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Investment Screening in the Netherlands

Jochem de Kok*

Despite imperfections, the Dutch framework for investment screening could function as a model for more proportionate and clearer investment screening rules. From a procedural perspective, the Dutch framework illustrates that it is possible to establish objective thresholds in order to more specifically target certain companies or categories of companies. Substantively, the Dutch framework shows that the general test of 'security' can be narrowed down to more specific substantive criteria. Providing clearer procedural thresholds and substantive tests under investment screening regulations, both in the Netherlands and elsewhere, will help ensure that investments are only restricted or prohibited where genuinely necessary and proportionate in order to safeguard national security interests. The Commission and national authorities throughout the Union should therefore endeavour to establish clearer procedural thresholds and frameworks of assessment to ensure that only transactions that can reasonably pose a threat to security or public order are made subject to filing obligations and are assessed on the basis of more clearly defined substantive criteria.

Keywords: investment screening, FDI screening, security screening, investment law, national security, proportionality, Chinese investments, Regulation 2019/452, investeringstoets, veiligheidstoets, ongewenste zeggenschap

1 INTRODUCTION

Following intensified scrutiny over foreign investments across the European continent, the Dutch government has proposed the implementation of a general framework for the screening of investments in critical industries and sensitive technologies on the basis of national security (the **National Security Screening Act**).[1] The National Security Screening Act will complement, rather than replace, various

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1 In Dutch: *Wet veiligheidstoets investeringen, fusies en overnames*, formerly known as *Wet toetsing economie en nationale veiligheid*. The first draft proposal, explanatory memorandum and responses to the internet consultation, https://www.internetconsultatie.nl/investeringstoets (accessed 5 Mar. 2021). The second draft will be published after submission of the legislative proposal at the Parliament. *See*, https://www.rijksoverheid.nl/actueel/nieuws/2020/12/18/investeringstoets-op-risico%E2%80%99s-voor-de-nationale-veiligheid (accessed 5 Mar. 2021). *See* for further background, *Verslag van een schriftelijk overleg over de investeringstoets op risico's voor de nationale veiligheid*, 28 januari 2020, Kamerstuk 30 821, nr.101 and *Investeringstoets op risico's voor de nationale veiligheid*, 29 Nov. 2019, Kamerstuk 30 821, nr. 97.

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sector-specific investment screening mechanisms in the gas, electricity, telecommunication, financial and defence sectors.[2] The proposed Dutch framework will therefore consist of a general framework and various sector-specific mechanisms.[3]

Successive Dutch governments have consistently been opposed to the introduction of a general screening mechanism on the basis of national security or public policy, citing concerns regarding legal certainty and the importance of the open investment climate of the Netherlands.[4] Until very recently, the position has been that public interests in the Netherlands are sufficiently safeguarded by means of generally applicable and sector-specific legislation.[5] In this sector-specific legislation, investment screening obligations applied to targeted undertakings, such as acquisitions of power plants with a capacity of more than 250 MW, acquisitions of liquefied natural gas (LNG) installations, or certain large telecommunication providers that meet certain quantitative thresholds.[6] These sector-specific mechanisms furthermore provide specific grounds for restricting or prohibiting the investment. The combination of sector-specific and a (proposed) general framework is rather unique and can have important advantages, notably the reduction of required screenings for investments and additional legal certainty for investors.[7]

This article offers a critical legal-historical analysis of the various screening mechanisms that have been adopted and proposed in the Netherlands, illustrating how these sector-specific mechanisms could function as a model for more proportionate and clearer investment screening rules. These lessons are not only of relevance for the proposed National Security Screening Act, but also for any jurisdiction operating a general screening mechanism. Providing clearer procedural thresholds and substantive tests under investment screening regulations,

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2 The Ministers of Economic Affairs and Climate Policy and Defence have informed the Parliament that companies that provide products, goods, services and/or know-how to the Ministry of Defence form part of the 'Dutch defence technological and industrial basis' and that investments in such companies should be screened for the potential impact on national security. *See Uitkomsten van de ex ante analyse van de Nederlandse defensie technologische en industriële basis (NLDTIB)*, 30 Dec. 2019, Kamerstuk 31 125, nr.108.

3 As far as the author is aware, the only other Member State that operates some sector-specific regulations in parallel to the general framework is Spain, with sector-specific regulation applying in the area of investments in the armament industry, audio-visual communication, and telecommunications sector. See, https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf (accessed 5 Mar. 2021).

4 *Ibid*.

5 Brief van de Ministers van Financiën en Economische Zaken, Kamerstuk 2009–2010, 31 350, nr.7; Brief van de Ministers van Financiën en Economische Zaken, Kamerstuk 2009–2010, 31 350, nr.8; Brief van de Ministers van Financiën en Economische Zaken, *Sovereign Wealth Funds*, 15 februari 2008, Kamerstukken II 2007–2008, 31 350, nr. 1; Brief van de Ministers van Economische Zaken en van Financiën, *Staatsfondsen,* Kamerstukken II 2007–2008, 31 350, nr. 6.

6 For completeness, acquisitions of Dutch financial institutions required approval by the Dutch central bank, the DNB.

7 The Spanish framework for investment screening can also be characterized by various sector-specific rules, *see* the 'List of screening mechanisms notified by Member States' published by the Commission. At the time of writing, https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf (accessed 5 Mar. 2021).

both in the Netherlands and elsewhere, could help ensure that investments are only restricted or prohibited where genuinely necessary and proportionate in order to safeguard national security interests.

The analysis of the historical background to the screening framework also illustrates that there has been a consistent mismatch between the concerns raised with respect to foreign investments and the scope of the mechanisms designed to address these concerns. Moreover, the analysis illustrates that the Dutch framework largely finds its origins in broader European developments and that the position of the successive Dutch governments and Commissions on investment screening have historically been aligned. Consequently, the historical analysis does not just allow for a better understanding of the development of the Dutch legal framework, but also gives an insight into the developments on the European level, which culminated in the adoption of Regulation 2019/452 establishing a framework for screening of foreign direct investments into the Union (the **FDI Screening Regulation**).[8]

The article is structured as follows. Sections 2 and 3 provide an analysis of the sector-specific screening mechanisms in the energy and telecom sectors and points out what general lessons can be learnt from sector-specific screening mechanisms. Section 4 analyses the National Security Screening Act in its legal-historic context. After a consideration of the historic opposition to investment screening by the Dutch government and the Commission (section 4.1) and growing concerns relating to Chinese investments (section 4.2), section 4.3 illustrates how general screening mechanisms can be structured to ensure a higher degree of legal certainty for investors. The article concludes by analysing how – despite various imperfections – the framework for investment in the Netherlands can function as a model for more proportionate and clearer investment screening rules.

2 SCREENING IN THE ENERGY SECTOR

This section provides an analysis of the sector-specific screening mechanism in the Dutch energy sector. This section first provides a short introduction to the adoption of the third energy package in 2009 and the privatization of the energy sector. The historical background illustrates the mismatch between the concerns raised with respect to foreign investments at the time and the scope of the Dutch screening mechanism. The second part of the section will provide general lessons that can be learnt from the Dutch sector-specific screening mechanisms from the perspective of transparency and legal certainty.

[8] OJ L 791 (21 Mar. 2019), at 1–14.

Sector-specific screening was introduced in the energy sector in the context of the implementation of the third energy package in 2009.[9] The third energy package in particular aimed at an unbundling of the electricity and gas transmission activities (the network) from the production and supply activities. The objective of this stricter separation was to ensure non-discriminatory access of producers and suppliers to the electricity and gas networks, thereby contributing towards the creation of an internal market in gas and electricity. The third energy package also aimed at improving the security of supply and the investment climate.[10] Under the third energy package, Member States are allowed to take measures '*to ensure a level playing field*', provided that those are in line with EU law and have been approved by the European Commission. The directives also introduced an EU-wide certification requirement for acquisitions of control of transmission systems by investors from third countries. Under this procedure, a certification may be refused if the acquirer, in short, does not comply with the requirements of effective separation or if the transaction could pose a risk to the security of the energy supply of the Member State or the Union.[11] The third energy package did not provide for a screening requirement for investment in energy producers or suppliers.

Around the time of the preparation and adoption of the third energy package, the Netherlands carried out a complete and strict 'unbundling' in the energy sector, requiring a full separation of ownership between the electricity and gas transmission and distribution activities, and the production and supply activities. While the networks remained (and still remain) under state ownership, large-scale privatization of the energy production and supply companies was started in 2007.[12]

In the context of the third energy package and the privatization of the energy sector, the Netherlands adopted sector-specific screening mechanisms for acquisitions of (large) power plants with a capacity of more than 250 MW and LNG installations on the basis of public security or security of supply.[13] The screening mechanism introduced a targeted mechanism to ensure that important electricity and

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9 Consisting of Directive 2009/72/EC, Directive 2009/73/EC, Regulation EC no 713/2009, Regulation EC no. 714/2009 and Regulation EC No 715/2009.

10 As summarized in the Dutch parliamentary history, Wijziging van de Elektriciteitswet 1998 en van de Gaswet (implementatie van richtlijnen en verordeningen op het gebied van elektriciteit en gas), Memorie van Toelichting, Kamerstuk 32 814, nr.3, https://zoek.officielebekendmakingen.nl/kst-32 814-3.html. (accessed 5 Mar. 2021).

11 Article 11 of Directive 2009/72/EC.

12 *See* for instance, P. A. Josephus Jitta & H. A. Schaap, *Privatiseer, maar met mate … ? De privatisering van de Nederlandse energiesector nader beschouwd*, 62 Onderneming en Financiering, 2 (2004); W. Koster & C. van der Weijden, *De eigendomspositie van de Nederlandse energienetwerken: (Über)unbundling, economische eigendom en privatisering*, Maandblad voor Vermogensrecht (2004).

13 Note that the Gas and Electricity Acts of 1998 may soon be replaced by the proposed Energy Act. At the time of writing, Art. 5.3 of the Proposed Energy Act incorporates the existing provisions without amendments. The proposed Energy Act, https://www.internetconsultatie.nl/energiewet (accessed 5 Mar. 2021).

gas undertakings are subject to a screening requirement by the Minister of Economic Affairs and Climate Policy (the **Minister**). To date, the Minister has not prohibited or restricted any transactions in the energy sector, nor have any transactions resulted in significant societal or parliamentary concerns or discussions.[14]

Somewhat confusingly, the Minister had argued that the legal basis of the screening mechanism was the so-called level playing field provision under the third energy package, which allows Member States to adopt measures '*to ensure a level playing field*'.[15] At the time, the debate on the 'level playing field' was predominantly focussed on the acquisitions of the unbundled Essent and Nuon energy companies by RWE and Vattenfall, which were not subject to the stricter Dutch unbundling rules in their respective home countries.[16] During subsequent debates, the Minister, however, clarified that filings are not restricted to investments by vertically integrated undertakings and that the possibility of intervention of an acquisition of an (unbundled) Dutch energy production company would only arise if the investment could create a risk to public security or security of supply.[17] Moreover, the vertically integrated nature of the investor would in itself be insufficient to prove a threat to public security or security of supply.[18] A more logical legal basis would have therefore been Article 65 of the Treaty on the Functioning of the European Union (**TFEU**), which already allowed Member States to restrict the free movement of capital on the basis of security and public order prior to the adoption of the FDI Screening Regulation.[19]

Under the Dutch energy screening mechanism, public security and security of supply are assessed by means of a review of the financial reliability of the investor, its governance and management and its transparency. In addition, the Minister will consider the investor's track record in terms of security and its technical expertise.

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14 N.B. The author is not aware of any informal prohibitions either.

15 Article 43 of Directive 2009/72/EC and Art. 47 of Directive 2009/73/EC.

16 Brief van de Minister van economische zaken, Liberalisering energiemarkten, Kamerstuk 28 982, nr.70, https://zoek.officielebekendmakingen.nl/kst-28982-70.html (accessed 5 Mar. 2021) and Verslag van algemeen overleg *Liberalisering energiemarkten*, Kamerstuk 28 982, nr. 80, 20 May 2009, https://zoek.officielebekendmakingen.nl/kst-28982-80.html (accessed 5 Mar. 2021).

17 Wijziging van de Elektriciteitswet 1998 en van de Gaswet (implementatie van richtlijnen en vorderingen op het gebied van elektriciteit en gas), nota naar aanleiding van het verslag, 22 Nov. 2011, Kamerstuk 32 814, nr.7, beschikbaar via https://zoek.officielebekendmakingen.nl/kst-32814-7.html (accessed 5 Mar. 2021).

18 The Counsel of State (*Raad van State*), a constitutionally appointed governmental advisor, correctly pointed out that the scope of the screening mechanism on the basis of public policy and security of supply provision goes beyond seeking to ensure a level playing field in terms of unbundling. Wijziging van de Elektriciteitswet 1998 en van de Gaswet (implementatie van richtlijnen en verordeningen op het gebied van elektriciteit en gas), Advies van de Raad van State en Nader Rapport, 27 juni 2011, Kamerstuk 32 814, nr. 4, https://zoek.officielebekendmakingen.nl/kst-32814-4.html (accessed 5 Mar. 2021).

19 *See also* Art. 21(4) Regulation 139/2004 of 20 Jan. 2004 on the control of concentrations between undertakings, OJ L 24 (29 Jan. 2004), at 1. This legal basis would have also removed the need to seek Commission approval for measures adopted on the basis of (Dutch) public security or security of supply.

The explanatory memorandum provides that in the application of the test, the protection of the Dutch 'open investment climate' must play an important role. According to the Minister, the Netherlands has a leadership role in this respect, both inside and outside of the EU. Finally, the screening should take into consideration the OECD principles on transparency, non-discrimination, proportionality and accountability in the context of investment screening.[20]

The specificity of the sector-specific screening mechanism in the Dutch energy sector can be contrasted with the general screening mechanisms adopted in most other EU Member States, as well as the general nature of the FDI Screening Regulation.[21] Notably, the EU FDI Screening Regulation merely provides that the Member States may consider potential effects on '*critical infrastructure, [] including energy*' in determining whether a foreign direct investment is likely to affect security or public order.[22] Most Member States have in essence copy-pasted the broad list of critical infrastructures, rendering any transaction in the area of 'energy' subject to prior governmental approval.[23] The Dutch sector-specific screening mechanism is more targeted and excludes filing obligations for small energy producers and/or other undertakings active in the energy sector. The Dutch mechanism also provides greater legal certainty, as the investor does not need to make a self-assessment of whether the target undertaking carries out activities that may affect national security, but can instead rely on objective procedural thresholds.

Also, substantively, the Dutch sector-specific screening mechanism in the energy sector provides a larger degree of legal certainty than the broad general frameworks. Notably, while the substantive tests under the Dutch Gas and Electricity Acts (public security and security of supply) are similar to the broad tests employed in other Member States, the substantive assessment is focussed on reasonably objective criteria such as financial reliability, governance and management, and transparency. These criteria are thus targeted at specific concerns that may arise in the context of a foreign acquisition of a large power plant or LNG facility, and provide a

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20 *Ibid*.

21 A notable exception is the German Ordinance on Critical Infrastructure (*BSI-KritisVO*), which provides detailed thresholds for the energy sector, *see* para. 2 and annex 1, part 3.

22 Article 4, FDI Screening Regulation.

23 This is the case, for instance, in Austria, https://trade.ec.europa.eu/doclib/docs/2020/september/tradoc_158955.pdf, (accessed 5 Mar. 2021) Hungary, https://trade.ec.europa.eu/doclib/docs/2020/july/tradoc_158834.pdf (accessed 5 Mar. 2021) and Italy https://www.whitecase.com/publications/alert/covid-19-italy-expands-golden-power-review-foreign-investments (accessed 5 Mar. 2021). *See also*, http://fire.bakermckenzie.com/category/?categoryid=261dc07b-47fb-4ffd-820a-c196c58ea95e&handbookid=d22d8311-2c47-472d-889c-a7e6d135de18. (accessed 5 Mar. 2021). In France, the general screening provisions under the Financial and Monetary Code merely provide that a screening obligation applies to acquisitions of companies carrying on activities that are vital to guaranteeing the integrity, security and continuity of energy supply. Monetary and Financial Code, Art. R 151–3 sub II Unofficial translation, https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158692.pdf (accessed 5 Mar. 2021).

framework for assessing a risk to the broader concepts of public security and security of supply. In addition, the Minister must balance any restrictions with the interest of the benefits generated by the open investment climate of the Netherlands. The Dutch mechanism therefore provides the investor with a reasonably clear understanding of the concrete assessment criteria and, consequently, more transparency and legal certainty with respect to the application of the screening mechanism.

3 SCREENING IN THE TELECOM SECTOR

This section discusses the screening mechanism in the telecom sector. This section will first provide the background to this screening mechanism, which can be traced back to the failed acquisition of KPN by América Móvil. This transaction will later be used to illustrate the narrow scope of the screening mechanism. Despite imperfections, this section will conclude with a consideration of how the telecom screening mechanism, with some amendments, could serve as a model for other Member States and the Commission.

The adoption of the Act on undesirable control in the telecom sector (*Wet ongewenste zeggenschap telecommunicatie*) (**Telecom Screening Act**) in the summer of 2020 can be traced back to the failed hostile takeover of KPN, the formerly state-owned telecom incumbent, by Mexico-based América Móvil almost a decade ago.[24] On 8 May 2012, KPN announced that it had received an unrequested offer by América Móvil for around a quarter of the shares, requesting its shareholders not to accept the offer.[25] The transaction immediately resulted in significant media attention and various parliamentary questions. The initial response of the Minister of Finance was that it had no intention of intervening, noting that it is not up to the government '*to render a judgment regarding an offer by an undertaking to purchase the shares of another undertaking*'.[26]

On 9 August 2013, América Móvil announced that it intended to fully acquire KPN.[27] It was an independent anti-takeover mechanism, the KPN Foundation,[28] rather than the Dutch government that blocked the transaction on the basis of the public interest. In a public statement, the KPN Foundation announced that it had

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24 *Kamerstukken II* 2018/19, 35 153, 3 (MvT), at 1.

25 https://zoek.officielebekendmakingen.nl/ah-tk-20112012-2788.html (accessed 5 Mar. 2021).

26 *Ibid*.

27 Under the Dutch Financial Supervision Act, undertakings that seek to acquire an interest of more than 30% in a publicly listed company must issue a bid to acquire the entire share capital, https://zoek.officielebekendmakingen.nl/kst-24095-356.html. (accessed 5 Mar. 2021).

28 On 29 Aug. 2013, the *Stichting Preferente Aandelen B KPN* (the **KPN Foundation**) announced that it had exercised an option to temporarily acquire preferential voting shares granting it approximately 50% of the voting rights. The KPN Foundation is an independent legal entity that was set up in 1994 when the former state monopoly was privatized and whose board consists of five Dutch business leaders, each of which is independent of KPN. For more information *see*, http://www.prefs-kpn.nl/.

intervened '*in order to safeguard the interests of KPN and its stakeholders, including shareholders, employees, customers, trade unions and Dutch society more generally*'.[29] According to the KPN Foundation, América Móvil had intentionally chosen a hostile approach.[30] The KPN Foundation noted that América Móvil's approach directly contradicted best practices for public takeovers and caused significant uncertainty for various stakeholders.[31]

Following the intervention by the KPN Foundation, the Dutch government informed the Parliament of the consequences of a potential acquisition of KPN by América Móvil.[32] In its letter, the Dutch government announced that it would review whether existing measures can be applied more effectively or whether additional measures are required in light of the *security interest*, resulting from a dependency of the armed forces, emergency services as well as other telecom providers on the KPN infrastructure.[33] In principle, however, the government stressed that the continuity, integrity and information security interests were already ensured by means of the Dutch Telecommunication Act and existing procurement contracts, but that additional arrangements could be entered into if needed. The government also stressed that *economic interests*, such as freedom of choice, price/quality ratio and innovation were best protected by means of effective competition, protected by means of legislation and supervision. These economic interests, the government noted, would not be affected by a possible acquisition of KPN by América Móvil. Ultimately, the government stressed that a decision on a possible sale of the shares in KPN remained with the shareolders.[34]

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29 https://web.archive.org/web/20130918135004/http://www.prefs-kpn.nl/docs/Persbericht%2029-08-2013-Stichting%20Preferente%20Aandelen%20B%20KPN%20oefent%20optie%20uit.pdf (accessed 5 Mar. 2021) (Dutch version) and http://www.prefs-kpn.nl/docs/Press_release%2029-08-2013%20Foundation%20Preference%20Shares%20B%20KPN%20exercises%20option.pdf (English version) (accessed 5 Mar. 2021).

30 Namely by failing to reach an agreement with KPN regarding a merger protocol with KPN and drafting an offer document and submitting it for approval with the Netherlands Authority for the Financial Markets (**AFM**) without consulting KPN.

31 *Ibid*. Two weeks earlier, it had warned América Móvil that the KPN Foundation was concerned about developments regarding KPN, noting that there is considerable uncertainty about América Móvil's intentions and its position on the further strategic development of KPN, http://www.prefs-kpn.nl/docs/Press%20Release%20Foundation%20Prefs%20KPN%20Tuesday%2013%20august%202013.pdf (accessed 5 Mar. 2021).

32 *Brief van de Minister van Economische Zaken*, 12 Sept. 2013, Kamerstuk 24 095, nr. 356, https://zoek.officielebekendmakingen.nl/kst-24095-356.html (accessed 5 Mar. 2021). *See also* responses to questions in Kamervragen (Aanhangsel) 2013–2014, nr. 2, 19 Nov. 2013, https://zoek.officielebekendmakingen.nl/ah-ek-20132014-2.html (accessed 5 Mar. 2021).

33 *Ibid*.

34 Kamervragen (Aanhangsel) 2013–2014, nr. 535, 20 Nov. 2013, https://zoek.officielebekendmakingen.nl/ah-tk-20132014-535.html (accessed 5 Mar. 2021). Kamervragen (Aanhangsel) 2013–2014, nr. 534, 20 Nov. 2013, https://zoek.officielebekendmakingen.nl/ah-tk-20132014-534.html

In the aftermath of the failed acquisition, following critical parliamentary questions,[35] the Dutch government proposed the introduction of a screening mechanism for critical companies in the telecommunication sector in order to prevent investors with undesirable intentions from acquiring control over critical telecommunication infrastructure.[36] The government considered that critical telecommunication infrastructure could be acquired for geopolitical reasons, that is, to exert pressure on the Dutch government by threatening to disrupt or cause outage of critical parts of the Dutch telecommunication infrastructure. Moreover, an acquisition could threaten the confidentiality of communications that are transmitted via telecommunication networks and could increase the risk of wiretapping and interference with the work of security and investigative agencies.[37]

Only in the summer of 2020, after the adoption of the European FDI Screening Regulation, did the Dutch Parliament ultimately adopt the Telecom Screening Act.[38] The Telecom Screening Act provides for a mandatory screening requirement for acquisitions of 30% of the voting rights in large telecommunication companies that have 'relevant influence' in the Dutch telecom sector. In addition, the Minister may also impose that an existing shareholder sells its shares in a telecom company if that shareholder becomes undesirable at a later stage, i.e., after the acquisition has taken place. The Telecom Screening Act applies to all investors, including Dutch investors and investors from other EU Member States.

A governmental decree (the **Decree**) accompanying the Telecom Screening Act provides for detailed rules on which undertakings are deemed to have relevant influence, and would therefore be subject to screening. For instance, under the Decree, an acquisition would, inter alia, be notifiable if the undertaking provides internet access or telephone services to more than 100,000 end users in the Netherlands,[39] operates a network on which such services are offered to more than

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35 For instance, the Parliament adopted a non-binding motion, requesting the government to ensure that telecommunication services for the emergency and armed forces would not fall into foreign ownership. In this regard, the opposition party noted that the Minister's assurances relating to 'procurement', 'market participants' and 'safeguards' were unconvincing. Questions were also raised whether the government had instructed the KPN Foundation to block the transaction, whether the government had insufficient knowledge of the vital infrastructure managed by KPN and whether the Minister had sufficient competences to intervene in order to protect vital infrastructures. Members of Parliament expressed concerns that KPN owned a significant part of the critical telecommunication infrastructure and could easily end up in foreign hands. Handeling 2012–2013, nr. 109, Item 7, 5 Dec. 2013, Motie 411 (29 628) via https://zoek.officielebekendmakingen.nl/h-tk-20122013-109-7.html (accessed 5 Mar. 2021). *See also* Handeling 2013–2014, nr.22, item 2, 26 Feb. 2014, https://zoek.officielebekendmakingen.nl/h-tk-20132014-22-2.html (accessed 5 Mar. 2021).

36 *Brief van de Minister van Economische Zaken, Frequentiebeleid,* 19 juni 2014, Kamerstuk 2013/2014, dossier 24 095, nr. 368, https://zoek.officielebekendmakingen.nl/kst-24095-368.html (accessed 5 Mar. 2021).

37 *Ibid*.

38 *See also* De Kok, '*Nationale Veiligheid en Buitelandse Investeringen*' (National Security and Foreign Investments), 5/6 NtER (2019).

39 Note that specific calculations apply, as a fixed access service counts for more than one user.

100,000 end users, offers data centres with a capacity of more than 50 MW or supplies services to the Ministry of Defence, national police or intelligence agencies. By establishing these thresholds, the government aimed to provide more legal certainty, predictability and applicability of this sector specific screening mechanism in practice. While these thresholds are not objective in the sense that no 'single correct' choice is stipulated for setting the thresholds for which a notification is required, the thresholds prevent smaller transactions that reasonably cannot have any sufficiently serious and genuine impact on national security from being subjected to regulatory approvals.[40] Considering that the Minister retains the discretion to determine that a target company enjoys relevant influence despite not meeting the thresholds in the Decree, and has the power to intervene after the investment has taken place, the risk of circumvention is limited.

In addition, rather than a broad test on the basis of national security and public order, the Minister may only prohibit the acquisition of controlling influence on the basis of a threat to the public interest. A threat to the public interest is narrowly defined, as such threat can only arise in the following cases:

(1) the investor or shareholder is an undesired person or a state, entity or person for which there are grounds that he or she has the intention to influence the telecommunication company in order to enable misuse or outage;
(2) the investor or shareholder has a close relationship with or is under the influence of persons, states or entities under (1);
(3) the investor or shareholder has such a [poor] track record,[41] that there is a significantly higher risk that misuse or intentional outage will occur;
(4) the identity of the investor or shareholder cannot be determined; or
(5) the investor or shareholder does not sufficiently cooperate in the investigation of the circumstances under (1) to (4).

In order to block a transaction under grounds (1) or (2), the Minister would have to demonstrate that the foreign investor, shareholder, person or state is 'undesirable' or that there are grounds to believe that such entity has the intention of influencing the respective (target) telecommunication company in order to enable misuse or outage. Consequently, the threshold for intervention under grounds (1) and (2) is likely to be very high, both from a legal and a diplomatic perspective. Ground (3) requires a prior (poor) track record of the investor or shareholder. The explanatory memorandum notes that this criterion is, amongst others, aimed at preventing acquisitions that

[40] *See* explanatory memorandum (Nota van Toelichting bij Besluit van 22 Sept. 2020, houdende regels ter uitwerking van hoofdstuk 14a van de Telecommunicatiewet *(Besluit ongewenste zeggenschap telecommunicatie)* Stb 2020, nr 352).
[41] In Dutch: '*een zodanige staat van dienst*'.

would significantly increase the risk of unlawful wiretapping. Grounds (4) and (5) cover situations where the investor does not cooperate with the investment screening investigation.

Even though the failed acquisition of KPN by América Móvil was the primary motivation for the adoption of the Telecom Screening Act, it is quite unlikely that the Minister would have reasonably been able to block this transaction on the basis of this Act. In particular, there were no grounds that América Móvil or Carlos Slim (founder, CEO and controlling shareholder of América Móvil) would have had the intention to influence KPN in order to enable misuse or outage. Insofar as América Móvil or Carlos Slim could be deemed to have a close relationship, or be under the influence of the State of Mexico, there was no suspicion, nor evidence, that the State of Mexico would have the intention to influence KPN in order to enable misuse or outage. In addition, the parliamentary discussions do not show that there were concerns over América Móvil or Carlos Slim having a (poor) track record that would result in a significantly increased risk that there would be misuse or intentional outage of KPN. In addition, the identity of América Móvil and Carlos Slim were publicly determined. Therefore, as long as América Móvil and Carlos Slim sufficiently cooperated in the investigation, the Minister would have had no choice but to approve the transaction. Considering that the proposed acquisition of KPN by América Móvil appears to have been purely guided by economic interests, and considering that there were no apparent concerns regarding América Móvil's track record, potential misuse or intentional outage, an approval would have indeed appeared to be reasonable as – based on parliamentary discussions – there were no indications of genuine national security concerns.

The strong focus on intentionality can be deemed fundamentally flawed, as it will likely be exceedingly difficult for the Minister to prove that there are grounds that a private investor would have the *intention* to cause abuse or outage. After all, no reasonable investor would inform the public or the Minister of such intentions or would submit internal documents showing such intentions (and would be unlikely to put those malicious intentions on paper in the first place). It would also be difficult to prove a poor track record of an investor, especially considering that the investor would have an interest in not being fully open about its poor track record. The Act's focus on intentionality and a proven track record is also inconsistent with the primary risks considered in the legislative history. Therefore, the test is written down too strictly, as a malicious intention or poor track record may be difficult to prove in practice. Rather than the (proven) intention of the investor, the laws, policies and track record of the foreign State and the investor's data protection and cyber security policies and track record would have been a more logical starting point for determining whether a transaction could increase geopolitical or security risks as identified by the government.

That being said, the Telecom Screening Act does provide general lessons for the Union and other Member States. Notably, the Telecom Screening Act provides for a clearly defined scope of application, covering only undertakings that are sufficiently large to have a 'relevant influence' in the telecom sector. Consequently, smaller undertakings and/or their suppliers do not require a mandatory notification. This targeted approach can be contrasted with the FDI Screening Regulation and the laws of most other Member States. As discussed under the energy screening mechanism above, the EU FDI Screening Regulation merely provides that the Member States may consider potential effects on '*critical infrastructure, [] including [] communications*' and most Member States simply require that any investment in the telecom sector is notified for approval on the basis of national security.[42]

Furthermore, the substantive test under the Telecom Screening Act provides for a more clearly defined scope of review. Rather than a review on the basis of very broad concepts like 'national security' and 'public policy', the Telecom Screening Act provides for limited grounds for intervention. As a result, the Telecom Screening Act provides for more predictable assessment criteria, thus providing a greater degree of legal certainty to the investor. With some amendments, these criteria could serve as a model for other Member States and the Commission. The limited grounds furthermore ensure that the Dutch government must remain hesitant to intervene in private relationships and that investment screening is meant to function as a measure of last resort.

4 GENERAL INVESTMENT SCREENING MECHANISM

This section analyses the National Security Screening Act in its legal-historical context. After an introduction to the historical opposition to investment screening by the Dutch government and the Commission (section 4.1), section 4.2 shows how growing concerns relating to Chinese investments ultimately resulted in the proposed National Security Screening Act and the FDI Screening Regulation. Section 4.3 concludes by illustrating how general screening mechanisms can be structured to ensure a higher degree of legal certainty for investors.

4.1 Historical opposition to investment screening

The Netherlands and the Commission have historically been opposed to the introduction of a general investment screening mechanism on the basis of national security. The Netherlands and Commission consistently stressed that screenings of investments on the basis of national security would negatively affect the investment

[42] Article 4, FDI Screening Regulation.

climate and are problematic in light of their commitment to an open investment regime.[43] For instance, in response to concerns over rapidly growing investments by sovereign wealth funds at the start of the 2008 global financial crisis, the Commission rejected proposals to create a European Committee on Foreign Investments, similar to the Committee on Foreign Investment in the United States (**CFIUS**. According to the Commission this would '*run the risk of sending a misleading signal – that the EU is stepping back from its commitment to an open investment regime. They would also be difficult to reconcile with EU law and international obligations*'.[44] As proponents of free trade and investments, Dutch governments and the Commission instead stressed that foreign investments provide significant economic benefits.[45]

The response to the (ultimately failed) acquisition of Draka by Tianjin Xinmao Science & Technology Investment Group (**Xinmao**) is illustrative of this historical opposition to investment screening. Draka is a market leader in the development, design, production and sale of cable and cable systems in the energy and telecoms cable sectors.[46] The Xinmao bid to acquire Draka raised concerns over the loss of valuable European know-how, relationships between private undertakings and the Chinese Communist Party, and state aid by the Chinese government.[47] The Xinmao bid had all the ingredients for a lively public debate: a small (private) Chinese company, founded and led by a successful entrepreneur,[48] a member of the Chinese Communist Party and former air force officer,[49] making a significantly

43 The Dutch government also stressed that general screening mechanisms based on vague and broad concepts like national security and public policy would make judicial review very difficult and would make such decisions more likely to be annulled in court. De Kok, *Towards a European Framework for Foreign Investment Reviews*, 44(1) Eur. L. Rev. 35 (2019); Gezamenlijke notitie ministeries van Financiën en Economische Zaken over Sovereign Wealth Funds, Kamerstukken 2007–2008, 31 350, nr. 1. *Brief van de Ministers van Financiën en Economische Zaken, Staatsfondsen,* Kamerstuk 2009–2010, 31 350, nr.8.

44 Commission, *A Common European Approach to Sovereign Wealth Funds*, COM(2008) 115, http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex%3A52008DC0115 (accessed 5 Mar. 2021).

45 *Ibid*., para. 3.

46 At the time, Draka generated 2,048 million euro in turnover and was active in thirty-one countries worldwide, with approximately 9,400 employees. Commission, Case No COMP/M.6092 – Prysmian/ Draka Holding (9 Feb. 2011), https://ec.europa.eu/competition/mergers/cases/decisions/m6092_20110209_20310_1635228_EN.pdf (accessed 5 Mar. 2021).

47 G. Grieger, European Parliamentary Research Centre, *Foreign Direct Investment Screening: A Debate in Light of China-EU FDI Flows*, Briefing (May 2017, PE 603.941), https://www.volkskrant.nl/nieuws-achtergrond/china-helpt-draka-bieder-niet~b0efb6c3/?utm_source=link&utm_medium=app&utm_campaign=shared%20content&utm_content=free (accessed 5 Mar. 2021).

48 *See* in detail P. J. Peverelli & J. Song, *Chinese Entrepreneurship* 3 (Springer-Verlag: Berlin Heidelberg 2012).The bid by the previously unknown company Xinmao prompted various media outlets to run stories on its founder and CEO, Mr Du Kerong, often in almost mythical proportions. Reuters described Mr Du's '*turbocharged life [] that has seen him rise from humble roots to senior air force officer and entrepreneur, getting by on as little as four hours of sleep a night*' and lauded Mr Du for being '*renowned for stamina when entertaining business associates, able to down glasses of rice wine in single gulps*' and that '*sometimes his thoughts move so fast that subordinates can't keep up with him*'. *See also*, https://www.nrc.nl/nieuws/2010/12/18/een-rode-kapitalist-van-roestvrij-staal-11981046-a581571

49 Various news reports casted doubt over Mr Du's military background and the apparent close connections between Xinmao and the Chinese military. These concerns resounded those that surround

higher bid than its European competitors,[50] seeking to acquire a leading multinational that is active in strategically important markets.

After losing a bidding war, Nexans (a French company that was outbid) reportedly sent a letter to the Commission in which it reportedly complained of Chinese state aid and the risk of valuable European technology being leaked to China.[51] Then Commissioner for Industry Antonio Tajani raised the alarm in various European media.[52] Similarly, Italy's minister of industry at the time, Paolo Romani, said that companies in strategic sectors like Draka should remain in European hands.[53] The transaction even prompted Antonio Tajani, together with Michel Barnier (then Commissioner for Internal Market), to issue the first proposal for the creation of a European high-level board with powers to reject non-EU investments, to replace the existing patchwork of national oversight bodies, creating a more unified investment screening process (the **Tajani-Barnier Proposal**).[54] The Commissioners also considered that the review should extend beyond mere security considerations to include interventions '*on behalf of European industrial competitiveness*', citing concerns over '*attempts to close down businesses after having stolen all of their "know-how"*'.[55]

The Tajani-Barnier Proposal, however, failed to gain the support of the wider Commission. In response to questions from the European Parliament, the Commission response was that the Tajani-Barnier Proposal should be seen in the context of an ongoing debate about some aspects of foreign investments, and that the position of the Commission remained that the EU should be a highly open economy. In fact, the response noted, the Commission had consistently expressed concerns about investment screening mechanisms that were based on a broad notion of 'national security', especially when covering economic grounds.[56] It is perhaps no coincidence that the EU FDI

Huawei founder Ren Zhengfei, a former army officer, today. *See* for instance, https://www.volkskrant.nl/nieuws-achtergrond/aan-xinmao-hangt-een-legerluchtje~b08fc7e5/. (accessed 5 Mar. 2021).

50 Upon announcement by Draka of a bid by France-based Nexan, Italian-based Prysmian outbid Nexans and proposed the combination with its own cable business. Only hours after the announcement that Draka had agreed to Prysmian's offer, Xinmao stated that it was offering 19% more than Prysmian's bid.

51 Reuters, *Interview – EU Industry Chief Worried About Xinmao's Draka Bid* (2 Dec. 2020), https://uk.reuters.com/article/idUKLDE6B11IP20101202. (accessed 5 Mar. 2021).

52 *Ibid*. *See also* Volkskrant, *Europese Bedrijven Beschermen*, https://www.volkskrant.nl/nieuws-achtergrond/europese-bedrijven-beschermen~bafccf7e/ (accessed 5 Mar. 2021).

53 *Ibid*.

54 *See* De Kok, *supra* n. 43, at 36.

55 Commission, *Cabinet Newsletter*, No. 33 (11 Feb. 2011), http://ec.europa.eu/archives/commission_2010-2014/tajani/about/newsletter/files/2011-02/cabnews-33-20110211_en.pdf (accessed 5 Mar. 2021).

56 A. Tajani, *Parliamentary Questions – Answer Given by Mr Tajani on Behalf of the Commission*, E-004320/2011, OJ C314E, http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2011-004320&language=EN; (accessed 5 Mar. 2021); Parliamentary Question by Constance Le Grip, *Reflection on the Impact of Foreign Direct Investments (FDI) in the European Union*, E-004320/2011, OJ C314E, htt

Regulation was (many years later) adopted under Tajani's presidency of the European Parliament.

In the Netherlands, the Dutch government also strongly defended a policy of non-intervention, informing the Parliament that '*It is up to market participants to issue a bid on the basis of commercial reasons. The Dutch government has no role to play in this*'.[57] In response to questions on whether essential technology may leave the Netherlands, the government responded that foreign investments bring in knowledge, skills and technology, but could also result in the loss of know-how to foreign countries. Indeed, obtaining technological research capacities is a common aim of mergers and acquisitions, not only of Chinese undertakings. The government furthermore noted that foreign acquisitions stimulate competition and that Dutch investments in China are significantly larger than inbound investments. The government therefore opposed any legislative measures restricting state-aided foreign investments or investments that could result in the loss of R&D capabilities in the Netherlands, noting that general and sector-specific rules sufficiently safeguard the public interest. In any event, the government noted that a possible transaction would be funded by the China Minsheng Bank, a privately-owned bank that is listed on the Hong Kong stock exchange, and that there was therefore no reason to suspect that the transaction was based on more than just commercial reasons.[58]

In the end, Xinmao withdrew its offer. The stated reason for the withdrawal was that Xinmao was unable to raise sufficient funds to finance the deal. In light of the small size of Xinmao compared to Draka (or Prysmian), this explanation is plausible, though many questioned whether the backlash in the media and from Commissioners Tajani and Barnier may have played a part in this decision.[59]

Towards the end of the 2010s, the rise in acquisitions of European companies possessing key technologies by Chinese companies, however, resulted in a renewed

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ps://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2011-004320+0+DOC+XML+V0//EN. (accessed 5 Mar. 2021).

57 Tweede Kamer, *Vragen gesteld door de leden der Kamer, met de daarop door de regering gegeven antwoorden*, Vergaderjaar 201–2011, Aanhangsel van de Handelingen, nummer 943, https://zoek.officielebekendmakingen.nl/ah-tk-20102011-943.html, *see also* in lesser detail Tweede Kamer, *Vragen gesteld door de leden der Kamer, met de daarop door de regering gegeven antwoorden*, Vergaderjaar 201–2011, Aanhangsel van de Handelingen, nummer 942, https://zoek.officielebekendmakingen.nl/ah-tk-20102011-942.html#ID-2010Z18595-d28e82.

58 *Ibid*.

59 Peter Peverelli and Jiwen Song question the official reason, noting that it is unlikely that Xinmao would have made such an offer if the management would not have been sure it would have been able to pay up. Instead, they contend that Xinmao withdrew from the battle for Draka because management was no longer willing to expose itself to the '*often emotional and usually prejudiced criticism*'. Peverelli & Song, *supra* n. 48, at 5. In an interview by the Dutch newspaper NRC with Prysmian, the new Draka shareholder noted that Xinmao did not have the funding, that no bank would have been willing to fund the EUR 1 billion bid, plus additional refinancing of EUR 500 to 600 million of debt, and that it was improper to make the bid without having the money. *See*, https://www.nrc.nl/nieuws/2011/01/27/bod-xinmao-was-niet-netjes-11991829-a1219219 (accessed 5 Mar. 2021).

interest in investment screening mechanisms. Chinese investments started being viewed as particularly problematic because of fears that such investments could be linked to the implementation of geopolitical objectives.[60] While investment screening does not just apply to Chinese investments, and does not specifically refer to China, the legal-historical background suggests that the geopolitical developments relating to China were pivotal in the ultimate change of policy position that resulted in the FDI Screening Regulation and the proposed National Security Screening Act.[61] The development in the Dutch governmental views with respect to Chinese investments therefore merits specific attention.[62]

It should be noted that various other developments were also relevant for the growing concerns in The Hague and Brussels over security implications of investments. In the Netherlands, the attempted acquisition of KPN by América Móvil had nothing to do with China. The Dutch Parliament has also raised questions regarding the national security implications of the acquisition of encryption company Fox-IT (which handles state secrets for the Dutch government) by the British NCC Group in November 2015,[63] and the (failed) acquisition of PostNL by Belgian BPost (40% owned by the Belgian state) in November 2016.[64] The United States trade policy under the Trump presidency[65] and the Covid-19 pandemic further increased awareness of the risks of foreign ownership over critical industries. However, none of these developments raised as many concerns as the shift of economic and geopolitical power to China.

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60 European Union Chamber of Commerce in China, *China Manufacturing 2025: Putting Industrial Policy Ahead of Market Forces* 55 (2017), http://www.europeanchamber.com.cn/en/china-manufacturing-2025 (accessed 5 Mar. 2021).

61 De Kok, *supra* n. 43, at 25; *See also* F. Nicolas, *China's Direct Investment in the European Union: Challenges and Policy Responses*, 7 China Econ. J. 103, 109–110 and 119–121 (2014); L. Röller & N. Véron, *Safe and Sound: An EU Approach to Sovereign Investment*, 8(1) Bruegel Pol'y Br. (2008); F. Godement, J. Parello-Plesner & A. Richard, *The Scramble for Europe*, European Council on Foreign Relations Policy Brief No.37 (2011); F. Godement & A. Vasselier, *China at the Gates: A New Power Audit of EU-China Relations* 37 (London: European Council on Foreign Relations 2017).

62 For an overview of the European views, *see* De Kok, *supra* n. 43, at 25.

63 *See* J. Leijten & E. Rosenberg, *Overheid eist invloed bij cyberbeveiliger Fox-IT*, NRC (24 Jan. 2017), https://www.nrc.nl/nieuws/2017/01/24/overheid-eist-invloed-bij-cyberbeveiliger-fox-it-6382806-a1542772 (accessed 5 Mar. 2021) and A. Weissink, *Beschermingswet kwam ook voor Fox-IT te laat*, FD (25 Jan. 2017), https://fd.nl/economie-politiek/1184549/beschermingswet-kwam-ook-voor-fox-it-te-laat (accessed 5 Mar. 2021).

64 *See* Brief van de Minister van Economische Zaken, Toekomstige ontwikkeling van de Nederlandse postsector, 14 Nov. 2016, Kamerstuk 29 502, nr. 125, https://zoek.officielebekendmakingen.nl/kst-29502-125.html (accessed 5 Mar. 2021) and Tweede Kamer der Staten-Generaal, *Mogelijke overname van PostNL door bpost,* 8 Dec. 2016, Kamerstuk 29 502, nr. 22, https://zoek.officielebekendmakingen.nl/h-tk-20162017–22-20.html (accessed 5 Mar. 2021).

65 *See* for instance, Brief van de Minister van Justitie en Veiligheid (18 Apr. 2019), Kamerstuk 30 821, nr. 72, https://zoek.officielebekendmakingen.nl/kst-30821–72.html (accessed 5 Mar. 2021), referring to Kamerstuk 30 977, nr.154 and 29 924, nr.165.

4.2 Between naivety and paranoia

In 2014, following the (ultimately failed) América Móvil/KPN and Xinmao/Draka transactions, as well as in light of the increased complexity and risks in the geopolitical context of the world economy more generally, including the '*shift of power towards Asia, the no longer guaranteed security coverage by the US,*[66] *increased dependencies on essential inputs and (digital) espionage*',[67] the National Coordinator for Security and Counterterrorism (**NCTV**) was requested by the Dutch intelligence services to review whether the national security interests (including economic security) were sufficiently safeguarded in the context of foreign acquisitions and investments. In particular, the NCTV focussed on the question whether foreign acquisitions and investments could increase existing vulnerabilities or create new risks regarding national security, and whether sufficient safeguards existed.

In its 2014 report titled '*Between naivety and paranoia*',[68] the NCTV advised against the introduction of a general screening framework and concluded that there was no potential national security dimension in the vast majority of foreign investments in the Netherlands. Only in a limited number of cases was this different. In the case of a genuine threat to national security, the NCTV considered that various laws and regulations, concession agreements, supervision frameworks, state ownership, commercial contracts and other protective measures under corporate law already provided for various instruments in order to protect public interests. The NCTV nonetheless advised that an *ex ante* analysis should be prepared on the risks in critical industries in order to determine whether there were any lacunas in the legal framework. In the analysis prepared for the NCTV by the Business Law Institute of Radboud University Nijmegen, the Institute concluded that in several sectors (in particular in the telecom, digital government and defence sectors) vulnerabilities existed due to the lack of legal instruments to preventively safeguard national security interests. The Institute therefore recommended the adoption of sector-specific instruments in order to target those risks.[69]

A cocktail of geopolitical developments, however, resulted in a significant realignment of the Dutch governmental position regarding the role of national

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66 In Dutch: '*de niet meer vanzelfsprekende veiligheidsparaplu van de Verenigde Staten*', literally, the no longer guaranteed security umbrella of the United States.

67 NCTV, *Tussen naïviteit en paranoia: Nationale veiligheidsbelangen bij buitenlandse overnames en investeringen in vitale sectoren* (Rapportage Werkgroep Economische Veiligheid Apr. 2014), https://zoek.officielebekendmakingen.nl/kst-30821-22.html (accessed 5 Mar. 2021).

68 *Ibid*.

69 The Institute also advised to adopt additional safeguards in the context of (domestic) rules on suspension of payments and bankruptcy, restructuring, cooperation agreements and financial management. C. Bulten, B. de Jong, E. Breukink & A. Jettinghoff, *Vitale vennootschappen in veilige handen* 1–3 (Nijmegen: Wetenschappelijk Onderzoek- en Documentatiecentrum 2017), https://www.wodc.nl/binaries/2609_Volledige_Tekst_tcm28-250320.pdf. (accessed 5 Mar. 2021).

security and international investments. In various documents, including the first Netherlands-China strategy ('*A new balance*'), the 2019 National Security Strategy and a letter to the Parliament by the Minister of Justice and Security, the government warned of the risks that investments could pose to the national security. These investments notably shifted the focus, from concerns over the protection of critical infrastructures to the acquisition of key technologies.

In the May 2019 Netherlands-China Strategy, the government warned that, while China is an important trade and investment partner, and while it is important to work together on the basis of shared interests, the Netherlands should avoid becoming dependent on China for key technologies and essential inputs (such as rare earth minerals), that intellectual property should be protected, undesirable technology transfers prevented, and risks relating to investments contained.[70] The government 'placed question marks' after the geopolitical intentions behind the economic expansion of China, in particular regarding investments in physical infrastructure and high-tech industries abroad,[71] specifically referring to the ambition of China to become a technological superpower under its China 2025 strategy.[72] The strategic document notes that the civil and military sectors in China are closely intertwined, which requires additional attention to the export of strategic goods or investments that touch upon national or economic security. According to the government, it cannot be excluded from the outset that goods acquired for civil purposes would not be used for military ends, especially for high-tech products. The China Strategy warned that the creation of strategic dependency should be prevented, notably dependency that could result in societal disruptions, such as interference with the democratic legal order or the continuity of vital processes.[73]

A month earlier, the Dutch Minister of Justice and Security had informed the Parliament of an '*inconvenient paradox*', that the freedoms that guarantee openness also provide room for foreign powers with malicious intentions to carry out activities to undermine national security and to impair freedom.[74] According to the Minister, '*new players*' (read: China) had entered the world stage and '*traditional allies*' (read: the US) had disappeared or changed. According to intelligence reports, more and more

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70 Policy Paper The Netherlands and China: a new balance at 12, https://www.government.nl/documents/policy-notes/2019/05/15/china-strategy-the-netherlands–china-a-new-balance (accessed 5 Mar. 2021).

71 *Ibid*., at 13.

72 *Ibid*., at 14; *See also* IISS, *China's Pursuit of Advanced Dual-Use Technologies*, Research Paper, https://www.iiss.org/blogs/research-paper/2018/12/emerging-technology-dominance (accessed 5 Mar. 2021).

73 *Ibid*., at 15.

74 Brief van de Minister van Justitie en Veiligheid, *supra* n. 63.

foreign powers are carrying out cyber-attacks, seeking to covertly influence and manipulate decision-making processes, and using economic means of power to realize political agendas.[75] The government would therefore be vigilant about threats to the integrity and exclusivity of knowledge and information and threats to continuity of critical services and processes for the Dutch economy, while harbouring and protecting the open society and economy where possible.[76] The government announced various measures, such as the creation of the Taskforce Economic Security, diplomatically noting that these proposed measures are generally applicable, and therefore do not just apply to investments from China.

4.3 The Proposed National Security Screening Act

Following the global Covid-19 pandemic, the Dutch government expedited the preparation of the National Security Screening Act (*Wet veiligheidstoets investeringen, fusies en overnames*).[77] The National Security Screening Act will introduce a mandatory filing obligation for investments in certain undertakings that are active in critical sectors and to undertakings that are active in the area of sensitive technologies.[78] The screening mechanism will apply to all investors, including those from the Netherlands.

Instead of subjecting all companies that are active in a critical sector to a mandatory screening obligation, the proposed Act will only apply to specific

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75 *Ibid*., referring to Kamerstuk 30 977, nr.154 and 29 924, nr.165.

76 The Minister's letter has a strong focus on threats arising from foreign powers with malicious intentions and traditional types of threats to national security, such as espionage, sabotage and manipulation of democratic processes, rather than the broader 'economic security' considerations, such as the protection of strategic autonomy or technological leadership. The Minister refers to the sector-specific analysis of threats to the integrity and exclusivity of information and the continuity of vital services and processes that is attached to the letter. However, this analysis offers no concrete guidance on how the government would seek to ensure 'economic security'. In fact, in merely four bullet points, the analysis concludes that vital services and processes are largely protected by means of sector-specific legislation. The Minister therefore offers little guidance on what types of information or technology need to be protected against what type of investors. *Ibid*., bijlage: Accenten van de aanpak statelijke dreigingen, https://zoek.officielebekendmakingen.nl/blg-880665. (accessed 5 Mar. 2021).

77 Formerly *Wet toetsing economie en nationale veiligheid*. The text of the Proposal, at the time of writing, is https://www.internetconsultatie.nl/investeringstoets (accessed 5 Mar. 2021). Investments taking place as of 2 June 2020 may be screened retroactively if necessary. According to government, the economic circumstances resulting from the Covid-19 outbreak have increased the risk of undesirable acquisitions and investments, warranting an expedited adoption. *See also* previous parliamentary discussions, such as *Verslag van een schriftelijk overleg over de investeringstoets op risico's voor de nationale veiligheid*, 28 januari 2020, Kamerstuk 30 821, nr.101 and *Uitkomsten van de ex ante analyse van de Nederlandse defensie technologische en industriële basis* (NLDTIB), 30 Dec. 2019, Kamerstuk 31 125, nr.108. *See also* Marinus Winters & Jochem de Kok, *Covid-19 Coronavirus: Upcoming FDI Regime in the Netherlands* (4 June 2020), https://blog.allenovery.com/aoblog/corporate_nl/covid-19-update-coming-fdi-regime-in-the-netherlands (accessed 5 Mar. 2021).

78 *See* Art. 2 of the proposal, https://www.internetconsultatie.nl/investeringstoets (accessed 5 Mar. 2021).

undertakings that have been designated, *ex ante*, as critical companies.[79] This specificity can be contrasted with the initial draft of the National Security Screening Act, which did not provide concrete guidance on which undertakings should be deemed to constitute critical companies.[80] The Ministry of Economic Affairs and Climate Policy confirmed that they changed the approach in order to ensure clarity and legal certainty while maintaining flexibility.[81]

With respect to sensitive technologies, the National Security Screening Act provides that these are technologies that are subject to dual use export restrictions under Regulation 428/2009, as well as additional technologies that have been designated as sensitive by governmental decree.[82] The government may designate additional technologies as sensitive if they are of essential importance for the functioning of the armed forces or intelligence agencies, if the availability of these technologies within the Netherlands or its allies is essential in order to avoid unacceptable risks relating to the availability of such essential products or services, or if the technology is characterized by a broad scope of application within different critical processes or processes that touch upon national security.[83] The National Security Screening Act therefore does not target each and every concern that has arisen with respect to Chinese investments in technology sectors more generally but rather focusses on the protection of technologies that are – in the end – related to national security.

The possibility for ad hoc adjustments to the list of critical undertakings or the scope sensitive technologies will inevitably create legal uncertainty for investors, as it cannot be excluded that the government would seek to expand its jurisdiction on a case-by-case basis if it seeks to intervene. However, the uncertainty under the general screening mechanisms elsewhere on the continent is far greater.[84] After all, the broad definition of the jurisdictional tests, based on vague concepts like 'critical industries' or 'critical technologies', requires the investor to make a judgment call as to whether the target company may or not may not be sensitive. In practice, this is not an easy exercise. For instance, it could be unclear whether a company that

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79 This was confirmed by the Ministry of Economic Affairs and Climate Policy to this author during an informal discussion on the legislative proposal. The critical companies will be designated as such by means of a governmental decree (*Algemene maatregel van bestuur*).

80 As noted above, the FDI Screening Regulation and screening mechanisms of various Member States are equally broad.

81 This was confirmed by the Ministry of Economic Affairs and Climate Policy to this author during an informal discussion on the legislative proposal. This change was partly guided by the response to the public consultation, including a reaction submitted by Tim Stevens, Marinus Winters and this author, Jochem de Kok, https://www.internetconsultatie.nl/investeringstoets/reactie/42b11f84-5bdf-41d7-a3c3-55e1693aba5c (accessed 5 Mar. 2021).

82 Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (OJ L 134, 29 May 2009, at 1–269).

83 *See* Art. 3 of the proposal, https://www.internetconsultatie.nl/investeringstoets (accessed 5 Mar. 2021).

84 *See* the text at fnn. 23–24 and43.

supplies information technology services in various sectors, including in the energy sector, is 'active in the energy sector'. It may also not be easy to tell whether a tech start-up is active in the area of 'sensitive technologies'. Yet, despite these vague jurisdictional tests, the consequences for a failure to notify a transaction are severe, as sanctions typically include nullification of the investment and/or steep fines.

The Dutch framework for investment screening illustrates that the legal uncertainty that follows in the wake of the introduction of a screening mechanism can be addressed through the adoption of concrete thresholds specifying the scope of application of the screening mechanism, and more detailed guidance on the substantive assessment. The analysis of the sector-specific mechanisms illustrates that it would also be possible for general screening mechanisms to provide general criteria for which undertakings can be deemed to be of substantial importance for the continuity and resilience of critical processes or the protection of sensitive technologies. It is even possible to specify exactly which undertakings are of such importance that a national security screening is warranted. National governments throughout the EU that are introducing or strengthening general screening mechanisms have seemingly given insufficient thought to which companies should be protected, and to what extent. Member States would be advised to consider what type of procedural thresholds could be adopted in order to provide for objective methods to assess whether a transaction does or does not fall under the scope of application of a screening mechanism. These thresholds could target specific companies (listed in secondary legislations), categories of companies (such as LNG facilities, companies that own dual use technologies or other specific types of technologies), facilities that have a certain capacity (such as power plants with a capacity of more than 250 MW or data centres of more than 50 MW), number of end users (such as internet access or telephone services to more than 100,000 end users), and/or other objective thresholds.

As regards the substantive analysis, the proposed National Security Screening Act unfortunately remains rather generic. The National Security Screening Act merely provides that certain elements relating to the investor may be taken into account, such as its track record and country of origin, but does not specify the types of risks that will be assessed as part of the review process.[85] With respect to the acquisitions in the area of sensitive technologies, the government may also take into consideration whether the acquirer is established in (or under the influence of) a country that has an offensive (i.e., active) programme aimed at acquiring sensitive technologies in order to acquire a technological or strategic position of power.[86] While this statement appears to be directed at China, it can easily be argued that the

[85] Article 7 of the Proposal.
[86] Article 7(3)(e) Proposal.

US and other democratic market economies have precisely the same strategic objectives.

Further guidance on the substantive assessment should, however, be developed, both in the Netherlands as elsewhere in Europe. Screening authorities should in particular specify the focus of the substantive analysis, namely which specific national security threats are assessed as part of the screening (such as security of supply in the energy sector, the risk of outage or misuse in the telecom sector, and/or which specific geopolitical risks). Further clarity should notably be provided with respect to the substantive assessment of acquisitions of companies that are active in the area of sensitive technologies. In addition, mechanisms should set out in more detail the relevant criteria for assessing the sensitivity of the target company and the desirability of the foreign investor (for instance, with a focus on the financial reliability, governance and management, transparency, track record and/or intentions of the investor) and explain how these criteria are considered in light of the potential threats. By ensuring more targeted screening obligations and clearer substantive thresholds, foreign investment screening mechanisms are ultimately likely to help ensure an open investment climate, addressing concerns over encroachment on national security in a changing geopolitical world, while ensuring that investments are only prohibited or restricted on the basis of genuine and sufficiently serious threats to security or public order.

5 CONCLUSION

The framework for investment screening in the Netherlands has developed and expanded over time in the context of specific legal-historical developments, such as the implementation of the third energy package, the failed hostile takeover of KPN by América Móvil and, more recently, concerns behind Chinese investments in physical infrastructures and high-tech industries.

The sector-specific screening mechanism in the energy sector was adopted in the context of the third energy package. The sector-specific framework is targeted only at covering acquisitions of large power plants and LNG installations and the substantive assessment is focussed on the financial reliability, governance and management, and transparency of the investor. The targeted approach provides important benefits to investors from the perspective of legal certainty as compared to general screening frameworks. Compared to the European FDI Screening Regulation and the general investment screening mechanism of many Member States, the Dutch screening mechanism in the energy sector has a more targeted approach, excluding filing obligations for small energy producers and/or other undertakings active in the energy sector, and providing greater legal certainty as it establishes objective thresholds for the investor to determine whether the investment

requires prior governmental approval. Substantively, the mechanism provides the investor with a reasonably objective insight into the concrete assessment criteria and, consequently, more transparency and legal certainty with respect to the application of the screening mechanism.

The Telecom Screening Act was a direct result of the failed hostile takeover of KPN by América Móvil. Even though the failed acquisition of KPN by América Móvil was the primary motivation for the adoption of the Telecom Screening Act, it is quite unlikely that the Minister would have reasonably been able to block this transaction on the basis of this Act due to the focus of the Act on the malicious intentions of the investor or State and/or track record of the investor. The focus on malicious intentions is also inconsistent with the most important risks identified in the legislative history, namely geopolitical and security risks. Rather than the (proven) intention of the investor or the foreign State, the laws, policies and track record of the foreign State and the investor's data protection and cyber security policies would have been a more logical starting point for determining whether a transaction could increase geopolitical or security risks as defined by the government during the legislative preparations. That being said, the Telecom Screening Act does provide general lessons for the Union and other Member States. Notably, the Telecom Screening Act provides for a clearly defined scope of application and specific and more predictable assessment criteria, thus providing a greater degree of legal certainty for the investor. Therefore, with some amendments, these criteria could serve as a model for other Member States and the Commission.

Breaking with a long-standing opposition by successive Dutch governments against introducing a general screening framework, the increased concerns over geopolitical intentions behind Chinese investments in physical infrastructure and, in particular, high-tech industries, in combination with the adoption of the EU FDI Screening Regulation, have prompted the government to propose the introduction of a general screening mechanism. The proposed National Security Screening Act will introduce a mandatory filing obligation for companies that have been qualified as, in short, critical infrastructure companies or companies active in the area of sensitive technologies. Substantively, while the legal-historical analysis illustrates that the Dutch state is unlikely to intervene in investments except for exceptional cases, the screening will be undertaken on the basis of the largely undefined and unspecified concept of 'national security'.

Despite imperfections in the drafting, the specificity of the Dutch sector-specific screening mechanisms offers important benefits to investors and can therefore serve as a model for ensuring more targeted screening mechanisms. Notably, instead of covering all transactions 'in the telecom or energy sector', the sector-specific mechanisms provide detailed rules on which undertakings are deemed to be of sufficient relevance to justify an investment screening filing obligation. In addition,

rather than a broad test on the basis of national security and public order, the energy and telecom screening mechanisms provide for more detailed frameworks of assessment. The legal uncertainty that follows in the wake of the introduction of a general screening mechanism can therefore be partly addressed through the adoption of concrete thresholds and a detailed framework of assessment.

The procedural thresholds could target specific companies, categories of companies, facilities that have a certain capacity, number of end users and/or other objective thresholds. With some amendments, the criteria set out under the Dutch screening mechanisms could serve as a model for other Member States and the Commission. With respect to the substantive framework of assessment, screening authorities should clarify the focus of the substantive analysis, namely which specific national security threats are assessed as part of the screening, the relevant criteria for assessing the sensitivity of the target company and the desirability of the foreign investor and explain how these criteria are considered in light of the potential threats. By ensuring more targeted screening obligations and clearer substantive thresholds, foreign investment screening mechanisms are ultimately likely to help ensure an open investment climate by addressing concerns over encroachments on national security in a changing geopolitical world, while ensuring that investments are only prohibited or restricted on the basis of genuine and sufficiently serious threats to security or public order.

Considering that investment screening mechanisms throughout the Union are still in their infancy, it is to be hoped that the Commission and governments throughout the Union will endeavour to establish clearer procedural thresholds and frameworks of assessment to ensure that only transactions that can reasonably pose a threat to security or public order are made subject to filing obligations and are assessed on the basis of more clearly defined substantive criteria.