Bird & Bird & Governance Control

Overview of the most relevant general and sectoral FDI screening mechanisms in the EU/Netherlands

General FDI screening mechanisms

EU level

The EU introduced an FDI screening mechanism with Regulation 2019/452 of the European Parliament and of the Council of 19 March 2019, establishing a framework for the screening of foreign direct investments into the Union ("Regulation 2019/452").

The EU FDI screening mechanism covers the following main characteristics:

- introduces **non-binding** ex-ante and ex-post FDI screening by the European Commission on projects or programmes likely affecting EU interest, security or public order, or likely affecting the security or public order of one or more EU Member States;
- requires EU Member States (with or without national screening mechanism) to inform to European Commission on FDIs in their territory;
- does not require EU Member States to adopt or maintain a formal FDI screening mechanism;
- provides for the possibility for EU Member States to express their views on proposed and completed FDI in a specific EU Member State if this is likely to affect its security or public order;

The Netherlands – as all other EU Member States – implemented Regulation 2019/452 in national legislation by – among others:

- establishing a competent authority and contact point for all issues relating to the implementation of Regulation 2019/452 in the Netherlands;
- introducing the possibility to hold foreign investors criminally liable if they do not provide certain information that is requested by the competent Dutch authority in view of planned or completed FDI in the Netherlands by such foreign investors.

National level

The Dutch Minister of Economic Affairs announced that the Netherlands will introduce a new Dutch screening mechanism for investments in sensitive sectors in order to safeguard the national security in the Netherlands. Although the new screening mechanism is, legally speaking, not limited to foreign investments into the Netherlands, it follows in our view from the draft legislative proposal that it is designed to mainly prevent (ex-ante) or prohibit and unwind (ex-post) a foreign merger or acquisition of (parts of) a business that is deemed contrary to the Dutch national security.

Screening will cover mergers and acquisitions finalised on or after 2 June 2020, and hence, the new – still to be adopted – Dutch (FDI) screening mechanism will have retroactive effect. Mergers and acquisitions made once the legislation is into force are subject to a prior notification requirement. Sensitive sectors subject to future FDI screening will cover the companies active in military or dual-use related industries as well as suppliers in essential processes or infrastructure.

Sectoral FDI screening mechanisms

Telecommunications

The Dutch act against undesired control in the telecommunications sector (*Wet ongewenste zeggenschap telecommunicatie*) is specifically designed to prevent (ex-ante) or prohibit and unwind (ex-post) a (foreign) merger or acquisition of (parts of) a business in the telecommunications industry that is deemed contrary to the Dutch national security.

Energy sector

Any change in ownership or control in the electricity or gas sector is to be notified to the Minister of Economic Affairs and Climate, prior to the anticipated transaction. The notification intends to prevent or prohibit and unwind a (foreign) merger or acquisition of (parts of) a business in the electricity or gas industry that is deemed contrary to the Dutch national security.

Defence

Dutch companies that have defence contracts with the Dutch Ministry of Defence ("MOD") or can be considered as subcontractors for companies that have defence contracts with the Dutch MOD, can be subject to certain contractual conditions of the MOD – referred to as the General Security Requirements for Defence Contracts ("GSRDC").

The GSRDC obliges Dutch companies – among others – to notify the Dutch Military Intelligence and Security Service in case of intended change of ownership or control of the company.

Other foreign direct investment restrictions

The European commission has launched a White Paper to regulate foreign subsidies. The initiative aims at detecting and addressing the negative impact of foreign subsidies on the EU internal market:

- mechanism to review distortions caused by foreign subsidies that are provided to companies active in the EU;
- notification mechanism to review foreign-subsidised acquisitions of EU companies, including certain non-controlling minority investments; and
- adjustments to EU public procurement rules to exclude bidders benefitting from distortive foreign subsidies from public tenders in the EU.

Possible measures to combat foreign subsidies or investments that have distortive effects on the internal market could range from divestments of assets to actual prohibitions of new investments in order to reduce capacity or market presence of foreign-subsidised companies. We expect the Commission to publish a legislative proposal in the course of 2021.

Team members

Feyo Sickinghe
Principal Regulatory Counsel

Tel: +31703538904
feyo.sickinghe@twobirds.com

Link to biography

Dick Ignacio
Associate

Tel: +31703538917
dick.ignacio@twobirds.com

Link to biography

Roger van Buuren
Partner

Tel: +31703538956
roger.van.buuren@twobirds.com

Link to biography

Michiel Wurfbain
Partner

Tel: +31703538915
michiel.wurfbain@twobirds.com

Link to biography

Brian Mulier
Partner

Tel: +31703538896
brian.mulier@twobirds.com

Link to biography

Pauline Kuipers
Partner

Tel: +31703538810
pauline.kuipers@twobirds.com

Link to biography

René Rieter
Partner

Tel: +31703538847
rene.rieter@twobirds.com

Link to biography