

**International
Comparative
Legal Guides**



Practical cross-border insights into FDI screening regimes

Foreign Direct Investment Regimes

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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”).

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, Europe and in general over the past decade. The COVID-19 pandemic has added 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. On 8 September 2020, the bill setting up this FDI screening mechanism, the Economy and National Security Bill (“ENSB”) was published for consultation. After extensive criticism from the Dutch Council of State, the revised Investment Screening Bill (“ISB”) was sent to Parliament on 30 June 2021. After potential amendments from Parliament and the Senate, the ISB is expected to enter into force by the end of 2021 or early 2022.

The ISB provides more legal certainty than the ENSB. It is clear as to which companies are in scope of the FDI screening mechanism. It also limits retroactive reviews to transactions from 8 September 2020 onwards rather than from 2 June 2020.

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

There is no practice regarding general FDI review yet. Acquisitions and attempts at acquisitions in the recent past have shown that, even though the Netherlands is in general very welcoming to FDI, acquisitions of companies that are considered crown jewels 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?

Investment Screening Bill

On 30 June 2021, the ISB was sent to Parliament. This bill sets up an *ex-ante* screening mechanism for investments in companies

active with vital processes or sensitive technologies. The ISB will have retroactive effect to the extent that investments which took place after 8 September 2020 and fall within the definitions of vital processes or sensitive technologies and pose a risk to Dutch national security, may be reviewed.

Defence sector

The Dutch Minister of Defence is preparing a bill regarding the protection of the Dutch defence technological and industrial sector. The bill will introduce a sector-specific test to complement the ISB and is expected to be published for public consultation in the first quarter of 2022.

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*).

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

Investment Screening Bill

The ISB applies to investments in companies established in the Netherlands when the company is (i) involved in vital processes, or (ii) active with sensitive technologies. The ISB catches all mergers and demergers, acquisitions, and other investments, whether by foreign or domestic investors, that result in (a) a change of control over a relevant company, (b) the acquisition of a relevant company, or (c) an increase or acquisition of significant influence over a relevant company.

FDI screening of an increase or acquisition of significant influence over a relevant company only applies to sensitive technologies.

This proposal intends to complement sectoral screening mechanisms (see below) as it applies to any investment that is not caught by specific sectoral review mechanisms.

Telecommunications sector

An investor is 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, notice of all transactions resulting in a change of control of an electricity production plant with a capacity of at least 250 megawatts must be given to the Minister. The same type of notification is envisaged in the Gas Act in relation to the change of control over Liquefied Natural Gas (“LNG”) 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.

The ISB will cover investments in companies (i) involved in vital processes, or (ii) active with sensitive technologies.

The ISB and its explanatory memorandum specifically mention what functions and processes are considered vital and give examples of companies that are relevant, namely heating network operators, activities in relation to storage, production and processing of nuclear materials, KLM, Schiphol Airport (including all activities related to air traffic management, passenger and luggage handling), the Rotterdam Port Authority, banks, financial market infrastructure, and companies active with natural gas exploration, transport and storage.

In addition, whilst not explicitly mentioned in the ISB, but rather in its explanatory memorandum, water management (drinking water and the management of water (resources)) is also considered a vital process. Additional vital processes can be added, but any addition must be confirmed by a formal law. Current candidates are companies that are active with road and rail transport infrastructure.

Regarding critical technologies, the ISB confirms that only military and dual-use technologies are caught. Other technologies can be added by Ministerial Decree, but the explanatory memorandum states that this cannot happen lightly. Quantum technology is currently considered a potential candidate to fall within the scope of critical technologies.

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

The ISB catches all mergers and demergers, acquisitions, and other investments, whether by foreign or domestic investors,

that result in (a) a change of control over a relevant company, (b) the acquisition of a relevant company, or (c) an increase in a significant influence over a relevant company.

2.5 Are there specific rules for certain foreign investors (e.g. non-EU / non-WTO), including state-owned enterprises (SOEs)?

At the moment, there are no special rules for SOEs or other foreign investors. The ISB explicitly captures both foreign and domestic investors. Under the Telecommunications Act and the ISB, the fact that a company is an SOE is one of the factors that may imply a threat to national security and is considered in the FDI review.

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.)?

All sector-specific regulations, by their very nature, require a local nexus. Under the ISB, relevant companies are target companies that are established in the Netherlands. The explanatory memorandum to the ISB clarifies and expands the scope of the targets that the ISB captures. It stipulates that the place of establishment should not be interpreted formally as a statutory requirement, but rather this criterion aims to capture entities that conduct actual economic activities in the Netherlands. The place of establishment should be based on geographical location of the activities and management, irrespective of its legal form.

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 if the requisite degree of control or significant influence is acquired.

3 Jurisdiction and Procedure

3.1 What conditions must be met for the law to apply? Are there any monetary or market share-based thresholds?

The ISB applies to all mergers and demergers, acquisitions, and other investments, whether by foreign or domestic investors, that result in a change of control of any company established in the Netherlands which is (i) deemed essential for the continuity and resilience of vital processes, or (ii) is active in the field of sensitive technology. In addition, any investments that lead to the acquisition or increase of significant influence over companies based in the Netherlands active in the field of sensitive technology are captured by the ISB.

Change of control mirrors the definition of control used in EU and Dutch Competition Law. Acquiring or increasing significant influence occurs where one person or entity may cast at least 10, 20 or 25% of the votes in the target’s shareholders meeting. The applicable threshold will depend on the type of company over which significant influence is acquired or increased. This will be determined in a subsequent Ministerial Decree.

The ISB applies unless a sector-specific regime applies.

3.2 Do the relevant authorities have discretion to review transactions that do not meet the prescribed thresholds?

No, but the relevant authorities have the possibility under the ISB to alter the significant influence thresholds, the designation of categories of vital companies, and sensitive technologies by Ministerial Decree. Alterations to the designation of categories of vital companies must subsequently be enacted by a formal law.

3.3. Is the filing voluntary or mandatory and is there a specific filing form? Are there any filing fees?

Filings under sector-specific regimes are mandatory and no filing fees are due. Similarly, filings under the ISB, once it enters into force, will be mandatory and it is expected that these filings will also not be subject to a filing fee either.

3.4 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 the transaction. Under the Telecommunications Act, only the buyer is responsible for the notification.

Under the ISB, both the investor and the target company are responsible for the notification of the transaction. The investor, however, cannot be held responsible for a failure to notify the transaction where it could not have known that a notification was required (for example, as a result of confidentiality constraints on the target company). In such cases, only the target company is responsible for the notification of the transaction.

3.5 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 explicitly provided for under the Gas Act, Electricity Act and the Telecommunications Act, but Dutch authorities are usually willing to speak with companies informally.

Under the ISB and upon request, the Minister will provide guidance on the scope of the ISB as soon as possible. Where appropriate, information on the scope of the ISB will be provided in a manual.

3.6 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 only needs to notify the Minister of Economic Affairs and Climate Policy of the intention to acquire a controlling interest in a telecommunications company. However, the Minister has the right to request additional information.

It is yet unknown what information exactly is to be included in a notification under the ISB. This will be clarified by a Ministerial Decree. It is expected that at least the following information will be required:

- (i) information on the parties and their representatives;
- (ii) information on the investor, including the structure of ownership, details and identity of the ultimate investor and their participating interest;
- (iii) value of the transaction;
- (iv) description of business activities of the investor and the target;
- (v) description of the jurisdictions in which the investor and target are active;
- (vi) description of the financing of the transaction as well as its sources;
- (vii) timing of the transaction; and
- (viii) all relevant facts and circumstances that may have a role in the assessment of the transactions, such as ties with foreign governments, financial, fiscal and criminal information as well as information of other authorities (including foreign) on the investor and target.

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

As mentioned under question 2.2, an unnotified transaction under the Gas Act or the Electricity Act will annul the transaction.

Under the Telecommunication Act, the Minister of Economic Affairs and Climate Policy may impose a fine of up to EUR 900,000 where there was late notification or a failure to notify the deal. If the acquisition of a controlling interest poses a threat to 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 void.

Under the ISB, if a transaction is implemented before the assessment by the Minister has taken place, a fine of up to EUR 870,000 or 10% of the turnover in the calendar year preceding the infringement of the companies involved may be imposed.

Alternatively, if a transaction is within the scope of the ISB, but has not been notified, the Minister may undertake an assessment *ex officio*. The Minister shall have the right to order the parties to submit a (new) filing within three months after it has become aware that a transaction should have been notified, or that incomplete or incorrect information has been provided in the notification.

A transaction executed despite the Minister's decision to prohibit the transaction is void. In the event that the prohibited acquisition took place through a stock exchange, it is subject to annulment. 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 the year preceding the infringement.

3.8 Is there a filing deadline and 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 deadline, an approval is deemed granted. If further investigation is required,

the Minister may extend the deadline by up to six months. If the Minister requests additional information, the total timeframe is suspended until this information is received.

The ISB notification procedure to the Dutch Investment Review Agency (*Bureau Toetsing Investerings*, the “BTI”) is a two-phase system:

- (i) Phase I runs from the day the investor submits the notification. A decision should be taken within eight weeks, but this period can be extended to six months. Phase I ends with an announcement by the BTI, either that no review is necessary or – in case that the investment may pose risk to national security – that an evaluation decision is required; and
- (ii) Phase II runs when the investor submits a request for an evaluation decision. The decision period in Phase II is another eight weeks and can also be extended up to six months, but the time used by the BTI in Phase I will be deducted from Phase II with the total timeframe not exceeding six months.

As is the case with notifications under the Telecommunications Act, the total timeframe is suspended if the BTI requests additional information.

Finally, another three months may be added to the six-month period if the notification must be shared with the European Commission and other Member States under the EU FDI Regulation.

3.9 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?

Under the sectoral regulations and the ISB, approval must be obtained prior to closing.

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

3.10 Are there any penalties if the parties implement the transaction before approval is obtained? Can the parties close the transaction at global level prior to obtaining local clearance?

If a transaction, captured by the regime, is executed without notifying the BTI may:

- (a) impose an administrative enforcement order; or
- (b) impose an administrative fine; and
- (c) within three months after it became aware that a transaction was not notified, require the parties to notify the transaction.

If the BTI requires notification, the already executed transaction must be suspended. This implies that all rights of control are automatically invalid. The BTI will then conduct its regular review.

The ISB does not provide explicitly whether a transaction can be closed at the global level prior to obtaining clearance. It cannot be excluded that a global standstill obligation will apply, if only to capture entities that conduct actual economic activities in the Netherlands without being formally established in the Netherlands (see question 2.7).

3.11 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.

3.12 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 Telecommunications 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.

Decisions under the ISB may potentially be published following the granting of a request made in terms of the Government Information (Public Access) Act.

3.13 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. Transactions may, however, fall under the competition law merger control review.

4 Substantive Assessment

4.1 Which authorities are responsible for conducting the review?

The Minister of Economic Affairs and Climate Policy will issue the decisions under the ISB. The contact point that will be set up to perform the review under the ISB is the 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 impose conditions 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. This would be especially important if wilful termination of the relevant services by the acquirer would cause a breach of the confidentiality of communications, an unacceptable interruption of online services to the public in general, or to defence and security services in particular.

Under the ISB, the BTI will assess whether an investment poses a risk to national security and the BTI therefore bears the burden of proof. National security is defined with reference to the concept of national security under the Treaty on the European Union and the concept of public security and essential interest of its security under the Treaty on the Functioning of the European Union. In particular, it is concerned with the continuity of critical processes, maintaining the integrity and information of critical or strategic importance for the Netherlands, preventing unwanted strategic dependence on other countries.

Companies are expected to cooperate with the authorities and provide sufficient information to enable the BTI to carry out its assessment. The degree to which the investor cooperates with the authorities will be a factor in the assessment.

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

The ISB will consider the following main criteria when evaluating whether an investment poses a risk to national security:

- the investor's ownership structure;
- the degree of transparency regarding the investor's identity;
- whether the investor has committed crimes;
- restrictions under national and international law; and
- the security situation in the acquirer's country or region of residence.

Other assessment criteria are specific to the investment, such as the exploitation track record in the case of the acquisition of vital infrastructure, and the track record of the acquirer on information security in case of an investment in sensitive technology.

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

Activities of foreign subsidiaries might be considered in the review process, for instance, when assessing whether an envisaged transaction poses a threat to the public interest.

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 subsidiaries, including non-local subsidiaries, could be relevant in 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 BTI has considerable leeway to assess national security risks based on one or more criteria as provided in the ISB (see question 4.3).

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 then be challenged in court.

A decision under the ISB is a decision under the Dutch General Administrative Law Act and is open to reconsideration by the BTI (administrative objection), followed by appeal proceedings at the Rotterdam District Court and the Trade and Industry Appeals Tribunal (CBb). This process is also open to third parties, individually and directly concerned by a decision under the ISB.

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

Any authorities' objections may be addressed by offering remedies. In fact, a transaction will only be prohibited if the risks identified cannot sufficiently be resolved by remedies.

Possible remedies include:

- regulating access to sensitive information;
- appointing employees in key positions according to security or integrity policies;
- appointing a security officer or committee with the authority to block access and report back to the Minister;
- bundling the sensitive activities in a Dutch entity;
- offering certain services and goods with limitations;
- appointing a separate supervisory board for the Dutch entity; and/or
- maximising the amount of shares that may be acquired or the obligation to certify the shares.

The ISB also provides specific remedies for the acquisition of sensitive technology. Those include the obligation to transfer to or share certain technology, source code, genetic code, or knowledge with a third party or the Dutch state as well as the duty to notify the Minister before activities are transferred to third countries – after which the Dutch state may decide to acquire the technology or require licensing on fair, reasonable and non-discriminatory conditions.

The Minister may appoint a third party to monitor compliance with any remedies.

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. We do expect that future enforcement will be pragmatic and reasonable, as the Explanatory Memorandum to the ISB states that the Netherlands want to continue to attract FDI.



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