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Regulation of Foreign Direct Investments in the Netherlands

The regulatory framework in a nutshell

On the 1st of June 2023, the Dutch FDI Act entered into force, marking a significant milestone in the regulation of (foreign) direct investment in the Netherlands. With the Dutch FDI Act, proposed investments in several vital and/or technologically sensitive undertakings must be notified to the Minister of Economic Affairs before the Proposed transaction can take place. 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.

Substance of the Dutch FDI regime

On 1 June 2023 the Investments, Mergers and Acquisitions Screening Act (= *Wet veiligheids-toets investeringen, fusies en overnames*, or "**Dutch FDI Act**") entered into force. The Dutch FDI Act aims to minimise the risks to Dutch national security by introducing a notification obligation and a subsequent screening mechanism for certain categories of proposed concentrations (such as acquisitions and mergers) and of (even) minority shareholder investments. Specifically, the FDI Act is aimed to prevent investments that may lead to 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 Dutch FDI Act applies to changes in control of or the acquisition of influence in Dutch target undertakings which are (i) vital suppliers, (ii) operators of high-tech campuses, or (iii) 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 investment is permitted. Proposed investments that fall within the scope of the Dutch FDI Act must be notified to the Minister. This notification obligation rests either on the acquiring entity and/or on the target undertaking. In practice, the FDI screening is carried out by the Bureau for Investment Screening (Bureau Toetsing Investeringen or '**BTI**'), which is part of the Ministry of Economic Affairs and Climate Policy.

On receipt of a notification, the Minister in principle decides within eight weeks whether an assessment decision is required. Before taking the assessment decision (or deciding that no decision is required) a standstill obligation applies to the parties involved. This means that the proposed investment must be suspended until the Minister has issued the final decision. If an investment poses a risk to the country's national security, the Minister may opt to allow a notified investment provided certain conditions are met or - if these conditions do not sufficiently mitigate the risk - to prohibit the transaction. Whenever an acquisition activity is not reported, the Minister may impose an order to prevent the undesirable consequences of the activity or annul the investment. In addition, investments in breach of the Dutch FDI Act may result in the suspension of any control rights obtained by the acquiring entity.

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

- **Suppliers of vital infrastructure or vital processes.** The targeted undertakings and sectors 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, such as the High Tech Campus Eindhoven, 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.** These undertakings produce, sell or develop military goods or dual use goods (which may be used for both civil and military purposes).

Unlike many other FDI regimes, the Dutch FDI Act does not discriminate between investments from acquirers based in the Netherlands, 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 notified. Thus, the Dutch regime is country-of-origin-neutral.

Checklist for proposed investments in the Netherlands

The following checklist may provide useful guidance for companies considering investments in the Netherlands:

1. The **first step** is to define whether the target undertaking is subject to a notification obligation imposed by legislation other than the FDI Act.
2. The **second step** is to determine whether the target undertaking falls within the scope of the FDI Act.
3. The **third step** is to determine whether the investment leads to a change of control in the target undertaking.
4. If the result of the three steps is that a notification obligation applies, the **fourth step** is to submit a notification to the BTI, who may decide whether it is necessary to take an assessment decision and who, if so, may (conditionally) approve or prohibit the investment.

Step 1: Does the proposed investment fall under a notification obligation other than the FDI Act?

The Dutch Electricity Act 1998, Gas Act, the Drinking Water Decree and Telecommunications Act contain sector specific notification obligations. If one of these notification obligations applies, the Dutch FDI Act does not apply, regardless of whether the investment falls within the scope of the FDI Act.

Sectoral specific notification obligations may apply to:

- Electricity production installations and the undertakings operating such installations
- Liquified natural gas plants and undertakings operating LNG-plants
- Providers of certain telecommunication services
- Drinking water companies

The relationship between the FDI Act and merger control

The fact that the investment may not be subject to a notification obligation under the Dutch FDI Act does not automatically mean that there is no obligation to notify under the Dutch Competition Act. The Dutch Competition Act puts in place a general merger control system for concentrations 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. Consequently, whenever an investment, proposed or actual, is subject to both regimes, this investment must be reported to the competent supervisory authorities under each of both Acts.

Step 2: Is the target undertaking subject to a notification obligation under the FDI Act?

Once it is established that no other notification obligation applies, the second step is to define in which sector or area the target undertaking is active. This serves to determine whether 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:
  - Operators of heat transportation networks;
  - Companies active in the nuclear sector;
  - The operator of Schiphol Airport and KLM;
  - A provider of ground handling services (responsible for example for the storage of aircraft fuel);
  - The 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);
  - Other categories of vital suppliers that can be designated by governmental decree.
- ***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 2021/821 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 may be subject to future changes made by governmental decree.
- ***Is the investment aimed at an undertaking that operates a high-tech campus?***
  Operators of high-tech campuses are companies that manage a site on which companies are active and where public-private cooperation takes place in technologies and applications that are of economic and strategic importance to the Netherlands.

If the answer to one of these questions is affirmative, the target undertaking falls within the material scope of the Dutch FDI Act. In this case, please continue to Step 3. If the answer to all three questions is negative, the investment is not subject to a notification obligation under the Dutch FDI Act.

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 2, 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 corresponds to 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 in principle does not have to be notified, unless the target undertaking is active in highly sensitive technologies. In that case, a notification obligation is triggered if the acquiring undertaking acquires 10%, 20% or 25% of the voting rights of that target undertaking. Consequently, for this type of undertaking the notification obligation applies irrespective of the extent of control within the meaning of competition law.

⚠ The Dutch FDI Act does not apply to public bodies, such as the State of the Netherlands, provincial authorities and municipal bodies.

Step 4: Investigation by the BTI

Proposed investments falling under the Dutch FDI Act must be notified to the BTI and may not be implemented prior to the completion of the notification procedure. Both the acquirer and the target have a duty to notify, unless the acquirer is unaware that the target is involved in areas that require notification (because the target has confidentiality obligations). In that case, only the target has a duty to notify.
Upon receipt of the notification, the BTI will initiate a Phase 1 procedure. During Phase 1, the BTI will conduct a preliminary assessment to determine if the investment poses risks to national security.

The Dutch FDI Act sets out the criteria on the basis of which the BTI carries out the assessment of the risk to national security. Factors to be taken into consideration include:

(i) Ownership structure;
(ii) Transparency;
(iii) Sanctions 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 in which it deals with security issues;
(vi) Compliance with applicable laws and regulations on security, classification and/or export controls.

If the BTI determines that there are minimal or no risks to national security, it may decide to clear the proposed investment without an assessment decision. BTI will proceed to a Phase 2 procedure if it deems a more thorough assessment necessary. The Phase 2 investigation may result in either:

(1) clearance of the proposed investment;
(2) clearance subject to certain remedies;
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 prohibition of the proposed investment.
This decision is taken if the imposition of additional obligations or requirements fails to eliminate the risk of a threat to national security or public order.

Temporal scope

In principle the Dutch FDI Act only applies to investments made after its entry into force on 1 June 2023. However, investments made after 8 September 2020 but before 1 June 2023 that raise national security concerns on reasonable grounds, may be called in for mandatory notification. Targets active in the areas of sensitive technology as designated by governmental decree or as operator of a high-campus are exempted from retro-active application of the Dutch FDI Act.

Notification procedure

Both Phase 1 and Phase 2 are subject to an eight-week time limit, which may be extended, in principle, by six months in total. If additional information is required, the investigation is suspended. The BTI's decisions are subject to appeal.

Notifications are to be submitted using the prescribed notification form (accessible in Dutch via this link). This FDI notification form inter alia requires information regarding the proposed investment, the companies involved and their ownership structure. If The BTI proceeds to an in-depth Phase 2 procedure, the notifying parties will be requested to submit a separate more detailed form.

If parties fail to notify an investment that falls within the material scope of the Dutch FDI Act, or if they violate the standstill obligation, or provide incorrect or misleading information, they may receive a fine of up to € 900,000 or 10% of the target or acquirer's worldwide turnover. The BTI may also impose a periodic penalty payment. All the more reason for companies to properly check whether an FDI notification obligation applies to envisaged investments in Dutch companies and, if so, to ensure that the whole procedure is completed correctly.

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
M: +32 477 88 5571
T: +31 88 253 5079
E: jhoudijk@akd.eu

Ayça Kul
Expertise: EU & Competition Law | Regulatory
M: +32 472 07 2380
T: +32 2 629 4250
E: akul@akd.eu

Karst Vriesendorp
Expertise: EU & Competition Law | Regulatory
M: +32 (2) 629 4275
T: +31 88 253 5053
E: kvriesendorp@akd.eu

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