From the outset, it is important to note that the Dutch Investment Screening Act applies retroactively to investments that took place from 9 September 2020 until the entry into force of the Act, if there are concerns this investment presents risks to national security.[61] The Act applies indiscriminately to all investors, and therefore applies to Dutch, EU and non-EU investors alike.[62] This is not to say that an investor's foreign origins are irrelevant, since the risk analysis conducted during the screening of the investment will take aspects relating to the investor's country of origin into account.[63] It does, however, mean that the Act places more emphasis on the target entity, rather than on the person or characteristics of the investor.

2.2.1.1 Target entities/activities within scope

Target entities that fall within the scope of the Act can be subdivided into three categories:
- 'vital suppliers';
- operators or managers of 'high-tech campuses';
- target entities active in the field of 'sensitive technologies'.[64]

The term 'vital supplier' is more generally defined in the act as an entity that operates, manages or makes available a service the continuity of which is of vital importance to Dutch society.[65] A specific subset of companies currently qualify as vital suppliers within the meaning of the Dutch Investment Screening Act. These are distributors, managers and operators of (local) heating grid systems[66]; (former) holders of a permit to store, produce and process nuclear energy[67]; the operator of Schiphol Airport[68], suppliers of ground handling services at Schiphol Airport[69], as well as airlines that hold at least a third of allocated slots (e.g. KLM) at Schiphol Airport[70]; the entity concerned with nautical safety in the port of Rotterdam (e.g. Port of Rotterdam Authority)[71]; certain providers of financial market infrastructure services, such as the exchange and trading of stocks and bonds, providers of clearing and settlement services, and payment and interbanking services[72]; permit holders in the recoverable energy (natural gas) sector (e.g. NAM and Gasunie), as well as operators of gas storage facilities.[73] New categories of vital suppliers may be designated at a later date by executive decree.[74]

The second category (i.e. operators and managers of 'high tech campuses') are more simply defined in the Act as target entities that manage sites on which a collection of companies are active where public-private collaboration takes place on technologies and

53. Wet van 18 mei 2022, houdende regels tot invoering van een toets betreffende verwervingsactiviteiten die een risico kunnen vormen voor de nationale veiligheid gezien het effect hiervan op vitale aanbieders, beheerders van bedrijfscampussen of ondernemingen die actief zijn op het gebied van sensitieve technologie (Wet veiligheidstoets investeringen, fusies en overnames) (*Stb. 2022, 215*) ('Dutch Investment Screening Act').
54. *Kamerstukken II* 2020/21, 35880, nr. 3, para 5.1.1 and 5.1.3 (*MvT*).
55. Article 66 Gaswet ('Dutch Gas Act').
56. Article 86f Elektriciteitswet 1998 (*Stb.* 1998) ('Dutch Electricity Act 1998').
57. Article 14 a.2 Telecommunicatiewet (*Stb.* 1998) ('Dutch Telecommunications Act).
58. Article 5:38 Wet op het financieel toezicht (*Stb.* 2006) ('Dutch Financial Supervision Act').
59. Articles 15 and 18 Drinkwaterwet (*Stb.* 2009) ('Dutch Drinking Water Act').
60. See, e.g. Article 5, sub b and c, Dutch Investment Screening Act.
61. Article 58(1) Dutch Investment Screening Act.
62. See, e.g., Article 2 Dutch Investment Screening Act; *Kamerstukken II* 2020/21, 35880, nr. 3, para 5.1.3 (*MvT*).
63. See *Kamerstukken II* 2020/21, 35880, nr. 3, pp 38-42 (*MvT*).
64. Articles 2, 3, 7 and 7 Dutch Investment Screening Act.
65. Article 1 Dutch Investment Screening Act.
66. Article 7(1) Dutch Investment Screening Act.
67. Article 7(2) Dutch Investment Screening Act.
68. Article 7(3), sub a, Dutch Investment Screening Act.
69. Article 7(3), sub c, Dutch Investment Screening Act.
70. Article 7(3), sub b, Dutch Investment Screening Act.
71. Article 7(4) Dutch Investment Screening Act.
72. Article 7(6), (7) and (8) Dutch Investment Screening Act.
73. Article 7(9) and (10) Dutch Investment Screening Act.
74. Article 7(11) Dutch Investment Screening Act.

applications that are of economic and strategic importance to the Netherlands.[75]

The third category under the Act ('sensitive technologies') includes dual use goods subject to an export licence pursuant to Article 3(1) of EU Regulation 2021/82, and items from the EU Common Military List.[76] At the time of writing, a draft executive decree which would extend the scope of the third category is being circulated.[77] Based on the draft decree, investments in target entities active in, *inter alia*, quantum technology, photonics, semiconductors and high assurance products will also fall within the scope of the Act.[78]

The Act indicates that it will not apply retroactively to investments where the target entity is either a manager or operator of a high-tech campus, or is active in the field of sensitive technologies, insofar as this pertains to the sensitive technologies currently being considered under the draft decree.[79]

2.2.1.2 Investments caught

Investments caught by the Act are legal mergers, the establishment of a full-function joint venture, the acquisition of assets essential to the functioning of a target entity, as well as more generally investments, legal acts which result in the ability to exercise direct or indirect control over a target entity or subsidiaries of a target entity based in the Netherlands.[80] The Act also applies to demergers in cases where a demerger results in the ability of an investor to exercise control over a target entity.[81] The term 'control' is defined in the Dutch Competition Act ('*Mededingingswet*') as the ability to exercise a decisive influence over the activities of an entity engaged in economic activity.[82] This definition aligns with the definition in the EU Merger Regulation (Council Regulation 139/2004). Hence, control is presumed to be present when an entity holds 100 % or more than 50 % of the shares or voting rights in an entity, and/or has the ability to appoint and dismiss board members, but control may also arise from other factual or legal circumstances, such as i.e. from shareholder agreements.[83]

Additionally, investments in target entities active in sensitive technologies within the meaning of the Act, will also be caught if it leads to the 'significant influence' over the target entity.[84]The acquisition of, respectively, 10 %, 20 % and 25 % of the voting rights qualifies as the ability to exercise significant influence and triggers an obligation to notify the investment.[85] The obligation to notify exists whenever one of these thresholds is triggered. Hence, an acquiring entity that acquires 10 % of the voting rights must notify the transaction, if this transaction is cleared it must notify the transaction again the moment it acquires i.e. 20 % of the voting rights.

The conditions for 'significant influence' are more easily fulfilled than the conditions for 'control'. In its explanatory memorandum the Dutch legislator notes that the reasoning for this lower threshold is that certain sensitive technologies are considered fragile and dangerous to the extent that the ability to exercise significant influence over a target entity active in this field may more readily present risks to national security.[86] This is in part due to the fact that, for instance, 'vital suppliers' are typically subject to (more) extensive regulation which in any case limits investors' ability to exert influence over these entities as opposed to entities active in the field of sensitive technologies.[87]

2.2.2 Notification procedure

Parties to a transaction that falls within the scope of the Dutch Investment Screening Act must notify the transaction to the Bureau of Investment Screening ('*Bureau Toetsing Investeringen*' or '*BTI*'), a department of the Dutch Ministry of Economic Affairs and Climate, prior to closing the transaction.[88] The Minister of Economic Affairs and Climate is the authority competent to take screening decisions.[89]

2.2.2.1 Required information in notification

The Act does not specify the information that must be included in the notification, this will be set out in an executive decree.[90] At this stage the Dutch legislator seemingly has not yet chosen to follow the example of

75. Article 1 Dutch Investment Screening Act.
76. Article 8(1) Dutch Investment Screening Act.
77. Annex to *Kamerstukken II* 2022/23 (Aanbiedingsbrief bij ontwerpbesluit toepassingsbereik sensitieve technologie) ('Draft Decree Sensitive Technologies').
78. Annex III to Draft Decree Sensitive Technologies.
79. Article 51(3) Dutch Investment Screening Act.
80. Articles 2 and 6 Dutch Investment Screening Act.
81. Article 2, sub d, Dutch Investment Screening Act.
82. Article 26 Mededingingswet (*Stb.* 1997)('Dutch Competition Act').
83. See also, Article 3(1)(b) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L 24/1; European Commission, Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2008] OJ C 95/1, para 11 et seq.
84. Article 3 Dutch Investment Screening Act.
85. Article 4(1) Dutch Investment Screening Act.
86. *Kamerstukken II* 2020/21, 35880, nr. 3, p 134 (*MvT*).
87. *Kamerstukken II* 2020/21, 35880, nr. 3, p 134 (*MvT*).
88. Articles 10(1) and 11(1) Dutch Investment Screening Act.
89. Article 12(1) and (5) Dutch Investment Screening Act.
90. Article 11(2) Dutch Investment Screening Act.

certain other FDI regimes to require investors to provide the information stipulated in Article 9(2) Regulation 2019/452, such as i.e. the approximate value of the investment and the ownership structure and ultimate beneficial owner of the investor and the target entity.[91]

2.2.2.2 Two phases in the notification procedure and their duration

The notification procedure consists of two distinct phases, 1) an assessment phase, and 2) a screening phase.[92]

The Act prescribes a statutory limit of eight weeks within which the Minister must assess whether the prospective investment raises concerns for national security (= the assessment phase) and, thus, whether it is necessary to commence a formal screening procedure.[93] The envisaged investment is deemed to be permissible if the Minister decides not to launch a formal screening procedure, or if the Minister fails to decide within the prescribed statutory limit.[94] The same rule applies to the formal screening phase: a failure to take a formal screening decision within the prescribed statutory time limit is equated with a decision to permit the notified investment.[95] The formal screening phase commences after the Minister notifies the parties to the transaction of the intention to launch a formal screening procedure and the subsequent receipt of the (renewed) notification of the prospective investment. The commencement of the screening phase starts a new eight-week time limit within which a screening decision must be taken.[96]

The statutory time limit in the assessment and screening phase may be suspended or extended. Additional information may be requested during both the assessment and screening phase. These requests for information will have a suspensory effect on the statutory time limits, and the clock will be stopped on the procedure until the parties to the transaction have provided the requested information.[97] The explanatory memorandum stipulates that the statutory term may also be suspended if the Minister intends to block the transaction or propose remedies. The Minister should then allow the parties to a transaction to submit their comments (*zienswijze*). The statutory limit will be suspended until the parties have submitted their comments, or until the time limit to submit comments has run out.[98]

Moreover, the time limit for both the assessment and the formal screening phase can be extended by up to six months.[99] This can be supplemented by an additional three months' extension in either phase if after receipt of the notification, information comes to light that triggers an obligation to notify the European Commission and other EU member states of the prospective investment pursuant to Regulation 2019/452.[100] The rationale for these longer extensions is that the assessment and screening may require information to be requested in third – non-EU – countries which could result in considerable delays.[101] Hence, extensions of this kind are more likely if the acquiring entity is a third-country investor.

The Dutch Investment Screening Act outlines several aspects and indicators that are considered when assessing whether a prospective investment presents a risk to national security. In all cases BTI must take the following risk indicators into account[102]:

- acquiring entity's ownership structure lacks transparency;
- acquirer is, or is influenced by an entity or person that is, subject to (international) sanctions;
- an uncertain or poor security situation in the acquirer's country of origin, or the country where the acquirer's board is headquartered, or in surrounding countries, as well as military, cyber and terrorist threats (including threats of an increased proliferation of weapons of mass destruction);
- the acquirer, or an entity or person under whose influence the acquirer operates, has committed a crime included in a list of crimes yet to be compiled by the competent Minister;
- the acquirer has failed to cooperate during the investigation into the presence of the abovementioned factors;
- the acquirer has (previously) submitted incorrect information.

If the target entity qualifies as a 'vital supplier', BTI must also consider an acquirer's past performance and track record of regulatory compliance in relation to the activities carried out by the target entity and the

91. See, e.g., the Belgian and Luxembourg FDI regimes discussed in this contribution where the national regimes require parties to a transaction to provide the information set out in Article 9(2) Regulation 2019/452.
92. Article 12(1) and (5) Dutch Investment Screening Act.
93. Article 12(1) and (2) Dutch Investment Screening Act.
94. Articles 10(1), sub a, and 12(4) Dutch Investment Screening Act.
95. Article 12(9) Dutch Investment Screening Act, referencing paragraph 4.1.3.3 Algemene wet bestuursrecht (*Stb.* 1992) ('Dutch Administrative Code').
96. Article 12(5) Dutch Investment Screening Act.
97. Articles 12(7) and 34(7) Dutch Investment Screening Act.
98. *Kamerstukken II* 2020/21, 35880, nr. 3, p 145 (*MvT*).
99. Article 12(3) and (6) Dutch Investment Screening Act.
100. Article 12(8) Dutch Investment Screening Act and Article 6(1) Regulation 2019/452.
101. *Kamerstukken II* 2020/21, 35880, nr. 3, pp 143-144 (*MvT*).
102. Article 19 Dutch Investment Screening Act.

acquirer's solvency and financial stability.[103] Moreover, BTI must also consider whether the acquirer is established in, a citizen of, or under the influence of a country known to have established offensive programmes targeted at disrupting or affecting the integrity, security, safety and availability of vital infrastructure and services. Furthermore, it must consider whether the acquirer's country of origin is bound by international treaties and resolutions of international organisations in relation to activities of the relevant vital suppliers, and if so, the acquirer's country of origin's track record with regard to compliance with such treaties.[104]

If the target entity is considered to be active in the field of 'sensitive technologies', BTI will assess the acquirer's past performance and track record regarding the security, trade and use of sensitive technology and compliance with applicable legislation concerning security, classification and export licensing. BTI will also check whether the acquirer's track record renders it likely that it will use its access to sensitive technologies as a means of controlling the availability, pricing, and further development of such technology in a manner that is not in line with ordinary commercial motives and practices. Furthermore, BTI will investigate whether the acquirer has motives other than usual commercial motives for carrying out the acquisition activity. Finally BTI will check if the government of the acquirer's country of origin is known to have an offensive programme targeted at acquiring sensitive technology in order to create or strengthen a strategic position of power.[105] Furthermore, risks to national security may also exist when the investor's country of origin lacks regulation concerning security, classification and export licensing of sensitive technologies, or when there is an insufficient or a non-transparent division between civic and military research and development programmes in the investor's country of origin.[106]

2.2.2.3 *Outcome of notification procedure: three possible decisions*

If during the assessment phase the Minister decides **not** to launch a formal screening procedure because the prospective investment does not raise concerns for national security, the investment is allowed.

In case the Minister decides to launch a formal screening procedure, one of three possible decisions may result from such a procedure. This can ultimately be appealed before the authorities and an administrative court. Firstly, the Minister may decide to permit the prospective investment or, secondly, permit the prospective transaction subject to conditions and restrictions.[107] Thirdly, the prospective investment may be blocked.

2.2.3 Remedies and sanctions

2.2.3.1 *Remedies*

The Dutch Investment Screening Act contains a – seemingly exhaustive – list of remedies which may be imposed in a formal screening decision in order to mitigate risks to national security.[108] These remedies include *inter alia* an obligation to leave certain assets or subsidiaries outside the scope of the prospective investment, imposing a cap on the amount of shares an investor can obtain which is lower than envisioned in the notification, prohibiting the provision of certain services, or the trade of certain goods by a target entity to particular countries or companies, and imposing an obligation to bundle certain activities and transfer these activities to a separate entity based in the Netherlands.[109] If the target entity is active in the field of sensitive technologies, additional remedies may be imposed, such as e.g. demanding that the parties to the transaction commit to licensing certain patented know-how under fair, reasonable and non-discriminatory (FRAND) conditions to third parties established within the European Union and/or a commitment to offer a buy option to the Minister, under market conditions, in situations where the acquirer ultimately seeks to either cease activities or transfer activities to a third country.[110]

2.2.3.2 *Sanctions*

The Minister is entitled to impose a fine for a failure to abide by the obligations under the Act, including the obligations to notify transactions, abide by remedies and provide requested information.[111] The maximum amount that can be imposed is either € 900 000,- or, if this amount does not have sufficient punitive effects, a maximum of 10 % of an entity's turnover.[112]

103. Article 20, sub a and c, Dutch Investment Screening Act.
104. Article 20, sub b and d, Dutch Investment Screening Act.
105. Article 21, sub a, d, e and f, Dutch Investment Screening Act.
106. Article 21, sub b and c, Dutch Investment Screening Act.
107. See, i.e. Articles 23 and 24 Dutch Investment Screening Act.
108. Articles 23 and 24 Dutch Investment Screening Act.
109. Article 23, sub d, e, g and h, Dutch Investment Screening Act.
110. Article 24, sub b under 2° and sub c, Dutch Investment Screening Act.
111. Article 51 Dutch Investment Screening Act.
112. Article 51(3) Dutch Investment Screening Act.

2.3 Luxembourg

The proposed Bill of Law n°7885 ('***Luxembourg FDI Act***')[113] introduces a mandatory *ex ante* notification and screening mechanism for foreign direct investments in Luxembourg law. The new law is expected to enter into force in 2023.

2.3.1 Scope

Like the Belgian FDI Act, the Luxembourg FDI Act applies solely to investors, be it natural persons or legal entities, originating from or established under the laws of a third country. In the case of Luxembourg this explicitly refers to non-EU, as well as non-EEA countries. In line with Regulation 2019/452, the law's scope extends to entities whose ultimate beneficial owner is an entity or national from a third country.[114]

The Luxembourg FDI Act targets investments that lead to the creation or strengthening of a lasting link between the foreign investor and an entity under Luxembourg law, and which allow a foreign investor, either directly or indirectly, to effectively exercise control over an entity that carries out 'critical activities' in Luxembourg.[115]

2.3.1.1 Target activities/entities within scope

The following activities are considered 'critical activities':

- Development, production and trade in dual use goods within the meaning of point 1 of Article 2 of EU Regulation 428/2009;
- In the energy sector: production and distribution of electricity; gas conditioning and distribution; trade in and storage of crude oil; quantum and nuclear technology.
- Transport by land, water and air;
- In the water sector: collection, purification, distribution of (potable) water; collection and treatment of wastewater; collection, treatment and disposal of waste.
- In the health sector: healthcare related activities; medical test and diagnostic facilities; nano- and biotechnology.
- In the communication sector: wireline communication; wireless communication; satellite communication; courier and postal services.
- In the data storage and processing sector: data processing facilities; hosting services; internet portals; artificial intelligence; semiconductors; cybersecurity.
- In the aerospace sector: space operations; space assets and infrastructure.
- In the defence sector: activities linked to national defence; production of and trade in weapons, ammunition and explosive substances for military purposes or purposes of war.
- In the finance sector: central bank activities; infrastructure and systems for exchange, payment and settlement of financial instruments.
- In the media sector: publishing; audiovisual activities; radio broadcasting.

In addition to these activities, research and production activities related to the abovementioned activities are likewise considered critical activities. The same goes for any activities liable to lead to access to premises where critical activities are carried out, or that otherwise result in access to sensitive information on critical activities.[116] In the explanatory memorandum it is stated, by way of example, that producers of protective face masks carry out healthcare related activities, while companies offering cleaning or security services would fall within the scope of the Act if these activities lead to access to sensitive information or premises where critical activities are carried out.[117] Due to this broad definition, an expansive range of activities may be covered by the Act, as a result of which the Act could become challenging to apply in practice. Especially when the transaction in question concerns an investment in an entity whose primary activities do not fall within the scope of the Act, but which nonetheless provides services or supplies products to entities that carry out critical activities within the meaning of the Act.

2.3.1.2 Investments caught

As indicated in the above, the Luxembourg FDI Act applies to investments that allow a foreign investor, either directly or indirectly, to effectively exercise control over an entity that carries out critical activities in Luxembourg. An investor exercises such control if it either holds the majority of the voting rights in an entity or can exercise these rights by virtue of a (shareholder) agreement, or has the right to appoint or remove board members.[118] Alternatively, an investor is also deemed to exercise control if it directly or indirectly holds 25 % of the capital in an entity.[119] Portfolio investments are explicitly excluded from the scope of the law.[120]

113. Chambre des députés, session ordinaire 2020-2021, projet de loi n n°7885 portant mise en place d'un mécanisme de filtrage national des investissements directs étrangers susceptibles de porter atteinte à la sécurité ou à l'ordre public aux fins de la mise en oeuvre du règlement (UE) 2019/452 du Parlement européen et du Conseil du 19 mars 2019 établissant un cadre pour le filtrage des investissements directs étrangers dans l'Union, tel que modifé ('Luxembourg FDI Act').
114. Article 3(1), 3(2) and 6 Luxembourg FDI Act; Recital 10 to Regulation 2019/452.
115. Articles 3(2) and 3(3) Luxembourg FDI Act.
116. Article 2(3) Luxembourg FDI Act.
117. Annex to Luxembourg FDI Act, p 13.
118. Article 3(3), under 1° Luxembourg FDI Act.
119. Article 3(3), under 2° Luxembourg FDI Act.
120. Articles 2(1) and 3(4) Luxembourg FDI Act; see also, Annex to Luxembourg FDI Act, p 14, citing inter alia CJEU 13 November 2019, *College Pension Plan of British Columbia*, C-641/17, EU:C:2019:960, para 102; CJEU 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, para 58.

2.3.2 Notification procedure

Foreign direct investments that fall within the scope of the Luxembourg FDI Act must be notified to the Minister of Economy prior to being put into effect.[121] An exception to this standstill obligation is made for the acquisition of share capital. Foreign investors that obtain 25 % of the share capital of an entity carrying out a critical activity in Luxembourg must notify the Minister of Economy of this fact within 15 days after the completion of the transaction.[122]

2.3.2.1 Required information in notification

The notification must contain information on the ownership structure of the foreign investor as well as the entity established under Luxembourg law, including information on the ultimate beneficial owner; the estimated value of the investment, the acquiring entity and target entity's products, services and commercial operations; the jurisdictions in which the acquirer and target entity are (commercially) active; the manner and source of financing of the investment, and the expected completion date of the transaction.[123]

2.3.2.2 Two phases in the notification procedure and their duration

The screening procedure is divided up into two phases. During the first phase, which takes up to two months, authorities assess whether it is necessary to commence a formal investigation.[124] If no formal investigation is commenced, the screening procedure ends with the first phase and the investor is free to complete the transaction. The second phase, the formal investigation phase, lasts up to 60 calendar days.[125] The clock on the time limits prescribed in the act can be paused by authorities through requests for additional information. The clock will be stopped until such time as the authority considers it has received sufficient information from the foreign investor.[126]

The relevant material test is whether the foreign direct investment is liable to undermine security and public order in Luxembourg, which is determined based on the extent to which the following aspects are affected[127]:

- the integrity, security and continuity of critical infrastructures;
- the viability of activities related to critical technologies and dual use goods[128];
- the supply of essential inputs (e.g., raw materials and potential effects on food security);
- access to sensitive information (e.g., personal data, or the capacity to oversee such information);
- pluralism and freedom of media.

Additionally, authorities may also take into account the fact (i) that a foreign investor is either directly or indirectly held or under control of the government of a third country; and/or (ii) that the foreign investor in question has already participated in activities undermining security and public order in an EU member state; and/or (iii) the fact that there is a grave risk that the foreign investor will carry out illegal or criminal activities.[129] This material test is derived from Article 4(2) of Regulation 2019/452, which sets out a list of factors that authorities in EU member states may take into account when screening foreign investments.[130]

Within the 60-day time limit of the formal second phase, authorities will take an investment screening decision considering the aforementioned aspects.

2.3.2.3 Outcome of notification procedure: three possible decisions

Like in FDI notification procedures in other jurisdictions, there are three possible decisions. Firstly, the authorities may authorise the investment. Secondly, the authorities may authorise the investment subject to certain conditions. Thirdly and lastly, the authorities may prohibit the investment.[131]

The Luxembourg FDI Act does not explicitly state that foreign investors are entitled to seek the annulment of screening decisions. However, the explanatory memorandum stipulates that the right to seek legal recourse before an administrative judge follows directly from Article 3(5) of Regulation 2019/452.[132] Although decisions on foreign direct investments within the meaning of the Act fall within the province of the Minister of the Economy and Minister of Finance, they will be assisted by a newly created inter-ministerial screening committee.[133] The inter-ministerial screening committee is tasked with assessing notified investments and subsequently advising the

121. Articles 5(1) and 5(2) Luxembourg FDI Act.
122. Article 5(3) Luxembourg FDI Act.
123. Article 6 Luxembourg FDI Act.
124. Article 7 Luxembourg FDI Act.
125. Article 8 Luxembourg FDI Act.
126. Article 7(2) and (3), and Article 8(2) Luxembourg FDI Act.
127. Article 9(1) Luxembourg FDI Act.
128. 'Dual use' goods within the meaning of point 1 of Article 2 of Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (recast) [2009] OJ L 134/1.
129. Article 9(2) Luxembourg FDI Act.
130. See also, Annex to Luxembourg FDI Act, p 15.
131. Article 10 Luxembourg FDI Act; see also Annex to Luxembourg FDI Act, p 15.
132. Annex to Luxembourg FDI Act, p 15.
133. Article 4 Luxembourg FDI Act.

responsible Ministers of Economy and Finance on the commencement of a formal investment screening procedure. It also advises on whether a notified investment should be cleared, cleared conditionally, or prohibited.

2.3.3 Remedies and sanctions

In terms of remedies and sanctions, the Luxembourg FDI Act is relatively terse. So, while the Act, for instance, indicates that foreign investments may be cleared subject to conditions, the Act does not specify any envisioned remedies and only indicates that any conditions that are put into place must be necessary to ensure that security and public order in Luxembourg are not undermined.[134]

Failure to comply with conditions, as well as a failure to abide by the standstill obligation laid down in the Act may lead to the imposition of a fine of up to € 1 million in case of foreign investors who are natural persons, and a maximum of € 5 million if the foreign investor is a legal entity.[135] The authorities will likely first enjoin a foreign investor to reinstate the situation prior to the completion of the transaction, or to comply with the conditions listed in the screening decision or demand that the investor complies with an alternative set of conditions.[136] The authorities may also withdraw their authorisation of the transaction.[137] Foreign investors may contest the fine before the administrative courts, they must do so within a month of receiving the decision imposing the fine.[138]

3. Conclusion

Foreign direct investment regulation is here to stay in the Benelux countries. It will soon be an inseparable part of the assessment framework for acquisitions and investments in vital and sensitive technology companies throughout the European Union (and beyond).

FDI regulation in Europe ultimately depends on *national* legislative frameworks that apply within each of the EU member states. One central European FDI enforcement system does not exist, although an EU coordination and information framework is in place that in practice does give the European Commission an important coordinating role in the assessment of FDI within the EU.

The FDI regulations of the three Benelux countries have many elements in common. They incorporate rules to determine the scope of the national FDI regulation. They contain rules of procedure to establish how the notification process must take place. They include a regulatory framework on remedies which enforcement authorities may propose in order to resolve objections to an approval decision, as well as sanctions that they can impose on parties which are in breach of notification or standstill obligations.

In terms of remedies and sanctions, the Luxembourg FDI Act is relatively terse. The Belgian and Dutch FDI Acts have a more fleshed out set of potential remedies that may be agreed upon and that can ultimately be made binding upon the parties to the transaction. At the same time there is a noticeable difference between the three jurisdictions in terms of the fines that can be imposed for violating standstill and/or notification obligations. Luxembourg opts for a set maximum amount. In the Belgian regime fines are based on the value of the investment and will therefore differ on a case-by-case basis. The Dutch regime prescribes a turnover-based fine in cases where the statutory maximum is deemed to have insufficient punitive effects.

A further difference between the Dutch Investment Screening Act on the one hand and the Belgian and Luxembourg FDI Acts on the other, is that the Dutch Act applies indiscriminately to investments from within the national territory, the European internal market or third countries. Rather than the origin of an acquiring entity, it is the nature of the target undertaking which determines whether an acquisition activity is to be notified. Thus, the Dutch regime applies to all investments irrespective of the origin of the investor. Since the Dutch Act also applies to investments from investors originating from within the EU, there is arguably a chance that the screening and prohibition of such investments could give rise to tensions between the Netherlands, other EU member states and the European Commission. It will therefore be interesting to see how the screening mechanism will operate in such cases, since the assessment criteria indicate that the investor's country of origin is, in fact, relevant to the substantive risk analysis conducted. The Belgian and Luxembourg FDI Acts apply solely to investors from third countries. In line with Regulation 2019/452, the scope of both Acts extends to entities whose ultimate beneficial owner is an entity or national from/of a third country.

The FDI legislation in the Benelux countries is almost *ready for launch*. Later this year, the regulatory framework will likely be in force in triplicate. It is then up to the competent authorities and legal practice to give further substance to this framework. FDI decisional practice and case law will be built up step by step (and file after file) in the years to come.

134. Article 10(3) and (4) Luxembourg FDI Act.
135. Article 11(7) Luxembourg FDI Act.
136. Article 11(1) and (2) Luxembourg FDI Act.
137. Article 11(3) Luxembourg FDI Act.
138. Article 12 Luxembourg FDI Act.