Netherlands


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1 Foreign Investment Policy

1.1 What is the national policy with regard to the review of foreign investments (including transactions) on national security and public order grounds?

The Netherlands remains one of the world's most attractive destinations for FDI. It offers foreign investors a stable political climate, a developed economy, a highly-qualified labour force, transparent tax guidance and an excellent communications infrastructure. Foreign investments are welcomed across industries, including in the utilities sector that has been extensively privatised. Investors are actively supported by the Netherlands Foreign Investment Agency (NFIA). According to the data collected by the OECD, in 2019, the Netherlands was among the top five FDI recipients worldwide, following directly behind the United States, China, and Singapore.

At the same time, the Netherlands is intensifying its review of FDI inflows. This is mainly caused by the strong rise of Chinese outbound investment in the Netherlands, in Europe and in general in the past decade. The COVID-19 pandemic has given a sense of urgency: in April 2020 the government announced the introduction of general FDI screening for all acquisitions and investments in sectors that are considered vital for national security and public policy.

1.2 Are there any particular strategic considerations that apply during foreign investment reviews?

There is no practice regarding general FDI reviewing yet. Acquisitions and attempts at acquisitions in the recent past have shown that, even though the Netherlands are in general very welcoming to FDI, the acquisition of a company that is considered a crown jewel of the Dutch economy may meet political resistance.

1.3 Are there any current proposals to change the foreign investment review policy or the current laws?

Implementation of the EU FDI Screening Regulation

In March 2019, the European Union adopted the EU FDI Screening Regulation, which is to apply starting from 11 October 2020. The new instrument is designed to enhance coordination among Member States when it comes to reviewing FDI that may affect security and public order.

To implement the EU FDI Screening Regulation, on 17 December 2019, the Dutch government published the bill 'Foreign Direct Investments Screening Regulation (Implementation) Act' (*Uitvoeringswet screeningsverordening buitenlandse directe investeringen*). It proposes to:

(i) assign the Minister of Economic Affairs and Climate as the point of contact;

(ii) establish an authority responsible for the collection of the information; and

(iii) regulate the enforcement of the obligation.

The bill should enter into force between the end of 2020 and the beginning of 2021.

Economy and National Security Review Bill

On 8 September 2020, a bill setting up an *ex-ante* screening mechanism for investments in companies active with vital processes or sensitive technologies in the Netherlands ("**Economy and National Security Review Bill**") was published for consultation. The bill will have retroactive effect, to the effect that investments that took place between 2 June 2020 and the entry into force of the bill may also be scrutinised.

Defence sector

The Dutch Minister of Defence is currently preparing a bill regarding the protection of the Dutch defence technological and industrial base. The bill will introduce a sector-specific test to complement the Economy and National Security Review Bill and will be published for public consultation in the first quarter of 2021.

Bill on reflection period for listed companies

The Dutch government has submitted a bill that would permit private parties to defend themselves against unwanted bids by invoking on a standstill period of 250 days. This is not formally an FDI screening mechanism, as the standstill period would be invoked by private parties and could be directed against Dutch companies as well as foreign ones. Nevertheless, the history of this bill shows that it is meant to give Dutch companies a defence mechanism against foreign activist shareholders.

White Paper on levelling the playing field as regards foreign subsidies

The Commission released the White Paper on levelling the playing field regarding foreign subsidies in June 2020. It signals as problematic situations (i) direct foreign subsidies, (ii) acquisitions facilitated by foreign subsidies, and (iii) unfair bidding in public procurement facilitated by foreign subsidies. All EU Member States, including the Netherlands, can be expected to obtain powers to review these situations in the near future.

2 Law and Scope of Application

2.1 What laws apply to the control of foreign investments (including transactions) on grounds of national security and public order? Are there any notable developments in the last year?

At present, incoming FDI is controlled exclusively in the electricity, gas and telecommunications sectors, through the Mining Act (*Mijnbouwwet*), the Electricity Act (*Elektriciteitswet*), the Gas Act (*Gaswet*), the Regulation for notification of changes of control of the Electricity Act 1998 and the Gas Act (*Regeling melding wijziging zeggenschap Elektriciteitswet 1998 en Gaswet*) and the Telecommunications Act (*Telecommunicatiewet*).

The Telecommunications Act was amended only in May 2020 to include an FDI screening mechanism, which applies retroactively to all relevant transactions that have taken place since 1 March 2020.

The Economy and National Security Review Bill is expected to enter into force at the beginning of 2021.

2.2 What kinds of foreign investments, foreign investors and transactions are caught? Is the acquisition of minority interests caught?

Economy and National Security Review Bill

The Economy and National Security Bill applies to all investments in companies established in the Netherlands when (i) the company is of particular importance for the continuity and resilience of critical processes, or (ii) the company is active in the area of sensitive technologies. Sensitive technologies may relate to (a) dual-use goods, (b) military goods, or (c) any other technology which is classified as sensitive by the Minister.

All acquisitions and investments, whether by foreign or domestic investors, that give control over a relevant company are caught. This proposal intends to complement the existing sectoral regulations (see below) as it applies to any transaction that is not caught by specific sectoral review mechanisms.

Telecommunications sector

An investor is notably deemed to have a controlling interest in the telecommunications company if it:

(i) either directly or indirectly, individually or jointly with other persons, holds at least 30% of the votes in its general meeting;
(ii) has the right to appoint or dismiss more than half of the members of its management or supervisory boards even if all persons entitled to vote cast their votes;
(iii) holds one or more shares granting special rights of statutory control; and/or
(iv) is liable as a partner (*vennoot*) for debts of the company acting under its own name.

Gas and electricity sector

Privatisation of Dutch companies responsible for the national high-voltage grid and the national transmission network is prohibited. Under the Electricity Act, all transactions that result in a change of control over an electricity production plant with a capacity of at least 250 Megawatts must be notified to the Minister. The same type of notification is envisaged in the Gas Act in relation to the change of control over LNG (Liquefied Natural Gas) plants.

Mining sector

The Mining Act (*Mijnbouwwet*) provides that the Dutch state will be entitled to 40% of the proceeds of any mining concession, possibly through a 40% stake in the relevant entity.

2.3 What are the sectors and activities that are particularly under scrutiny? Are there any sector-specific review mechanisms in place?

For the sector-specific provisions, please refer to question 2.2 above.

The Economy and National Security Review Bill will cover investments in companies (i) providing vital processes, or (ii) developing sensitive technologies such as technologies with a military or dual-use application.

Which vital processes and sensitive technology will fall under the scope of the Economy and National Security Review Bill has not yet been decided definitively. Vital processes could include oil and gas supply and distribution, water supply, internet and data supply, access to internet and data traffic, voice services, money transfer, citizen identification and authentication, traffic handling at seaports and airports, and nuclear waste disposal. The scope of 'sensitive technology' is defined in line with definitions used in existing multilateral export control regimes for dual-use goods and strategic goods. The legislator has already indicated that the category of sensitive technology will include only a select number of technology companies.

2.4 How are terms such as 'foreign investor' and 'foreign investment' specifically addressed in the law?

The terms 'foreign investor' and 'foreign investment' are not defined in Dutch law, as the sector-specific regulations apply to all companies, regardless of nationality. Likewise, the Economy and National Security Bill is non-discriminatory as regards the nationality of the investor. It applies to all investors, irrespective of their nationality, to prevent investors from setting up artificial legal structures to circumvent the filing obligation. In addition, this permits the Economy and National Security Bill to catch transactions by criminal organisations, or – in case of sensitive processes – financially instable investors. In the substantive assessment, the nationality of the investor may play a role (see question 4.3 below).

2.5 Are there specific rules for certain foreign investors such as state-owned enterprises (SOEs)?

There are no special rules for SOEs at present. Under the Telecommunications Act and the Economy and National Security Bill, the fact that a company is an SOE is one of the factors that may imply a threat to the public interest.

2.6 Is there a local nexus requirement for an acquisition or investment to fall under the scope of the national security review? If so, what is the nature of such requirement (existence of subsidiaries, assets, etc.)?

The sector-specific regulation and the Economy and National Security Bill require a local nexus as they apply to acquisitions of companies that are established in the Netherlands.

2.7 In cases where local presence is required to trigger the review, are indirect acquisitions of local subsidiaries and/or other assets also caught?

Direct and indirect acquisitions are caught as long as the requisite degree of control is acquired.

3 Jurisdiction and Procedure

3.1 What conditions must be met for the law to apply? Are there any monetary thresholds?

The Economy and National Security Bill will cover all acquisitions by any investor resulting in (a) a change of control, or (b) in the acquisition or increase of a significant influence over companies based in the Netherlands which are (i) deemed essential for the continuity and resilience of vital processes, or (ii) are active in the field of sensitive technology, unless a sector-specific regime applies. Change of control refers to the concept used in EU and Dutch Competition Law. The concept of significant influence leaves room for deviations from Competition Law under particular circumstances, which are yet to be defined.

For the conditions under sector-specific law, we refer to question 2.2 above.

3.2 Is the filing voluntary or mandatory? Are there any filing fees?

Filings are mandatory.

There are no filing fees due under the actual mechanisms. Similarly, it is expected that the filings under the Economy and National Security Bill will not be subject to a filing fee.

3.3 In the case of transactions, who is responsible for obtaining the necessary approval?

Under the Gas act and the Electricity Act, both parties are responsible for notifying their transaction. Under the Telecommunications Act, only the buyer is responsible for the notification.

Under the Economy and National Security Bill, both the investor and the target company will be responsible for the notification of the transaction. However, the investor will be exempted from the filing obligation if the target is under a confidentiality obligation which prevents it from advising the investor that it is involved in vital processes or sensitive technology. This could, for example, be the case of the target supplies of the Ministry of Defence but this cannot be disclosed to the investor due to a confidentiality obligation. In that case, the target company is obliged to notify.

3.4 Can foreign investors engage in advance consultations with the authorities and ask for formal or informal guidance on the application of the approval procedure?

Informal guidance is not provided under the Gas Act, Electricity Act, Telecommunications Act and the Economy and National Security Bill. However, Dutch authorities are normally willing to speak with companies informally.

3.5 What type of information do investors have to provide as part of their filing?

According to the Regulation for notification of changes of control of the Electricity Act 1998 and the Gas Act, a notification must contain information covering:

(i) the installations and relevant parties involved;
(ii) the intended change in control;
(iii) the financial position; and
(iv) the strategy intentions and past performance.

Under the Telecommunications Act, the buyer must only notify the Minister of Economic Affairs and Climate Policy of the intent to acquire a controlling interest in a telecommunications company. However, the Minister has the right to request additional information.

It is as of yet unknown what information must be included in a notification under the Economy and National Security Bill. In line with the EU FDI Screening Regulation, required information can be expected to include ownership structure, information about the value of the investment, the products, services and business operations of the foreign investor and the target company, the Member States in which the foreign investor and the target company conduct relevant business operations and the date when the foreign direct investment is planned to be completed. In addition, we expect that information regarding ties to foreign governments must be provided.

3.6 Are there sanctions for not filing (fines, criminal liability, unwinding of the transaction, etc.) and what is the current practice of the authorities?

As specified in question 2.2 above, a transaction which has not been notified under the Gas Act or the Electricity Act is subject to the annulment of the deal.

Under the Telecommunication Act, the Minister of Economic Affairs and Climate Policy may impose a fine of up to EUR 900.000 in case of a late notification or a failure to notify the deal. If the acquisition of a controlling interest can pose a threat to the public interest, the Minister may either completely prohibit the transaction or prohibit it under suspensive conditions. An acquisition executed despite the Minister's prohibition is considered to be void.

Under the Economy and National Security Bill, the Minister may order the annulment of a transaction which has not been notified. Additionally, the Economy and National Security Bill provides that the Minister shall have the right to order the parties to submit a (new) filing within three months after it has become aware of the fact that a transaction should have been notified, or that incomplete or incorrect information has been provided. Under these circumstances, the Minister may also impose a fine of up to EUR 870.000 or 10% of the turnover of the companies involved in year preceding the infringement.

3.7 What is the timeframe of review in order to obtain approval? Are there any provisions expediting the clearance?

Under the Telecommunication Act, the Minister of Economic Affairs and Climate Policy must decide within eight weeks after receiving the notification whether to approve or prohibit the transaction. If no decision is made before the established deadline, an approval is deemed granted. If further investigation is required, the Minister has the option of extending the timeframe by six months. In addition, where the Minister requests additional information, the period is suspended until this information is received.

In principle, the same deadlines will apply to notifications under the Economy and National Security Bill. Additionally, the Minister may extend the review period with another three months if the transaction falls within the scope of the EU FDI Screening Regulation.

3.8 Does the review need to be obtained prior to or after closing? In the former case, does the review have a suspensory effect on the closing of the transaction? Are there any penalties if the parties implement the transaction before approval is obtained?

Under the sectoral regulations and the Economy and National Security Bill, approval must be obtained prior to closing.

Under the Gas Act and Electricity Act, a notification must be made no later than four months before the intended change of control. Under the Telecommunications Act, a notification must be made no later than eight weeks before the intended date of closing.

Please refer to question 3.6 above for the relevant penalties for implementing the transaction before approval is obtained.

3.9 Can third parties be involved in the review process? If so, what are the requirements, and do they have any particular rights during the procedure?

Third parties are not involved in the review process and do not have any formal participation rights.

3.10 What publicity is given to the process and the final decision and how is commercial information, including business secrets, protected from disclosure?

According to the new chapter of the Telecommunication Act (Article 14a.4 sub 7), a prohibition shall be communicated to the party to which the prohibition is addressed and to the party concerned. In addition, all prohibitions will be published on the internet to be defined by the Minister. There is no similar provision in the Gas Act and Electricity Act.

According to the EU FDI Screening Regulation, the confidentiality of information collected in the process of screening must be observed. Nevertheless, decisions under the Economy and National Security Review Bill may potentially be published following the granting of a request to that end on the basis of Government Information (Public Access) Act.

3.11 Are there any other administrative approvals required (cross-sector or sector-specific) for foreign investments?

There are no other administrative reviews in the Netherlands specifically aimed at foreign investments. Transaction may fall under the merger control review.

4 Substantive Assessment

4.1 Which authorities are responsible for conducting the review?

The Minister of Economic Affairs and Climate Policy is the main competent authority to conduct the review. The contact point that will be set up to perform the review under the Economy and National Security Bill is the Dutch Investment Review Agency (*Bureau Toetsing Investeringen* or BTI).

4.2 What is the applicable test and who bears the burden of proof?

Under the Gas and Electricity Act, the Minister may prohibit an envisaged transaction or attach certain conditions to it on grounds of public safety or security of supply. Under the Telecommunications Act, the Minister can prohibit an envisaged transaction if it poses a threat to the public interest, notably if wilful termination of the relevant services by the acquirer would cause a breach of the confidentiality of communications or an unacceptable interruption of online services to the public in general or to defence and security services in particular.

The Minister is responsible for gathering the information if further research is necessary. The parties are obliged to provide the Minister with the requested information.

Under the Economy and National Security Bill, the Minister shall determine whether the transaction poses a threat to national security. It is up to the parties to provide sufficient information to enable the Minister to carry out the assessment.

4.3 What are the main evaluation criteria and are there any guidelines available?

There is no official guidance available. The only insight is given by the Telecommunications Act, which provides that a threat to the national interest may be considered to exist if the investor is a *persona non grata* or a state that can reasonably be expected to use its influence to the detriment of the public interest, as well as any investor connected to such state. Investors who do not cooperate with national authorities or whose identity cannot be established may also be considered a threat to the public interest.

The Economy and National Security Bill provides that several factors must be taken into account in the evaluation whether an investment poses a potential risk to national security: the ownership structure of the acquiring company; the transparency thereof; restrictions under (international) law; and the security situation in the investor's country or region of residence. In this regard, the degree of cooperation by the acquirer with the authorities also constitutes an important factor.

In cases relating to the continuity and resilience of vital processes, the following additional factors may be taken into account: the track record of the investor regarding the management of vital processes and its compliance with the relevant rules; connections to jurisdictions that have offensive programmes aimed at disturbing or harming vital processes; financial solvability of the acquirer; and/or connections to jurisdictions that are not bound by relevant international treaties or jurisdictions that do not have good track record of compliance with the relevant international treaties.

In cases relating to sensitive technologies, the following additional factors may be taken into account: the track record of the investor relating to protection, trading or handling of sensitive technologies and compliance with export control regulations; connections to jurisdictions that are not bound by export control regulations or do not have a good track record of compliance with the relevant export control regulations; connections to jurisdictions which do not have a transparent division between civil and military research and development programmes; motives of the acquirer if they differ from normal commercial or economic motives; and/or connections to jurisdictions that have offensive programmes aimed at acquiring a strategical or technological dominant position.

4.4 In their assessment, do the authorities also take into account activities of foreign (non-local) subsidiaries in their jurisdiction?

These subsidiaries might be taken into account in the review

process, for example, when assessing whether an envisaged transaction poses a threat to the public interest. In addition, under the Electricity Act and the Gas Act, the parties must provide information about the past performance of the acquirer in the electricity or gas industries. Other (non-local) subsidiaries could be relevant for this information.

4.5 How much discretion and what powers do the authorities have to approve or reject transactions on national security and public order grounds?

The Minister may prohibit an envisaged transaction under the Telecommunications Act or the Economy and National Security Bill if it threatens the public interest or national security. However, the Minister is bound by the conditions as explained under questions 2.1 and 4.3. Moreover, the powers of the Minister must be exercised in accordance with the principles of the Dutch General Administrative Law Act. The Minister's decision must be motivated and must explain why a controlling interest cannot be accepted in a particular case. Courts are expected to perform a genuine check of the motivation of the Minister's decision.

4.6 Can a decision be challenged or appealed, including by third parties? Is the relevant procedure administrative or judicial in character?

A decision prohibiting the acquisition of a controlling interest under the Telecommunications Act is open to administrative objection and appeal that can be challenged in court.

The EU FDI Screening Regulation stipulates that foreign investors and the company concerned must have the possibility to seek recourse against screening decisions of the national authorities. A decision under the Economy and National Security Bill is a decision under the Dutch General Administrative Law Act and is open to reconsideration by the BTI (administrative objection) and appeal at the Rotterdam District Court and the Industry Appeal Tribunal (CBb).

4.7 Is it possible to address the authorities' objections to a transaction by providing remedies, such as undertaking or other arrangements?

If an acquisition or investment is deemed to pose a threat to national security, the Dutch Minister of Economic Affairs and Climate Policy may impose mitigating measures, such as appointing a trustee to work within the company, obliging the company to grant a licence on its knowhow to keep the knowledge or technology available to the national vital infrastructure or, where absolutely necessary, unwinding the acquisition or investment.

4.8 Are there any other relevant considerations? What is the recent enforcement practice of the authorities and have there been any significant cases? Are there any notable trends emerging in the enforcement of the FDI screening regime?

Due to the novelty of the FDI screening procedures, the Dutch authorities have not yet developed solid enforcement practices. Based on the public debate and EU and international developments we expect enforcement practice to launch in the (very) near future.

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