

# NETHERLANDS IS ABOUT TO INTRODUCE A FOREIGN DIRECT INVESTMENT SCREENING REGIME

The Netherlands is about to introduce a scheme for scrutinizing foreign direct investments (FDI). On 8 September 2020 a legislative proposal on the review of economy and national security (Wetsvoorstel toetsing economie en nationale veiligheid) was published for public consultation (Dutch FDI Bill). It introduces far-reaching governmental interventions in (intended) investments in vital processes or sensitive technology in order to protect national security for the first time. Although it is recognized that an open economy and international trade are driving forces behind the Dutch economy, it is also acknowledged that due to globalization and digitalization geopolitics, economy and (national) safety are closely intertwined.

**SAFETY NET FOR VITAL  
PROCESSES AND SENSITIVE  
TECHNOLOGY**

This legislative proposal complements existing national industry-specific legislation on the screening of foreign direct investments in, amongst others, the telecommunications sector (a new regime for this sector came into force in May 2020), the gas and electricity sectors. It is considered to be a safety net to protect all companies which operate in vital processes or deal with sensitive technology from malicious actors endangering national security. The screening regime under the Dutch FDI Bill is to apply to transactions that are not yet covered by any specific sectoral screening regime. The new regime will fall under the scope of the of foreign direct investments of 19 March 2019 that intends to coordinate national FDI regimes (EU FDI Screening Regulation).

**NEW SCREENING REGIME APPLIES  
TO TRANSACTIONS NOT YET  
COVERED BY ANY SECTORAL  
SCREENING REGIME**

## ACQUISITION OF CONTROL OR SIGNIFICANT INFLUENCE

The legislative proposal shows many similarities to existing industry-specific legislation. In order to protect national security, any investments in companies established in the Netherlands that are active in the areas of vital processes or sensitive technology and lead to (i) a change of control (wijziging van zeggenschap) or (ii) the acquisition or increase of significant influence (significante invloed) over such company, will be subject to a notification requirement and screening by the Minister of Economic Affairs and Climate Policy (the Minister). The Minister may deny foreign state actors, companies or investors (with debatable reputations), irrespective of its nationality or state of incorporation, permission to acquire control or significant influence.

When defining the concept of control, the legislator closely considered the definition used in the context of Dutch and EU competition law. The concept of significant influence is new and still needs to be defined, but will, amongst others, include transactions whereby a substantial minority interest is acquired or special voting shares are created. Not only investments, but also acquisitions, mergers, setting up joint ventures, the acquisition of assets and other legal acts that may lead to control or significant influence in entities will fall within scope of the legislative proposal. This also includes non-financial transactions such as entering into (voting)agreements or the acceptance of an inheritance (including a share portfolio).

## **VITAL PROCESSES AND SENSITIVE TECHNOLOGY**

Vital processes and sensitive technology that will fall under the scope of new screening mechanism are still to be determined. Examples of vital processes are most likely oil and gas distribution, internet access and data supply, main aerial, road, rail, and water networks, cashless payment systems, citizen identification and authentication, traffic handling at seaports and airports, and nuclear waste disposal. Sensitive technology will in any event include products or technology that are subject to export control regimes for dual-use goods and strategic goods, i.e. dual-use goods, military goods. The Minister has the right , from time to time, to classify other technology as sensitive and hence bring such technology under the scope of the scrutinizing regime.

## **NATIONAL SECURITY**

If the national security is endangered the Minister may impose conditions on or prohibit (if no conditions would be sufficient to safeguard national security) a transaction that may lead to (i) a change of control (wijziging van zeggenschap) or (ii) the acquisition or increase of significant influence (significante invloed) over such company. The Dutch FDI Bill stipulates that several factors need to be taken into account when evaluating whether an investment poses a threat to the national security. These factors include the ownership structure of the acquirer, restrictions under (international) law and the security situation in the acquirer´s country of residence. In addition, for vital processes, the Minister will, amongst others, also look into the track record of the acquirer, connections to jurisdiction that have offensive programs aimed at disturbing or harming vital processes. For sensitive technology, the Minister will, inter alia, also look into the track record of the acquirer, compliance with export control regulations, connection with jurisdictions that do not have a transparent division between military and civil research and development programs and connection with jurisdictions that have an offensive programs aimed at acquiring a strategical or technological dominant position. Conditions may involve safety regulations regarding sensitive information, appointment of a safety commissioner or commission, the obligation to hold assets in the Netherlands, granting a license on specific technologies to the Dutch State or a third party designated by the Dutch State or specific governance related requirements. Enforcement may be done under administrative or criminal law.

## EXPECTED TO BE EFFECTIVE EARLY 2021

The Dutch FDI Bill is expected to come into force in the beginning of 2021. The Dutch FDI regime will, however, have retroactively effect as of 2 June 2020. Therefore, as of 2 June 2020, a transaction involving an investment in either a company operating in the area of vital processes or a company involved with sensitive technology is subject to the Dutch FDI screening regime.

IN CASE OF QUESTIONS OR QUERIES, PLEASE CONTACT.



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