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INTERNATIONAL TRADE

# SCREENINGMECHANISME BUITENLANDSE INVESTERINGEN: ALLES WAT UW BEDRIJF MOET WETEN

FDI screening and our neighbours: common challenges & best practices

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## Introduction

- A steep increase of jurisdictions who adopted (or upgraded) a FDI screening mechanism
- An expansion of the scope and the scope and coverage of the “national security” concept in recent years (new sectors, emerging technologies, sensitive personal data, ...)
- A continuous effort to balance a countries’ ability to address essential security concerns without weakening its FDI (sustainable) development plans
- What follows is NOT academic research, but merely based on feedback received from colleagues & friends in NL, D, SP & DK who are dealing with the newly implemented (or upgraded) FDI screening regimes in their respective jurisdictions

## ❖ More guidance needed - lack of legal certainty

- Example: What is critical infrastructure ?
- Lists of strategic / critical sectors is very broad and only limited guidance available
- No (public) database of previous assessments

## ❖ Lack of information throughout the procedure

- Concerns (and potentially commitments and corrective actions) established based on 'classified' information
- As a consequence, difficulties for investor (and target) to address these risks

## ❖ Commitments / Corrective actions

- Often focussed on the target (not the investor)
- Risk that authorities (mis)use the framework to achieve certain targets not directly related to national security concerns

## ❖ Lack of harmonization & timing

- Remains a patchwork of national MS procedures and policies
- Timing can be unpredictable (up to 8 months in more in some cases)
- Low thresholds in some jurisdictions and expansion to for example supplier and/or R&D agreements

- ❖ **Investors should carefully map the risks and make an early risk assessment**
  - National security, public order or strategic interests are **evolving concepts** (e.g. new and advanced technologies and/or new geopolitical risks)
  - Consulting early with **(local) counsel and/or the competent regulator** helps to identify (and assess) risks and obtain guidance
  - The risk analyses will anyhow be part of the **negotiation** so it better to have a clear analyses ready when engaging with the target
  - An early and transparent approach of the target can also help to obtain the assistance of the target in the **regulatory process**

## ❖ Identify the procedures and time frame(s)

- **Timelines** do not always correspond with what is foreseen in the underlying legislation
- **Procedures** can be different from one jurisdiction to another (for example level of detail required in the notification forms to allow a swift assessment, importance of voluntary notifications, ...)
- **Additional complexities** when multiple jurisdictions are involved



- ❖ **Make sure that as an investor you are allowed to identify and address FDI screening risks**
  - Include this right in the transaction agreement and the due diligence
  - ‘Ask the right question(s)’
  - Include branches and subsidiaries in the review
  - Include condition precedents in the transaction documentation + clearly allocate risks & liabilities

Example:

*“Closing shall be conditional on FDI clearance having been obtained the (“Condition”). ”*

## ❖ If risks are identified develop a strategy

- Does the transaction allow for divestment of the critical parts ?
- Pro-actively suggest commitments and/or corrective actions) that could remove concerns
- Align (early) with regulators and other parties



Questions ?



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