akd

Regulation of Foreign Direct Investments in the Netherlands

The regulatory framework in a nutshell

In the Member States of the European Union, specific rules apply to foreign investors whose investments may impact national security or public order. This brochure provides a step-by-step explanation of the FDI screening procedure in the Netherlands and outlines 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 ("**Regulation**") has served as an incentive for Member States of the European Union ("**EU**"), including the Netherlands, to set up screening mechanisms for foreign direct investments ("**FDI**") in companies which have an establishment in a Member State of the European Union ("**EU**"),

The Regulation grants EU Member States the discretion to issue their own sets of FDI regulation. As a result, each Member State is responsible for its own tailor-made FDI legislation, which can result in substantial differences between the various Member States. For investors considering investing in a Dutch company it is therefore of crucial importance to have a good overview as well as a thorough understanding of the relevant Dutch FDI framework.

Substance of the Regulation

The Regulation does not establish a fully-fledged EU-level FDI control mechanism but, instead, introduces an overarching FDI information framework for the whole European Union and gives substance to a number of FDI principles that EU Member States may, if they want, incorporate into their own legal systems. The Regulation provides for a number of criteria and examples that EU Member States can draw inspiration from when establishing domestic FDI legislation and when determining whether an investment is likely to affect national security or public order.

In addition, the Regulation provides for a mechanism for cooperation and information exchange between the EU Member States and the European Commission, which may also issue opinions on its own initiative.

The Regulation does not prescribe which EU Member State or institution should screen foreign investments falling within its scope. As noted earlier, the decision whether or not to screen an investment and whether or not to adopt any control measures remains the sole responsibility of individual EU Member States. The national foreign investment rules that apply to a specific investment determine which body has the authority to screen that investment.

Implementation Act Screening Regulation foreign direct investments

In the Netherlands, the Regulation has been transposed into domestic legislation through the Implementation Act Screening Regulation foreign direct investments ("**Implementation Act**"). Having entered into force on 4 December 2020, this Act provides that the Minister of Economic Affairs and Climate Policy ("**Minister**") is the point of contact in the Netherlands for all issues related to the execution of an FDI screening. The Minister is responsible for passing on the information which the Netherlands is required to share with other EU Member States as part of their cooperation, among other things. The Implementation Act also lists the sources from which the Minister can retrieve information (such as the Trade Register, the Land Register and other public registers) and the government organisations that can be requested to provide information (such as the Minister of Finance, the Netherlands Authority for Consumers and Markets, ACM, and the AIVD and MIVD intelligence and security services).

Substance of the - future - Dutch FDI regime

The Dutch legislator implemented a FDI screening mechanism by introducing the Investments, Mergers and Acquisitions (Security Screening) Act (Wet veiligheidstoets

investeringen, fusies en overnames, or "**The Dutch FDI-act**" for short). On 17 May 2022, the Dutch Senate adopted the bill for this Act. The Dutch FDI-act aims to minimise the risks to Dutch national security by introducing a notifying obligation and an assessment of potential investments relating to specific acquisition activity such as investments and mergers. Risks could be posed by strategic dependency, erosion of the continuity and resilience of vital processes, or the loss of the integrity and exclusivity of knowledge and information of critical or strategic importance to the Netherlands.

The Act applies to acquisition activities, such as mergers, joint ventures and demergers, involving Dutch target undertakings which are (i) vital suppliers or operators of high-tech campuses or (ii) active in the field of sensitive technology. Rather than the registered office, the decisive factor in determining whether a target undertaking is established in the Netherlands is the location of that entity's actual management and activities.

The Dutch FDI-act provides for a screening procedure to determine whether an acquisition activity is permitted. Every intention to perform an acquisition activity must be notified to the Minister. This notifying obligation rests either on the acquiring entity or on the target undertaking. In practice, the FDI screening is carried out by the Investment Assessment Agency (Bureau Toetsing Investeringen) on the Minister's behalf.

On receipt of a notification, the Minister normally decides within eight weeks whether an assessment decision is required. Before taking the assessment decision (or deciding that no decision is required) the standstill obligation applies. This means that the acquisition activity must be suspended until such time as the Minister has issued the final decision. If an acquisition activity poses a risk to the country's national security, the Minister may opt to allow a reported transaction subject to specific conditions or - if these conditions do not sufficiently mitigate the risk - to prohibit the transaction. Whenever an acquisition activity is wrongly not reported, the Minister may impose an order to prevent the undesirable consequences of the activity or annul the activity.

In addition, any activity in breach of the Dutch FDI-act will result in any control rights obtained by the acquiring entity as part of the acquisition activity concerned being suspended.

The Dutch FDI-act is expected to enter into force in the first six months of 2023. However, the Act may under circumstances have retroactive effect with regard to acquisition activities that took place from 9 September 2020 onwards. Up to eight months after the entry into force of the Dutch FDI-act, the Minister may order that any parties involved in acquisition activities notify these activities after all, and then screen these activities for their risk to national security. This makes the Dutch FDI-act a piece of legislation that has practical relevance even prior to its entry into force.

The assessment whether national security is at risk focuses on three groups of undertakings:

- **Suppliers of vital infrastructure or vital processes.** The relevant areas are specified in the Dutch FDI-act and may in anticipation of legislative amendments be temporarily extended by governmental decree;
- **Undertakings operating high-tech campuses.** An operator of a high-tech campus is an undertaking managing a campus on which a collective of undertakings is active and where public-private cooperation takes place to work on technologies and applications that are of vital economic and strategic importance to the Netherlands;
- **Suppliers of sensitive technology.** This group mainly produces strategically important products that can be used for both civil and military purposes (dual-use goods).

The Dutch FDI-act does not discriminate between 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 reported. Thus, the Dutch regime applies to all investments irrespective of the nationality of the investor.

Screening checklist for proposed investments in the Netherlands

We recommend that potential investors closely read the following checklist before making any investment 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 the investor's proposed 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 applies.
5. Once these four steps have been completed, an **assessment** or **screening** decision may be taken (**fifth step**).

This checklist is elaborated below.

Step 1: Defining the sector in which the target undertaking is active

The first step is to define in which sector or area the target undertaking is active. This serves to determine whether or not the Dutch FDI-act applies to the proposed investment.

The following questions are relevant in this context:

- **Is the investment aimed at an undertaking that provides vital processes the continuity of which is of vital importance to Dutch society?**

  The Dutch FDI-act lists the following undertakings as vital suppliers:
  - Heating suppliers
  - Nuclear power suppliers
  - The operator of Schiphol Airport, KLM, specific ground handling services (fuel provision, fire safety, emergency services)
  - Rotterdam Port Authority
  - Undertakings active in the extraction, transportation or storage of natural gas
  - Banks having their registered offices in the Netherlands
  - Specific undertakings providing financial infrastructure (AEX)

- **Is the investment aimed at an undertaking active in the production of sensitive technology?**
  - Sensitive technologies include military goods and dual-use products.
  - The list of sensitive technologies is based on Annex I to Regulation (EU) 428/2009 setting up an EU regime for the control of export or transfer of dual-use products.
  - Dual-use products are products which can be used for military as well as civil purposes. The list of sensitive technologies is subject to future changes made by governmental decree.

- **Is the investment aimed at an undertaking that operates a high-tech campus?**

  If the answer to either question is affirmative, please continue with the second step. If the answer to all three questions is negative, neither will the investment have to be reported under the default regime nor will it be subject to further screening, if any, under the retroactive regime (see step 4 for an explanation of the various regimes).

Step 2: Is the investment subject to a special screening mechanism?

The second step is to determine whether the investment is subject to a special screening mechanism already in place. For specific sectors, the Dutch legal system has several specific screening mechanisms in place.

If the proposed investment is covered by any of the following acts, notification of the investment is based on the particular act rather than the Dutch FDI-act.
The relevant acts are named below:

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

What's more, the Dutch Competition Act puts in place a general merger control system for investments/acquisitions that bring about a permanent change in control within an undertaking if the concentration in question fulfils certain criteria, such as specific minimum turnover thresholds of the undertakings involved. The merger control 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.

Thus, the aim of the merger control system is quintessentially different from the FDI screening mechanisms mentioned previously. In fact, the distinction is further accentuated by differences in procedural frameworks. It is for this reason that the Dutch legislator has decided to allow the screening mechanism introduced by the Dutch FDI-act and the merger control system of the Competition Act to co-exist. As a consequence, whenever an investment, proposed or actual, is subject to both regimes, this investment must be reported to the competent supervisory authorities under both Acts.

As noted previously, the application of a special Act **supersedes the Dutch FDI-act**. If the investment is not subject to any of the Acts mentioned earlier (with the exception of the Dutch Competition Act), step 3 is next.

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

If the investment is aimed at a target undertaking as described in step 1, it is up to the acquiring entity/target undertaking to determine whether the investment will cause a change of control within the target undertaking. The definition of the term 'control' in the Dutch FDI-act ties in with the definition as used in the Competition Act. Control is defined as the ability to exercise decisive influence on the activities of an undertaking on the basis of actual or legal circumstances.

If the answer to this question is affirmative, the investor should continue to step 4.
If the answer to this 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 Dutch FDI-act also applies to investments aimed at acquiring or enlarging significant influence of an acquiring entity on the activities of a target undertaking, if such investments concern a target undertaking active in the field of highly sensitive technology. The threshold values are allocated by sector or by number of undertakings. The bill for the Dutch FDI-act set the threshold values at: 10%, 20% or 25% of the number of votes capable of being cast in the general meeting of a target undertaking. Consequently, for these undertakings the notification obligation applies irrespective of the extent of control within the meaning of competition law.

Public bodies, such as the State of the Netherlands, provincial authorities and municipal bodies, are exempt from the notification obligation.

Step 4: When does the investment take place?

Step 4 is all about determining the moment when the acquiring activity takes place. As noted previously, two different regimes apply to foreign direct investments that have taken place since 9 September 2020.

The first regime, i.e. the retroactive regime, applies to investments made between 9 September 2020 and the moment the Dutch FDI-act enters into force. The second regime, i.e. the standard regime, applies to investments taking place after the Dutch FDI-act enters into force.

It follows that an investment may fall into one of three distinct periods:

- **Did the investment take place before 9 September 2020?**
  - In that case, no screening mechanism applies, save for the sector-specific mechanisms that were in place already.

- **Does the investment take place between 9 September 2020 and the date of entry into force of the Dutch FDI-act?**
  - A retroactive screening may apply to the investment. However, the relevant authority will only exercise this retroactive power in cases where the breach of legal certainty is proportionate to the threat that the investment poses to national security or public order.
  - There is no independent notification obligation for these investments.

- **Does the investment take place after the date of entry into force of the Dutch FDI-act?**
  - Entities under the notification obligation must notify the Minister of the proposed acquiring activity.
  - The Minister will typically take a decision within eight weeks after the screening notification.
  - If further research is needed, the eight-week period may be extended by no more than six months.

Step 5: The screening decision

The Dutch FDI-act lays down a number of screening criteria relating to the prospective investor which the Minister shall take into account when assessing the risk to national security or public order. Factors to be taken into consideration include:

(i) Ownership structure
(ii) Transparency
(iii) Restrictions under national or international law
(iv) The security situation in the country where the acquiring entity is established
(v) The acquiring entity's track record and the way it deals with security issues
(vi) Marketing or the use of technology
(vii) Compliance with applicable laws and regulations on security, classification and/or export controls

On receipt of a screening notification or a potential retroactive screening, as described earlier, the Minister can take any one of three decisions:

1. **The proposed investment is allowed without further restrictions.**

2. **The proposed investment is allowed subject to specific conditions.**

The aim of such conditions is to remove the perceived threat to national security or public order.

Potential conditions include:

- Placing sensitive technology in custody of the State of the Netherlands
- Compliance with additional security and user regulations
- A ban prohibiting the Dutch establishment of the undertaking from selling specific goods to specific undertakings in other countries.

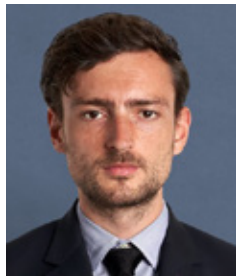
3 **The proposed investment is prohibited**

This decision is taken if the imposition of additional obligations or requirements fail to eliminate the risk of a threat to national security or public order.

Key contacts in the event of a possible screening

If you have any questions about the application of the Dutch FDI regime to your proposed investments in a Dutch company or undertaking, please do not hesitate to contact AKD's FDI specialists named below.

Joost Houdijk
Expertise: EU & Competition Law / Regulatory
T: +31 (0)88 253 5079
E: jhoudijk@akd.eu



Octave Schyns
Expertise: EU & Competition Law / Regulatory
T: +31 (0)88 253 5055
E: oschyns@akd.eu

Karst Vriesendorp
Expertise: EU & Competition Law / Regulatory
T: +31 (0) 88 253 5053
E: kvriesendorp@akd.eu

T: +31 88 253 5000
E: info@akd.eu
akd.eu

Version January 2023