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Dutch Government Plans Retroactive Foreign Investment Screening in View of COVID-19 Crisis

Proposed retroactive application could expose investments made as from June 2, 2020, to ex post scrutiny.

On June 2, 2020, the Dutch Government ("Government") [announced](#) that it plans to apply a proposed comprehensive foreign direct investment ("FDI") screening mechanism retroactively to investments and takeovers ("Investments") carried out as from June 2, 2020.

At the end of 2019, the Government [informed](#) the Dutch parliament about its intention to adopt a legislative proposal ("Proposal") which provides for a more comprehensive FDI screening mechanism.

The Proposal covers Investments in (i) providers of [critical processes and infrastructure](#) as well as (ii) companies active in high-end sensitive technology, such as goods with a military or dual-use application.

The Proposal consists of a mandatory notification requirement prior to the Investment allowing the competent minister to conduct a risk analysis. Following the risk analysis, the Proposal provides for the potential imposition of measures to mitigate national security risks including, as a measure of last resort, the blocking of the Investment.

The Proposal would significantly broaden the possibilities of foreign investment screening in the Netherlands. Unlike some other EU Member States, the Netherlands currently only has certain sectoral FDI screening mechanisms in place (e.g., in the gas and electricity sectors). Dutch Parliament recently adopted a new sectoral regime through the Act on Undesirable Control (Telecommunications) (*Wet ongewenste zeggenschap telecommunicatie*) ("AUCT") which provides for an investment screening mechanism in the telecommunications sector. The date of entry into force of the AUCT is yet unknown and will be set in subordinate legislation.

In its June 2, 2020, announcement, the Government explicitly referred to the COVID-19 crisis as a driver for the retroactive application of the Proposal. It also referred to recent related European Commission Guidance (see [Jones Day Alert, March 2020](#)), published ahead of the entry into force of the new EU FDI screening mechanism in October 2020 (see [Jones Day White Paper, April 2019](#)).

According to the Government, the inclusion of the June 2, 2020, reference date in the Proposal means that, once the Proposal enters into force, even completed Investments which fall within the Proposal's scope and are carried out as from June 2, 2020, may be subject to an *ex post* assessment. Mitigating measures may then also be imposed, including—as an ultimate measure—reversal of the transaction.

The Government intends to give adoption of the Proposal high priority and to submit the Proposal to Parliament in the last quarter of 2020.

The proposed retroactive application means that investors should already carefully consider this development in any pending or proposed transaction. We will monitor developments and provide further updates when appropriate.

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