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FOREIGN INVESTMENT & NATIONAL SECURITY

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in foreign investment and national security.

NETHERLANDS

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There is no formal or public list of ‘hostile actors’ or trusted allies, but generally speaking investors that have close relationships with governments should expect greater scrutiny.

Q. How would you describe recent foreign investment activity in the Netherlands? How are macroeconomic and geopolitical trends impacting the flow of inbound capital?

A. The Netherlands is still considered one of the most competitive economies due to the country’s stable political climate, developed financial sector and strategic location. Foreign investment in the Netherlands is increasing again after the coronavirus (COVID-19) pandemic, potentially to investment levels seen prior to the pandemic. The global trend of increasing scrutiny on foreign investments is also impacting the Netherlands. As a member of the European Union (EU), investments in the Netherlands may also be subject to the EU foreign direct investment (FDI) coordination mechanism, as well as the forthcoming EU Foreign Subsidies Regulation. On a national level, FDI screening will intensify in the short term with the envisaged entry into force of the cross-sector FDI regime, known as the Vifo Act, in 2023. Further legislation is also expected for the defence sector.

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Q. What key issues are dominating the regulatory climate around foreign investment? To what extent have national security concerns – actual or perceived – increased in the Netherlands in recent years?

A. The Dutch FDI enforcement climate focuses on preventing the creation of undesirable strategic dependencies, threats to the continuity and resilience of vital processes and the possible impairment of the integrity and exclusivity of knowledge and information. By way of example, the General Intelligence and Security Service of the Netherlands (AIVD) published its annual report for 2021 in April 2022, in which it identified a key issue regarding the leakage of high-tech knowledge through investments in, and acquisitions of, companies which could hurt the Dutch economy. The AIVD particularly highlighted its concern for potential Chinese investments and acquisitions in the Dutch semiconductor industry. The Dutch semiconductor sector is an area of national security concern and regularly features in parliamentary discussions and questions put to the responsible minister of economic affairs and climate, as well as in the broader public domain.

Q. What impact are political agendas and foreign investment policies having on foreign investment screening programmes, including national security assessments?

A. Considering the potential national security concerns, the Netherlands will probably have a cross-sector FDI screening regime in place in the first half of 2023. The forthcoming regime will serve as a review mechanism for investments that could pose a risk to the national security of the Netherlands. The FDI regime will apply regardless of the origin of the investor but captures a limited set of sectors deemed of vital importance, such as financial institutions, Schiphol Airport and the Port of Rotterdam, gas storage and so on, as well as highly sensitive technology, such as semiconductors and quantum or photonic technology. The current scope of application of the FDI regime may expand subject to political agendas and other preferences.

Q. Have there been any recent regulatory reforms in the Netherlands worth

highlighting? What are they likely to mean for foreign acquirers and domestic sellers going forward?

A. After entry into force of the forthcoming FDI regime, any transaction or investment that directly or indirectly concerns Dutch activities in a relevant vital sector or relevant sensitive technologies within the scope of the FDI regime potentially requires a mandatory and suspensory filing to the Dutch Investment Screening Bureau (BTI). If so, the transaction or investment can only be completed once it has been cleared by the BTI. In addition, the forthcoming FDI regime will have retroactive effect and allows the government to 'call in' investments dating back to 8 September 2020 if it identifies serious national security concerns. Recently, the minister of economic affairs and climate was questioned by members of parliament regarding whether the forthcoming FDI regime, including its retroactive effect, would allow a review of the acquisition of Nowi, a start-up which specialises in energy harvesting chipsets, by Nexperia, a Chinese-Dutch semiconductor manufacturer.

Q. Could you outline the factors likely to trigger investigations and potentially result in blocks or conditions being placed on pending acquisitions? Which sectors and regions are more likely to give rise to national security reviews?

A. The incoming FDI regime captures undertakings that are active in vital processes or highly sensitive technologies. Examples of vital processes include financial institutions, gas storage, nuclear energy and designated airport activities. Sensitive technologies are currently understood to include military goods, dual-use goods that fall under EU export control regulations, and other technologies designated as such by ministerial decree. A draft ministerial decree envisages the inclusion of quantum technology, photonic technology, technology regarding semiconductors, and so-called 'high assurance' products. Other categories of technologies could also be designated as highly sensitive in the future. There is no formal or public list of 'hostile actors' or trusted allies, but generally speaking investors that have close relationships with governments should expect greater scrutiny.

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Q. What advice and practical insights would you offer to foreign acquirers on navigating regulatory requirements in the Netherlands?

A. FDI screening is one of the fastest-changing areas of global regulation. It presents a major challenge for anyone looking to pursue investments or transactions across the globe. The Netherlands is no exception. Most transactions or investments require a thorough analysis of potential FDI requirements, on top of the more familiar merger control processes. This clearly has the potential to quickly impact the complexity, certainty and timing of transactions. In addition, the FDI environment in which investors operate is more volatile than ever, with rapidly evolving foreign investment rules. What was true yesterday might not be accurate tomorrow. As such, when contemplating a transaction or investment opportunity it is critically important to develop a timely and thorough understanding of the potential FDI screening impact, such that it can be taken into account in the broader transaction considerations.

Q. Looking ahead, what are your predictions for foreign investment levels in the Netherlands over the coming months? Do you expect to see a rise or fall in the number of overseas acquirers targeting domestic assets?

A. We do not expect foreign investment levels in the Netherlands to significantly drop, at least not as a result of increased scrutiny under existing and forthcoming Dutch FDI screening mechanisms. That increased scrutiny will, however, impact the complexity, certainty and timing of transactions. Anyone looking to pursue investments or acquisitions in the Netherlands is best advised to conduct a timely and thorough analysis of potential FDI requirements and impact to ensure that they navigate these increasingly complex regulatory waters in an optimal way. ❑

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CLIFFORD CHANCE is a full-service top-tier law firm, whose Amsterdam office has been providing its clients with the highest-quality advice and legal insight for half a century. The firm combines its global quality standards with its in-depth expertise of the Dutch market. The firm's clients include major financial institutions, financial investors and multinationals with a traditional focus on finance, capital markets, private equity, cross border M&A and an increased focus on the tech sector.

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