

# International **Comparative** Legal Guides



## Foreign Direct Investment Regimes **2020**

A practical cross-border insight into FDI screening regimes

**First Edition**

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**ICLG.com**



ISBN 978-1-83918-010-1  
ISSN 2633-3724

Published by

**glg** global legal group

59 Tanner Street  
London SE1 3PL  
United Kingdom  
+44 207 367 0720  
[www.iclg.com](http://www.iclg.com)

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**Cover Image**

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# Foreign Direct Investment Regimes 2020

**First Edition**

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# Netherlands

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Netherlands

## 1 Foreign Investment Policy

### 1.1 What is the national policy with regard to the review of foreign investments (including transactions) on national security grounds?

In 2018, the Netherlands, together with Luxembourg, Portugal, Slovenia and the Czech Republic, made up the top five OECD countries scoring lowest on the OECD Foreign Direct Investments Regulatory Restrictiveness Index (FDI Index), meaning that it was among the five OECD countries with the least restrictive regulatory measures in place with respect to foreign direct investments. The FDI Index measures statutory restrictions on foreign direct investment in 22 economic sectors across 69 countries, including all OECD and G20 countries.

With the exception of specific sectors that are deemed vital from a security or public interest point of view (to be addressed below), Dutch law does not provide for general restrictions on or review of direct foreign investments. In fact, the Dutch economy is largely dependent on the worldwide economy, which to some extent explains the liberal Dutch view of foreign direct investments.

Nonetheless, the Dutch government has recently become more aware of the potential risks accompanying foreign direct investments, particularly where they could affect vital matters of public safety, e.g. infrastructure, the integrity and exclusivity of information and the functioning of the democratic legal order. The government has taken a somewhat more active approach to foreign investments in Dutch companies it deems vital.

In general, however, the Dutch government relies heavily on regulating or protecting its vital sectors through either (i) partial or full ownership of or control over vital companies by the government, or (ii) permit systems through which permits can be revoked in the interest of national safety or in the public interest.

### 1.2 Are there any particular strategic considerations that apply during foreign investment reviews?

The Netherlands has a rather welcoming direct foreign investment policy, and has generally favourable corporate tax treatment and (tax) treaties in place. Save for specific sectoral restrictions (as set out in question 2.2) which may apply to a very limited number of direct foreign investments, Dutch foreign direct investment policies do not generally impose significant constraints on foreign investments.

### 1.3 Are there any current proposals to change the foreign investment review policy or the current laws?

Taking into account the recent (March 2019) adoption of the EU regulation on establishing a framework for the screening of foreign

direct investments into the EU, the Dutch government has not made any proposals to implement an overarching regulatory framework with respect to foreign direct investments.

However, on 23 April 2019, the Minister of Justice and Security announced that the Dutch government intends to introduce sector-specific investment screening protocols for the protection of “vital companies”. The purpose of the intended investment screening is to mitigate potential national security risks.

The first and – for now – only sector-specific legislative proposal currently under review by the House of Representatives of the Dutch Parliament (*Tweede Kamer*) is the proposal to amend the current Telecommunications Act (*Telecommunicatiewet*) (the ‘TA’). Under the amended TA, the Minister of Economic Affairs and Climate Policy (the ‘Minister’) will be authorised to prohibit a party from acquiring or holding a controlling interest over a telecommunications company if and to the extent such controlling interest could pose a threat to the public interest. While the legislative proposal with respect to the TA is still under debate, it may well reveal how the Dutch government intends to address (foreign) direct investments in specific sectors it deems vital.

Please refer to question 2.2 for further clarification with respect to the proposed amended TA.

In addition to the proposal to amend the TA in order to incorporate a way for the government to control direct investments, the Dutch government is discussing a legislative proposal aimed at introducing a “standstill period” in Dutch corporate law. The proposal aims to provide Dutch listed corporates with additional means to hold off a potential (hostile) takeover. In summary, it has been proposed that the board of directors of a listed company may invoke a standstill period of a maximum of 250 days in the event that: (i) a public offer on its shares is announced; (ii) such offer has not been agreed with the board of directors of the company; and (iii) the board of directors deems such offer to be materially in conflict with the interest of the company and the continuity, independence, identity or development of the company is in jeopardy.

During the standstill period, no members of the board of directors or the supervisory board may be appointed, suspended or dismissed. This would allow the board of directors (and the supervisory board) to act more freely, without the general meeting (indirectly) pressuring the directors into making certain strategic decisions. The standstill period would allow the board to enter into discussions about the bid with the relevant stakeholders, such as the shareholders but also the works council, and it would allow it to properly evaluate the impact and consequences of the envisaged takeover.

In the end, the standstill period does not provide the board with means to block a potential transaction, and the shareholders are still free to sell their shares to a bidder during the standstill period. Generally, however, a bidder would want the boards’ cooperation when placing its bid, and it is less likely that the boards’ cooperation is forced by the general meeting during the standstill period.

A preliminary draft of the proposed legislation on the standstill period is being hotly debated and it is doubtful that the legislation will be introduced soon.

## 2 Law and Scope of Application

### 2.1 What laws apply to the control of foreign investments (including transactions) on grounds of national security?

As set out above, there is no one overarching law or framework that applies to control over foreign investments on grounds of national security. Nevertheless, the Dutch government has identified the following vital sectors. We include the relevant sector-specific acts that may apply to certain foreign investments in these vital sectors.

- Energy:
  - The Mining Act (*Mijnbouwwet*).
  - The Electricity Act (*Elektriciteitswet*).
  - The Gas Act (*Gaswet*).
- ICT/Telecom:
  - The Telecommunications Act (*Telecommunicatiewet*).
- (Drinking) Water:
  - Drinking Water Act (*Drinkwaterwet*).
- Transport:
  - No specific Acts in relation to (foreign) control.
- Chemistry:
  - No specific Acts in relation to (foreign) control.
- Nuclear:
  - Treaty of Almelo (*Verdrag van Almelo*).
  - Nuclear Energy Act (*Kernenergiewet*).
- Financial:
  - No specific Acts in relation to (foreign) control, but a broad range of (European and national) regulatory measures regarding prudential supervision exist.
- Defence:
  - General Security Requirements for Defence Contracts 2017 (*Algemene Beveiligingseisen voor Defensieopdrachten 2017*).

### 2.2 What kinds of foreign investments, foreign investors and transactions are caught? Is the acquisition of minority interests caught?

#### Mining Act

Under the Mining Act, mining activities (detection and extraction of gas and crude oil) on or under Dutch soil can only be performed by companies in which the state, through the state-owned company Energie Beheer Nederland ('EBN'), holds 40% of the shares. The remaining 60% of the shares can be held by one or more private and foreign entities. EBN enters into mine construction agreements with extraction permit holders pursuant to which EBN can veto decisions of the permit holder to (i) outsource mining (construction) activities, and (ii) enter into obligations with respect to supply and transport of natural gas.

Additionally, both (a) mining activities (detection and extraction of gas and crude oil), and (b) underground storage of gas in the Netherlands are controlled through a permitting system under the administration of the Minister of Economic Affairs and Climate Policy. The Minister can revoke these permits on grounds of endangerment of national security or national defence (not necessarily related to a change of control). In certain cases, foreign direct investments in permit-holders may result in the Minister arguing that it is in the interest of national security or national defence to revoke a permit.

#### Electricity Act and the Gas Act

Under the Electricity Act and the Gas Act, the shares in the companies responsible for the national high-voltage grid respectively the

national transmission network must be owned (directly or indirectly) by the state. As a result of these privatisation prohibitions, shares in these companies cannot be held by (foreign) investors.

Furthermore, under the Electricity Act, any party involved in a (direct or indirect) change of control over production plants with a capacity of 250 Megawatts or more is required to notify the Minister. The notification requirement provides that any of the parties involved has to notify the Minister ultimately four months prior to the envisaged change of control taking place. On grounds of public safety, security of supply or security of services, the Minister may prohibit the envisaged change of control or attach certain conditions to his consent. In the event that parties forego the notification, the change of control (transfer of shares or otherwise) is subject to annulment (*vernietigbaar*).

The Gas Act contains the same notification obligation with respect to an envisaged change of control over LNG (Liquefied Natural Gas) plants, regardless of their size or capacity.

Lastly, under the Electricity Act and the Gas Act, a supply permit is required for the supply of electricity or gas to low-volume users. A permit can be revoked by the Minister should the permit-holder no longer be able to satisfy the demand and/or threaten to discontinue its services. In essence, a foreign investment should not affect the permit, unless it triggers the revocation grounds.

#### The Telecommunications Act

The current Telecommunications Act (*Telecommunicatiewet*) (the 'TA') does not contain specific arrangements preventing the acquisition of shares in a communications service provider. Nonetheless, as we have seen in América Móvil's attempt to acquire KPN, the Minister has several, more informal ways of putting pressure on a communications service provider in the public interest.

As briefly addressed in question 1.3, however, a proposal to amend the existing TA is currently under review by the House of Representatives of the Dutch Parliament (*Tweede Kamer*).

For the Minister to be allowed to prohibit an investment, it should be ascertained that: (a) the investment will result in a position of "controlling interest"; (b) over a "telecommunications company"; (c) which position would – in the Minister's view – pose "a threat to the public interest", which threat can only be ascertained if and to the extent the position of controlling interest leads to; and (d) a "relevant influence" in the telecommunications sector.

- (a) "Controlling interest" under the proposed TA is defined as the situation where the acquirer, as a result of the acquisition:
  - 1) either individually or jointly with one or more persons acting in concert, directly or indirectly, holds at least 30% of the votes in the general meeting of the legal entity;
  - 2) can appoint or dismiss more than half of the statutory or supervisory directors of the legal entity (also in the situation where all votes are cast);
  - 3) holds one or more shares granting it specific statutory control rights;
  - 4) has at its disposal a branch office that is a "telecommunications company" (as defined under (b) below);
  - 5) is liable as a partner (*vennoot*) towards creditors for debts of a partnership that is acting under its own name; *or*
  - 6) is the owner of a sole proprietorship (*eenmanszaak*).
- (b) The proposed TA applies solely to the acquisition of a "telecommunications company", being defined as a branch office or an independent legal entity, sole proprietorship or partnership established in the Netherlands that – either directly or indirectly – offers:
  - 1) an electronic communications network or service;
  - 2) hosting services, internet hubs or data centres (with the exception of data centres for own use); *or*
  - 3) categories of networks or services designated by order in council (*aangewezen bij algemene maatregel van bestuur*).

- (c) The identity of the acquirer of a controlling interest is of great importance under the proposed TA, and “a threat to the public interest” is exhaustively defined as those situations where:
- 1) the acquirer is an unwanted person (a person subject to public sanctions) or a state, (legal) entity or person of which it is known or in respect of which there are grounds to suspect that it has the intention to influence the telecommunications party to abuse its power or to intentionally cut its services;
  - 2) the acquirer has close connections with or is under the control of a state, (legal) entity or person as described under (c) 1), or is a person in relation to whom there are grounds to believe that such connections or influences exist;
  - 3) the acquirer has a track record that gives reason to believe that there is an increased risk that the acquirer will exercise “relevant influence” (as defined under (d) below);
  - 4) the identity of the (indirect) acquirer or person in control cannot be determined; *or*
  - 5) the acquirer does not offer sufficient cooperation on the investigation into the matters set out under (c) 1) through (c) 4) above.
- (d) The last cumulative condition to allow for a prohibition of an acquisition under the proposed TA is that the controlling interest in the telecommunications company will result in a “relevant influence” on the telecommunications sector. Relevant influence is presumed where abuse or intentional termination of services of the telecommunications company could lead to:
- 1) an unlawful breach of the confidentiality of the communications or an interruption of the internet access or phone services for more users than acceptable by order in council;
  - 2) an interruption of availability of a significant part of the services and applications delivered through the internet;
  - 3) an interruption of availability, reliability or confidentiality of products or services in the interest of public duties in the field of national security and defence, law enforcement and emergency services (to be designated by order in council); *or*
  - 4) other serious consequences with respect to the continuity of service provision by a telecommunication company or the confidentiality of communications, as designated by order in council.

The proposal requires the Minister to be notified no later than eight weeks before the envisaged acquisition, unless the acquisition is effectuated through a public offer, in which case the envisaged acquisition should be notified at the same time as the public offer is made. A late notification or failure to notify could result in a penalty of up to €900,000. Once notified, the Minister is required to inform the European Commission (and – under certain circumstances – other Member States) under the recently adopted Regulation (EU) 2019/452, establishing a framework for the screening of foreign direct investments into the EU.

The Minister can prohibit an envisaged acquisition or it can consent to the acquisition, either subject to certain conditions safeguarding national security interests or otherwise. If and to the extent the acquisition is executed in spite of the Minister’s prohibition, the acquisition will in most instances be null and void (*nietig*). An exception applies to a position of controlling interest acquired through the stock exchange. In the latter case, the acquirer would need to sell its shares until it is no longer in a position of “controlling interest”. If the obligation to notify was not observed, an executed acquisition can also be prohibited retroactively, that is after it has been executed.

To be thorough, we reiterate that the legislative proposal with respect to the TA as set out above is still under debate in the House of Representatives. It may reveal how the Dutch Government intends to address (foreign) direct investments in specific sectors it deems vital.

#### The Drinking Water Act

Pursuant to the Drinking Water Act, only “qualified legal entities” can exercise control over and hold an interest in drinking water com-

panies and each separate part of its business operations. Qualified legal entities are defined as legal entities governed by public law (*e.g.* the Dutch state, provinces or municipalities) or legal entities wholly owned by such legal entities. Because of these privatisation prohibitions, shares in drinking water companies cannot be held by (foreign) investors.

#### Other state-owned companies in vital sectors

The three following sectors are also deemed vital. While these sectors are regulated, those regulations do not currently focus on (foreign) direct investments in these sectors. Dutch public and safety interests are sufficiently safeguarded as a result of the Dutch State owning (an (majority) interest in) the vital companies in these sectors. Privately owned companies related to these vital companies (suppliers, service providers, clients, etc.) may – in some cases – be regulated through the use of mandatory permits or contractual obligations.

- **Transport:** the largest transport infrastructure hubs in the Netherlands, Schiphol Airport and the Port of Rotterdam, are state-owned, as is the road network. Only after privatisation would regulations as regards ownership in relation to the public and safety interest be relevant.
- **Nuclear sector:** the nuclear sector is heavily regulated on safety, and key companies in this sector are either partly or fully state-owned.
- **Defence:** the Ministry of Defence is state-run and does not allow (foreign) investors. In order to safeguard the integrity and the interests of the Dutch armed forces, the Ministry of Defence has set up a contractual system through which all of its suppliers are bound to comply with measures protecting the Ministry of Defence against – for instance – data breaches or products of dubious origin. The requirements for a party wishing to establish a relationship with the Ministry of Defence are set out in the General Security Requirements for Defence Contracts 2017 (*Algemene Beveiligingseisen voor Defensieopdrachten 2017*).

#### 2.3 What are the sectors and activities that are particularly under scrutiny? Are there any sector-specific review mechanisms in place?

Please refer to the sectors deemed “vital” as set out under question 2.1.

#### 2.4 How are terms such as ‘foreign investor’ and ‘foreign investment’ specifically addressed in the law?

Dutch law does not specifically address “foreign investor” or “foreign investment”.

#### 2.5 Are there specific rules for certain foreign investors such as state-owned enterprises (SOEs)?

Sector-specific laws require certain companies to be held by Dutch state-owned companies only. Reference is made, for instance, to the Electricity Act, the Gas Act and the Drinking Water Act. No specific regulations exist specifying different types of foreign investors.

#### 2.6 Is there a local nexus requirement for an acquisition or investment to fall under the scope of the national security review? If so, what is the nature of such requirement (existence of subsidiaries, assets, etc.)?

This is not applicable in the Netherlands.

**2.7 In cases where local presence is required to trigger the review, are indirect acquisitions of local subsidiaries and/or other assets also caught?**

This is not applicable in the Netherlands.

### 3 Jurisdiction and Procedure

**3.1 What conditions must be met for the law to apply? Are there any monetary thresholds?**

Please refer to question 2.2 for the conditions under sector-specific laws.

**3.2 Is the filing voluntary or mandatory? Are there any filing fees?**

Parties have an obligation to notify the authorities in the event of an envisaged change of control captured under the Electricity Act or the Gas Act. Under the proposed amended TA, notification of an envisaged transaction is mandatory as well. No filing fee applies.

**3.3 In the case of transactions, who is responsible for obtaining the necessary approval?**

Under the proposed amended TA, a party “intending to acquire a controlling interest over a telecommunications company” will be required to notify the Minister. Nonetheless, because non-compliance with the proposed TA could result in the transaction being ruled null and void, it is also in the seller’s best interest to ensure that the Minister is notified.

**3.4 Can foreign investors engage in advance consultations with the authorities and ask for formal or informal guidance on the application of the approval procedure?**

It is at this stage uncertain whether any formal, or informal, consultations will be made possible under the proposed amended TA.

**3.5 What type of information do investors have to provide as part of their filing?**

Investors will only be required to notify the Minister of their intent to acquire a controlling interest over a telecommunications company.

**3.6 Are there sanctions for not filing (fines, criminal liability, unwinding of the transaction, etc.) and what is the current practice of the authorities?**

Please refer to question 2.2 for possible sanctions under the proposed amended TA.

**3.7 What is the timeframe of review in order to obtain approval? Are there any provisions expediting the clearance?**

Under the proposed amended TA, the Minister has eight weeks after receiving a notification to approve or disapprove the envisaged transaction, failing which approval is deemed granted. The Minister has

the option to extend the term of eight weeks by six months if further investigation is required. The term is extended by the period of time that the Minister needs to wait to receive additional information from the investor.

**3.8 Does the review need to be obtained prior to or after closing? In the former case, does the review have a suspensory effect on the closing of the transaction? Are there any penalties if the parties implement the transaction before approval is obtained?**

Approval will need to be granted prior to closing. The review does not in and of itself have a suspensory effect on closing, but please refer to question 2.2 for possible sanctions under the proposed amended TA.

**3.9 Can third parties be involved in the review process? If so, what are the requirements, and do they have any particular rights during the procedure?**

This is not applicable in the Netherlands.

**3.10 What publicity is given to the process and the final decision and how is commercial information, including business secrets, protected from disclosure?**

As per the proposed amended TA, a prohibition against the completion of an acquisition will be (i) notified to the party requesting the approval, and (ii) made public online on a website to be determined by the Minister.

**3.11 Are there any other administrative approvals required (cross-sector or sector-specific) for foreign investments?**

Merger control approval may be required when certain revenue requirements are met.

### 4 Substantive Assessment

**4.1 Which authorities are responsible for conducting the review?**

The Minister is responsible for the review under the proposed amended TA.

**4.2 What is the applicable test and who bears the burden of proof?**

Under the proposed amended TA, the Minister can prohibit an envisaged transaction if it – in its discretion – deems the envisaged transaction to be a “threat to the public interest”. For the remaining conditions, please refer to question 2.2.

**4.3 What are the main evaluation criteria and are there any guidelines available?**

Please refer to question 2.2.

**4.4 In their assessment, do the authorities also take into account activities of foreign (non-local) subsidiaries in their jurisdiction?**

These subsidiaries may be taken into account when assessing to what extent an envisaged transaction poses a threat to the public interest.

**4.5 How much discretion and what powers do the authorities have to approve or reject transactions on national security grounds?**

Please refer to question 2.2.

**4.6 Can a decision be challenged or appealed, including by third parties? Is the relevant procedure administrative or judicial in character?**

It is as yet uncertain whether and in what way the decision of the Minister can be appealed.

**4.7 Is it possible to address the authorities' objections to a transaction by providing remedies, such as undertaking or other arrangements?**

Please refer to question 2.2 for a brief description of potential remedies that may be proposed by the Minister.

**4.8 Are there any other relevant considerations? What is the recent enforcement practice of the authorities?**

This is not applicable in the Netherlands.



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With two decades of experience, Carlos advises on complex cross-border transactions, on – both domestic and international – strategic and private equity acquisitions, participations, divestments and exits, buyouts, joint ventures, and corporate restructurings, as well as on corporate law issues and critical contracting matters. Carlos is a trusted advisor to many of his clients. He counts among his extensive and diverse client base entrepreneurs and large quoted and private companies, based in the Netherlands and overseas, as well as a number of private equity firms. Carlos' work spans a wide range of industries and sectors, including transport & logistics, energy, food, manufacturing, technology and leisure. Clients benefit from his responsive, pragmatic approach and his ability to focus on his clients' principal deal objectives.

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*IFLR1000* identifies Carlos as a leading lawyer in his field and quotes a client: "Carlos Pita Cao is excellent, very good, and superb, [...]. [He is] very responsive understands the pressures of clients and gives excellent advice. The main thing that impressed [...] was the way he picks up the vital parts in legal documentation to understand how to achieve the commercial end."

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