# Foreign Investment in the Netherlands

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A Practice Note setting out the legal regime for foreign investment review in the Netherlands. It sets out the requirements relating to protecting national interests in certain sectors and provides an overview of the Dutch Investment Review Act and the Dutch Telecommunications Act.

Until 1 June 2023, there was no comprehensive, overarching framework regarding foreign investment review in the Netherlands. Foreign investment review laws in place in the Netherlands were applied to specific sectors only. The notification requirements resulting from these laws typically apply irrespective of the nationality of the acquirer. There is usually no exemption for acquirers based in the Netherlands or the European Union. Outside of European Union and Dutch general merger control rules – which are not discussed in this note – the main laws currently in force in the Netherlands containing foreign investment review-related provisions are:

- Electricity Act 1998.
- Gas Act.
- Financial Supervisory Act.
- Gambling Act.
- Healthcare Market Regulation Act.
- Mining Act.
- Telecommunications Act.

These laws continue to apply. Additionally, on 1 June 2023, the Dutch Investment Review Act covering investments in vital providers and sensitive technology in the Netherlands came into force (see *Dutch Investment Review Act*).

The note focuses on the following legislation:

- Regulation 2019/452/EU establishing a framework for the screening of foreign direct investments into the Union (FDI Regulation) (see *FDI Regulation*) (REGULATION (EU) 2019/452 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL).
- The *Implementation Act for Regulation 2019/452/EU* (see *Dutch implementation of the FDI Regulation* ).
- The Dutch Investment Review Act (*Wet veiligheidstoets investeringen, fusies en overnames*), including the Dutch Investment Review Decree (*Besluit veiligheidstoets investeringen, fusies en overnames*, the Dutch Scope of Application Sensitively Technology Decree (*Besluit toepassingsbereik sensitieve technologie*), and the Dutch Investment Review Regulation (*Regeling veiligheidstoets investeringen, fusies en overnames*) (see *Dutch Investment Review Act*).

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- The Dutch Telecommunications Act, as amended by the Dutch Act on undesired control telecommunications (see *Telecommunication Act*).
- In line with the terminology adopted in the FDI Regulation, this note uses below the term “foreign direct investment” (FDI) to denote foreign investment review-related notification requirements in the Netherlands.

## FDI Regulation

On 19 March 2019, the EU adopted the FDI Regulation. Under the FDI Regulation, natural persons or companies of a third country (that is, a country outside the EU) intending to make, or having made, a foreign direct investment must be screened by local authorities. The FDI Regulation sets out a set of baseline principles by which EU member states such as the Netherlands must abide when maintaining, amending, or adopting FDI mechanisms. The FDI Regulation establishes an EU-wide FDI cooperation framework through which the European Commission and the EU member states can coordinate their actions on FDI such as by sharing information.

Under the FDI Regulation, direct investment is defined as investment of any kind by a foreign, non-EU investor that aims to establish, or to maintain, lasting and direct links between the foreign investor and a party in an EU member state to carry on business in a member state.

Each member state screening foreign direct investment must notify the European Commission if they investigate a (proposed) qualifying investment. They must also notify other member states "whose security or public order is deemed likely to be affected", (A*rticle 6, FDI Regulation*.) If the Commission or the member state believes that the proposed investment is likely to affect security and public order in another member state, or holds relevant information on the transaction, they may, respectively, provide an opinion or make comments. These comments or opinion must be provided within 35 days of the initial notification from the member state's government (*Article 6(7), FDI Regulation*). The member state undertaking the screening will give “due consideration” to the comments of the other member states and to the European Commission’s opinion.

The member state's government remains in control of the final decision regarding the investment or transaction.

Accordingly, the term of duration of the screening process under the FDI Regulation is suspended if another EU member state, or the Commission, indicates its intention to provide comments or issue an opinion on the investment or transaction under review under the FDI Regulation. The suspension ends, and the term starts running again, when the opinion is received by the member state's government. Similarly, the term is suspended if the screening member state's government itself requests the Commission, or another member state, to make comments or issue an opinion on the proposed investment.

To implement the FDI Regulation, in December 2020, the Netherlands introduced the *Implementation Act for Regulation 2019/452/EU* (*Uitvoeringswet screeningsverordening buitenlandse directe investeringen*) (IAR).

## Dutch Implementation of the FDI Regulation

The Netherlands assigned the Minister of Economic Affairs and Climate as responsible for implementing the FDI Regulation. Only limited measures have been taken in the Netherlands in connection with its implementation.

The IAR regulates the three elements necessary for the effective application of the FDI Regulation. The IAR:

- Establishes a point of contact, which is the Minister of Economic Affairs and Climate (*article 2, IAR*).
- Sets out the authority to process, collect, and provide information to and by administrative bodies (*article 3, IAR*).

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- Sets out who is responsible for enforcing the obligation for investors and companies receiving investment to provide certain information to the authorities (*article 4, IAR*).
- The IAR does not contain a screening mechanism or investment test to apply to see if any security risks or damage of a "vital process" is involved. Screening mechanisms can be found in sectorial acts, as in the Dutch Investment Review Act (see *Dutch Investment Review Act*).

## Dutch Investment Review Act

On 1 June 2023, the Dutch Investment Review Act entered into force. The Investment Review Act aims to protect Dutch national security by introducing a test for acquisition activities that lead to changes of control (as defined in the Dutch Competition Act) over vital providers (see, *Vital Providers*), providers or managers of a corporate campus, or companies active in the field of sensitive technology, including highly sensitive technology. In addition, in relation to companies active in the field of sensitive technology (see, *Sensitive Technology*), the acquisition or increase of significant influence – which is below the level of control – over these companies is equally caught under the Act.

Under the Act, the Minister of Economic Affairs and Climate is the competent authority. However, in practice, proposed acquisition activities caught under the Act must be reported to the Dutch Investment Review Office (*Bureau Toetsing Investeringen* (BTI)), which falls under the Ministry of Economic Affairs and Climate. This office acts as a coordinator of the Act and assesses whether an acquisition activity poses one or more risks to national security based on statutory criteria. If there are risks, the BTI can impose additional requirements and regulations (conditional clearance) or, in extreme cases, a prohibition.

### Investments within Scope of the Investment Review Act

The following are within scope of the Investment Review Act:

- Investments that lead to a change of control over a company that is based in the Netherlands, and:
    - which is a vital provider; or
    - which is a provider or a manager of a corporate campus; or
    - is active in the field of sensitive technology, including highly sensitive technology.
    - (*Article 2, Investment Review Act*.)

Control in this context means the ability to exercise decisive influence, either based on shareholding or on a factual basis.

- Additionally, in the case of a target company active in the field of sensitive technology, including highly sensitive technology, the acquisition or increase of significant influence – which is below the level of control – is also within the scope of the Investment Review Act.

The Act does not apply, *inter alia*, if:

- The Dutch state, provinces, municipalities or other public bodies is the acquirer.

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- A sector-specific national security test applies to the activity to be acquired, such as under the Telecommunications Act (see *Telecommunication Act*).
- (*Article 5, Investment Review Act*.)

## Vital Providers

The Investment Review Act set outs vital providers, such as in the field of transportation of heat, nuclear energy, air transport, banking, infrastructure for the financial market, recoverable energy, gas storage, and in the port area (*Article 7, Investment Review Act*). Additional vital providers can be added subsequently by general measure of government (*Algemene Maatregel van Bestuur, (AMvB)*).

## Sensitive Technology

Sensitive technology includes:

- Dual-use products for which an export licence is required (for example, military products). The export of dual-use products from the Netherlands often requires an export licence. Annex l of Regulation (EU) no. 2021/821 lists the products which need a licence.
- Military goods, as referred to in Article 2 of the *Strategic Goods Implementation Regulation 2012* (*Uitvoeringsregeling strategische goederen 2012*).

(*Article 8, paragraph 1, Investment Review Act*.)

However, by ministerial decree, dual-use and military items can be excluded from being defined as sensitive technology. In addition, other technologies can be designated by a ministerial degree as sensitive technology. This is provided that:

- They could be essential for the functioning of defence, investigation, intelligence and security services.
- The availability and presence of these technologies within the Netherlands or within allies of the Netherlands is essential to prevent unacceptable risks to the availability of certain essential products or services.
- They are characterised by a wide range of applications within different vital areas processes or processes that affect national security.

(*Article 8, paragraph 3, Investment Review Act*.)

## Screening Process and Government Powers

The Minister of Economic Affairs and Climate shall assess whether an investment leads to the realization of one or more risks to national security. However, in practice BTI acts as a coordinator. An investment cannot occur before a decision has been made (*Article 10, Investment Review Act*).

## Obligation to Notify

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The obligation to notify will apply to both the investor and the target company. However, the investor will be exempted from the obligation to report if the investor cannot know that the investment is subject to a notification obligation due to a secrecy obligation of the target company(*Article 11, Investment Review Act*). A filing form template has been published as an annex to the Investment Review Regulation.

## Duration of Screening Process

The Minister of Economic Affairs and Climate must make a review decision within eight weeks of receiving a notification for a decision. If further investigation is necessary, the Minister may extend the term by a reasonable term, but not by more than six months. If the Minister requests additional information, the period will be suspended with effect from the day on which the Minister submits the request for additional information up to the day the requested information is provided.

If it appears that there is a foreign direct investment as defined under the FDI Regulation, the period will be extended by a maximum of three months. If no review decision has been made within the period, the activity will be permitted by operation of law (*Article 12, Investment Review Act*).

## Assessment of Foreign Investments

When the Minister of Economic Affairs and Climate assesses whether an investment may create a risk to national security, they take into account certain factors. These include whether:

- The ownership structure of an acquirer is sufficiently transparent.
- The acquirer or the person under whose influence the acquirer is, is subject to sanctions.
- The security situation in the country of which an acquirer is a resident, or in the country in which the acquirer's government is located or in the countries of the surrounding region, is volatile.
- The acquirer has committed a criminal offence or is under the influence of a person or legal person who has committed a criminal offence.
- An acquirer did not co-operate, or insufficiently co-operated, in the investigation of the above factors.
- Moreover, the Minister of Economic Affairs and Climate will consider the following factors in relation to the target being a vital producer:
- The acquirer has a poor track record of operating or managing the relevant vital process or complying with relevant requirements.
- The acquirer is a resident of, or the acquirer's central administration is located in, or the acquirer is under the influence of, a state known to have programmes aimed at disrupting or compromising the integrity of a vital process.
- The acquirer has the financial resources to make the necessary investments in the vital process.
- The state of which the acquirer is a resident, or in which the acquirer's central administration is established, or under whose influence the acquirer is, has a good track record of complying with international law.

In addition, the Minister of Economic Affairs and Climate will consider the following factors in assessing whether an activity by a company active in the field of sensitive technology potentially poses a risk to national safety:

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- The track record of the acquirer in maintaining the security, the use of sensitive technology and complying with applicable laws and regulations on security or export control.
- The level of export controls in the state in which the acquirer is resident, or in which the central administration of the acquirer is established, or under whose influence the acquirer is under.
- If the acquirer is a resident of, or the acquirer's central administration is located in, or the acquirer is under the influence of a state of which it is known, or for which there are grounds to suspect, that it has no or an inadequate or non-transparent distinction between civil and military research and development programmes.
- The motives of the acquirer. For example, the Minister will consider whether such motive is about gaining access to sensitive technology for purposes other than commercial exploitation.
- If the acquirer is a resident of, or the acquirer's central administration is located in, or the acquirer is under the influence of a state of which it is known or for which there are grounds to suspect that it has an offensive program aimed at acquiring sensitive technology to gain technological or strategic dominance.

(*Article 19-21 Investment Review Act*.)

Based on their review, the Minister will decide if the foreign direct investment is permissible. In exceptional circumstances, the Minister can reassess an investment, even if they originally decided that it was permissible. Such exceptional circumstances are applicable in case of serious security risks or in case of an increased threat to Dutch sovereignty.

### Consequences of Carrying out Unauthorized Acquisition Activities

Expected consequences under the Investment Review Act are nullity respectively voidability of a transaction and the imposition and enforcement of an order to undo the effects of a transaction.

### Implications of the Investment Review Act for M&A transactions

The Investment Review Act may impose an extra burden on M&A transactions and lead to investments taking longer to complete. For example, when a party wants to make a direct investment, it needs to consider whether such investment is within scope of the Act. It may be necessary to include a condition precedent in the agreement of a M&A transaction as clearance by the Minister of Economic Affairs and Climate is required.

## Telecommunication Act

On 1 October 2020, the *Telecommunication Sector (Undesirable Control) Act (TSC)* came into force. It amended the Telecommunications Act by introducing a screening mechanism for the telecommunications sector in *chapter 14a* (Undesirable control in telecom parties).

An investment leading to a change in “predominant control” (*overwegende zeggenschap*) in a telecommunications party, where such control results in relevant influence in the telecommunications sector, will be scrutinised by the Minister of Economic Affairs and Climate. However, in practice, BTI acts as a coordinator. Investments in a certain provider of an electronic communications network or service, or a hosting service, internet node, trust service, or a data centre not for own use, are within scope. The Minister of Economic Affairs and Climate can prohibit predominant control from being acquired or retained if they find facts or circumstances indicating a public interest threat.

### Predominant Control

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Predominant control exists if after the acquisition the holder or acquirer of such control:

- Alone or together with persons acting in concert directly or indirectly, holds at least 30% of the voting rights in the general shareholders' meeting.
- Alone or together with persons acting in concert is able to appoint or dismiss the majority of the directors or the supervisory directors of a legal entity.
- Holds one or more shares with special controlling rights attached to it.
- Has a telecommunication branch.
- Becomes a fully liable partner in a partnership (see *Practice Note, Trading Vehicles: Overview (The Netherlands): Partnerships*).
- Is a sole trader (see *Practice Note, Trading Vehicles: Overview (The Netherlands): Sole Trader (Eenmanszaak)*).
- (*Article 14a.3, TSC*.)

## Public Interest Threat

- The Minister of Economic Affairs and Climate can prohibit predominant control from being acquired or retained if they find facts or circumstances indicating a public interest threat. There can only be a threat to the public interest if predominant control leads to relevant influence in the telecommunications sector, and the acquirer or holder:
- Is or was an undesirable natural person or is a state, legal entity or person where it is known there are reasonable grounds to suspect that they intend to influence a telecommunications party to enable abuse or deliberate failure.
- Has close links with or is under the influence of such state, legal entity or person or is a person with respect to whom there are grounds to suspect such links or influence.
- Has a track record suggesting that the risk of relevant influence in the telecommunication sector will probably increase significantly.
- Cannot be established.
- Does not co-operate, or does not co-operate sufficiently, with investigating the above circumstances.

The same broad powers to prohibit predominant control apply when the Minister receives new information about the investor that leads to the conclusion that the public interest may be threatened. This is even if the circumstances only arise after the notification to and approval by the Minister.

The parties may suggest measures to mitigate the perceived threat and avert a decision prohibiting control. If so, the Minister can adopt a conditional clearance decision, but will retain the power to reverse it if the parties fail to implement the measures.

## Relevant Influence in the Telecommunications Sector

- Relevant influence is defined in the Telecommunications Act and the Decree on Undesired Control of Telecommunications (*Besluit ongewenste zeggenschap telecommunicatie*).

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- Relevant influence in the telecommunications sector exists if abuse or intentional failure of the telecommunications party can lead to:
- Breach of confidentiality in internet traffic and telephone communications.
- A telecommunications services outage for a large number of users or for the national or military security and intelligence agencies.
- (*Article 14a.4, paragraph 3, TSC*.)
- The criteria set out in the Decree on undesired control of telecommunications to define relevant influence act in practice and *de facto* like jurisdictional thresholds to a telecommunications party. The thresholds relate to providing:
- An internet access service or telephone service to more than 100,000 end users in the Netherlands.
- An electronic communications network over which internet access services or telephone services are offered to more than 100,000 end users in the Netherlands.
- An internet node to which more than 300 autonomous systems are connected.
- Data centre services with a power capacity of more than 50MW.
- Hosting services for more than 400,000 .nl domain names.
- Qualified trust service.
- An electronic communications service or electronic communications network, data center service or trust service to the Dutch General Intelligence and Security Service, the Dutch Ministry of Defence, the Dutch Military Intelligence and Security Service, the Dutch National Coordinator for Counterterrorism and Security, or the Dutch National Police Service.
- A combination of services as referred to in in the first five subsections above, which add up together to a threshold value.

## Who Must Notify?

In principle, the investor is responsible for securing approval and filing notification. However, if the target company is bound by a secrecy obligation regarding the provision of telecommunication services, the target is not allowed to disclose this to an investor. In that case, the obligation to notify falls on the target company to which the secrecy obligation applies.

(*Article 14a.2, paragraph 1, TSC*).

## Duration of Screening Process

The Minister of Economic Affairs and Climate must be notified of the intended acquisition at least eight weeks before its completion. If the acquisition takes place through a public offer for a listed telecommunication party, such notification must coincide with the public announcement of the public offer (*Article 14a.2, paragraph 2, TSC*). The Minister must decide within eight weeks after receipt of the notification. If the Minister requires additional information, the Minister can suspend the term of eight weeks for a maximum of six months (*Article 14a.2, paragraph 3, TSC*). Such review periods are subject to stop-the-clock information requests.

## Sanctions

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The obligation to notify the transaction to the Minister of Economic Affairs and Climate rests on the investor. Failure to notify in a timely manner may lead to a fine of up to EUR900,000. Where a qualifying transaction is completed without making a notification, the Minister can prohibit the transaction within eight months after learning of it. Parties will then have to reduce the extent of their control below the threshold for predominant control. Pending that reduction, the acquirer may not exercise control.

In contrast with EU and Dutch merger control rules, mandatory notification under the regime does not suspend a transaction. Parties could theoretically continue with the intended transaction before the Minister decides on the case, but that has its risks. The Minister could prohibit the transaction afterwards. If the risk is taken, and the Minister prohibits the transaction, the transaction will be null and void and the parties would have to reduce their influence so that it no longer qualifies as predominant control. If a transaction is executed after a decision to prohibit it has been taken, the transaction will be null and void.

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