

Foreign Direct Investments rules in the Netherlands

The regulatory framework in a nutshell



In the Member States of the European Union, including the Netherlands, specific rules apply for natural persons or undertakings that want to invest in national companies responsible for vital economic processes or active on the market for sensitive technology (including dual use technology). This brochure provides a step-by-step explanation of the FDI review procedure in the Netherlands and marks the most important principles behind the relevant legal framework.

Introduction

EU Regulation 2019/452 establishing a framework for the screening of foreign direct investments into the European Union (**hereinafter 'Regulation'**) regulates foreign direct investment ("**FDI**") in companies which have an establishment in a Member State of the European Union, including the Netherlands. The Regulation has direct effect in the Dutch legal system, but it exists alongside national legislation and thus does not replace it. EU Member States have the discretion to issue their own set of FDI regulation within the boundaries of EU law. Each Member State is responsible for its own tailor-made piece of FDI legislation, which can lead to substantial differences between European countries. For a (non-EU) investor that considers investing in a Dutch company, it is therefore crucial to have an overview as well as an understanding of the relevant Dutch FDI framework.

Content of EU Regulation 2019/452

As a preliminary note, the Regulation does not establish a fully-fledged EU level FDI control regime, nor does it replace existing national rules. Instead, it introduces an overarching FDI information framework for the whole European Union, designed to complement national rules.

The Regulation lays down a set of minimum requirements for national FDI control regimes (whether pre-existing or adopted following the Regulation). The Regulation

provides for a number of criteria and examples that EU Member States can draw on in establishing national FDI legislation and in determining whether an investment is likely to affect national security or public order. Furthermore, the Regulation provides a mechanism for cooperation and information exchange between the EU Member States and the European Commission (including the possibility of issuing opinions).

The Regulation does not prescribe which institution may review a foreign investment that falls within its scope. As noted, the decision on whether to screen an investment, and whether to adopt any control measures, remains the sole responsibility of EU Member States. The national foreign investment rules that apply to a particular investment determine the relevant body competent to review an investment.

Content of the (future) Dutch FDI regime

The Dutch legislator has drafted a legislative proposal (= 'Economy and National Security Screening Bill', hereinafter '**Screening Bill**') that creates a general screening mechanism for FDI. The Dutch Minister of Economic Affairs (or its executives) will act as the enforcement body of FDI legislation in the Netherlands.

The screening mechanism applies to transactions that cause a change in control within one or more undertakings in the Netherlands (1) that are considered responsible for vital economic processes or (2) that are active on the market for sensitive technology (including dual use technology). Any change in control in those types of companies by foreign investors must be notified to the Minister of Economic Affairs.

The Minister of Economic Affairs will subsequently take a screening decision within eight weeks. This term can be extended to six months. The Minister can, in case of threats to national security, choose to allow a notified transaction under specific terms, or (if this is deemed insufficient to remedy the threats), prohibit the notified transaction. Any action that infringes the screening decision is considered void.

The Screening Bill is currently still in the legislative process. Once the Screening Bill goes into force it will have retroactive effect and may apply to investments made since 2 June 2020 that come within the scope of the bill. The Dutch government admits that retroactive intrusion in the ownership of companies is a harsh measure. The FDI-rules will therefore only apply in circumstances in which the public threat of an investment outweighs the intrusiveness of the act.

The Screening Bill focuses on two areas when determining whether national security is at stake:

- **Critical infrastructure or vital process.** The relevant areas are specified on the website of the National Coordinator for Counterterrorism and Security (“**NCCS**”) but can be further elaborated by a governmental decree (please see below for a list of example areas);
- **Sensitive technology.** This area mainly focuses on strategically important products that can be used for both civil and military purposes.

The Screening Bill does not discriminate between sensitive investments from within the national territory, the European internal market or third countries: the Dutch regime can apply to all investments regardless of the nationality of the investor.

Screening checklist for envisaged investments in the NL

We advise prospective investors to go through the following checklist before making any investments in a Dutch company:

1. The **first step** is to define the sector in which the target undertaking is active.
2. The **second step** is to decide which screening mechanism applies to investor’s envisaged investment.
3. The **third step** is to determine the effect of the investment on the control situation within the target undertaking.

4. At the **fourth step**, investors need to establish when their investment will take place and which corresponding FDI regime is applicable.
5. Upon completion of the four steps, a **screening decision** may follow.

Below, this checklist is further elaborated.

Step 1: The definition of the sector in which the target is active

The first step is to define in which sector or area the target company is active. This will determine whether the Dutch Screening Bill applies to the intended investment or not.

The following questions are relevant in this context:

- ***Is the investment aimed at a company that is providing vital processes?***

The list of vital processes can currently be found on the website of the NCCS under <https://www.nctv.nl/onderwerpen/vitale-infrastructuur/overzicht-vitale-processen>. This list may be subject to future changes made by Governmental Decree.

Examples of activities/processes that currently qualify as vital are:

- (i) Oil supply,
- (ii) Internet and data services,
- (iii) Transportation and distribution of gas, electricity, and drinking water,
- (iv) (Main) road transport,
- (v) Storage, production and processing of nuclear materials,
- (vi) Payment and securities transactions.

- ***Is the investment aimed at a company active in the production of sensitive technology?***

The list of sensitive technologies is based on Annex I of Regulation (EU) 428/2009 that sets up an EU regime for the control of export or transfer of dual-use products.

Dual-use items can be used for both civil and military purposes. The list of sensitive technologies can be subject to future changes made by Governmental Decree.

If the answer to either question is positive, please continue with the second step. If the answer to both questions is negative, the investment will neither have to be notified under the normal regime nor will it be subject to possible further scrutiny under the retroactive regime (please see below under Step 4 for an explanation of these regimes).

Step 2: Is the investment covered by any specialized screening mechanism?

The second step is to determine whether the investment is already covered by any specialized screening mechanism that is already in force. The Dutch legal system has several screening mechanisms in specific sectors. The interaction between the Screening Bill and these other screening mechanisms differs. If the envisaged investment is covered by the following acts, notification of the investment is based on the specialized act instead of on the Screening Bill.

Please find below the relevant legislative acts:

- Article 86f of the Electricity Act 1998;
- Article 66e of the Gas Act;
- Article 14a.2 of the Telecommunications Act;
- Article 5:38 of the Financial Supervision Act;
- Article 15 and 18 of the Drinking Water Act.

Moreover, the Dutch Competition Act puts in place a general merger control system for investments/acquisitions that cause a lasting change in control within an undertaking if the concentration in question fulfils certain criteria such as certain minimum turnover thresholds of the parties involved. The merger control screening mechanism has the aim of preventing or mitigating the creation of concentrations

that have the ability to significantly impede competition within a specific market. This can particularly be the case through the creation or strengthening of a dominant position in a relevant market. The aim of the merger control system is therefore essentially different from that of the previously mentioned FDI-screening mechanisms. This distinction is further accentuated by a different procedural framework. The Dutch legislator has therefore decided **that the supervisory Screening Bill mechanism and the merger control system of the Competition Act exist side by side**. Consequently, in case an investment falls under both regimes, the investment has to be notified to the competent authorities under both laws.

As mentioned above, application of a 'lex specialis' **takes the place of** the Screening Bill. If the investment does not fall within the aforementioned acts (except for the Competition Act), investors can continue to Step 3.

Step 3: The effect of the investment on the control situation within the target

If the investment is aimed at a target company as described in Step 1, the investor has to determine whether the investment will lead to a change of control within the target company. A change of control is defined in the same way as it is defined under the competition law regime. This means that one has to determine whether the investment gives rise to a legal or de facto control within the target company.

If the answer to this question is affirmative, investors have to continue to Step 4. If the answer to the question is negative, the investment will neither have to be notified under the normal regime nor will it be subject to possible further scrutiny under the retroactive regime.

The Screening Bill allows for a different interpretation of the control threshold by Governmental Decree for specific sectors or companies (in the form of a 'significant influence' standard), effectively lowering the review threshold. Public bodies such as

the State of the Netherlands, Provincial authorities and Municipal bodies, are exempt from the notification requirement.

Step 4: When does the investment take place?

The fourth step is to assess at what moment the investment takes place. As stated before, there are two different regimes applicable to foreign direct investments taking place as of 2 June 2020. The first regime applies to investments made between 2 June 2020 and the time of entry into force of the Screening Bill (= the retroactive regime). The second regime is the regime that will apply to investments made after the entry into force of the Screening Bill (= the normal regime).

An investment can hence fall in one of three different periods:

- **Does the investment take place before 2 June 2020?**
 - In this case, no screening mechanisms apply, except the sector specific mechanisms that were already in place.
- **Does the investment take place between 2 June 2020 and the date of entry into force of the Screening Bill?**
 - A retroactive screening may apply to investments. However, the relevant authority will only use this retroactive competence in cases where the breach of legal certainty is proportionate to the threat that the investment poses to national security.
 - There is no notification requirement for these investments.
- **Does the investment take place after the date of entry into force of the Screening Bill?**
 - Investors must notify the Minister of Economic Affairs of the intended investment.
 - The Minister will take a decision within eight weeks after the screening notification.
 - If further research is necessary, this deadline can be extended to six months.

Step 5: The screening decision

The proposed Screening Bill lays down a number of testing criteria concerning the prospective acquirer that the Minister takes into account in its national safety assessment. Some examples of weighting factors are:

- (i) Ownership structure,
- (ii) Transparency,
- (iii) Restrictions under (international) law,
- (iv) The security situation in the country of establishment of the acquirer,
- (v) Track record of the acquirer and the way it deals with security,
- (vi) Marketing or use of technology,
- (vii) Compliance with applicable legal requirements concerning security, classification and/or export control.

Following a screening notification or a possible retroactive screening, as described in the above, the Minister of Economic Affairs can take three types of decisions:

- **The first decision type is to allow the intended investment without further restrictions.**
- **The second decision type is to allow the intended investment while laying down specific additional obligations or requirements for the investor to adhere to.** These requirements intend to remove a perceived threat to national security. Potential measures can be:
 - Placing sensitive technology in custody of the Dutch State;
 - Compliance with additional security and user guidelines;
 - A prohibition that the target company sells certain goods to certain undertakings in other countries.
- **The third decision type is to prohibit the intended investment.** This decision will be taken if imposing additional obligations or requirements cannot remedy the risk of a threat to national security.

Key contacts in case of a possible screening

If you have any questions with regard to the application of the Dutch FDI regime to your envisaged investments in a Dutch company or business, please do not hesitate to contact AKD's FDI specialists mentioned below.



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