



**CORPORATE
ACCOUNTABILITY IN A
CHANGING BUSINESS
WORLD | FOREIGN
DIRECT INVESTMENT**

THE NETHERLANDS

BE UNSTOPPABLE

BUREN

LEGAL | TAX | NOTARY

This paper serves to outline the rules for foreign investments and acquisitions of businesses which are related to sensitive and national security interests. These limitations under Dutch law are limited in number to date but an European Union regulation is about to change that by establishing a framework for the screening of foreign direct investments into the EU. The paper is based on a contribution prepared for the ALFA virtual ICS held in March 2021.

According to the 2018 OECD's Foreign Direct Investment Regulatory Restrictiveness Index , the Netherlands is one of the least restrictive countries for foreign direct investments worldwide.

Current Dutch screening mechanisms: Electricity Act, Gas Act and Telecommunications Act

The Electricity Act, the Gas Act and, since 1 October 2020, the Telecommunications Act require the parties to a transaction to notify such transaction to the Dutch Ministry of Economic Affairs (and Climate Policy) in case such transaction would lead to any change of control with respect to an electricity, gas or telecommunications company.

This screening obligation applies to any change of control, regardless the identity of the investor, which leads to a change of "predominant control" in any electricity company, gas company or telecommunications company. A transaction may be prohibited or be subjected to certain conditions for reasons of public safety or supply security. If parties fail to notify the Ministry, a transaction is voidable.



Current Dutch screening mechanism: Financial Supervisions Act

The Dutch Financial Supervisions Act regulates supervision of financial institutions (such as banks, trust companies and insurers) and the entire financial system. Certain changes of control in companies and institutions that are subject to the Financial Supervisions Act are to be reported to the Authority for Financial Markets (Autoriteit Financiële Markten) or the Dutch Central Bank (De Nederlandsche Bank).

European Union ("EU") FDI Screening Regulation

In 2019, an EU regulation establishing a framework for the screening of foreign direct investments into the Union (Regulation (EU) 2019/452) (the "FDI Screening Regulation") entered into force. It applies to all foreign direct investments ("FDIs") into each of the EU Member States effective from 11 October 2020 and has retrospective effect on all such investments back to 10 April 2019.

The FDI Screening Regulation aims to increase the cooperation between EU Member States and the EU Commission in respect to FDIs. If an EU Member State is screening an FDI, it is required to inform the other EU Member States and the EU Commission about such FDI.

The EU screening framework introduced by the FDI Screening Regulation focuses on FDI's that are likely to affect security or public order of EU Member States or the EU as a whole, thereby aiming to protect strategically significant sectors which are included in the following, non-exhaustive, list:

- critical infrastructure (physical or virtual): energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, including land and real estate crucial for the use of such infrastructure;

- critical technologies: AI, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies
- supply of critical inputs including energy, raw materials and food security;
- access to, or control of, sensitive information, including personal data; or
- freedom and pluralism of the media.

If an EU Member State or the EU Commission is of the opinion that an FDI in an EU Member State could affect security or public order, such EU Member State or the EU Commission may provide comments to such EU Member State. If an EU Member State provides comments to another EU Member State, it will have to simultaneously inform the EU Commission about this. The EU Commission will then inform all other EU Member States. The EU Member State in which the FDI takes place will then be asked to share information about the FDI. Such comments may be drawn up until 15 months following completion of an FDI.

The information to be shared about an FDI shall include:

- the ownership structure of the foreign investor and of the undertaking in which the FDI is planned or has been completed, including information on the ultimate investor and participation in the capital;
- supply of critical inputs including energy, raw materials and food security;
- the approximate value of the FDI;
- the products, services and business operations of the foreign investor and of the undertaking in which the FDI is planned or has been completed;
- the Member States in which the foreign investor and the undertaking in which the FDI is planned or has been completed conduct relevant business operations;
- the funding of the investment and its source, on the basis of the best information available to the Member State;
- the date when the FDI is planned to be completed or has been completed.

Apart from the above list, an EU Member State or the EU Commission may request additional information.

Dutch implementation of screening mechanisms

Even though an EU regulation enters into force without implementation by national governments being required, certain aspects will need to be regulated on a national level in order to fit into the respective state's national system. In the Netherlands, the respective legislation is the draft "Screening of economy and national security act" (Wet toetsing economie en nationale veiligheid) ("Dutch Screening Act") which is currently in the legislation process. If the Dutch Screening Act enters into force in its current form, the screening mechanism will apply retroactively to investments made after 2 June 2020.

The Dutch Screening Act will require the notification of a change of control in certain Dutch companies to the Dutch Ministry of Economic Affairs (and Climate Policy). This notification obligation only applies to companies which are of fundamental importance for vital processes or active in the field of sensitive technologies. A specific list will be drawn up by ministerial decree. In this respect, the term "control" refers to the ability to exercise decisive influence on a target company, either through shareholding, or on a de facto basis once the investment will have taken place. This notification obligation relates to both Dutch and foreign investors. The notification needs to be made either by the target company or by the acquirer. If another more specific national screening mechanism applies to the FDI, this more specific mechanism will prevail over the screening mechanism of the Dutch Screening Act.

Non-compliance with the Dutch Screening Act will be subject to sanctions, including the suspension of voting rights, information rights and other shareholder rights, and penalties of up to EUR 870,000 or 10% of the target company's turnover.

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