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ARTICLES

FOREIGN INVESTMENTS AND ENERGY TRANSITION IN THE NETHERLANDS: BALANCING ECONOMIC AND SECURITY INTERESTS

Olga Hrynkiv and Saskia Lavrijssen

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ABSTRACT

Affordability, competitiveness, security of supply, and sustainability are among the goals set for the field of the energy transition for 2030[1] through 2050.[2] In order to meet these goals, the energy sector of the European Union (EU) will require a continuous inflow of capital, particularly Foreign Direct Investment (FDI).[3] Unfortunately, FDI has raised severe national security concerns in EU Member States, leading to the need to adopt and subsequently revisit the FDI screening framework on the EU level. On a domestic level, several EU Member States, such as the Netherlands, have either strengthened

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[1] *See generally A Policy Framework for Climate and Energy in the Period from 2020 to 2030*, at 4, COM (2004) 15 final (Jan. 22, 2014) (discussing the 2030 policy framework and what it is based on).

[2] *See generally The European Green Deal*, at 2, COM (2019) 640 Final (Dec. 11, 2009) (discussing the primary objective of the European Green Deal which is to "transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use.").

[3] *See* Victoria Masterson, *How much will it cost Europe to switch to clean energy by 2050?*, WORLD ECONOMIC FORUM (Sept. 15, 2023, 1:52 PM), https://www.weforum.org/agenda/2022/04/bnef-european-energy-transition-2022/ (estimating the necessary investment for the EU to switch to clean energy by 2050 to be $5.3 trillion USD).

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or are considering strengthening their screening mechanisms. States have been screening FDI on national security grounds for decades, but the scope of new mechanisms has dramatically expanded to cover more sectors, transactions, and types of investors. In particular, FDIs that affect energy infrastructure, supply of energy, raw materials, dual-use items, and critical technologies necessary for the energy transition should be subjected to more rigid scrutiny.[4] These regulatory and policy developments might hinder the flow of investments into the energy sector and the advancement of new technologies and thus have implications for the prospects and speed of the energy transition in Europe.

This Article will discuss the overarching question of how states can organize their investment screening mechanisms in a way that balances their national security interests against the need for free flow of FDI to stimulate development of technologies that accelerate the energy transition. This includes a case study of the FDI policy of the Netherlands, one of the major destinations of global FDI. This Article initially distills the principles necessary to balancing competing security and economic interests of host states in the investment law context. Based on such principles, it further examines the extent to which existing regulatory mechanisms in the Netherlands are adequate in addressing security concerns posed by FDI while continuing to attract investments in the energy sector and related technologies. Specifically, this Article aims to identify trends in investment screening in the Netherlands, reflect on their coherence with overarching EU investment policy objectives and the multilateral guidance on a good policy design, and discuss the potential implications of recent regulatory developments for the future of the energy transition in Europe. More broadly, this Article contextualizes the case of the Netherlands within the global movement of tightening control over FDI and explores the relationship between the investment policy of a State, on the one hand, and its objectives to combat climate change and safeguard energy security, on the other.

Keywords

Balancing, critical infrastructure, energy transition, foreign investment, investment screening, national security, and sensitive technology.

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[4] *Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation)*, 2020 O.J. (C 99I) 3–4.

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I. INTRODUCTION

Foreign direct investment (FDI) is essential for developing renewable energy projects and smart energy systems that require large amounts of capital and technology. It helps strengthen the know-how and technological expertise necessary for shifting to renewable energy sources and facilitates the transfer of technology related to renewable energy, thereby boosting energy efficiency and energy security.[5] At the same time, ". . . [o]nce the investment is legally established, it is not just capital that is transferred into a host State but, depending on the transaction, also a combination of rights, control, and access that is, in return, legally afforded to foreign investors."[6] To this end, FDI is increasingly recognized to present security threats to a host State, by undermining its cybersecurity, creating dependence on foreign goods or services crucial to the functioning of its economy, or granting access to foreign companies to critical technologies that can harm its essential interests.[7]

To address such national security concerns in the energy sector, States might decide to restrict foreign ownership of energy assets, to screen investments for security risks, and/or to diversify import routes for certain goods. Increasingly, governments are rejecting the idea that national welfare can only be achieved by ensuring self-sufficiency in crucial goods and services and keeping ownership of crucial companies in national hands. Many have committed to promoting free trade and the free flow of investments by entering into Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs) with other countries. International trade and investment laws constrain the implementation of restrictive trade and investment measures, including in the energy sector and regarding the development of new technologies necessary for the energy transition.

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[5] Zerrin Kiliçarslan, *The Relationship between Foreign Direct Investment and Renewable Energy Production: Evidence from Brazil, Russia, India, China, South Africa and Turkey*, 9 INT'L J. ENERGY ECON. POL'Y 291, 291–92 (2019).

[6] Manu Misra, *Foreign Investment in Critical National Infrastructure (CNI) by State-Controlled Entities (SCEs) and Investment Screening Mechanisms (ISMs)*, *in* 28 STATE CAPITALISM & INT'L INV. L. 143, 150 (Panagiotis Delimatsis et al. eds. Hart Publ'g, 2023).

[7] *See* THEODORE MORAN, THREE THREATS: AN ANALYTICAL FRAMEWORK FOR THE CFIUS PROCESS (Peterson Inst. for Int'l Econ., 2009).

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Nevertheless, governments are still expected to balance their trade and investment liberalization agenda with ensuring national security. The completion of national security reviews by host governments becomes an important condition for allowing FDI transactions in both capital-importing and capital-exporting countries.[8] Such reviews are based on domestic screening mechanisms with a rather limited scope. They generally do not undermine the premise in favor of the free movement of FDI, but rather allow governments to prevent the implementation of specific investment proposals or to impose mitigation measures when such proposals can otherwise harm national interests. The criteria based on which a host government decides to allow or prohibit an FDI project vary from country to country, as does the process for their evaluation by domestic authorities.

Several scholars argue that the absence of clear regulatory criteria and the lack of transparent decision-making on matters related to FDI screening based on national security grounds fosters arbitrary regulation, legal uncertainty, and contributes to rising economic protectionism in host States.[9] The government's intervention in foreign takeovers might be motivated by pressing geostrategic concerns, such as the desire to ensure a host State's power and security in the international arena; to protect the liberal values it has in common with certain other States/blocs; to signal a change in tone, addressing a counterpart as a systemic rival or competitor instead of the previous strategic partner; or to demonstrate increased self-sufficiency, self-reliance, and resilience in continuing economic integration.[10] Investment restrictions can also be used as an economic nationalist policy allowing a host State to attract those FDIs that would advance its development policy[11] or to satisfy the private interests of domestic political elites[12] or competitors who

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[8] *See generally* Tania Voon & Dean Merriman, *Incoming: How International Investment Law Constrains Foreign Investment Screening*, 24 J. WORLD INV. & TRADE 75 (discussing the results of increased domestic screening of inbound foreign investments in recent years).

[9] *See generally* Cheng Bian, *Foreign Direct Investment Screening and National Security: Reducing Regulatory Hurdles to Investors Through Induced Reciprocity*, 22 J. WORLD INV. & TRADE 561; MORAN, *supra* note 7, at 36–37.

[10] *See* ASHLEY THOMAS LENIHAN, BALANCING POWER WITHOUT WEAPONS: STATE INTERVENTION INTO CROSS-BORDER MERGERS AND ACQUISITIONS 40–41 (2018).

[11] Kenneth J. Vandevelde, *The Political Economy of a Bilateral Investment Treaty*, 92 AM. J. INT'L L. 621, 633 (1998).

[12] *See* Nick Ritchie, *Rethinking Security: A Critical Analysis of the Strategic Defence and Security Review*, 87 INT'L AFFAIRS 355, 359 (2011).

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rely on investment screening as a convenient vehicle to implement their own takeover plans.[13] As a result, FDI that could be necessary and useful for the transition toward a sustainable economy in a host State can be at risk of being repelled for political reasons.

Even if it does not result in blocking the FDI, excessive investment screening might discourage foreign investors from investing in a host State or entering into potential agreements with its administration.[14] Thus, by creating an unpredictable regulatory climate or making the screening procedure too burdensome for investors, a host State might unintentionally hinder the flow of investments into its energy sector and the advancement of new technologies and, by extension, undermine the prospects and speed of the energy transition.

The overarching question is how States can (or should) organize their investment screening mechanisms in a way that protects their national security interests, but also allows for adequate flow of FDI needed to stimulate and accelerate the energy transition. Such a balance should be understood as a matter of degree that depends on the weighing of conflicting demands and interests, such as the benefits of the free flow of FDI in a specific sector, the right of a host State to protect non-economic national interests, and the interest of foreign investors to profit from a minimum level of protection in a host State. This research argues that an appropriate balance between the security and economic objectives of a host State can be achieved when domestic regulations preserve enough space to protect genuine and pressing security concerns of a host State that cannot be addressed by other means, while simultaneously ensuring precise and transparent procedures and criteria for the FDI screening. These objectives may be attained by tailoring mechanisms to the particularities of specific sectors or types of investments. In particular, they might consider the vulnerabilities of certain domestic companies; the nature of the threat posed if such vulnerabilities are misused; and the availability of other regulatory tools that can mitigate

[13] MORAN, *supra* note 7, at 9.

[14] Carlos Esplugues Mota, *A More Targeted Approach to Foreign Direct Investment: The Establishment of Screening Systems on National Security Grounds*, 15 BRAZ. J. INT'L L. 440, 460 (2018).

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national security risks of such investments or prevent potential harm to the sector in case of misuse.[15]

In order to sharpen and rectify the issues arising from the implementation of investment screening mechanisms worldwide, this Article uses the FDI policy of the Netherlands as a case study. The Netherlands remained one of the major destinations of global FDI in 2022, together with the United States of America (US), the United Kingdom, and Ireland.[16] For a long time, Dutch governments have opposed the introduction of a general screening mechanism on national security grounds fearing that it could impede the open investment climate of the country.[17] Instead, countries like the Netherlands operated sector-specific mechanisms, among others, in the gas, electricity, and, more recently, telecommunication sectors.[18] Following intensified scrutiny over FDI within the EU, the Dutch government has abandoned its former position and developed a general framework for screening investments in critical industries and sensitive technologies, which came into force in June 2023.[19]

The Netherlands is unique for several reasons. First, in addition to the international legal context, the FDI screening mechanism in the Netherlands is bound by the EU investment screening framework. Second, the introduction of a general screening mechanism in the Netherlands was subject to thorough examination and scrutiny by Dutch authorities, which resulted in years of robust discussions about ensuring the unimpeded flow of investments into the country.[20] Third, the Netherlands' cross-sectoral screening mechanism complements rather than replaces various sector-specific screening mechanisms and provides limited grounds for

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[15] *See* LUCIA RETTER ET AL., RELATIONSHIPS BETWEEN THE ECONOMY AND NATIONAL SECURITY: ANALYSIS AND CONSIDERATIONS FOR ECONOMIC SECURITY POLICY IN THE NETHERLANDS 74 (2020), https://www.rand.org/pubs/research_reports/RR4287.html.

[16] *Foreign Direct Investment Statistics: Data, Analysis and Forecasts*, OECD, https://www.oecd.org/investment/statistics.htm (select "Download the data in excel"; in Table 2, each country's 2022 investment will be in Excel column BH) (last visited Jan. 18, 2024).

[17] RETTER ET AL., *supra* note 15, at 72.

[18] *See* Elektriciteitswet 1998, Stb. 2012, 334 (see Article 86f specifically); Gaswet, Stb. 2012, 334 (see Article 66e specifically); Telecommunicatiewet, Stb. 2013, 102 (see Article 14(a) specifically).

[19] *See Wet veiligheidstoets investeringen, fusies en overnames* [Investment, Mergers and Acquisitions Screening Act], TWEEDE KAMER (June 30, 2023) (Neth.) [hereinafter *National Security Screening Act*], https://wetten.overheid.nl/BWBR0046747/2023-06-01 (see Article 4 specifically).

[20] *See* Tessa van Breugel & Saskia Larvijssen, *De Investeringstoets in Vitale Infrastructuren: Laatste Redmiddel of Reden tot Zorg?*, 6 MARKT EN MEDEDINGING (2019) (Neth.).

intervention.[21] It is for these reasons this Article uses the example of the Netherlands as a model for more targeted and predictable investment screening rules and discusses the implications of such an approach for the security and economic interests of the country. In particular, this research examines regulatory developments in the Netherlands and in the EU in general and assesses how new regulations attempt to balance the promotion of FDI in energy-related infrastructure and technology that would enable the energy transition and the need to address the security risks that such investments could potentially pose to energy security and stability in Europe.

The Article is structured as follows: *Section II* discusses the types of national security threats generated by FDI and how these threats are regulated under domestic law. *Section III* elaborates on how investment screening mechanisms operate under the existing multilateral, European, and domestic frameworks. *Section III* also distills the principles of balancing competing security and economic interests of host States in the investment law context. *Section IV* is a case study of the Netherlands and examines whether and to what extent the existing legal and institutional mechanisms in the Netherlands are adequate in addressing security threats posed by FDI while maintaining the necessary level of openness and predictability necessary for attracting foreign investments. While not attempting to evaluate all concerns arising from the implementation of the examined regulations to specific types of investors or specific investments, this Article aims to identify the trends in investment screening in the Netherlands, their coherence with the overarching EU investment policy and the multilateral guidelines, and their implications for the future of the energy transition in Europe. Finally, drawing upon the lessons from Dutch regulations and practices, *Section V* discusses how the design and implementation of FDI screening mechanisms can affect the renewable energy sector and energy security in Europe and provides policy recommendations for EU and national policymakers and directions for potential reforms.

II. MANAGING SECURITY THREATS POSED BY FDI

The growing national security concerns of host States are not unwarranted. FDI allows a foreign investor to affect the business decisions

[21] *See National Security Screening Act*, *supra* note 19 (see Article 4 specifically).

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of a domestic target, which, in some instances, might also have implications for domestic government policy. For example, the investor's interest in such decisions might be guided not only by its own commercial considerations but also by the considerations of its home country's government. The concerns are mainly related to the FDI of state-owned enterprises and sovereign wealth funds due to suspicions that such investments might no longer follow a strictly market-based logic but also be utilized for geopolitical ends.[22] The primary focus of the discussion about the security threats posed by such FDI is the possibility that FDI gives a foreign company (and by extension, its government) the influence and control over the operations of critical industries, such as the energy sector.[23] This control could be used strategically for geopolitical objectives, especially if a home State of foreign investors and a host State maintain competing economic and political systems. As such, the political pressure could lead to delays in the supply of goods and services or interrupt critical processes, including electricity or gas distribution.[24]

On top of that, digital technology is now an integral part of all products and processes.[25] The technology industry needs to grapple with the fact that technological sources of security threats are not restricted to any industry or business purpose (such as intelligence or military surveillance software). For example, the key functions of the energy industry rely on the industrial Internet of Things (IoT). Operational technology, such as sensors and industrial control systems, are linked to Information Technology (IT), machine learning, Artificial Intelligence (AI), and corporate and industrial software.[26] The integration of Information and Communication Technology (ICT) networks into critical infrastructure creates more sophisticated channels of foreign attacks, bringing cybersecurity to the forefront of

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[22] Giacomo Rojas Elgueta & Benedetta Mauro, *The Paradoxical Relationship between "Foreign Direct Investment Screening" and International Investment Law: What Role for Investor-State Arbitration?*, KLUWER ARBITRATION BLOG (Apr. 30, 2020), https://arbitrationblog.kluwerarbitration.com/2020/04/30/the-paradoxical-relationship-between-foreign-direct-investment-screening-and-international-investment-law-what-role-for-investor-state-arbitration/.

[23] *See* RETTER ET AL., *supra* note 15, at 73.

[24] *Id.*

[25] Ted Saarikko, Ulrika H. Westergren & Tomas Blomquist, *The Internet of Things: Are You Ready for What's Coming?*, 60 BUS. HORIZONS 667, 669 (2017).

[26] ATLANTIC COUNCIL, SECURING THE ENERGY TRANSITION AGAINST CYBER THREATS (2022), http://www.jstor.org/stable/resrep42195.7.

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national security concerns.[27] "Concurrent with the emergence of greater threat mechanisms, a greater perception of threats" to States' essential interests arises.[28]

Against this background, this section further defines the security threats that FDI can pose to host States' national security and discusses the legal measures that host States might adopt in response to them, focusing on the perception of such threats and measures in the Netherlands.

A. Defining Security Threats

Previous scholars suggest a framework dividing security threats that foreign acquisitions might pose to a host State into three categories:[29] First, where foreign control results in delay, denial, or placement of conditions on access to goods or services crucial to the functioning of the economy of a host State; second, where a foreign government might use domestic companies to gain access to technology or other expertise in a host State, then use that technology or expertise in a way that harms the host State's essential interests; third, where a foreign investor uses goods or services crucial to the functioning of the host State's economy for surveillance or sabotage.[30] Each of these categories is discussed in more detail in the following sections:

1. Denial of Essential Goods or Services

Dependence on a supplier of certain goods or services controlled by a foreign company or a foreign government is a major concern of many host States, because when significant portions of the economy are controlled outside the country, it may result in delays, denials of certain goods or services, or placement of conditions on those goods and services by the foreign owner.[31] Dependence on energy assets and services are particularly concerning because energy security is absolutely essential to a functioning

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[27] Misra, *supra* note 6, at 147.
[28] *Id.*
[29] *See generally* MORAN, *supra* note 7.
[30] *Id.*
[31] Theodore Moran, *Toward a Multilateral Framework for Identifying National Security Threats Posed by Foreign Acquisitions: With Special Reference to Chinese Acquisitions in the United States, Canada, and Australia*, 7 CHINA ECON. J. 39, 41 (2017).

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economy and public welfare. Governments want to protect their economies from the tightness of global energy markets and the political instability in many significant energy-producing countries, but cannot do so if they are dependent for resources.[32] By the same token, semiconductors play a fundamental role in the development of green technologies necessary for the energy transition.[33] In light of increasing geopolitical tension and supply chain disruptions, future supplies of such technologies or their components could also lead to energy security concerns.

Yet, foreign dependence for certain goods and services should not justify restrictions on FDI without a credible probability that such goods or services can be withheld. It shall be presumed that foreign investors pursuing private interests have little incentive to deliberately cause harm to the company that holds their investments unless a home State's government uses such ownership in its geopolitical games. The denial, delay, or restriction on the energy sources, semiconductors, or other crucial inputs to the goods, services, or technologies relevant to the energy transition can significantly harm a host State's economy only where there are no alternative sources available or where shifting from one provider to another is extremely difficult. The multiplication of energy supply around the world might indicate that there is no credible probability that the government of a foreign investor would attempt to use the investments of its nationals to harm a host State's interests by withholding the goods or services that are easily substitutable by other domestic sources or sources from the other countries.[34]

2. Leaking Sensitive Technology

Certain FDI can imply the transfer of particular technology or expertise from an acquired company to a foreign investor that could be misused by the

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[32] *Critical Infrastructure (Protection)*, DUTCH MINISTRY OF JUST. AND SEC., https://english.nctv.nl/topics/critical-infrastructure-protection (last visited Mar. 7, 2023).

[33] For example, semiconductor technologies are used for both solar panel systems and wind turbines and are also necessary for producing electric vehicles and charging stations. *See* Caterina Favino, *The Role of Semiconductors in the Renewable Energy Transition*, EARTH.ORG (Oct. 6, 2022), https://earth.org/semiconductors/.

[34] Theodore Moran, *When does a Foreign Acquisition Pose a National Security Threat, and When Not?*, VOXEU (Sept. 11, 2009), https://cepr.org/voxeu/columns/when-does-foreign-acquisition-pose-national-security-threat-and-when-not.

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investor, or its government, in a manner harmful to the national interests of a host State.[35] Almost all foreign acquisitions offer the foreign investor some production or managerial interest that it would not have possessed otherwise. The risk arises when the domestic law of a home State requires their companies to share with them any requested information. The transfer of sensitive or confidential knowledge to a foreign investor can enable its home government to deploy such knowledge in ways harmful to the host government.[36]

This is particularly the case where a foreign company has unique expertise or capabilities, such as actual weapons or dual-use technologies (i.e., civilian products that can be utilized as weapons) subject to export controls. Alternatively, a company that provides goods, services, or technologies that are not necessarily covered by domestic export controls but that might assist the security adversary in developing technology such as AI, robotics, or other advanced technologies that will foster its competitive position. The question of what types of investment can be permitted when dealing with this category remains.

To illustrate, Article 7 of China's National Intelligence Law (2017) requires that "any organization or citizen shall support, assist, and cooperate with State intelligence work according to law." China's National Intelligence Law may apply extraterritorially to activities of Chinese organizations or citizens outside of China, including in the Netherlands.[37] The Netherlands-China Strategy also notes that the civil and military sectors in China are closely intertwined.[38] As a result, the possibility that goods acquired for civil purposes might be used for military ends remains open, especially for high-tech products. This might arguably justify stricter scrutiny of Chinese investments in the Netherlands and other countries raising similar concerns.[39]

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[35] Frank Bickenbach & Wan-Hsin Liu, *Chinese Direct Investment in Europe—Challenges for EU FDI Policy*, 19 CESIFO FORUM 15, 16 (2018).

[36] Moran, 15 note 31, at 39.

[37] Guó Guójiā Qíngbào Fǎ (国国家情报法), NATIONAL INTELLIGENCE LAW (PROMULGATED BY THE STANDING COMM. NAT'L PEOPLE'S CONG., effective June 28, 2017), P.R.C. Laws.

[38] Nederland-China: een nieuwe balans [China: A New Balance], DUTCH MINISTRY OF FOREIGN AFFAIRS, NETHERLANDS (2019), https://zoek.officielebekendmakingen.nl/blg-883780.pdf.

[39] *See Tiptoeing the Line Between National Security and Protectionism: A Comparative Approach to Foreign Direct Investment Screening in the United States and European Union*, 47 IJLI, 105, 105 (2019) (discussing the U.S. practice at Jason Jacobs).

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3. Cybersecurity Threats

A host State might also have concerns that FDI would facilitate surveillance, or sabotage of the supply of certain goods or services which are crucial to the functioning of the host State's economy.[40] To illustrate, in 2019, the United States revealed Russian intrusions in several major electricity generation facilities, such as the plants that supply emergency power to military bases.[41] In 2022, Russian hackers were also suspected of probing a liquid gas terminal in Rotterdam as a prospective cyber target.[42] Ensuring the resilience of the energy supply systems against cyberattacks is becoming increasingly important as the functioning of infrastructures underlying the energy systems, including generation, transmission, distribution, and process, is becoming more dependent on ICT.[43]

One major obstacle to FDI in energy and high-risk technology sectors, where the establishment itself, its products, or its services may pose cyberattack threats to the host country, is that it requires a high degree of confidence in safety. Confidence comes from trust in detailed due diligence of the persons and activities involved at all phases of an investment that presents vulnerabilities, as well as continued supervision of these activities in global value chains. If and when a sufficient level of trust is absent, a host State has the incentive to implement or strengthen the verification of transactions to ascertain whether the level of vulnerability of the investment facility and its products to the hacking of software and hardware is acceptable.[44] Notably, verification can be extremely difficult for complex software. Without trust and the possibility of verification, a host State can be more inclined to impose restrictions on an investment or prohibit it altogether, based on either the need to address the cybersecurity risk that such a transaction poses or the need to prevent the leakage of sensitive technology to which it can lead.

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[40] Moran, *supra* note 31, at 23–32.

[41] ATLANTIC COUNCIL, *supra* note 26.

[42] *Russian Hackers Target Dutch LNG Terminal*, NL TIMES (Nov. 25, 2022), https://nltimes.nl/2022/11/25/russian-hackers-targeting-dutch-gas-terminal-report.

[43] *See* Friederich Kupzog, Ross King & Mark Stefan, *The Role of IT in Energy Systems: The Digital Revolution as Part of the Problem or Part of the Solution*, 137 ELEKTROTECH INFTECH 341, 341 (2020).

[44] Joel P. Trachtman, *The Internet of Things Cybersecurity Challenge to Trade and Investment: Trust and Verify?* (2019), https://ssrn.com/abstract=3374542.

B. Addressing Security Threats

National security concerns discussed above can be addressed in domestic law and practice in different ways. Export controls are generally recognized as a part of States' trade strategies that seek to restrict the export of military and dual-use goods, such as high-tech products. Notably, many States are primarily focused on the development of dual-use products for civilian purposes—such as self-driving cars, medicines, and manufacturing tools. The restrictions on the export of such goods remain controversial. In particular, it might be difficult to identify specific technologies or their components that could be made subject to export controls on national security grounds without affecting levels of competitiveness and innovation in the sectors of a state's economy.[45]

Given that many cross-border transactions with sensitive items happen while shifting ownership, rights, or control, in addition to export controls, many States have adopted or strengthened their FDI regulations to restrict the foreign government's control over strategic industries, products, or services.[46] Host States may decide to maintain exclusive domestic ownership in certain strategic sectors. Full prohibition or partial restriction on foreign ownership on national security grounds usually exists in the defense industry, "air and maritime cabotage services and air traffic control," or the purchase of "a real estate in border areas or near other sensitive sites."[47] As part of the investment liberalization movement, the complete prohibition of foreign ownership in the energy sector of many countries has mainly been eliminated.[48] Security threats posed by FDI in companies whose function is essential for the energy transition can often be mitigated by adopting safeguard measures, such as limiting the transfer or sharing of specific intellectual property, trade secrets, or technical knowledge, ensuring that

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[45] Stephen Ezell, *How Stringent Export Controls on Emerging Technologies Would Harm the U.S. Economy*, ITIF (May 20, 2019), https://itif.org/publications/2019/05/20/how-stringent-export-controls-emerging-technologies-would-harm-us-economy/.

[46] Misra, *supra* note 6, at 151–55.

[47] Carlos Esplugues Mota, *A More Targeted Approach to Foreign Direct Investment: The Establishment of Screening Systems on National Security Grounds*, 15 BRAZ. J. INT'L L. 440, 453 (2018).

[48] *See Allows 100% Foreign Ownership in the Renewable Energy Sector*, INV. POL'Y MONITOR (Nov. 15, 2022), https://investmentpolicy.unctad.org/investment-policy-monitor/measures/4130/philippines-allows-100-foreign-ownership-in-the-renewable-energy-sector- (discussing the most recent example of the Philippines).

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certain activities and products are located only in a host State, or ensuring that only authorized persons have access to certain activities.[49] If such safeguards are not available or host States consider them to be ineffective, the governments might, nevertheless, decide to prohibit FDI transactions.

Trade with certain countries and certain individuals can also be restricted on national security grounds based on domestic sanctions regulations, the rules on money laundering, and criminal law. Furthermore, export controls and investment screening mechanisms related to the development and deployment of new technologies can be complemented by host States' "policies in the fields of electronic communications, cybersecurity, and industrial competitiveness in cybersecurity products and services."[50] The ever-increasing concerns reflected in these legal instruments taken together and the practice of adopting trade and investment restrictions demonstrate a host State's stance toward comprehensive protection of its national security, including when deciding whether to allow FDI in the energy sector or in the companies that are essential for advancing the energy transition.

C. Considerations of National Security in the Netherlands

The integrity of critical infrastructure and the distribution and transmission of electricity is essential for national security in the Netherlands. For this reason, the electricity distribution and transmission networks in the Netherlands are in the hands of Dutch public shareholders.[51] The only electricity transmission system operator, TenneT, is owned by the Dutch State.[52] Furthermore, the Netherlands has a strong position in specific niche markets for the high-tech sector, including semiconductors, quantum technology, and photonics, whose global supply chains are closely

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[49] *See* THE DEPT. OF THE TREASURY, COMM. ON FOREIGN INV. IN THE U.S. ANN. REPORT TO CONGRESS (2020), https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2020.pdf (discussing an example of the U.S.).

[50] *Proposal for a Regulation of the European Parliament and of the Council Establishing a Framework for the Screening of Foreign Direct Investments into the Union*, COM (2017) 487 final (Sept. 13, 2017).

[51] Electricity Act, S.O. 1998, art. 93(a) (Can.).

[52] *Our Organisation*, TENNET, https://www.tennet.eu/about-tennet/our-organisation (last visited Mar. 8, 2023).

intertwined with the United States and China.[53] The Netherlands largely bases its export control over such strategic technologies and their components on the EU dual-use regulation.[54]

Unsurprisingly, the largest FDIs in the Netherlands have occurred in the high-tech sector from China and are (indirectly) related to Royal Philips.[55] In recognition of potential threats posed to the Dutch economy by FDI in the high-tech sector and critical infrastructure, economic security has emerged as an important strategic priority for the Dutch government, as emphasized in the most recent National Security Strategy (NSS) (2019).[56] Economic security in the Netherlands is defined as "the unimpeded functioning of the Dutch economy in an effective and efficient manner."[57] The Dutch government recognizes that recent geopolitical, environmental, and technological developments can affect the national security of the Netherlands. In particular, the NSS has identified eleven predominant national security risks and threats to national security based on two criteria: "the impact that the threat/risk would have on one or more national security interests;" and "the likelihood of the threat/risk actually occurring, as determined by its development in the medium term."[58] Such threats include, among others, the disruption of critical national infrastructure, cybersecurity threats, and threats from State-sponsored actors. A problem of economic security arises when FDI represents not only a strategic commercial value but also a strategic political value for the foreign investor's home State. For example, the NSS expressly stipulates that the "acquisition of and investment in critical national infrastructure" or companies that develop high-quality

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[53] Brigitte Dekker & Maaike Okano-Heijmans, *Emerging Technologies and Competition in the Fourth Industrial Revolution: The Need for New Approaches to Export Control*, 6 STRATEGIC TRADE REV. 53, 60 (2020).

[54] *Export Control on Strategic Goods and Services*, GOVERNMENT OF THE NETHERLANDS, https://www.government.nl/topics/export-controls-of-strategic-goods/laws-and-rules-on-the-export-of-strategic-goods (last visited Mar. 8, 2023).

[55] John Seaman, Mikko Huotari & Miguel Otero-Iglesias, *Chinese Investment in Europe: A Country-Level Approach*, MERICS (Dec. 2017), https://merics.org/en/report/chinese-investment-europe-country-level-approach.

[56] *National Security Strategy*, DUTCH MINISTRY OF JUSTICE AND SECURITY 12 (2019), https://english.nctv.nl/documents/publications/2019/09/19/national-security-strategy.

[57] *Id.*

[58] *Id.* at 21.

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technology "could result in an unwanted level of dependence," jeopardize the continuity of critical processes, and enable economic espionage.[59]

There are several known examples of the Dutch government expressing concerns or taking action to prevent an instance of FDI because of security implications.[60] To illustrate, in 2013, the Dutch authorities worried that the (ultimately failed) acquisition of the formerly State-owned telecommunication carrier Royal KPN NV by a Mexican company, América Móvil, could have consequences for Dutch national security.[61] The Dutch Parliament also raised questions regarding the national security implications of the acquisition of encryption company Fox-IT (which handled State secrets for the Dutch government) by the British NCC Group in November 2015, and the (ultimately failed) acquisition of PostNL by Belgian BPost (40% owned by Belgium) in November 2016.[62] The most recent example is the decision to examine whether it is necessary and possible to prevent the takeover of the Delft chip company Nowi by chipmaker Nexperia, which has a Chinese owner.[63] The Ministry of Economic Affairs and Climate Policy is specifically concerned about the possible leakage of sensitive technology from the Netherlands to China.[64] For similar reasons, Germany prevented Elmos Semiconductor, an automotive chipmaker, from selling its factory to Silex, a Swedish subsidiary of China's Sai Microelectronics.[65]

China is the world's leading producer of minerals and metals crucial for advancing the energy transition and meeting decarbonization goals.[66] At the

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[59] *Id.* at 27.

[60] Seaman, Huotari & Otero-Iglesias, *supra* note 55, at 99.

[61] Dolia Estevez, *Dutch Government Issues Warning on Takeover of Telecom Firm KPN by Mexican Billionaire Carlos Slim*, FORBES (Sept. 13, 2013), https://www.forbes.com/sites/doliaestevez/2013/09/13/dutch-government-issues-warning-on-takeover-of-telecom-firm-kpn-by-mexican-billionaire-carlos-slim/?sh=40f709751a57.

[62] Dries Faems, *Dutch Fear of Being Cleaned Out by Belgian Takeovers is Unfounded*, UNIV. OF GRONINGEN FACULTY OF ECONOMICS AND BUISNESS (Nov. 23, 2016), https://www.rug.nl/feb/research/frn/news/archief/2016/nederlandse-angst-voor-leegroof-door-belgische-overnames-ongegrond?lang=en.

[63] Sandra Olsthoorn, *Ministerie Neemt Overname Chipbedrijf Nowi Onder de Loep*, FD (Jan. 23, 2023), https://fd.nl/tech-en-innovatie/1463624/ministerie-laat-overname-chipbedrijf-nowi-niet-zomaar-passeren.

[64] *Id.*

[65] Michelle Toh, *The U.S.-China Chip War is Spilling over to Europe*, CNN (Nov. 25, 2022), https://edition.cnn.com/2022/11/25/tech/us-china-chip-war-spillover-europe-intl-hnk/index.html.

[66] Derek Yan & Cole Wenner, *U.S. Export Control—Impact & Opportunity for China's Semiconductor Industry*, KRANESHARES (Nov. 1, 2022), https://kraneshares.com/us-export-control-impact-opportunity-for-chinas-semiconductor-industry/#.

same time, the dependence of the operation and continued existence of Dutch strategic companies on access to the foreign market and their capital, technology, and trade flows creates a potential risk of the Netherlands' strategic dependence on the Chinese government.[67] From this perspective, the Dutch government has a reason to screen FDI transactions involving Chinese companies to address the geopolitical developments in the U.S.-China geopolitical fights and to ensure the capacity for autonomous action in a geopolitical context.[68] Thus, investment screening in the Netherlands has to satisfy competing goals and interests. It must address the security and geopolitical implications of FDIs in high-tech companies and the risks of a high degree of strategic dependence on a single operator or control of its critical infrastructure by a foreign government. But it must also consider the position of certain countries in the global supply chain and the importance of FDI for the improvement of energy technologies and energy utilization efficiency.

Notably, the NSS recognizes that dealing with national security threats requires the Dutch government to develop consistent and technically up-to-date criteria for evaluating potential risks affecting critical national infrastructure and boosting structural and adaptive risk management within all critical sectors.[69] Specifically, in the energy sector, a proposed Energy Act contains an additional basis for further regulations aimed at the protection of vital processes, such as the transport and distribution of electricity and gas.[70] The NSS also highlights that certain national security concerns can be addressed by relying on the Dutch export control regulations and implementing National Cybersecurity Agenda.[71] Finally, similar to other

[67] PLH van den Bossche et al., *Geopolitieke factoren in relatie tot China als grond voor toetsing van buitenlandse directe investeringen* [Geopolitical factors in relation to China as grounds for assessing foreign direct investments], *in* TOETSING VAN BUITENLANDSE INVESTERINGEN IN GEOPOLITIEK EN JURIDISCH PERSPECTIEF [Assessment of Foreign Investments in Geopolitics and Legal Perspectives] (Zutphen 2020), *translated in* Frans-Paul van der Putten, Brigitte Dekker & Xiaoxue Martin, *China and Geopolitical Considerations for Investment Screening in the Netherlands*, NETHERLANDS INSTITUTE OF INTERNATIONAL RELATIONS (2020).

[68] *Id.*

[69] DUTCH MINISTRY OF JUSTICE AND SECURITY, *supra* note 56, at 28.

[70] Wijziging van de Elektriciteitswet 1998 en van de Gaswet (voortgang energietransitie) [Amendment of the Electricity Act 1998 and of The Gas Act (Progress Energy Transition), "Energy Transition Act"], 2018. The Energy Transition Act repeals the current Electricity Act (1998) and the Gas Act and merges them into one new act.

[71] DUTCH MINISTRY OF JUSTICE AND SECURITY, *supra* note 56, at 27–30.

countries,[72] the Netherlands has embraced the political and policy debate about complementing its sectoral screening with the general screening mechanism on national security grounds.[73]

All these regulatory measures should demonstrate the consistency as well as the persistence of the Netherlands' stance towards comprehensive protection of its national security. Yet, it does not mean that in order to protect its security interests, the Dutch government should begin using investment screening as means of export control. Neither should it prohibit FDI where the national security concerns of the Netherlands can be addressed by adopting less restrictive alternatives that can increase the resilience of domestic infrastructure and domestic companies to cyberattacks and other incidents. The availability of such measures, their effectiveness, and costs will, of course, depend on different factors that are to be assessed on a case-by-case basis, as further discussed.

III. EXISTING REGULATORY FRAMEWORKS FOR FDI

Balancing the interests of a host State and a foreign investor is problematic. As discussed, a country like the Netherlands might have a genuine interest in screening investments to identify potential national security concerns. At the same time, foreign investors have a genuine interest in the predictability and lack of burdensome procedures while entering a Dutch market. Unnecessary hurdles towards attracting FDI may hinder the technological lead of the Dutch industries and the powering of the energy transition. The challenge, therefore, is to find ways to reconcile the interests of foreign investors and the security and economic concerns of the Netherlands as a host State, i.e., to achieve the balance when it is worthwhile for the Dutch government to admit FDI and for investors to invest in the Dutch economy.[74]

The domestic screening mechanisms should reflect such a balance. Importantly, the screening regime in the Netherlands exists within broader European and multilateral contexts. Compliance with the commitments

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[72] *See, e.g.*, the Foreign Investment Risk Review Modernization Act, H.R. 5841, 115th Cong. § 1703 (2018).

[73] *See infra* Section 4.

[74] Karl P. Sauvant, *Improving the Distribution of FDI Benefits: The Need for Policy-Oriented Research, Advice, and Advocacy*, 4 J. OF INT'L BUS. POL'Y 244, 246 (2021).

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undertaken by the Netherlands under international agreements and EU law should contribute to the balance between the interests of foreign investors and the Netherlands as a host State, allowing the preservation of the open investment climate in the country without disregarding its valid national security concerns.

A. Multilateral Legal Framework

The Energy Charter Treaty (ECT)[75] provides for substantive protections to investors from more than seventy ECT contracting parties, such as nondiscriminatory conditions for trade in energy materials and energy-related equipment, full protection and security, and the prohibition of expropriation (without compensation).[76] Some of these protections might apply even before the establishment of the investment. Where the ECT no longer applies (or in addition to the ECT), a foreign investor may rely on the BIT concluded by its home country with a host country, which typically contains protections for all kinds of investments, including those in the energy sector.[77] Recent FTAs usually contain investment-related protections. Foreign investors can protect their rights in case of a breach of these substantive protections by initiating an investment dispute.

Nondiscrimination is one of the key elements of the protection afforded to international investment by BITs and RTAs; for example, the most-favored-nation and national treatment clauses. It implies that the decision to approve or disapprove a proposed acquisition by a company from China, India, Russia, or any other State should not depend on its nationality but be based on clearly defined national security criteria.[78]

Furthermore, most agreements require host States to ensure fair and equitable treatment of foreign investors, which sets a quality requirement for

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[75] In October 2022, the Netherlands shared its decision to withdraw from the ECT. *See also* Martina Igini, *Netherlands Becomes 3rd EU Country to Quit Energy Charter Treaty*, EARTH.ORG (Oct. 20, 2022), https://earth.org/energy-charter-treaty/. Nevertheless, according to Article 47(3) ECT, the protections afforded by the ECT shall continue to apply to pre-existing investments in the Netherlands even after the formal withdrawal.

[76] The Energy Charter Treaty, Annex I, 2080 U.N.T.S. 95 (Dec. 17, 1994).

[77] The Netherlands signed the Multilateraleral Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union, which entered into force on August 29, 2020. Yet, the Netherlands still has BITs in force with non-EU members.

[78] MORAN, *supra* note 7, at 12.

the interference of State regulatory and adjudicatory systems with FDI acquisitions. The absence of clear substantive and procedural regulation of investment screening under domestic law might lead to the breach of such commitments. In the case of *Global Telecom Holding SAE v. Canada*, for example, Global Telecom (a Claimant) argued that Canada (a Respondent) used a statutory national security review as a pretense to inappropriately gather information regarding Global Telecoms' business plans and to force the sale of its subsidiary.[79] It argued that the national security review lacked a legitimate basis and was therefore arbitrary and unreasonable and breached Canada's commitment to fair and equitable treatment under Canada-Egypt BIT.[80]

Admittedly, most States attempt to preserve their right to regulate when they need to protect their national security interests, by incorporating a broad national security exception under BITs and FTAs. They might be especially keen to exercise it if a proposed transaction directly or indirectly affects their critical infrastructure, the production of strategic goods, or the provision of strategic services. Yet, national security exceptions are not unlimited, and the host State's measures adopted in the interests of national security are generally subject to review by an investment tribunal or a court, though such a review is, in many cases, a lenient one.[81]

The Code of Liberalization of Capital Movements adopted by the Organisation for Economic Co-operation and Development (OECD) (the Code) aims to eliminate restrictions on capital movements between the members.[82] The Code is binding on its members, including the Netherlands. It allows for restrictions on capital movements only based on public order or security concerns. Additionally, recognizing the need to design investment policies of host States in a way that States can achieve their national security

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[79] Glob. Telecom Holding v. Can., ICSID Case No. ARB/16/16, Award ¶ 582 (Mar. 27, 2020), https://jusmundi.com/en/document/decision/en-global-telecom-holding-s-a-e-v-canada-award-friday-27th-march-2020.

[80] The Tribunal found that Canada provided enough evidence of its genuine national security concerns and dismissed Global Telecoms' claims that Canada's actions were unreasonable and arbitrary. *Id.* ¶ 616.

[81] *See also* Caroline Henckels, *Investment Treaty Security Exceptions, Necessity and Self-Defence in the Context of Armed Conflict*, 2019 EUROPEAN Y.B. OF INT'L ECON. L., SPECIAL ISSUE: INTERNATIONAL INVESTMENT LAW AND THE LAW OF ARMED CONFLICT 319.

[82] OECD, OECD CODE OF LIBERALISATION OF CAPITAL MOVEMENTS (2023), www.oecd.org/investment/codes.html.

goals with the smallest possible impact on investment flows, the members of the OECD agreed on the Guidelines for Recipient Country Investment Policies Relating to National Security (the OECD Guidelines). The respective recommendation was adopted by the OECD Council on 25 May 2009. It recommends that if governments consider or introduce investment policies designed to protect national security, they should adhere to longstanding investment principles, such as nondiscrimination, transparency of policies and predictability of outcomes, the regulatory proportionality of measures, and accountability of implementing authorities.[83] "OECD recommendations are not legally binding, but practice accords them great moral force as representing the political will of members, and there is an expectation that members will do their utmost to fully implement a recommendation."[84]

B. European Legal Framework

While the EU has historically maintained an open mindset toward foreign investors, the trends and policies of emerging FDI providers, such as China, have cast doubt on the effectiveness of the decentralized and fragmented system of FDI screening in the EU—in use only by some EU Member States.[85] Fears that foreign investors may obtain ownership or control in strategic sectors, combined with the lack of reciprocal openness of third countries' markets toward EU investors, have raised concerns in many Member States and provoked the EU to take action.[86] In 2019, the EU adopted Regulation 2019/452 "establishing a framework for the screening of foreign direct investments in the Union" (the FDI Screening Regulation),

[83] OECD, GUIDELINES FOR RECIPIENT COUNTRY INVESTMENT POLICIES RELATING TO NATIONAL SECURITY 3–4 (2009), https://www.oecd.org/daf/inv/investment-policy/43384486.pdf.

[84] OECD, PUBLIC CONSULTATION: RECOMMENDATION ON CONSUMER PROTECTION IN THE FIELD OF CONSUMER CREDIT, https://search.oecd.org/finance/recommendation-on-consumer-protection-in-the-field-of-consumer-credit.html (last visited Jan. 16, 2024).

[85] EU Framework for FDI Screening, PARL. EUR. DOC. PE 614677 (2019), https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/614667/EPRS_BRI%282018%29614667_EN.pdf.

[86] Konstantina Georgaki, *The Screening of Cross-Border Investments by State-Owned Enterprises Under EU Law*, *in* STATE CAPITALISM & INT'L INV. L. 123, 131 (Panagiotis Delimatsis, Georgios Dimitropoulos & Anastasios Gourgourinis eds., 2023).

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which entered into force on 11 October 2020.[87] The FDI Screening Regulation establishes the framework for the screening of FDI from third countries (i.e., non-EU Member States) based on a somewhat imprecise, seemingly broad screening ground of "security or public order" while leaving broad room for the discretion of the domestic authorities of EU Member States.[88] Even though any Member State is, in principle, free to determine whether a cross-border transaction with a third country is likely to affect its national security, it has to be ready to justify its restriction on such a transaction based on valid reasons, especially if its legislation goes beyond the guiding principles under the FDI Screening Regulation or establish restrictions on investments from other EU members, as discussed below.[89]

1. FDI Screening Regulation

The difficulty in striking the balance between FDI openness and security concerns in the EU has been compounded by the complexity of the EU system of allocation of powers: On one hand, after the Lisbon Treaty, the EU has exclusive competence in the field of the Common Commercial Policy (CCP), including the FDIs (Article 207(1) Treaty on the Functioning of the EU (TFEU)). On the other hand, States have a sovereign right to restrict or prohibit FDI for national security reasons.[90] Article 4(2) of TFEU and Article 346(1)(b) of TFEU dictate that national security and essential security interests remain the sole responsibility of Member States.[91] The strong connection of the Member States' screening mechanisms with the protection of their national security interests may explain why the Member States insisted on keeping the final word on whether the economic benefits of each specific transaction outweigh its potential negative impact on the respective Member States. Taking these considerations into account, the FDI Screening Regulation neither establishes screening at the EU level nor fully harmonizes screening procedures at the Member State level but instead aims to

[87] Commission Regulation 2019/452 of Mar. 19, 2019, Establishing a Framework for the Screening of Foreign Direct Investments into the Union, 2019 O.J. (L 79) 1 [hereinafter *FDI Screening Regulation*].
[88] *Id.*
[89] *Id.*
[90] Misra, *supra* note 6, at 156.
[91] Consolidated Version of the Treaty on European Union [2008] OJ C115/13, reg 3.

coordinate the domestic procedures used by EU Member States.[92] The final decision on the appropriate response to the FDI transaction remains with a host Member State. The Commission may only issue non-binding opinions.[93]

The FDI Screening Regulation "empowers Member States to review investments within its scope on the grounds of security or public order, and to take measures to address specific risks."[94] There is no exhaustive definition of the concept of security or the concept of public order, mainly since Member States essentially retain the freedom to determine the meaning of these notions in accordance with their national needs. In addition to such broad grounds, however, the FDI Screening Regulation provides a list of factors that EU Member States might consider while making a final screening decision to allow or prohibit the investment.[95] "By suggesting several factors that the Member States 'may consider' when determining whether or not FDI is likely to affect security or public order, the FDI Screening Regulation initiates a collective process aimed at a converging interpretation and application of those legal terms across EU Member States: in other words a 'rough consensus.'"[96] These factors are the considerations deemed relevant for the screening decision and do not constitute a list of detailed criteria. According to Article 4(1) FDI Screening Regulation, when screening FDI, the Member States may consider the potential effects on, among others, critical infrastructure, whether physical or virtual, including energy; critical technologies and dual-use items, including AI, robotics, semiconductors, energy storage, quantum, and nuclear technologies; and the supply of critical inputs, such as energy or raw materials.[97]

To determine whether FDI can affect security or public order, a Member State may also consider the ownership structure or funding of the foreign investor, its previous involvement in activities affecting security or public

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[92] Georgios Dimitropoulos, *National Security: The Role of Investment Screening Mechanisms*, *in* HANDBOOK OF INT'L INV. L. & POL'Y 1, 13–14 (Julien Chaisse, Leïla Choukroune & Sufian Juso eds., 2020).

[93] *FDI Screening Regulation*, *supra* note 87.

[94] *Id.*

[95] *Id.*

[96] Andreas Moberg & Steffen Hindelang, *The Art of Casting Political Dissent in Law: The EU's Framework for the Screening of Foreign Direct Investment*, 57 COMMON MKT. L. REV. 1427, 1449 (2020).

[97] Wolf Zwartkruis & Bas de Jong, *The EU Regulation on Screening of Foreign Direct Investment: A Game Changer?*, 31 EUR. BUS. L. REV. 447, 463 (2020).

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order in the Member State, or the presence of a serious risk that the foreign investor engages in illegal or criminal activities.[98] A screening framework taking these factors into consideration might provide special legal treatment for certain countries whose geopolitical activities may pose risk to the host State.[99]

The comprehensive, non-exhaustive, multifactor approach of Article 4 FDI Screening Regulation reflects the trend of expanding the scope of investment screening worldwide and raises concerns about the foreign acquisitions of companies that, among others, are active in the energy sector or are relevant to the energy transition.[100]

Notably, the FDI Screening Regulation also contains a provision for investments with a specific EU dimension.[101] "If an investment is likely to affect projects or programs of 'Union interest,' the Commission may issue an opinion on whether the investment constitutes a threat to public security or order."[102]

> The Member State should take utmost account of the opinion received from the Commission through, where appropriate, measures available under its national law or in its broader policy-making and provide an explanation to the Commission if it does not follow that opinion in line with its duty of sincere co-operation under Article 4(3) TEU.[103]

This gives the Commission a tool to protect projects and programs that serve the EU and represent an essential "contribution to its economic growth, jobs, and competitiveness."[104] In particular, this includes projects and programs involving substantial EU funding or established by the EU law regarding critical infrastructure, critical technologies, or critical inputs.[105]

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[98] *Guidance to the Member States Concerning Foreign Direct Investment from Russia and Belarus in view of the Military Aggression Against Ukraine and the Restrictive Measures Laid Down in Recent Council Regulations on Sanctions*, at 2, COM (2022) C 151 final (Apr. 6, 2022).

[99] Joanna Warchol, *The Birth of the EU Screening Regulation*, *in* YSEC Y.B. OF SOCIO-ECONOMIC CONSTITUTIONS 53, 74 (Steffen Hindelang & Andreas Moberg eds., 2020).

[100] *See also* Mikko Rajavuori & Kaisa Huhta, *Investment Screening: Implications for the Energy Sector and Energy Security*, 144 ENERGY POL'Y 1, 4 (2020).

[101] *FDI Screening Regulation*, *supra* note 87.

[102] Thomas Verellen, *When Integration by Stealth Meets Public Security: The EU Foreign Direct Investment Screening Regulation*, 48 LEGAL ISSUES OF ECON. INTEGRATION 19, 26 (2021).

[103] *FDI Screening Regulation*, *supra* note 87, at 3.

[104] *Id.*

[105] *Id.* at 10.

Considering the current list includes a significant number of energy-related infrastructure projects in the EU, the FDI Screening Regulation may affect foreign participation in the EU energy sector.[106]

Finally, in light of the COVID-19 crisis and the economic shock it caused, the Commission has further intensified political pressure on EU Member States, warning them of possible hostile takeovers of Europe's strategic assets in all sectors and urging them to address these risks by adopting and applying domestic FDI screening mechanisms in accordance with the EU framework.[107] The FDI Screening Regulation establishes several key requirements for domestic screening mechanisms. First, domestic rules and procedures relating to screening mechanisms should not discriminate between third countries.[108] Second, they should be transparent and should apply clear timeframes.[109] Third, foreign investors should have the possibility to appeal screening decisions of the national authorities.[110] Finally, Member States should enforce their screening regulations and decisions in compliance with EU law, to ensure protection of confidential, including commercially sensitive, information.[111]

2. Domestic FDI Screening and the EU Free Movement Principles

In addition to international agreements and the EU FDI screening framework, the legal limitations for domestic screening by EU Member States may be determined by EU primary law. In particular, Member States' screening mechanisms have to comply with the EU provisions on the free movement of services and capital and the freedom of establishment in cases of FDI from other EU Member States or with the EU provisions on the free

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[106] Leonie Reins & Dylan Geraets, *The EU FDI Screening Regulation as an Example of the Proliferation of FDI Screening Processes Affecting the Energy Sector*, *in* THE GLOBAL ENERGY TRANSITION: LAW, POLICY AND ECONOMICS FOR ENERGY IN THE 21ST CENTURY 252 (Peter D. Cameron, Xiaoyi Mu & Volker Roeben eds., 2020).

[107] JENS VELTEN, SCREENING FOREIGN DIRECT INVESTMENT IN THE EU: POLITICAL RATIONALE, LEGAL LIMITATIONS, LEGISLATIVE OPTIONS 2–3 (2022).

[108] *FDI Screening Regulation*, *supra* note 87, at 7.

[109] *Id.*

[110] *Id.*

[111] *Id.*

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movement of capital in cases of FDI from non-Member States.[112] Such freedoms, however, are subject to exceptions.

First, Article 346(1)(b) TFEU allows any Member State "to take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production or trade in arms, munitions, and war material." Under EU law, such derogations are held to be interpreted strictly.[113] In *Commission v. Italy*, for example, the Court of Justice of the European Union (CJEU) specified that Italy could not invoke the exception under Article 346 TFEU to justify a measure related to the purchasing of goods that were undoubtedly for civilian use and possibly for military use.[114] Furthermore, the CJEU confirms that the discretion accorded to the Member States in such cases is limited by the principle of proportionality enshrined in the EU law.[115] Trybus suggests that the CJEU rarely used to find the measures adopted in the interests of national security to be disproportionate, for example, when the measure is clearly unsuitable for promoting national security, when "a Member State has arbitrarily chosen a measure more detrimental to the market than necessary, or when there is no balance between the two interests."[116] Yet, the CJEU ruling in *Schiebel Aircraft* in 2014 seemed to revert to a stricter form of proportionality.[117] It agreed with the Czech government and the Commission that a restrictive measure (in this case, the refusal to grant Schiebel Aircraft authorization to engage in business in the arms sector) should satisfy the three-step objective proportionality test: first, the measure must be for the protection of essential security interests; second, it must be a suitable means; and third, there must not exist other, less restrictive means.[118] Finally, the CJEU concluded that the objectives of the challenged measure could be achieved through less restrictive measures, including export controls, an obligation of confidentiality under administrative law, or the imposition of penalties for the disclosure of strategic information under criminal law.[119]

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[112] *See generally* Verellen, *supra* note 102.

[113] Case C-367/89, Aimé Richardt, Les Accessoires Scientifiques SNC, 1991 E.C.R. I-4651.

[114] Case C 337/05, Comm'n v. Italian Republic, 2007 E.C.R. I-2215-26.

[115] *See, e.g.*, Case C-474/12 Schiebel Aircraft GmbH v. Bundesminister für Wirtschaft, ECLI:EU:C:2014, 2139 ¶ 16 (Sept. 4, 2014).

[116] Martin Trybus, *The EC Treaty as an Instrument of European Defence Integration: Judicial Scrutiny of Defence and Security Exceptions*, 39 COMMON MKT. L. REV. 1347, 1357 (2002).

[117] *See* Schiebel Aircraft GmbH, EU:C:2014:2139.

[118] *Id.* ¶¶ 35–39.

[119] *Id.* ¶¶ 38–39.

Second, the FDI Screening Regulation and domestic screening mechanisms are without prejudice to the right of Member States to derogate from the free movement principles in the interests of public policy, public security, or public health as provided for in Articles 45(3), 52(1), and 65(1) TFEU. The most commonly invoked justification in the context of FDI from third countries is public security. The Council of the EU summarizes that the concept of public security, within the meaning of the TFEU:

> Presupposes the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society, such as a threat to the functioning of institutions and essential public services and the survival of the population, as well as by the risk of a severe disturbance to foreign relations or the peaceful coexistence of nations, or a risk to military interests.[120]

The Commission expressly states that (as confirmed by the CJEU) public security exception can justify:

> [R]estrictive measures necessary to ensure the security of supply (for instance in the energy field) or the provision of essential public services if less restrictive measures (e.g., regulatory measures imposing public service obligations on all companies operating in certain sectors) are insufficient to address a genuine and sufficiently serious threat to a fundamental interest of society.[121]

The CJEU held that, for example, maintaining the sufficient domestic capacity of petroleum products could be justified based on the public security exception under EU law.[122]

Notably, on multiple occasions, the CJEU has ruled that the ground of public security under EU law must be interpreted strictly and should not be invoked unless there is a "genuine and sufficiently serious threat to a fundamental interest of society."[123] In several golden share cases, for example, the CJEU rejected that the interest on economic grounds, such as the interest in ensuring the conditions of competition in a particular market, or the prevention of a possible disruption of the capital market, could

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[120] Regulation (EU) 2018/1807, A framework for the free flow of non-personal data in the European Union, 2018 O.J. (L 303) 59.

[121] Commission Directive 2020/C 99 I/EC, Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation), 2020 O.J. (C 99 I) 1.

[122] Case 72/83 Campus Oil Ltd. v. Minister for Industry and Energy, 1984 E.C.R. 2730.

[123] Case C-171/08, Comm'n v. Portugal, 2010 E.C.R. I-6843.

constitute a justification for restricting the free movement of capital since this objective refers to the aim of advancing the competitiveness of national companies.[124]

In a more recent case, *Associação Peço a Palavra*, the CJEU examined whether tender specifications governing the conditions under which a (re)privatization process of an air carrier company (TAP) would take place are compatible with the freedom of establishment under EU law.[125] It found that the considerations of "preserving and promoting the growth of TAP . . . and contributing to the growth of the national economy" constitute purely economic grounds and, according to settled case law, cannot be used as valid justifications for restrictions on EU fundamental freedom of establishment.[126] At the same time, the CJEU stated that the ground of "safeguarding the public interest service aimed at ensuring that there are sufficient scheduled air services to and from Portuguese-speaking third countries with which Portugal has particular historical, cultural and social ties" constituted a valid public interest consideration.[127] The agreements between Portugal and Portuguese-speaking third countries required that TAP maintain their principal place of business in Portugal to use traffic rights for air routes with those countries.[128] This implication allowed the CJEU to find that the tender specification requiring TAP's principal place of business to be maintained in Portugal was proportionate to the fulfilment of the public interest objective.[129] Yet, the CJEU found disproportionate the requirement that the purchaser of shares must ensure maintaining and developing the existing national hub, among other reasons, ensuring the sufficiency of scheduled air route services to and from the Portuguese-speaking third countries could possibly be attained by a different, less restrictive organizational model.[130]

Notably, different from the other freedoms, Article 63 of the TFEU enshrines the free movement of capital not only between EU Member States

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[124] Case C-337/05, Comm'n v. Italy, 2008 I-2195, I-2216; Case C-338/06, Comm'n v. Spain, 2008 I-10169, I-10172.

[125] Case C-563/17, Associação Peço a Palavra v. Conselho de Ministros 2018 ECLI:EU:C:2018:937, ¶ 1 (Nov. 21, 2018).

[126] *Id.* ¶ 70.

[127] *Id.* ¶ 73.

[128] *Id.* ¶ 75.

[129] *Id.* ¶¶ 76–78.

[130] *Id.* ¶¶ 80–82.

but also in relation to third countries. The public security exception with respect to the free movement of capital can therefore be invoked not only by investors from other EU Member States but also by investors from non-Member States that experience restrictions as a result of the robust investment screening. According to Advocate General Kokott, the scope of the prohibition of restrictions on capital movements to and from non-Member States and on capital movements within the EU (regarding the EU internal market) is not necessarily the same.[131] The CJEU case law does not shed light on whether the derogations from the principle of free movement should be applied uniformly to the measures adopted against companies from other Member States and third countries.[132] The CJEU acknowledged that the movement of capital to or from third countries occurs "in a different legal context from that which occurs within the EU."[133] However, this jurisprudence is developed only in the field of taxation, where the EU legislation seeks to ensure harmonization and cooperation between national tax authorities of EU Member States, especially regarding tax information exchange mechanisms.[134] There is little guidance on how this exception applies to other types of measures, such as investment restrictions. Yet, in principle, it cannot be denied that the grounds for justification in the case of FDI from third countries will be interpreted more broadly than in the case of FDI from other EU Member States.[135]

C. Domestic Screening Mechanisms

Most States use two approaches to identify which investments can potentially threaten their national security.[136] The first approach is to set the

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[131] Joined Cases C-436 & 437/08, Haribo Lakritzen Hans Riegel BetriebsgmbH, Österreichische Salinen AG v. Finanzamt Linz, 2011 E.C.R. I-00305.

[132] *See also* Tessa van Breugel, Saskia Lavriissen & Leigh Hancher, *De Investeringstoets in Vitale Infrastructuren: Laatste Redmiddel of Reden Tot Zorg? [The Investment Test in Vital Infrastructures: Last Resort or Reason for Concern?]*, 6 MARKT EN MEDEDINGING 203, 207–208 (2019) (Neth.).

[133] Case C-194/06, Staatssecretaris van Financiën v. Orange Eur. Smallcap Fund NV, 2008 E.C.R. I-03747.

[134] Case C-446/04, Test Claimants in the FII Grp. Litig., 2006 E.C.R. I-11753.

[135] *Id.* ¶ 171.

[136] Domestic competition regulations of many countries maintain a general merger control system for certain acquisitions. Yet, such screening mechanisms do not deal with questions of national security

rules for FDI in certain sensitive sectors, such as with respect to certain energy infrastructure.[137] The second approach is to address the threats to national security in general, irrespective of the sector concerned. For example, the Netherlands has decided to use these two approaches complementarily.[138]

The most controversial questions related to protecting the national security of a host State arise when the state adopts cross-sectoral mechanisms that address the threats to national security in general.[139] In practice, instead of defining "national security interests" that can trigger an investment review, States tend to offer a vague "clarifying definition" or include a potential illustrative list of factors that would allow for ascertaining a threat to national security, such as investments from foreign countries that do not respect democracy and the rule of law.[140] The level of weight decisionmakers apply to each of these factors is "ultimately subjective and therefore inevitably an exercise of executive political discretion."[141]

As a result, existing FDI screening mechanisms on national security grounds are often considered "black-box regulations" and "are subject to criticisms over their ambiguous nature."[142] For these reasons, a draft bill for general investment screening in the Netherlands (2020) was strongly criticized by the Dutch Council of State.[143] The Advisory Division of the Council of State noted that the bill contained unclear definitions and

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but rather aim to prevent or mitigate the creation of concentrations that could significantly impede competition within a specific market and thus are outside the purview of this Article.

[137] Mikko Rajavuori & Kaisa Huhta, *Investment Screening: Implications for the Energy Sector and Energy Security*, 144 ENERGY POL'Y 2020, at 1, 3.

[138] *See generally* OECD, ACQUISITION-AND-OWNERSHIP-RELATED POLICIES TO SAFEGUARD ESSENTIAL SECURITY INTERESTS (RESEARCH NOTE BY THE OECD SECRETARIAT) 141 (2020), https://search.oecd.org/daf/inv/investment-policy/OECD-Acquisition-ownership-policies-security-May2020.pdf (last accessed Mar. 8, 2023).

[139] Frédéric Wehrlé & Joachim Pohl, *Investment Policies Related to National Security: A Survey of Country Practices—OECD Working Papers on International Investment 2016/02* (June 14, 2016), https://www.oecd-ilibrary.org/finance-and-investment/investment-policies-related-to-national-security_5jlwrrf038nx-en (last accessed Apr. 5, 2022).

[140] *Id.* at 20–21.

[141] Misra, *supra* note 6, at 151.

[142] Cheng Bian, *Foreign Direct Investment Screening and National Security: Reducing Regulatory Hurdles to Investors Through Induced Reciprocity*, 22 J. WORLD INV. & TRADE 561, 565 (2021).

[143] Each bill and governmental decree in the Netherlands goes through the Council of State for advice. *See generally The Council of State Act*, RAAD VAN STATE (Neth.), https://www.raadvanstate.nl/talen/artikel/ (last visited Mar. 8, 2023).

provisions that might hinder its implementation.[144] The bill was subsequently amended, among others, to elaborate on key terms such as "national security" and "vital suppliers" and to ensure more transparency and predictability on the security risks such screening attempted to address.[145]

"Some degree of indeterminacy is inevitable in any body of rules."[146] However, indeterminate normative standards make it harder to know what is expected from the players and, consequently, make it easier to justify the measures that run afoul of the underlying principles and proclaimed reasons for their adoption. This lack of clarity elevates the risk that host States might misuse the ambiguity of FDI screening regulations whenever it favors their economic agendas and strategic interests.[147]

To a great extent, policymakers are left at a crossroads. If their investment screening mechanisms are drafted and interpreted too narrowly, there is a risk that they will not cover essential emerging security threats, including cyber threats or the vulnerability of critical infrastructure. If, however, investment screening mechanisms are drafted and interpreted too broadly, they can hamper the flow of FDI into a country and, consequently, national interests dependent on such investments.

D. Balancing Principles for Investment Screening

This Article does not advocate for a precise objective standard that is generally applicable to all FDI screening mechanisms. Investment screening policy is a political decision as opposed to a general regulation, and the standard of "assessing their procedural design and degree of fairness should reflect this distinction."[148] This Article attempts to elaborate on the principles for balancing the security and economic interests that a host State should consider while adopting its screening policy, particularly in the multilateral and European legal contexts. Although their exact delineation is not fixed,

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[144] RAAD VAN STATE, *Wet veiligheidstest investeringen, fusies en overnames* [Investment, Mergers and Acquisitions Screening Act], 35880, no. 4 (Feb. 10, 2021) (Neth.), https://www.raadvanstate.nl/adviezen/@123818/w18-20-0499-iv/#highlight=Wet%20Veiligheidstoets%20Investeringen%2c%20Fusies%20en%20Overnames.

[145] *Id.*

[146] IAN HURD, HOW TO DO THINGS WITH INTERNATIONAL LAW 32 (Princeton UP, 2017).

[147] Karl P. Sauvant, *Improving the Distribution of FDI Benefits: The Need for Policy-Oriented Research, Advice, and Advocacy*, 4 J. INT'L BUS. POL'Y 244, 246 (2021).

[148] Misra, *supra* note 6, at 156.

the international and European organizations and the existing literature identify several core principles, each with its own content and evolution. First, given that the OECD Guidelines are the starting point for members' domestic screening mechanisms and OECD members can be expected to implement them in their domestic regulations, this Article will use the principles of nondiscrimination, transparency and predictability, proportionality, and accountability as a normative framework for the assessment of investment screening. Second, EU law informs the content of the principles of a good policy design and prescribes more specific conditions for investment screening mechanisms in the Member States. Third, the scope of the discussed threats posed by FDI can be used as an analytical framework for defining the factors that can justify investment restrictions based on national security grounds. All this considered, the balancing principles for FDI screening can be concretized as follows:

Nondiscrimination. Governments should treat similarly situated investors in a similar manner and should rely on measures of general application that apply to both domestic and foreign investors.[149] Only where the measures of general application are deemed inadequate to protect national security might governments consider adopting specific measures with respect to FDI only. Such measures, however, should be based on the assessment of the specific circumstances of an individual investment proposal.[150] In certain cases, the ownership or control over an investor by a specific State can signal the lack of trust in a purely economic interest from the proposed acquisition and the likelihood of a national security risk to a host State. Yet, the nationality of an investor should be a factor for investment screening only when the investor's State meets certain objective conditions confirming the probability of such risks.

Regulatory proportionality. The requirement of proportionality emphasizes the relevance and credibility of any potential threats for a particular acquisition depending on the level of damage that FDI can cause to national security interests and the likelihood of a situation where such a threat will actually materialize.[151] The goal, thus, is to limit national security

[149] OECD, GUIDELINES FOR RECIPIENT COUNTRY INVESTMENT POLICIES RELATING TO NATIONAL SECURITY 3 (2009), https://www.oecd.org/daf/inv/investment-policy/43384486.pdf.

[150] *Id.*

[151] *Id.*

scrutiny to specific conditions, for example, where the denial of access to goods or services will impose high costs on a host State's economy; or where the investment grants a foreign State an unwanted advantage that can be misused to harm a host State's essential interests; or where the investment entails a high risk of unavoidable damage from surveillance or disruption via foreign ownership.[152] A limited scope of investment screening should also ensure that investment restrictions do not serve purely economic objectives.[153] It also means that domestic policies should avoid the prohibition on FDIs when other existing measures are adequate and appropriate to address the national security concerns of a host State.[154] Thus, investment restrictions should be used as measures of last resort when other policies (e.g., sectoral licensing, export controls, cybersecurity legislation) cannot be used to eliminate the unacceptable level of risk posed by FDIs.[155] The proportionality principle also implies the use of other policy measures (especially risk mitigation agreements) that address security concerns before blocking an investment proposal altogether.[156]

Transparency and Predictability. Regulatory objectives and practices of investment screening should be as transparent as possible so as to increase the predictability of outcomes for investors.[157] The principle of transparency implies procedural requirements, such as the codification and publication of the relevant regulations, prior notification of interested parties about plans to change investment policies, and detailed procedural rules and time limits for screening.[158] Furthermore, it might include substantive requirements for the grounds of screening and the conditions under which the acquisition can be restricted or prohibited to make the outcomes as predictable for investors as possible.[159] Finally, the transparency principle might require the governments to establish the necessary measures to prevent the circumvention of screening mechanisms and screening decisions.

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[152] MORAN, *supra* note 7.
[153] *See supra* Section III.B.2.
[154] OECD, *supra* note 149, at 4.
[155] *Id.*
[156] *Id.* at 3.
[157] *Id.*
[158] *Id.*
[159] *Id.*

Accountability. A host State must ensure the procedures for oversight, judicial review, and periodic regulatory impact assessments of screening decisions and that important decisions are taken at high government levels.[160] Foreign investors should be able to seek a review of decisions to restrict FDI through administrative procedures or before courts.[161] Furthermore, a mix of political and judicial oversight mechanisms should ensure political accountability and the neutrality and objectivity of the investment review process.[162]

Adopting the framework for investment screening that is based on the principles of nondiscrimination, transparency and predictability, proportionality, and accountability, as they are understood in the international investment law and practice and the CJEU jurisprudence, and tailoring such principles to the national security concerns and economic objectives of a host State could help reduce arbitrary or unjustified decisions against non-threatening foreign acquisitions and thus bring more predictability and certainty for foreign investors in the Netherlands and other EU Member States. Furthermore, the provided conclusions and policy recommendations that follow from the analysis of the Dutch screening mechanism could help foster legal and policy developments in the EU in general and third countries.

IV. THE EXPANSION OF INVESTMENT SCREENING IN THE NETHERLANDS

Following intensified scrutiny over FDI across the EU, the Dutch government has proposed implementing a general framework for screening investments in critical industries and sensitive technologies on the basis of national security—the National Security Screening Act.[163] It came into force in June 2023, with transactions closed after 8 September 2020 being subject to a potential retroactive review.[164] The National Security Screening Act will

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[160] *Id.* at 4.
[161] *Id.*
[162] *Id.*
[163] The National Security Screening Act was proposed in addition to the Implementation Act for (EU) FDI Screening Regulation. The Implementation Act does not introduce a new screening mechanism. Instead, it focuses on the obligations arising from the Regulation, such as those related to the exchange of information between Member States. *See* Uitvoeringswet Screeningsverordening Buitenlandse Directe Investeringen [Implementation Act for (EU) FDI Screening Regulation] (June 1, 2023) (Neth.).
[164] *National Security Screening Act*, *supra* note 19.

complement, rather than replace, various sector-specific investment screening mechanisms in the Netherlands, such as under the Electricity Act (1998), the Gas Act, and the Telecommunication Screening Act. A general screening mechanism has been additionally introduced to scrutinize the cases of the change of control and influence that are not or cannot be adequately covered by such sector-specific legislation, as further discussed.

A. Limited Scope of Application

The National Security Screening Act has a limited scope of application. It does not apply to any FDI in the energy sector or technology company in the Netherlands but only to those companies which either qualify as a "vital supplier" or a "manager of a high-tech campus," or are active in the field of "sensitive technology" (i.e., companies that are considered vital to Dutch national security).[165]

"Vital suppliers" include, for example, gas storage providers, vital providers in the field of extractable energy, heating network operators, and nuclear energy providers.[166] Other undertakings can be designated as vital by the governmental decree. As elaborated after the criticism of the Council of State,[167] any such expansion of the scope of the targeted undertakings must subsequently be regulated by law to ensure the involvement of the Parliament.[168]

A manager of a high-tech campus refers to "the company that manages a site on which companies are active and where public-private cooperation takes place in technologies that have economic and strategic importance to the Netherlands."[169] It could potentially include investments in high-tech startups that develop and exploit technology. The addition of managers of high-tech campuses to the list was made due to the concerns after the

[165] *Id.* at 4.
[166] *Id.* at 6.
[167] RAAD VAN STATE, *supra* note 144.
[168] *National Security Screening Act*, *supra* note 19, at 8.
[169] *Id.* at 2.

acquisition of a High-tech Campus in Eindhoven by the Government of Singapore Investment Corporation (GIC).[170]

"Sensitive technologies" include, among others, dual-use items and military goods subject to EU export controls.[171] Investment screening of the targets active in the field of sensitive technologies aims to complement the purpose and objective of export controls by preventing an undesired acquirer from gaining control over a target that offers such sensitive goods.[172] The scope of "sensitive technologies" within the meaning of the National Security Screening Act can be further amended in the governmental decree that can be adopted only after informing the Parliament.[173] For example, the current Governmental Decree extended the investment screening to new areas of technologies that are not subject to existing export controls, such as semiconductors, quantum mechanics, and photonics.[174] The government may designate additional technologies as sensitive only 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, or if the technology is characterized by a broad scope of application within different critical processes that can affect national security.[175]

Moreover, the National Security Screening Act covers acquisitions of control and significant influence over Dutch companies. The concept of "control" follows the definition under Dutch competition law and means the ability, based on factual or legal circumstances, to exercise decisive influence over the activities of a company.[176] The concept of "significant influence" is relevant only to the companies active in the field of sensitive technologies.[177] For example, "an interest of 10% or more and/or the ability to appoint or

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[170] Jan-Willem Neggers, *Eindhoven High Tech Campus sold to Singapore State, not U.S. investor: report*, NL TIMES (Oct. 5, 2021, 2:50 PM), https://nltimes.nl/2021/10/05/eindhoven-high-tech-campus-sold-singapore-state-us-investor-report.

[171] *National Security Screening Act*, *supra* note 19, at 8.

[172] RAAD VAN STATE, *supra* note 144, at 5.

[173] *National Security Screening Act*, *supra* note 19, at 8.

[174] Besluit Toepassingbereik Sensitieve Technologie [Governmental Decree] June 1, 2023, Stcrt. 2023 (Neth.).

[175] RAAD VAN STATE, *supra* note 144, at 19.

[176] *National Security Screening Act*, *supra* note 19, at 4.

[177] *Id.* at 1, 5.

dismiss one or more board members" in a company producing sensitive technologies might be considered a "significant influence."[178]

In some instances, the transactions closed after September 8, 2020 can be subjected to retroactive review on national security grounds. Such a review was introduced after the outbreak of COVID-19 exposed the risks of reliance on foreign markets for various crucial products and raised concerns that important assets could now be acquired at depressed prices.[179] With the retroactive effect of the general screening mechanism, the Minister of Economic Affairs and Climate Policy (the Minister)[180] will be able to review the transactions closed after 8 September 2020 but before the National Security Screening Act is in force and thus to prevent "opportunistic takeovers" where it is in the interests of Dutch national security. To ensure the predictability and proportionality of such a review, the retroactive effect will not apply to the companies that were added to the list at a later stage of the discussion of the bill, such as managers of a high-tech campus and companies that are active in the field of sensitive technology other than dual-use products or military goods subject to export controls.[181] Furthermore, the Minister may require a company to submit the notification only within eight months after the National Security Screening Act becomes effective.[182]

Thus, at the time of writing this Article, the general screening mechanism in the Netherlands is not expected to have a significant direct effect on the energy sector. Since the electricity distribution and transmission networks in the Netherlands stay in the hands of Dutch public shareholders, FDI in the companies that ensure such vital processes is already restricted. Additional control has only been established for gas storage and nuclear energy providers, providers in the field of extractable energy, and heating network operators. At the same time, the introduced screening might

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[178] *Id.* at 5.

[179] *See* Letter to the Chairman of the Ministry of Econ. Affs. and Climate Pol'y (Feb. 10, 2021) (Neth.), https://open.overheid.nl/documenten/ronl-e0fdff65-e379-4711-94fc-4e6a52a14f7f/pdf.

[180] More specifically, the Dutch Investment Screening Desk (Bureau of Investments Screening), part of the Ministry of Economic Affairs and Climate Policy.

[181] RAAD VAN STATE, *supra* note 144, at 32. *See* Proposed National Security Screening Act, 27 (Feb. 10, 2021) (Neth.), https://www.raadvanstate.nl/adviezen/@123818/w18-20-0499-iv/#highlight=Wet%20Veiligheidstoets%20Investeringen%2c%20Fusies%20en%20Overnames (last visited Mar. 8, 2023).

[182] RAAD VAN STATE, *supra* note 144, at 32.

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indirectly affect the development of new technologies necessary for the functioning of the energy sector and powering of the energy transition.

B. National Security Test

The investments that meet the above-discussed criteria have to be notified to the Minister. The National Security Screening Act prescribes a clear and transparent procedure and timeline for such notification and the Minister's responsibilities.[183]

The Minister assesses whether notified investments pose a risk to national security. National security within the meaning of the National Security Screening Act shall be understood as national security referred to in Article 4(2) TEU, public security under Articles 45(3), 52(1), and 65(1) TFEU, and the essential interests of State security under Article 346(1)(a) TFEU that serve to protect security interests that are essential for the democratic legal order, social stability or security of other essential interests of the Netherlands.[184] The National Security Screening Act explicitly notes that such interests include ensuring "the continuity of critical processes, maintaining the integrity and exclusivity of knowledge and information of critical or strategic importance, and preventing unwanted strategic dependence on other countries."[185] The interest to prevent unwanted strategic dependence of the Netherlands can be related to Russia's crucial position in the energy market and China's strategic position in the raw materials market, which falls in the category of threats discussed in Section II.A.1.[186] The interest to maintain "the integrity and exclusivity of knowledge and information of critical or strategic importance to the Netherlands" refers, among others, to the threat of leaking knowledge and technology to China due to China's "tech race" (including key technologies such as quantum technology and AI) that will determine geopolitical power in the coming years, which falls in the category of threats discussed in Section II.A.2.[187]

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[183] *See id.* at 9–18.
[184] *Id.* at 2.
[185] *Id.* at 2–3.
[186] *See* Dreigingsbeeld Statelijke Actoren 2 [Threat Assessment of State Actors 2], 25 (Nov. 2022), https://open.overheid.nl/documenten/ronl-f76b037c88b27bbede038d38647642b408245240/pdf (last visited Mar. 8, 2023).
[187] *See id.* at 31.

The interest to safeguard the continuity of critical processes might arise, for example, in the case of the threat of sabotage activities on vital infrastructure such as the Nord Stream gas pipelines, which falls in the category of threats discussed in Section II.A.3.[188] Thus, such interests correspond with the general analytical framework for potential national security threats posed by FDI used for the purpose of this research.

In spite of the criticism of the Council of State, the National Security Screening Act does not specify the types of risks against which a specific acquisition will be assessed as part of the review process in each specific case but merely provides that certain elements relating to the investor may be taken into account, such as its track record and country of origin. In particular, the screening should include the assessment of the transparency of the investor's ownership structure, identity, and/or criminal record; the application to it of restrictive measures under national and/or international law, and the security situation in the country or region of residence of the investor.[189] It is clarified that the security situation in the country or region should be considered in the screening process when it is affected by foreign interference or its threat, as well as military threats, cyber threats, terrorist threats, the threats posed by increasing proliferation of weapons of mass destruction within the region, or as a result of internal armed conflicts or the declaration of martial law or a state of emergency due to an attempted overthrow of the internationally recognized government.[190] Furthermore, considering the recommendations of the Council of State, specific investment-related criteria have been added for "vital suppliers"[191] and separately for companies active in the field of "sensitive technology."[192] For example, in assessing whether a foreign acquisition of a company active in the field of sensitive technology threatens national security, the Minister should consider the existence and quality of export control policy in a home State of a foreign investor.[193] Thus, executive political discretion to allow or

[188] *See id.* at 23–24.
[189] RAAD VAN STATE, *supra* note 144, at 13–14.
[190] *Id.* at 14.
[191] *Id.*
[192] *Id.*
[193] *Id.*

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prohibit an investment is, to a large extent, a reflection of existent trust to the investor but also its home State.

In principle, a foreign acquisition that falls within the scope of the National Security Screening Act can happen only after the Minister has issued an assessment decision or has indicated that such a decision is not required.[194] "If the public interest is at stake, with a risk of economic, physical or social harm to society . . . or adverse effects on financial stability," the Minister may grant a limited exemption and allow the transaction before the assessment.[195] Such an exemption is subject to strict procedure and regulation, as elaborated after the criticism of the Council of State.[196]

In exceptional situations where there is a serious risk to the national security of the Netherlands, an FDI proposal that has been previously reviewed under the National Security Screening Act and allowed can be reassessed based on the above-discussed screening criteria. Such exceptional situations include "a potential social disruption with economic, social, or physical consequences or a direct threat to Dutch sovereignty."[197] Reassessment may take place only within six months after the risk becomes known.[198]

C. Mitigation Measures

If and when a sufficient level of trust is absent, the Minister can decide to implement or strengthen the verification of the transaction instead of unconditionally allowing it. To this end, the Minister can impose mitigation measures and appoint a third party to monitor compliance with those measures. In the explanatory memorandum, the Dutch government emphasizes that an open society and economy are at the foundation of Dutch society and prosperity and that the effects of the National Security Screening Act on the Dutch investment climate should be as limited as possible.[199]

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[194] *Id.* at 9.
[195] *Id.* at 10.
[196] *National Security Screening Act*, *supra* note 19; *see* RAAD VAN STATE, *supra* note 144.
[197] RAAD VAN STATE, *supra* note 144, at 17.
[198] *Id.*
[199] *See* Rules Introducing a Test Regarding Acquisition Activities That May Pose a Risk to National Security Given Their Effect on Vital Providers or Companies Active in the Field of Sensitive Technology, 3 (July 1, 2021), https://zoek.officielebekendmakingen.nl/kst-35880-3.pdf (last accessed Mar. 5, 2023).

Thus, the Minister should always first seek to address potential concerns by means of mitigation measures and only then consider prohibiting the transaction altogether.[200]

The National Security Screening Act provides a non-exhaustive list of possible mitigation measures. They include, among others, regulating access to sensitive information, or requiring mandatory certification of all or part of the investor's shares via a foundation.[201] Additionally, after the criticism of the Council of State, specific mitigation measures have been added for companies dealing with sensitive technologies. Such measures can include, for example, depositing certain technology with the Dutch State or a third party and/or a duty to notify the Minister of any intention to transfer the activities of an acquired company to a third country.[202] The Dutch authorities may then decide to acquire the technology concerned or require approval for any transfer based on fair, reasonable, and nondiscriminatory conditions.[203]

D. Relationships with Sectoral Screening Mechanisms

Sector-specific regimes in the Netherlands prevail over the general investment regime.[204] It means that if the investment is covered by the Electricity Act (1998); the Gas Act; or the Telecommunication Screening Act, no notification under the general screening regime is required.

In the context of the third energy package and the privatization of the energy sector, the Netherlands adopted sector-specific screening mechanisms on the basis of public security and the security of supply.[205] According to the Electricity Act (1998) and the Gas Act, investment screening obligations apply to targeted undertakings, such as acquisitions of power plants with a capacity of more than 250 MW or acquisitions of liquefied natural gas (LNG) installations.[206] The parties to any transaction involving a production

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[200] *See id.* at 66.
[201] *National Security Screening Act*, *supra* note 19, at 15–16.
[202] *Id.* at 16.
[203] *Id.*
[204] *Id.* at 5–6.
[205] Note that the Gas Act and Electricity Act (1998) may soon be replaced by the proposed Energy Act. At the time of writing, Art. 6.3 Energy Act incorporates the existing provisions without amendments.
[206] *Foreign Direct Investment Reviews 2021: Netherlands*, WHITE & CASE (Dec. 20, 2021), https://www.whitecase.com/insight-our-thinking/foreign-direct-investment-reviews-2021-netherlands.

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installation with such a capacity or regarding an LNG installation have to notify the Minister of the transaction before the proposed change of control.[207] The Minister may then prohibit the transaction or impose specific limitations regarding "such a change of control on the grounds of public security or security of supply."[208] To date, the Dutch authorities have not prohibited or restricted any transactions in the energy sector, nor have any transactions resulted in significant societal or parliamentary concerns or discussions. Notably, the Electricity Act (1998) and the Gas Act will soon be replaced by the new Energy Act. Article 6(3) Energy Act incorporates the same grounds for screening yet broadens its scope by lowering the current threshold for covered power plants from an electric capacity of 250 MV to 100 MV. If the notification thresholds of power plants are not met, no notification is needed under the general regime either.[209]

Furthermore, in the aftermath of the failed acquisition of the formerly State-owned telecommunication company KPN by Mexican company América Móvil, the Dutch government proposed the introduction of an additional screening mechanism for critical companies in the telecommunication sector in order to prevent investors with undesirable intentions from acquiring control over critical telecommunication infrastructures.[210] The Telecommunication 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 telecommunication sector.[211] The Minister may prohibit the acquisition of controlling influence on the basis of a threat to the public interest.[212] A threat to the public interest is further defined as a threat that can arise where the investor or shareholder is an undesired person or a State, entity, or person with malicious intention to influence the telecommunication company in order to enable misuse or outage, where the investor has a poor track record, or where the investor does not cooperate with the investment

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[207] *See* Elektriciteitswet 1998, Stb. 1998, 50; Gaswet, Stb. 2000, 47.

[208] *Id.*

[209] Voorstel van Energiewet (Proposal for Energy Act) (36378-2) (June 9, 2023) (Neth.) (see Article 6(3) specifically).

[210] *See* Jochem de Kok, *Investment Screening in the Netherlands*, 48 LEGAL ISSUES OF ECON. INTEGRATION 43, 49–50 (2021).

[211] *See* Telecommunicatiewet, Stb. 1998, 84–85.

[212] *See id.* at 85.

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screening investigation.[213] Thus it can be argued that the public interest test is written down quite strictly and can be quite difficult for domestic authorities to prove in practice.[214]

E. Balancing the Security, Economic, and Environmental Interests of the Netherlands

Ultimately, the developments in investment screening regulation in the Netherlands largely originate in broader European developments. Some aspects of such developments are aligned with international and European contexts, while the other aspects reflect the particularities of the Netherlands' stance on national security and investment liberalization and are difficult to judge before the regime is in force and applies in practice. Nevertheless, the analysis of the Dutch regime based on the distilled balancing principles for investment screening in accordance with the EU law and multilateral guidelines can already offer certain conclusions:

Nondiscrimination. The National Security Screening Act and sectoral legislation in the Netherlands do not discriminate between sensitive investments from within the Netherlands, other EU Member States, or third countries (non-Member States). Notably, the scope of such a general screening regime is primarily driven by the particularities of the target (i.e., acquired company) rather than by the investor's identity: the Dutch regime applies to all investments regardless of the investor's nationality. Even though the mechanism does not differentiate between the ownership status of an investor, in order to assess the risk FDI might pose to national security, particular attention shall be given to the security situation in the country or region of residence of the investor. The National Security Screening Act prescribes certain criteria when the security situation in the country or region can contribute to a high risk of the proposed acquisition.[215] Thus, a third-State ownership or control or purely political and economic differences between the Dutch government and the government of a home State should not, in principle, affect the decision of the Minister to allow a foreign transaction. It is also important to note that the security situation in the country or region in itself is not considered proof of a plausible threat to

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[213] *See id.*
[214] de Kok, *supra* note 210, at 54.
[215] *National Security Screening Act*, *supra* note 19, at 14.

national security in the Netherlands. It is only one of the factors that the Minister must consider together with the others while assessing whether a foreign acquisition is likely to affect the national security of the Netherlands.

Regulatory proportionality. The investment screening mechanisms in the Netherlands allow distinguishing between critical and non-critical assets and thus have a limited effect on the overall investment flow to the country. First, the general screening mechanism in the Netherlands applies only where the investment is aimed at a vital supplier, a manager of a high-tech campus or a company active in the field of sensitive technologies. The list of vital suppliers can be changed only by law. The scope of sensitive technologies mostly depends on the scope of export controls in the EU. Yet, other technologies that are not covered by export control regulations but that might exuberate threats to national security might be additionally added to the list. Second, even if the transaction involves one of the listed targets, it is excluded from the scope of the general mechanism if a narrowly drafted sector-specific screening mechanism covers the transaction. Third, the transaction has to meet the thresholds of "control" or the acquisition or increase of "significant influence." Consequently, the Minister will be authorized to review the national security implications of only those transactions that apply to specifically defined targets, are not covered by sector-specific screening mechanisms, and affect the control within a target to a specific degree (See Chart 1 below).

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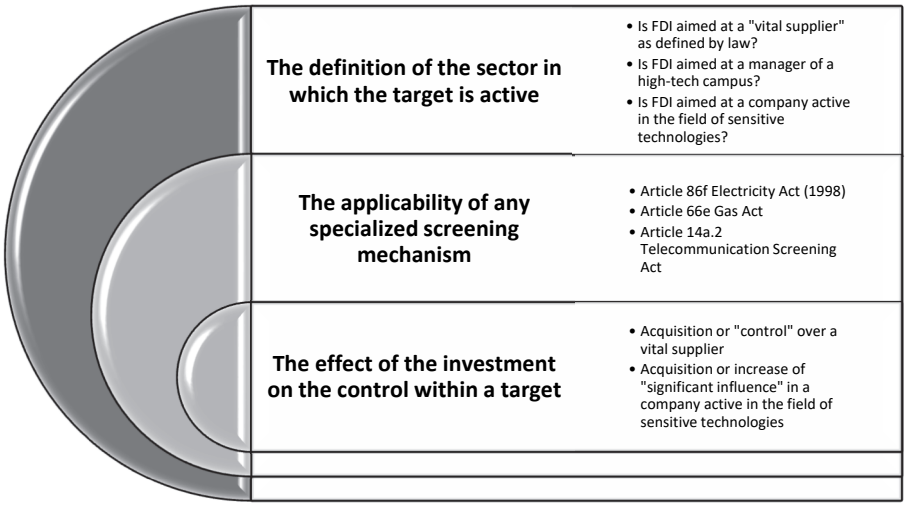

Chart 1. Screening of FDI Transactions with Potential Implications for the Energy Transition in the Netherlands

The application of the screening regime under the National Security Screening Act to specific targets only means that investment restrictions are narrowly focused on concerns related to national security and tailored to the specific risks posed by investments in certain companies. This specificity can be contrasted with the initial draft of the bill, which, for example, did not provide concrete guidance on which undertakings should be deemed to constitute vital suppliers. The Dutch government confirmed that they changed the approach in order to ensure clarity and legal certainty of the investment screening while maintaining the flexibility necessary to address immediate security concerns.[216] Yet, there remain questions arising from the application of the general screening regime in practice. For example, it is not straightforward whether a company that supplies IT services in the energy sector or a tech start-up are "active" in the field of sensitive technologies in the meaning of the National Security Screening Act.[217] Furthermore, the possibility for adjustments to the scope of sensitive technologies based on the governmental decree inevitably creates legal uncertainty for investors, as it

[216] *See National Security Screening Act*, *supra* note 19.
[217] de Kok, *supra* note 210, at 63.

cannot be excluded that the government would seek to expand its authority on a case-by-case basis if it seeks to intervene.

Finally, the transactions with critical assets shall be notified to the Minister and assessed based on a national security test. The National Security Screening Act understands "national security" fairly broadly to include national security but also public security in the meaning of EU law. Such a definition of national security excludes purely economic interests of the Netherlands as a ground for investment screening. The national security test further considers various factors that primarily focus on the reputation and behavior of investors and their home country. Some of these criteria generally apply to all companies subject to screening, while the others are designed to evaluate specific risks: the cybersecurity risks and risks of acquiring the technology that can be deployed in a harmful way for the Netherlands in case of screening a company whose operation involves sensitive technology, or the competence and interest of an investor to run the processes the continuity of which is vital for the Dutch economy in case of screening of a vital supplier. The focus, thus, is on establishing a high level of trust in an investor. If and where a sufficient level of trust is absent, the acquisition requires further verification and might be subjected to certain mitigation measures.

The prohibition of an investment is understood as a measure of last resort. Yet, it is unclear under which circumstances the level of risk to national security shall be considered acceptable and under which circumstances the transaction should be subject to mitigation measures rather than be prohibited. The broad discretion of the Minister on these questions can be justified by the need to leave the executives with enough flexibility to make efficient decisions on sensitive national security questions. Yet, it also leaves room for politicizing economic relations between the Netherlands and certain other States and using FDI as a geo-economic tool.

Transparency and Predictability. The possibility for the retrospective screening of investments, meaning screening of investments that have already been lawfully established, contributes to the uncertainty for the companies that made their investments after 8 September 2020 and before the general screening mechanism becomes effective. The drafters, however, have attempted to eliminate such uncertainty by limiting the retroactive screening to a specific time frame and putting efforts to make the details of

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the bill available to the public three months prior to 9 September 2020,[218] the date from which the retroactive screening is possible.

Furthermore, the National Security Screening Act addresses the issues related to the prevention of the circumvention of investment screening. The application of the National Security Screening Act to both domestic and foreign investors not only contributes to the nondiscriminatory character of the screening mechanism but also effectively prevents circumvention constructions. For example, the exclusion of investments from other EU Member States from the scope of the screening could open the door to certain circumvention practices, for example, when an investor from a third country invests in a target through a "shell" company based in an EU Member State to avoid the screening of its transaction. For similar reasons, extending the scope of the notification requirement to investments by Dutch investors helps prevent circumvention in the case of investments by Dutch-owned companies or Dutch citizens acting as vehicles for foreign companies or their governments.

Finally, the possibility of retroactive screening of certain transactions on national security grounds allows for the prevention of strategic or opportunistic behavior by certain investors due to the COVID-19 pandemic and its effect on the global supply chain.[219]

Accountability. A decision prohibiting foreign acquisition in the Netherlands is, in principle, open to administrative objection and appeal that can be brought before the court under the Dutch General Administrative Law Act.[220] "A foreign investor can expect to be given treatment no different than the one afforded to local investors before national courts."[221] Yet, the standard of the court's review of administrative actions remains a contentious issue.[222]

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[218] *National Security Screening Act*, *supra* note 19.

[219] *See* Eric Wiebes, *Aankondiging peildatum in wetsvoorstel investeringstoetsing op risico's voor de nationale veiligheid bij overnames en investeringen [Regarding the Date of the Application of National Security Screening Act]*, OVERHEID (June 2, 2020), https://open.overheid.nl/documenten/ronl-e0fdff65-e379-4711-94fc-4e6a52a14f7f/pdf.

[220] *See* Algemene Wet Bestuursrecht, Stb. 1992, 37–45.

[221] *Netherlands*, WORLD JUST. PROJECT, https://worldjusticeproject.org/rule-of-law-index/country/2022/Netherlands (last visited Mar. 8, 2023).

[222] *See generally* Tom Barkhuysen & Michiel van Emmerik, *Judicial Review in Dutch Environmental Law: General Observations*, *in* JUDICIAL REVIEW OF ADMINISTRATIVE DISCRETION IN THE ADMINISTRATIVE STATE 104 (Saskia Lavrijssen, Ernst Hirsch Ballin & Jurgen de Poorter eds., 2019).

As the existent CJEU jurisprudence suggests, Member States adopting investment screening must consider compliance with the principle of proportionality very carefully; otherwise, their investment restrictions, if challenged, might be found in breach of EU law. Yet, it can be argued that where the Netherlands is likely to raise national security concerns, a foreign investor "is more likely to abandon the project than to move ahead at whatever cost, including the cost of litigation."[223] In view of this, there are not likely to be many opportunities for the CJEU to control whether a national security interest is indeed present in domestic screening decisions and whether the adopted investment restrictions are proportionate.

At the same time, the possibility for the retrospective screening of investments in the Netherlands increases the potential for conflict with BITs' and FTAs' substantive provisions and, thus, investors' claims for damages since the scope of protection under international agreements is much greater for established investments than for the investments at the pre-establishment stage.[224]

Finally, the Netherlands should take into utmost account the opinion received from the Commission regarding the screening of certain acquisitions. When a Member State receives an opinion from the Commission, "it should give such opinion due consideration through, where appropriate, measures available under its national law, or in its broader policy-making," in line with its duty of sincere cooperation laid down in Article 4(3) TEU.[225] Member States should ground their refusal to take the Commission's opinion into account on valid reasons. Given the current State of EU law and CJEU practice, a Member State can rarely violate its duty of sincere cooperation within the CCP where the EU has exclusive competence while, at the same time, not breaching its other commitments.[226] Yet, this happened in the context of shared competences.[227] The paradox of the FDI Screening Regulation is that even though it is based on Article 207 TFEU and the EU has exclusive competence in the field of FDI, EU Member States have exclusive competence with respect to their national security. Thus, it

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[223] *See* Verellen, *supra* note 102, at 19.

[224] *See, e.g.*, Netherlands Model Investment Agreement, 2019.

[225] Council Regulation 2019/452. Preamble ¶ 17, 2019 O.J. (79) 1.

[226] Joris Larik, *Sincere Cooperation in the Common Commercial Policy: Lisbon, a "Joined-Up" Union, and "Brexit," in* EUROPEAN Y.B. INT'L ECONOMIC L. 98 (Marc Bungenberg et al. eds., 2017).

[227] *Id.*

can be argued that Member States can always attempt to justify the refusal to take into account the Commission's opinions based on their national security concerns. It remains to be seen to which extent the Commission would intervene in the FDI screening decisions of individual Member States and to which extent the Member States would be ready to follow its recommendations.

All this considered, it can be concluded that the screening mechanism in the Netherlands does not discriminate between domestic and foreign investors, is narrowly targeted, and aims to ensure transparency, predictability, and accountability. This was achieved by addressing the criticism of the Council of State in the final version of the National Security Screening Act aimed to improve the clarity and proportionality of the proposed mechanism. In particular, the National Security Screening Act eventually elaborates on the definition of national security and the factors to be considered under the national security test, ensures that companies can be designated as vital suppliers only by law, and specifies the limits of the retroactive effect of the screening mechanism. The questions remain on how the suggested regime will be implemented in practice. In particular, investors in the energy and technology sectors in the Netherlands might raise questions about the applicability of certain thresholds and national security factors to particular acquisitions. It also remains ambiguous against which specific national security threats the FDI proposal regarding a specific acquisition will be assessed. Nevertheless, the Dutch regime that attempts to target only a limited number of companies designated in advance and provide an extensive and relatively precise list of factors that have to be assessed under the national security test could serve as a model for other Member States and the Commission.

V. POLICY RECOMMENDATIONS FOR EU AND NATIONAL AUTHORITIES

With the raised environmental concerns and climate change goals, energy infrastructures, including electricity generation, electricity grids, and electricity retail supply, are becoming even more critical for the economy of

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a host State.[228] Furthermore, expanding the definition of "sensitive technologies" with a focus on data and data-driven technologies opens the door for investment restrictions that can indirectly affect energy infrastructure and energy-related services.

By ensuring more targeted screening obligations and clearer substantive thresholds, FDI screening mechanisms can preserve an open investment climate while addressing concerns over encroachment on national security in a changing geopolitical world and ensuring that investments are only prohibited or restricted on the basis of genuine and sufficiently serious threats. To this end, investment screening mechanisms must respect the principles of a good policy design, such as nondiscrimination, transparency and predictability, proportionality, and accountability, and address specific rather than generic security concerns arising from foreign acquisitions.

With this respect, the direction of the Netherlands, taken after robust domestic discussions and criticism, is a good example of a narrowly tailored regime that attempts to balance the free flow of investments and the protection of critical infrastructure and sensitive technologies in compliance with multilateral guidance and EU law. While it remains to be seen how the regime will be applied in practice, several lessons can be drawn from its regulatory design and purpose.

First, a starting point for investment screening is the distinction between critical and non-critical assets. This requires domestic authorities to give sufficient thought and decide in advance which companies should be covered by the screening regime and under which conditions. The assessment of a foreign transaction should start with the determination of how "critical" the goods or services provided by the targeted company are. Companies should be able to determine in advance whether the intended acquisition targets a vital supplier or a company that is operating in the field of sensitive technologies. The Dutch legislation does it by establishing several objective thresholds for screening, including designating specific companies as targets (listed in the National Security Screening Act), screening only certain categories of companies (such as LNG facilities, companies that own dual-use technologies or other specific types of technologies) or facilities that have

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[228] Liliane Gam & Marco Grantaliano, *Foreign Direct Investment in the Energy Sector: Three Important Trends*, LINKLATERS: FOREIGNINVESTMENTLINKS (June 29, 2021), https://www.linklaters.com/en/insights/blogs/foreigninvestmentlinks/2021/june/foreign-direct-investment-in-the-energy-sector-three-important-trends.

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a certain capacity (such as power plants with a capacity of more than 250 MW), and applying the general screening regime only to transactions that can result in a certain level of "control" or "significant influence." The Dutch legislation is not unambiguous. Yet, the approach that attempts to determine the "criticality" of assets *ex ante* as much as possible prevents unnecessary obstacles to the free flow of investments in cases of the acquisition of "non-critical" assets, thereby leaving the open investment climate in the country unhindered.

Second, it might be difficult in practice to specify which specific national security threats should be assessed as part of the FDI screening. The National Security Screening Act clarifies the notion of national security by referring to its understanding under EU law and listing specific concerns that have to be considered while assessing the national security risks of investments. While it has attempted to define the categories of threats in general and their relevance for the acquisition of either a vital supplier or a technology-related company, the decision to allow or prohibit FDI on national security grounds will always be the political one. It can be argued that such a list of threats and factors that are used to assess a national security risk of the proposed acquisition could be further specified by referring to specific geopolitical risks, the risk to the security of supply, of cyberattacks. Yet, it is doubtful that a host State should be expected to provide an exhaustive list of threats to its national security. The geopolitical, technological, and environmental developments bring new security concerns and accelerate the changes in States' stances on the threats they must address. Instead, the ambiguity of the national security test can be mitigated if investment screening applies only to specific targets, the law specifies the specific factors that the authorized decision-maker has to consider, and the decisions on investment screening are subject to review, such as in the Netherlands.

It is also important to note that the investments with a specific EU dimension covered by the FDI Screening Regulation include energy-related infrastructure projects in the EU. If the transaction is likely to impact projects or programs of "Union interest," the Commission may issue an opinion to the host Member State regardless of whether it is undergoing screening. It remains unclear to what extent the Member States can be forced to consider this opinion. Neither the National Security Screening Act nor Implementation Act for EU FDI Screening Regulation in the Netherlands has established any explicit powers to take measures necessary to address

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concerns expressed in the Commission's opinion, including when such an opinion concern a project or a program of "Union interest," which may affect foreign participation in the EU energy sector.

By the same token, as many companies in Europe have affiliates or operate the infrastructure in several Member States, the impact of the foreign acquisition on national security might not always be limited to the home country of the targeted company alone.[229] Yet, as of now, only Germany, Lithuania, and the Slovak Republic explicitly mention the interests of other Member States as one of the factors that allow their respective authorities to start the screening procedure.[230] EU Member States continue to have "very different attitudes and rules for security screening," which may lead to "inefficient, [uncoordinated] decisions and cause conflicts between affected Member States," undermining the goal and purpose of FDI screening in Europe.[231] The EU has launched a legislative proposal to strengthen FDI screening on the EU level.[232] It remains to be seen to which extent the reforms to the FDI Screening Regulation will address the concerns raised in this Article.

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[229] *See* European Commission, PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE SCREENING OF FOREIGN INVESTMENTS IN THE UNION AND REPEALING REGULATION (EU) 2019/452 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 2024/0017 (COD) (Jan. 24, 2024), https://circabc.europa.eu/ui/group/aac710a0-4eb3-493e-a12a-e988b442a72a/library/f5091d46-475f-45d0-9813-7d2a7537bc1f/details?download=true.

[230] OECD, FRAMEWORK FOR SCREENING FOREIGN DIRECT INVESTMENT INTO THE EU 49–50 (2022), https://www.oecd.org/investment/investment-policy/oecd-eu-fdi-screening-assessment.pdf.

[231] Frank Bickenbach & Wan-Hsin Liu, *Chinese Direct Investment in Europe—Challenges for EU FDI Policy*, 19(4) CESIFO F. at 15, 19 (2018), https://www.cesifo.org/DocDL/CESifo%20Forum-2018-4-bickenbach-liu-chinese-FDI-december.pdf.

[232] European Commission, COMMISSION PROPOSES NEW INITIATIVES TO STRENGTHEN ECONOMIC SECURITY, Press Release (Jan. 24, 2024), https://ec.europa.eu/commission/presscorner/detail/en/IP_24_363.

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