Tilted balance to security or economy? A comparative study of national security review mechanisms in the Netherlands and the United States

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Abstract
The Netherlands and the United States stand as strong allies, united by a robust commitment to democratic norms and market principles that anchor a more open, fair, and market-led global economy. Their prosperity has been founded on free trade and investments. However, with the evolving dynamics in global geoeconomics and geopolitics in recent years, both nations have introduced or enhanced their national security review mechanisms. Given their shared attributes, this article compares the review mechanisms of the two countries and explores whether the new Dutch national security review system will mirror the regime of the United States or introduce distinct innovations. It also explores the reasons behind each nation's different preferences regarding the balance between economy and security.

Keywords: Foreign Direct Investment, National Security, Economic Security, Investment Screening, the Netherlands, the United States, Comparative Research

1. Introduction

Dutch society is dominated and characterised by freedom, the democratic constitutional state and an international orientation. Free trade and investments have been the basis of its prosperity. These foundations offer an attractive business and investment climate, and the Dutch benefit from the opportunities and possibilities provided by globalisation and remain welcoming investments from the world. According to the Organisation for Economic Co-operation and Development (OECD) and the International Monetary Fund (IMF), in 2020, the Netherlands was the second-largest recipient and source of foreign direct investment (FDI) in the world and one of the largest historical recipients of direct investment from the United States (the US).[2] However, as a consequence of globalisation, economy and security have become increasingly intertwined. The shifting global geoeconomics and geopolitical environment have strengthened the growing concern in the Netherlands that the acquisition of certain enterprises is not always motivated solely by commercial considerations. Technological development and geopolitical shifts have increased the vulnerability and the risk of misuse of Dutch openness. The COVID-19 crisis and the war in Ukraine have also accelerated the implementation of investment screening mechanisms worldwide. Many countries, including the Netherlands, have developed or updated their foreign investment screening mechanisms to protect national security or public order.

Recently, in response to the EU Regulation 2019/452 establishing a framework for the screening of foreign direct investment into the Union (the EU FDI Screening Regulation),[3] a new Dutch general investment screening regime, Investments, Mergers and Acquisitions Security Screening Act (*Wet veiligheidstoets investeringen, fusies en overnames,* the Vifo Act),

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[2] US Department of State, *2022 Investment Climate Statements: the Netherlands*. https://www.state.gov/reports/2022-investment-climate-statements/the-netherlands/
[3] Regulation (EU) No. 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ L 791, 21 March 2019.

entered into force on 1 June 2023.[4] Up to now, all 27 EU Member States have either developed, upgraded or are in the process of establishing screening mechanisms.[5] Compared to the screening rules of other EU Member States, the Vifo Act is characterised by a great deal of attention to transparency and legal certainty with the provision of low-threshold legal protection. This will serve the open investment climate of the Netherlands.[6]

FDI is also vital to the continued growth and vitality of the US economy.[7] The US has been the world's leading destination for FDI, with a long history of balancing public concerns about the national security risks of specific FDI with maintaining an open environment for FDI.[8] The US has developed a relatively mature national security review system, which has been used for reference by many other countries. The US screening system is a typical example of cross-sectoral screening, with broadly defined review criteria focusing on specific risks rather than industries. Recently, the global order has changed a lot. The rise of China continues, and the US leadership is under strain while the global economy remains in stagnation.[9] With the changing global context and the growing geoeconomics concerns, the US also tightened its national security review and focused more on the security side.

The Netherlands and the US are strong allies, have strong economic ties, work closely together worldwide to promote trade and sound investment and find solutions to global challenges.[10] The US collaborates with the Netherlands to promote and protect leading-edge technology and safeguard critical supply chains. Considering the long-term relationship, the Dutch government policies are occasionally affected by the US, for example, in the export control of ASML products.[11] Semiconductors, which can be used from mobile phones to military hardware, have been seen as the centre of the US-China dispute. Since 2019, the Dutch government has prevented ASML from selling its most advanced lithography machines to China. In October 2022, the US declared that any company would need a license to export semiconductors to China using American tools or software, irrespective of the production location. The US has been pushing the Netherlands to adopt similar restrictions.[12] Earlier this year, the Dutch government put restrictions, following a similar move by the US, on the country's most advanced microchip technology exports to protect national security.[13] Even though this is an

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4 It has been published by Dutch Ministry of Economic Affairs and Climate on 10 June 2022, Staatsblad 2022, 215, https://zoek.officielebekendmakingen.nl/stb-2022-215.html

5 European Commission, Third Annual Report on the Screening of Foreign Direct Investments into the Union, 19 October 2023. Bulgaria is the only EU Member State which has no national FDI screening mechanism in place or under a consultative or legislative process expected to result in the adoption of a new mechanism, but it has a publicly reported initiative underway.

6 Explanatory Memorandum to the Dutch Vifo Act, (in Dutch: *Wet veiligheidstoets investeringen, fusies en overnames, Memorie van Toelichting*, Kamerstuk 35880, nr. 3), at 18.

7 Jonathan C. Stagg, *Scrutinizing foreign investment: How much congressional involvement is too much*, 93 IOWA L. REV. (2007), at 327.

8 Joanna R. Travalini, *Foreign direct investment in the United States: Achieving a balance between national economy benefits and national security interests*, 29 Nw. J. Int'l L. & Bus. (2009), at 779.

9 Scott Lavery and Davide Schmid, *European Integration and the New Global Disorder,* 59 JCMS: Journal of Common Market Studies 1322 (2021).

10 *See* both the government website of the Netherlands, *Our story: A partnership that works*, https://www.netherlandsandyou.nl/your-country-and-the-netherlands/united-states/about-us/our-story and the United States, *US Relations With the Netherlands*, https://www.state.gov/u-s-relations-with-the-netherlands/

11 ASML, a Dutch multinational corporation, is one of the world's most advanced semiconductor manufacturing equipment producers.

12 BBC News, *US-China Chip War: Netherlands Moves to Restrict Some Tech Exports*, https://www.bbc.com/news/business-64897794> accessed 30 November 2023.

13 *ibid.*

example of export control instead of investment screening, it reflects governments' attitude towards national security.

It is easy to understand that countries with different political or economic systems will follow different screening logics. However, for countries sharing more similarities, it does not directly mean they will follow the same methodology. Considering the effect of the US on the Netherlands, it is interesting to see if the new Dutch national security review system will follow the same pattern as the US regime or have its innovations, and how they will conduct the balance between economic interests and security. Unlike the US, free trade and investments have been the basis of its prosperity and play a more important role in Dutch society. Even though they have similar outlooks and value systems in politics and economics, there have also been some sharp divergences. Especially under the changing global order, American policy shifted to a security focus, while the Dutch remained strong supporters of free trade on the international stage. The Dutch government places a great value on upholding an investment-friendly reputation. This trend is reflected in their newly changed investment screening mechanisms. This article compares the national security review mechanisms in the Netherlands and the US and evaluates their preferences for balancing economy and security. This article is structured as follows. Sections 2 and 3 briefly introduce the investment screening mechanisms in the US and the Netherlands. Section 4 compares the divergences in these two systems. The article concludes by analysing why different approaches have been adopted by these two countries even though they share similarities in politics and economics.

2. National Security Review of Foreign Investments in the US

The US has had its national security review mechanism for foreign investment for almost five decades. The establishment of this mechanism, as well as each subsequent modification and change, is rooted in the internal concerns of the country regarding the national security risks posed by foreign investments at different times. The Committee on Foreign Investment in the United States (CFIUS or the Committee), established in 1975 based on President Ford's 1975 Executive Order, is the regulatory body that reviews certain transactions involving FDI in the US.[14] Before its establishment, the specific concern was that the large number of petrodollars being accumulated by the members of the Organization of Petroleum Exporting Countries (OPEC) might be used to acquire critical US assets and cause possible control of the US economy.[15] The lack of a comprehensive solid review mechanism highlighted the urgent need for the creation of a regulatory body. At its creation, the CFIUS's power was limited to monitoring investments and collecting data. It did not include any substantive authority to regulate or prohibit any transactions with national security concerns.[16] Its inception may have been rooted in the imperative to safeguard national security, but as international investment landscapes and security threats evolved, it became apparent that the initial function was insufficient to respond to evolving security challenges. Thus, multiple amendments have been enacted since its creation, and more stringent procedures have been adopted for screening inbound foreign investments.

CFIUS now has delegated power from the US President and is authorised to examine and scrutinise specific transactions related to foreign investment in the US.[17] It assesses whether

[14] Executive Order 11858 (b), 7 May 1975, 40 F.R. 20263.
[15] Edward M. Graham, *US National Security and Foreign Direct Investment* (David Matthew Marchick ed. 2006), at 20.
[16] Travalini, *supra* n. 8, at 783.
[17] Executive Order 12661 of 27 December 1988, 54 F.R. 779, the President delegated its responsibility to CFIUS to conduct investigations into foreign investment transactions.

these transactions impact US national security and determines whether potential concerns can be mitigated. It operates only as a last resort when other national security regulations fall short of providing protection. CFIUS serves in an advisory capacity. With guidance from CFIUS, the US President holds the ultimate authority to halt or prohibit transactions that threaten national security.[18] CFIUS is an interagency committee consisting of nine Cabinet members,[19] with two non-voting, *ex-officio* members,[20] and five other White House offices,[21] that assist the President in reviewing foreign direct investments in the US with national security concerns.[22]

2.1 National Security Review Legislation Development in the US[23]

CFIUS and the US national security review mechanism have evolved and gained strength through subsequent executive orders and statutes. Each revision signifies a shift in the concerns related to foreign investment in the US. These legislations, regulations, presidential executive orders, and CFIUS guidance have shaped the content and procedures of the review system over time. The first ripple stemmed from national security concerns about the sudden surge in Japanese investments in the mid-1980s. During this period, Japanese investment in the US increased from less than US$1 billion in 1980 to US$18 billion by 1990.[24] Before the 1980s, regulations on FDI reviewing were sporadic and primarily driven by World Wars I and II.[25] From the mid-1980s, the debate on FDI in the US centred on issues of national security, especially the concern that acquisitions of US companies by Japanese entities might erode US technological prowess.[26] Japan's burgeoning economic strength and strong competitiveness sparked concerns that it might surpass the US to become the world's leading economy.

The event that triggered the regulation amendment was an attempt by Japanese entity Fujitsu Corporation to acquire an 80% interest in a US company, Fairchild Semiconductor Corporation.[27] Although Fujitsu Corporation quit this acquisition afterwards due to political pressure, the Omnibus Trade and Competitiveness Act of 1988 was enacted by Congress and ratified by President Reagan, with the concluding Exon-Florio clause incorporated as Section 5021 of the Act, often referred to as the Exon-Florio amendment.[28] This amendment

[18] Section 721 (d)(1) of the Defence Production Act of 1950, 50 U.S.C. App. 2170.

[19] CFIUS Overview, US Department of the Treasury, https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-overview, last visited on 30 November 2023. The members of CFIUS include the heads of these nine departments and offices: Department of the Treasury (chair), Department of Justice, Department of Defence, Department of Commerce, Department of Homeland Security, Department of State, Department of Energy, Office of the US Trade Representative, and Office of Science & Technology Policy. The CFIUS staff is part of the Department of the Treasury.

[20] *Ibid*. The Director of National Intelligence and the Secretary of Labour are non-voting, *ex-officio* members of CFIUS.

[21] *Ibid*. Five White House offices observe and, as appropriate, participate in CFIUS's activities, including Office of Management & Budget, Council of Economic Advisors, National Security Council, National Economic Council, and Homeland Security Council.

[22] James K. Jackson, *The Committee on Foreign Investment in the United States (CFIUS)*, Congressional Research Service, 14 February 2020, at 5.

[23] This section is based on and built further upon the author's previous publication: Yao Yuan, 'Economic Security Considerations in FDI Screening' (2022) 11 Law and Economics Yearly Review 64.

[24] Curtis J. Milhaupt, *Is the US ready for FDI from China? Lessons from Japan's experience in the 1980s*, 185 Investing in the United States: Is the US Ready for FDI from China (2010).

[25] James F. Carroll, *Back to the Future: Redefining the Foreign Investment and National Security Act's Conception of National Security*, 23 EMORY INT'L L. REV. (2009), at 170.

[26] Graham, *supra* n.15, at 23.

[27] Stagg, *supra* n. 7, at 335.

[28] Exon-Florio Provision, Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418, Title V, Section 5021, 23 August 1988 (codified at 50 U.S.C. Appendix §2170), amended by P.L. 102-484, § 837, 106 Stat. 2463, 2463-65 (1992), P.L. 110-49, 121 Stat. 246 (2007), and P.L. 115-232, 132 Stat. 2173, Subtitle A of Title XVII (2018).

empowered the President to scrutinise foreign acquisitions, mergers or takeovers from a national security perspective. It even allowed the President to halt or prohibit any such activities if they posed a potential risk to US national security.[29] The purpose of Congress was to offer a mechanism for reviewing whether the President deems it essential to halt a particular deal in certain circumstances but not to prevent foreign investment in general.[30] Therefore, Congress also set pre-conditions for the exercise of the President's authority, which is limited to those situations only when the President determines that (1) there exists 'credible evidence' that the foreign entity gaining control could act in a way that jeopardises national security; and (2) no other US legislation offers sufficient measures for the President to safeguard national security.[31] This standard has been maintained since then.

President Reagan delegated his initial review, decision-making and investigative authorities on such transactions to CFIUS via Executive Order 12661.[32] The role of CFIUS then changed from simply collecting data to reviewing data and providing recommendations to Presidents to block specific transactions. However, CFIUS cannot independently determine its approach to examining foreign investment transactions. It has to follow the President's attitudes and policies.[33] In November 1991, the Treasury Department released its final regulations enacting the Exon-Florio provision.[34] These regulations set up a primarily voluntary notification system for parties involved in an acquisition.

Following that, with a growing number of acquisitions taken by foreign government-owned or controlled firms and the resulting national security concerns, in 1992, Congress revised the Exon-Florio statute via Section 837(a) of the National Defence Authorization Act for Fiscal Year 1993, often referred as the Byrd Amendment.[35] The Byrd Amendment introduced two pivotal revisions, primarily concerning mandatory requirements for transactions involving foreign governments and an enhanced reporting obligation to Congress.[36] In transactions carried out by entities controlled by or acting on behalf of a foreign government, the reporting threshold stating that the transaction 'could affect the national security' is notably lower compared to the standard for transactions involving non-foreign government-controlled entities, which states that the transaction 'threatens to impair the national security.'[37] Consequently, transactions by foreign government-controlled entities are more likely to undergo review due to this heightened reporting standard. The Byrd Amendment also required a report to Congress after any investigation. By this means, Congress had a chance to increase its involvement and exert political pressure on each transaction.[38]

The national security review rule was substantially amended by the Foreign Investment and National Security Act of 2007 (FINSA), effective 24 October 2007.[39] The reason for this amendment can be traced back to the 9/11 terrorist attacks in 2001. This tragedy has

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[29] 50 U.S.C. app. § 2170(d).
[30] Stagg, *supra* n. 7, at 336.
[31] Omnibus Trade and Competitiveness Act of 1988, Section 5021.
[32] Executive Order 12661 of 27 December 1988, 54 F.R. 779.
[33] Jackson, *supra* n. 22, at 8.
[34] Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons. 31 C.F.R. Part 800.
[35] National Defense Authorization Act for Fiscal Year 1993 (Byrd Amendment), Public Law 102-484, US Statutes at Large 106 (1993): 2315, 2463, 23 October 1992.
[36] Stagg, *supra* n. 7, at 337.
[37] *See*, § 837(a) of the National Defense Authorization Act for Fiscal Year 1993, and 50 U.S.C. app. § 2170(d).
[38] Carroll, *supra* n. 25, at 177.
[39] Foreign Investment and National Security Act of 2007, P.L. 110–49, 121 Stat. 246, enacted 26 July 2007 (codified at 5 U.S.C. § 5313, 31 U.S.C. § 301, 50 U.S.C. app. §§ 2061, 2170).

fundamentally changed the way the US views national security. Starting in 2005, there was a renewed wave of public concerns regarding national security, mainly directed against investments from China. The furore reached fever pitch when the China National Offshore Oil Corporation (CNOOC) attempted to buy a US oil company Unocal, and Dubai Ports World planned to purchase the port operation of the UK-based Peninsular and Oriental Steam Navigation Company (P&O), which includes the management rights of six US ports. Even though CNOOC subsequently withdrew its bid and Dubai Ports World sold its interest in the six US ports to a US company, these cases raised questions over the efficacy of the CFIUS review procedure and the necessity for refined legislation to define the roles and authorities of CFIUS.[40] In 2007, Congress modified Exon Florio and passed FINSA. FINSA is the foremost major legislative initiative focusing on the CFUIS review mechanism.[41] This amendment fundamentally transformed the CFIUS procedure and formally established the structure, role and duties of CFIUS. FINSA requires a preliminary review of any covered transaction that CFIUS chooses to investigate on its own or receives a written notification from the involved parties.[42] Additionally, it broadened CFIUS's purview to encompass a more inclusive understanding of national security, including aspects like homeland security, energy assets, and other critical infrastructure. The criteria that the President could use in his decision-making were expanded. FINSA also requires that the CFIUS submit a report to Congress at the end of any review or investigation,[43] which significantly increases congressional involvement and gives members of Congress access to confidential information.[44]

The latest revision to the US national security review mechanism was the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), enacted into law on 13 August 2018.[45] This amendment stems from growing concerns regarding China's economic power and distrust in its acquisition of crucial assets in recent years. Stakeholders and political officials have perceived Chinese FDI to be distinct from that of other nations.[46] According to the analysis of the Congressional Research Services, the concerns stem from a mix of factors: the increasing foreign investment activities by Chinese state-owned companies, the perception that this investment aligns with official strategic objectives rather than solely commercial motives, and the notion that Chinese firms are benefiting from varied forms of government support which result in unfair competitive advantages.[47] FIRRMA upholds CFIUS's authority over transactions that might lead to foreign control of any US business. It further expands the President's and CFIUS's powers to scrutinise and address national security issues stemming from specific non-controlling investments and real estate transactions.[48] However, such expanded jurisdiction for non-controlling transactions does not apply to specific 'excepted investor' and 'excepted foreign state', such as Australia, Canada, and the United Kingdom.[49] While maintaining the primarily voluntary nature of the CFIUS review process, FIRRMA adds

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[40] Travalini, *supra* n. 8, at 787-790.
[41] *Ibid*, at 792.
[42] Foreign Investment and National Security Act of 2007 § 2(b)(1)(A). *See also* Stagg, *supra* n. 7, at 346.
[43] 50 U.S.C.A. app. § 2170(b)(3).
[44] Stagg, *supra* n. 7, at 329.
[45] The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), Subtitle A of Title XVII of Public Law 115–232, 132 Stat. 2173.
[46] B. Canes-Wrone, et al., *Foreign direct investment screening and congressional backlash politics in the United States*, 22 British Journal of Politics & International Relations (2020), at 5.
[47] Jackson, *supra* n. 22, at 39.
[48] 31 CFR Parts 800 and 801, Provisions Pertaining to Certain Investments in the United States by Foreign Persons, Federal Register, Vol. 85, No. 12, 17 January 2020.
[49] On 13 February 2020, the Treasury Department listed Australia, Canada, and the United Kingdom (comprising Great Britain and Northern Ireland) as excepted foreign states.

obligatory filing prerequisites for certain transactions involving critical technologies or significant foreign government ownership. In FIRRMA, Congress recognised the significant contribution of foreign investment to the US economy and reaffirmed the US's commitment to an open investment policy while ensuring national security is upheld.[50] However, FIRRMA permits CFIUS to differentiate between foreign investors based on their country of origin, though it does not explicitly specify particular countries. For a 'country of special concern', more strict scrutiny may be applied in reviewing certain investment transactions.[51] In the Executive Order signed in 2023, President Biden identified China (including Hong Kong and Macau) as a country of concern.[52] This has demonstrated markedly divergent review stances towards allied nations and competitor countries. Chinese investment has an appropriately high priority for close scrutiny. After these successive legislative restrictions on FDI, the US has become less welcoming to foreign investors. According to the FDI restrictiveness index of OECD, the US was the 51st least restrictive country in 2020, while the Netherlands was the 4th.[53]

2.2 The National Security Review Process in the US

2.2.1 Scope of the Review

FIRRMA significantly expanded the scope of national security review from the traditional foreign controlling mergers, acquisitions, or takeovers to also include certain non-controlling transactions concerning critical infrastructure, critical technologies, and sensitive personal data of United States citizens that may be exploited in a manner that threatens national security.[54] Under the new framework, a thorough evaluation of the target business based on these detailed criteria will be necessary for the jurisdictional analysis. For the traditional type of covered transaction, it is essential to examine whether there is foreign control over a US business. 'Control' is defined as 'the power, direct or indirect, whether exercised or not exercised, to determine, direct, or decide important matters affecting an entity, subject to regulations prescribed by the Committee'.[55] However, in the case of other non-controlling investments, a considerably reduced threshold is necessary to undergo the review process. For instance, meeting the standard is deemed sufficient when such non-controlling investments grant a foreign person access to 'material non-public technical information' held by the US business, confer rights to a foreign person to be a member or observer on the board of directors, or involve any participation in significant decision-making regarding US businesses related to sensitive personal data, critical technology or critical infrastructure.[56] In this light, CFIUS possesses extensive discretion and flexibility regarding what it considers a covered transaction within the broad statutory framework.

2.2.2 National Security Risk Assessment

The nature of the CFIUS review is highly subjective. The broad definition of national security combined with open-ended lists of considering factors give CFIUS considerable discretion to be exercised in the assessment. The CFIUS review aims to identify if any national security risk

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[50] Section 1702(b) of FIRRMA.
[51] Section 1702(c) of FIRRMA.
[52] Executive Order 14105, 88 F.R. 54867, 9 August 2023.
[53] OECD Data on FDI restrictiveness, available at https://data.oecd.org/fdi/fdi-restrictiveness.htm#:~:text=FDI%20restrictiveness%20is%20an%20OECD%20index%20gauging%20the,restrictions%20on%20key%20foreign%20personnel%20and%20operational%20restrictions, last visited on 30 November 2023; *see also* B. Canes-Wrone, et al., *supra* n. 46, at 5.
[54] 50 U.S.C. App. 4565 (a)(4)(B).
[55] 50 U.S.C. app. § 4565(a)(3).
[56] 50 U.S.C. app. § 4565(a) (4)(D); Jackson, cited *supra* n. 22, at 16. This new authority was first included in the Treasury Department's pilot program, then in the final regulations.

emerges due to a covered transaction. However, neither Congress nor the Administration has ever clarified the meaning of 'national security', the CFIUS statute[57] also does not clearly define 'national security'. It only clarifies that the term shall be designed to encompass matters related to homeland security, including its application to critical infrastructure and critical technologies.[58] In practice, national security is decided on an individual case basis.[59]

During the historical policy revision process, there were heated discussions between Congress and the Administration about the definition of national security. The swift surge in foreign investment often led to a significant congressional backlash, while the executive branch favoured foreign direct investment. The tension between these two branches paved the way for subsequent political debates in the ensuing decades. For example, concerning the Exon-Florio proposal, the Reagan Administration argued that foreign investment positively impacted the US economy and was hesitant to expand the definition of national security beyond the conventional concept of military/defence framework to encompass economic considerations.[60] Finally, the Administration prevailed, ensuring that the primary objective of Exon-Florio was to address transactions posing a threat to national security without encompassing potential economic implications.[61] In earlier years, these disputes, to some extent, struck a balance in the US, and the scope of national security was not overextended. Now, it has been gradually influenced by current geopolitical developments. US's attitude started to change around 2008, culminating in a clear change in US economic and security strategy in 2017 and 2018, when the Trump Administration clearly and openly indicated that 'economic security is national security.'[62] The scope of national security becomes so broad in practice, and there is a risk that the national security review mechanism may be used as a weapon for other political gain.

When assessing if a transaction might jeopardise US national security, FINSA set forth 11 factors CFIUS shall consider to determine the impact of the transaction on national security: 1) domestic production necessary for national defence; 2) capability and capacity of domestic industries for national defence purposes; 3) control of domestic industries and commercial activity by foreign citizens as it implicates the US' national security; 4) possible effects of the transaction in question on sales of military goods, equipment, or technology to certain nations; 5) possible effects of the transaction in question on the US' international technological leadership insofar as national security is concerned; 6) possible national security-related effects on the US critical infrastructure; 7) possible national security-related effects on the US critical technologies; 8) the status of the covered transaction as a foreign government-controlled transaction; 9) non-proliferation, counter-terrorism, and military uses of technology-related considerations; 10) sources of energy and other critical resources and material that the US may need in the long run; and 11) other considerations as deemed by the president or CFIUS.[63] FIRRMA revised and further included a 'sense of Congress' with six additional factors for CFIUS and the President to consider when reviewing a transaction, such as transactions linked to a 'country of special concern', the track record of the acquirer in adhering to US laws and

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[57] The term 'CFIUS Statute' refers to section 721 of the Defence Production Act of 1950, which was amended by FIRRMA in 2018, and it may be further amended, modified, supplemented or replaced from time to time, and including all applicable regulations and interim rules promulgated thereunder.
[58] 50 U.S.C. app. § 4565(a)(1).
[59] James K. Jackson, *The Exon-Florio National Security Test for Foreign Investment*, Congressional Research Service, 29 March 2013, at 7.
[60] *Ibid*, at 172-173.
[61] Stagg, *supra* n. 7, at 355.
[62] White House, National Security Strategy of the United States of America, December 2017, https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf.
[63] Section 721(f) of the Defence Production Act of 1950, 50 U.S.C. § 4565(f)(1)—(11).

regulations, transactions dealing with sensitive data or cybersecurity, etc. [64] In September 2022, President Biden signed Executive Order 14083 to reiterate and command the CFIUS to further consider five risk factors when reviewing covered transactions: resilience and security of supply chains, US technological leadership, the cumulative effect of transactions, cybersecurity risks, and data vulnerability.[65] These factors are illustrative and open-ended, and there is a tendency to keep the national security term fairly broad, granting the CFIUS broad discretion to apply the screening rules when appropriate.

2.2.3 National Security Review Procedure in the US

The CFIUS review process is generally composed of three stages, namely (1) filing by declaration or written notification, (2) a national security review, and (3) a national security investigation. Based on the assessment results, CFIUS can refer a transaction to the President for a final decision.[66] A party involved in a covered transaction can voluntarily submit a filing and initiate a review.[67] CFIUS also has the authority to conduct a unilateral initiation of review *ex officio* for pending or completed covered transactions if the Committee suspects or has grounds to believe that there is significant false or incomplete information, or if the deal seriously violates a mitigation agreement and no other adequate and appropriate remedies are available to resolve such violation.[68] Before the enactment of FIRRMA, this filing process has been largely voluntary. However, FIRRMA regulated certain mandatory declarations by requiring parties to notify CFUIS before entering into a transaction where a foreign person would acquire a 'substantial interest' in a US business about critical infrastructure, critical technology and sensitive personal data, or a foreign government directly or indirectly holds a 'substantial interest' in the foreign entity investing.[69]

Upon CFIUS receiving a declaration or written notice about a covered transaction, or when it initiates its own notification, it will conduct a review to evaluate the impact of that transaction on US national security. If the pending transaction threatens to jeopardise the US national security and the risk has yet to be mitigated during or prior to the initial review period, or the lead agency recommends, then CFIUS shall immediately extend its review into an additional investigation stage. [70] After this in-depth investigation, if CFIUS still concludes that the transaction raises a national security concern, in practice, members of CFIUS are authorised to 'negotiate, enter into or impose, and enforce any agreement or condition with any party of the transaction to mitigate the perceived threats.'[71] For example, implementing particular export control measures, designating security officers, or divesting certain assets, business sectors or operations that have triggered national security concerns. Such mitigation measures can only be implemented if risks are not sufficiently addressed by other legal provisions. CFIUS also has the authority to maintain ongoing supervision to guarantee that parties involved in the investment transaction consistently adhere to the mitigation measures implemented for approval.[72] In practice, for most transactions, the primary concern for CFIUS is not about

[64] FIRRMA Section 1702 (c).
[65] Executive Order 14083 of 15 September 2022, Presidential documents, *Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States*.
[66] Jackson, *supra* n. 22, at page 12.
[67] 50 U.S.C. §4565 (b)(1)(C)(i).
[68] 31 C.F.R §800.401(b) and (c); 50 U.S.C. §4565 (b)(1)(D).
[69] 50 U.S.C. 4565 (b)(1)(C)(v)(IV)(bb). Part 800 of the Regulations Pertaining to Certain Investments in the US by Foreign Persons defines 'substantial interest' as a voting interest (direct or indirect) of 25% between a foreign person and a US business, and in the latter case, 49% or more between a foreign government and a foreign person.
[70] 50 U.S.C. App. 4565(b)(2)(C)(i).
[71] 50 U.S.C. App. 4565(l)(3).
[72] 50 U.S.C. App. 4565(l)(6)(C).

prohibiting a specific transaction but rather determining how to mitigate potential national security threats, if there are any.[73]

If CFIUS is not able to decide within the review and investigation stages or if a CFIUS member suggests halting or banning the transaction, a report detailing this recommendation must be forwarded to the President.[74] Only the President holds the power to halt or block a covered transaction. As parties prefer to withdraw transactions voluntarily rather than enter into the presidential review stage once CFIUS refuses to grant its approval, until now, only seven foreign acquisitions have been vetoed by US Presidents since the Exon-Florio provisions first granted the President the authority.[75]

3. Investment Screening Mechanism in the Netherlands

Unlike the relatively mature review system in the US, foreign investment screening on the grounds of national security in the Netherlands appeared and developed in recent years. Especially due to the effect of COVID-19, this topic has gained significant attention in both the Netherlands and the European Union (EU). On the European level, it has been recognised that foreign investment may entail specific risks. The EU FDI Screening Regulation, which entered into force in 2020, established an EU-level framework and provided a cooperation mechanism for EU Member States and the EU Commission to work together and exchange information.[76] The EU Member States are encouraged, not obliged, to establish or amend their national screening mechanisms. Before the EU FDI Screening Regulation took effect, the Netherlands had limited screening procedures in place for sectors like electricity, gas, and telecommunication.[77] Due to market vulnerabilities brought about by the COVID-19 pandemic, which heightened the risk of unwanted takeovers and investments, the Dutch government saw it as an opportune moment to introduce a more thorough screening process.

As a result of both the implementation of European legislation and national policy intentions, the Netherlands first updated its sector-specific investment screening in the communication sector in 2020 by adding extra screening requirements to prevent a potential threat to the public interest on the existing or forthcoming predominant control in a telecommunication party. The Dutch government recently introduced a new Dutch general investment screening mechanism, the Dutch Vifo Act, in 2023. This new Act complements the existing sectoral screening regimes in the electricity, gas and telecommunication sectors. The current sectoral screening mechanism continues to be in effect and will take precedence in case of overlap with the new Act. It makes no distinction according to the nationality or origin of the investors. To date, the Dutch investment screening framework is a combination of general and sector-specific legislations, which consist of (1) a sector-specific screening mechanism for the Energy (electricity and gas) sector, (2) a sector-specific screening mechanism for the telecommunication sector, and (3) a general investment screening mechanism. The Dutch

[73] Graham, *supra* n. 15, at 58.

[74] 50 U.S.C. App. 4565(d)(1); Executive Order 13456, section 6(c), 23 January 2008.

[75] These seven blocked transactions include: the attempted acquisition of MAMCO Manufacturing Co. by China National Aero-Technology Import and Export Corporation in 1990; the proposed purchase of windfarms in Oregon by Ralls Corporation in 2012; the attempted acquisition of Aixtron by Fujian Grand Chip Investment Fund in 2016; the attempted acquisition of Lattice Semiconductor Corporation by Canyon Bridge Acquisition Company, Inc. in 2016; the attempted acquisition of semiconductor chip maker Qualcomm by Broadcom in 2017; the attempted acquisition of Musical.ly by ByteDance in 2017; and the attempted acquisition of StayNTouch by Beijing Shiji in 2018.

[76] EU FDI Screening Regulation, *supra* n. 3.

[77] Harold Koster, *Investeringstoetsing door de Wet veiligheids-toets investeringen, fusies en overnames*, afl.1, O&F (2023).

Investment Screening Agency (*Bureau Toesting Investeringen*, BTI), a division of the Ministry of Economic Affairs and Climate Policy (the Minister), has been appointed as regulatory authority to support implementing sectoral and general investment tests in the Netherlands. The BTI is also a contact point for the EU FDI Screening Regulation pursuant to the Screening Regulation Implementation Act.

3.1 Investment Screening in the Energy Sector

Before the Dutch Vifo Act, there were several sector-specific legislations for the screening of foreign investments in the Netherlands. One example is the notification obligations included in the Gas Act and the Electricity Act 1998,[78] which was first introduced in the Netherlands in the context of implementing two EU directives that are part of the 'third energy package' in 2009 and the privatisation of the energy sector.[79] The third energy package was designed to enhance the efficiency of the internal energy market by segregating energy supply and generation from the operation of transmission networks. It contained detailed provisions ensuring that the unbundling of networks in different EU Member States is brought to a more equal level. However, it did not provide for a screening requirement for investment in energy producers or suppliers.[80] In the Netherlands, the national network operators are already positioned independently of production and supply. While the transmission and distribution activities remained under state control, large-scale privatisation of the energy production and supply companies started in 2007.[81] Due to the privatisation of the energy sectors, more foreign investors are able to participate in market competition, and there is a higher chance of potential risks to public security. The notification obligation in the energy sector was introduced in this context.

In the revised Gas Act, any change of control in an LNG installation or an LNG company needs to be notified to the Minister.[82] Similarly, under the updated Electricity Act 1998, any change of control of a production installation with a nominal electric capacity exceeding 250 MW or a company overseeing such an installation, must also be brought to the Minister's attention.[83] Based on considerations of public safety or security of supply, the Minister may prohibit the change in this control or attach conditions to it.[84] In this test, the Minister may consider relevant factors, such as the financial reliability of the involved company, its management practices, transparency levels, the track record of the parties involved and their technical expertise for the reliable operation of the relevant activities to be examined.[85]

Back then, maintaining an open investment climate still played an essential role in applying this test. Under this sector-specific screening mechanism, the threshold for the Minister to take

[78] Dutch Parliamentary Documents II 2010/11, 32814, nr. 2, Amendments to the Electricity Act 1998 and to the Gas Act (implementation of directives and progress in the field of electricity and gas).
[79] The implementation of two EU directives: Directive 2009/72/EC concerning common rules for the internal market in electricity, and Directive 2009/73/EC concerning common rules for the internal market for natural gas. It also provides for the necessary adjustments that follow from three regulations that also form part of the third energy package: Regulation (EC) no 713/2009, Regulation (EC) no 714/2009 and Regulation (EC) no 715/2009.
[80] European Commission, third energy package, https://energy.ec.europa.eu/topics/markets-and-consumers/market-legislation/third-energy-package_en
[81] Jochem de Kok, *Investment Screening in the Netherlands,* 48 Legal Issues of Economic Integration 43, (2021), at 46.
[82] Article 66e (1) of the amended Gas Act.
[83] Article 86f (1) of the amended Electricity Act 1998.
[84] Article 66e (2) of the amended Gas Act, and Article 86f (2) of the amended Electricity Act 1998.
[85] Dutch Parliamentary Documents II 2010/11, 32814, nr. 3, Explanatory Memorandum to the Amendment to the Electricity Act 1998 and of the Gas Act (implementation of directives and regulations in the area of electricity and gas).

further restrictive measures or forbid certain transactions is relatively high, and the investors have fairly minimal obligations. Firstly, suppose further requirements or restrictive measures are decided to be taken after the test. In that case, these measures must align with Article 36 of the Treaty on the Functioning of the European Union (TFEU). This entails that the measures should be grounded in reasons like safeguarding public morality, ensuring public order, public safety, health and other valid justifications.[86] It is also necessary to be compatible with the principles established at the OECD regarding the investment policy of recipient countries concerning national security: transparency, non-discrimination, proportionality and accountability.[87] Secondly, the burden of proof to demonstrate the potential risks to public safety or security of supply rests with the Minister.[88] Finally, although a reporting obligation is imposed, there is no question of approval by the Minister. To date, the Minister has not banned or limited any deals in the energy sector, nor have any deals sparked significant societal or parliamentary concerns or discussions.[89]

As a considerable part of the regulation that applies to the gas and electricity markets does not differ from each other in terms of content, the Dutch government plans to convert the current Gas Act and Electricity Act 1988 into a single integrated Energy Act, and to provide a modern and updated organisational framework. This Energy Act is largely ready but still under consultation.[90] The draft includes an investment test provision that aligns with the existing notification obligation provision in the Electricity Act 1988 and the Gas Act without substantive amendments.[91]

3.2 Investment Screening in the Communication Sector

For a long time, the Dutch telecommunications market has been highly competitive and liberal. Foreign investments also play an essential and positive role in this market. Possible takeovers of telecommunications companies were supervised by the Netherlands Authority for Consumers and Markets (ACM) through merger control under the Competition Act. It did not provide possibilities for the screening of foreign investments with undesirable intentions acquiring control over critical telecommunication infrastructure on the grounds of national security. The attempted acquisition of KPN by América Móvil in 2013 raised questions over the effectiveness of the existing measures and the need for additional legislation to safeguard national security and public order.[92] The globally shifting economic balance of power in recent years makes this issue more pressing. It is more likely that the acquisition of control will partly be motivated by geopolitical motives. A particular risk lies in the dependence of public authorities on communication services and the confidentiality of communications.[93] Against this backdrop, and to implement the EU FDI Screening Regulation, the Dutch government amended its existing rules and introduced a new, sector-specific investment screening

[86] *Ibid*, at 11.
[87] OECD, *Guidelines for Recipient Country Investment Policies relating to National Security*, recommendation adopted by the OECD Council on 25 May 2009.
[88] Explanatory Memorandum, *supra* n. 85, at 11.
[89] In the past 5 years, several studies based on different sectoral investment tests have been carried out. In the period running from 2018 to September 2022, a total of 23 investigations were completed. To date, no investigation has led to a ban. *See* Report to Dutch Parliament on the application of the Undesirable Control in Telecommunications Act, 3 November 2022, https://www.rijksoverheid.nl/documenten/kamerstukken/2022/11/03/rapportage-toepassing-wet-ongewenste-zeggenschap-telecommunicatie
[90] The proposed Energy Act has been published for consultation on 17 December 2020, *see* https://www.internetconsultatie.nl/energiewet.
[91] Article 6.3 of the draft Energy Act.
[92] For more details on this acquisition, *see* de Kok, *supra* n. 81, at 49–50.
[93] *Ibid*, at 2.

mechanism in the communication sector: The Act on Undesirable Control in Telecommunications (*Wet ongewenste zeggenschap telecommunicatie*, Telecom Screening Act) on 1 October 2020.[94] A ministerial decree - the Undesirable Influence Telecommunication Decree – was followed to provide details on which situations are deemed to have relevant influence and would therefore be subject to screening.[95]

The Telecom Screening Act provides for a mandatory reporting requirement for parties who intend to acquire 'predominant control' in a telecommunications entity, and such acquisition results in a 'relevant influence' within the telecommunications sector. 'Predominant control' exists if the acquirer will, for example, have at least 30% of the voting rights or can appoint or dismiss more than half of the directors or supervisory directors.[96] Should the Minister believe that the existing or forthcoming control poses a risk to the public interest, they have the authority to block such an acquisition in the telecommunications sector.[97]

When determining whether the existing or forthcoming predominant control should be prohibited due to a potential threat to the public interest, the Telecom Screening Act provides two criteria that need to be satisfied simultaneously. A threat to the public interest can only exist if: (a) the predominant control results in 'relevant influence' in the telecommunications sector and (b) one or more of the circumstances about the 'undesirable person' referred to in Article 14a.4, paragraph 2 of the Act apply to the shareholder or acquirer. Firstly, whether the predominant control leads to 'relevant influence' depends on the potential consequences that could arise if this control were exercised adversely. If the misuse or intentional failure of the telecommunications party will have specific consequences listed in the Telecom Screening Act or other serious consequences pursuant to an order in council, then there is 'relevant influence'. Whether the acquirer of predominant control actually has the intention to cause the damage is not decisive. It is not required to prove that these consequences will occur if no prohibition is imposed. However, the Minister must provide a rationale for believing that the predominant control by the concerned party threatens the public interest. Secondly, an exhaustive list of circumstances has been provided concerning the acquirer or shareholder. The various circumstances all relate to the prevention of a situation where the government can be put under pressure, especially when it comes to a person, state or other entity designated as an 'undesirable person'. These circumstances include whether the acquirer or shareholder (i) is an 'undesirable person' known or there are grounds for suspecting that it intends to influence a telecommunications party to facilitate misuse or intentional blackouts; (ii) has close ties with or is under the influence of an 'undesirable person', or there are grounds to suspect such ties or influence; (iii) has such a track record that this significantly increases the risk; (iv) the actual identity cannot be determined; or (v) does not sufficiently cooperate in the investigation process.[98]

3.3 General Investment Screening – The Vifo Act

To align with the EU FDI Screening Regulation, a new Dutch general investment screening regime - the Vifo Act - has been introduced and entered into force on 1 June 2023, following the adoption of two ministerial decrees: Decree on the application of sensitive technology,[99]

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[94] Act on Undesirable Control in Telecommunications, https://wetten.overheid.nl/BWBR0044118/2021-03-05
[95] Decree of 22 September 2020, providing for rules to implement Article 14a of the Telecommunications Act.
[96] Article 14a.3 of the Telecom Screening Act.
[97] Article 14a.4 of the Telecom Screening Act.
[98] *Ibid.*
[99] Decree on the application of sensitive technology, Staatsblad 2023, 172, 31 May 2023, https://zoek.officielebekendmakingen.nl/stb-2023-172.html

and the Decree on the implementation of the Vifo Act.[100] The new Dutch security screening mechanism provides a general and broad assessment, which serves as a safety net and covers other investments if no sector-specific legislation is applicable. Sector-specific regimes will prevail over the general investment regime. It introduces a mandatory reporting obligation for investments in target entities across a wide variety of sectors, such as the acquisition of 'control' over all or a part of vital suppliers, operators or managers of company campuses, or companies active in sensitive technology, as well as the acquisition or increase of 'significant influence' in target companies active in highly sensitive technology areas. This general screening regime is an *ex-ante* assessment for the admissibility of these proposed acquisition activities. The Dutch Investment Screening Agency BTI takes charge of the assessment of covered transactions and decides whether a potential risk to national security exists.

3.3.1 Scope of the Vifo Act

Unlike the US national security review mechanism and many other FDI screening mechanisms, the Dutch screening system is country-neutral.[101] The target company needs to be established in the Netherlands, while the acquirer does not need to be a 'foreign' entity. The Vifo Act applies equally to non-EU, EU and Dutch investors. This new regime is more of a national security review mechanism than a foreign investment control mechanism. The focus of the Dutch system largely hinges on the nature of the target company, not on the origin of the investor. It not only demonstrates the principle that foreign investments are welcome in principle but also effectively prevents circumvention of the reporting obligation.

Various types of investments are covered by this Act, such as acquisitions, mergers, the establishment of a joint venture, demergers, the transfer of vital assets of the target company, and other legal acts that result in one or more (legal) persons acquiring control or significant influence in a target company.[102] The scope of the Dutch regime is relatively limited, as it involves only three groups of target companies based in the Netherlands, either: (a) a vital supplier, (b) an operator or manager of a company campus, or (c) a company active in sensitive technologies. Notification obligation applies to investment activities in these target companies through two different assessment thresholds: (i) change of control and (ii) acquisition of or increases in significant influence.

Firstly, a notification is mandatory for any acquisition activities that result in a change of control in target companies. The meaning of 'control' is aligned with the definition in the Dutch Competition Act, which refers to 'the ability, based on factual or legal circumstances, to exercise decisive influence over the activities of an undertaking'.[103] The concept of control is a material criterion; it looks not only at the formal rights that arise from share percentage in a company but also at forms of influence that arise from actual circumstances. Secondly, in the area of certain highly sensitive technologies, the Vifo Act also applies, with a lower threshold, to the acquisition or increase of significant influence in target companies. Significant influence can already be reached if shareholders acquire or increase their share to 10% of the votes in target companies active in highly sensitive technology areas, and another notification must be submitted when the successive higher thresholds of 20%, 25% and control are reached. A duty to notify exists for the acquirer when exceeding each threshold. This stepwise screening is used considering the acquirer may take the strategy to have an incremental expansion of the interest

[100] Decree on the implementation of the Vifo Act, Staatsblad 2023, 173, 31 May 2023, https://zoek.officielebekendmakingen.nl/stb-2023-173.pdf
[101] Dutch Parliamentary Documents II 2020/21, 35880, nr. 3, Explanatory Memorandum to the Vifo Act, at 5.
[102] Articles 2 and 3 of the Vifo Act.
[103] Article 26 of the Dutch Competition Act.

or influence and gradually become a dominant investor in the target company. Particularly in the case of highly sensitive technology, an extra careful assessment is called for at any time when an additional risk to national security may arise.

If the target company operates in sensitive technology, there is an obligation to notify only when control is taken. However, if the company is engaged in highly sensitive technology, the duty to notify already arises even with the acquisition of or change to significant influence. According to the Decree on the Scope of Application of Sensitive Technology, whether a target company is engaged in 'normal' or 'highly' sensitive technologies will be determined by order in council given the nature of their activities. Factors used to assess whether a technology can be regarded as highly sensitive include but are not limited to high chain dependency of this technology for the entire technology area (or even beyond), high degree of uniqueness and difficult reproducibility, direct (advanced) military or security applications, international requirements regarding the protection and security of this technology.[104]

3.3.2 Risk Assessment

The presence of a security interest in a target company does not mean that an acquisition activity involving this target company automatically poses a risk to national security. When necessary, an investment assessment is required to investigate and assess this potential risk to impose proportionate measures or forbid the covered transaction. When designing this general screening mechanism and assessment criteria, the Dutch lawmakers set up three principles to protect its legal certainty and the open investment environment. The management of risks to national security is the only point of action for applying this Act, the consequences for the investment climate must be as limited as possible, and the Act must be transparent.[105] Therefore, the assessment criteria have been stipulated strictly, prudently and in more detail.

On the one hand, the definition of national security in the Dutch screening mechanism is directly linked to the relevant articles and concepts in EU law, which was interpretably narrowly. On the other hand, it also specifies security interests in the Netherlands and enumerates an exhaustive list of security risks without further extension possibility. According to the Vifo Act:

> National security is referred to in Article 4(2) of the Treaty on European Union, and public security is referred to in Articles 45(3), 52(1) and 65(1)(b) of the Treaty on the Functioning of the European Union, or the essential interests of the security of the state as referred to in Article 346 (1)(a) of the Treaty on the Functioning of the European Union, which serve to protect the interests within the Netherlands that are essential for the continuity of the democratic legal order, for security or other important interests of the state, or the maintenance of social stability, insofar as they relate to the interface between economy and security, namely:
> i. maintaining the continuity of vital processes;
> ii. maintaining the integrity and exclusivity of knowledge and information with critical or strategic significance for the Netherlands; or
> iii. preventing unwanted strategic dependencies on the Netherlands from other countries.[106]

[104] Explanatory Memorandum of the Vifo Act, *supra* n. 101, at 15.
[105] *Ibid*, at 16.
[106] Article 1 of the Vifo Act.

Based on the national security definition, acquisition activities that could jeopardise national security mainly encompass three threats: disruption of vital processes, compromise of the confidentiality and uniqueness of knowledge and data, or the creation of undesirable strategic dependencies.[107] When assessing whether a particular investment activity may lead to one of these national security risks, the Vifo Act illustrates three groups of factors to be considered: (1) general factors, which apply to all acquiring activities and mainly focus on the acquirer itself, such as the ownership structure, the transparency, the security situation of the investors' country of origin, criminal offence record, insufficient cooperation or incorrectly supplied information; (2) factors that only apply if the acquisition is directed at a vital operator, which is not only about the acquirer itself, such as the acquirer's operating record of the relevant process, but also its home state and their ties; and (3) factors that only apply to a company active in sensitive technology, which focus on the acquirer's track record of security, trading or use of technology, and compliance with export control rules.[108] These factors can be viewed individually or in conjunction as a basis for risk analysis and decision-making. The Dutch regime employs an exhaustive list of potential security risks without room for further extension, significantly limiting the potential for the concept to be arbitrarily expanded and misused.

3.3.3 Review Procedure

Different from the major voluntary notification obligation under the US review mechanism, the Vifo Act introduced a mandatory and suspensory notification obligation for investments in or acquisitions of target companies. Any plans to conduct acquisition activities covered by the Vifo Act must be reported to the BTI, and this notification requirement applies to both the target company and the acquiring party. Besides, the regime is suspensory, meaning approval must be secured before finalising the deal, and the involved parties have a standstill duty. Acquisition activities cannot proceed until the Minister communicates that no detailed assessment is necessary or the deal is approved.[109] This led to a suspension of the acquisition that cannot be completed until a preliminary risk assessment is conducted. Any transaction executed against the Minister's prohibition is considered null and void.[110]

In certain circumstances, the Minister can also initiate a unilateral review *ex officio*. This can occur if a covered acquisition has been executed without informing the Minister beforehand, or if a previous screening relied on inaccurate or incomplete information. In this case, the Minister can order the parties concerned to submit a complete and correct notification within three months of becoming aware of this activity or any inaccuracies or omissions in the notification.[111] If the parties fail to provide the required notification within the stipulated time, the Minister can independently conduct a new assessment and render a screening decision. Even though an investment has been approved, new significant risks to national security are possible if there is a change of circumstances. In such exceptional cases, the Minister has the power to reopen a previously tested file and re-evaluate the previously reviewed and authorised investment.[112] This is on condition that this new assessment must be conducted within six months after the Minister is notified of the abovementioned risk and can only be carried out with the approval of the Council of Ministers.

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[107] Explanatory Memorandum to the Vifo Act, *supra* n. 101, at 6.
[108] Articles 19-21 of the Vifo Act.
[109] Article 10(1) of the Vifo Act.
[110] Article 28 of the Vifo Act.
[111] Articles 16-17 of the Vifo Act.
[112] Article 27 of the Vifo Act.

After receiving a notification, the Minister needs to assess within eight weeks whether a substantive review is required (Phase 1). Further investigation is necessary only if the Minister determines that the acquisition activities might threaten national security. In this case, the involved parties must initiate a request for the substantive review. Following this, the Minister has an additional eight weeks to finalise the in-depth review (Phase 2). If the Minister concludes that an acquisition would threaten national security, it can impose certain mitigation measures for the acquisition, on the condition that this is necessary to mitigate the potential threats to national security or reduce them to an acceptable extent. To address identified risks, a non-exhaustive list of possible mitigation measures has been offered in the Vifo Act. The choice of a particular measure partly depends on the seriousness of the identified risks, and it will be assessed on a case-by-case basis. These measures can range from setting enhanced security protocols for sensitive information access, designating a security officer, excluding certain assets or subsidiaries of the target company from the transaction, relocating vital processes from the target company to a separate Dutch subsidiary, to imposing maximum equity interest that is lower than the intended investment.[113] In terms of proportionality and the purpose for which it can be imposed, the mitigation measures may only serve the interest of national security and, therefore, not pursue any commercial or economic objectives.[114]

If the Minister determines that the risk to national security cannot be sufficiently mitigated through the stipulation of conditions or the involved parties do not comply with the imposed order, acquisition activity can be prohibited as a last resort.[115] The reasons for the review decision must always show why the measure or set of measures in question is the most appropriate. By explaining the considerations, the assessment decision must clarify the relationship between the risk and the imposed measure. This review decision is subject to objection and appeal and can be challenged before the Dutch administrative court.[116] Different from the US, the possibility of recourse against screening decisions will give foreign investors more protection and legal uncertainty.

4. Comparison of the National Security Review Mechanism in the Netherlands and the US

Even though the Netherlands and the US share similar outlooks and value systems in politics and economics, there have also been some sharp divergences in their national security review mechanisms from both policy and procedure perspectives. One with a long history and extensive experience stands in contrast to another that has just begun its general screening. Especially under the changing global order, American policy shifted to a security focus, while the Dutch remained strong supporters of free trade on the international stage. This preference is reflected in their newly respective investment screening mechanisms. The Netherlands has adopted a unique screening mechanism - a combination of sector-specific and a general framework - which is also different from most other EU Member States.[117] The US system is cross-sectoral, focusing on specific risks rather than industries.

Fundamentally, the Dutch review mechanism is shaped more directly by external pressures, especially within the context of the EU FDI Screening Regulation. Until about 2016, investment screening enjoyed rather unfavourable press in many Member States, including the

[113] Articles 23 and 24 of the Vifo Act.
[114] Explanatory Memorandum to the Vifo Act, *supra* n. 101, at 49.
[115] Article 25 of the Vifo Act.
[116] Article 52 of the Vifo Act, *see also* Explanatory Memorandum to the Vifo Act, *supra* n. 101, at 44.
[117] Spain is the only other EU Member State that has both sector-specific and general screening legislation. *See also*, de Kok, *supra* n. 81, at 44.

Netherlands, and within European institutions. However, several changes in the last few years – growing concerns about geopolitical developments, strategic acquisitions by foreign government investors, new vulnerabilities arising from technological development, and exposure of ignored supply chain dependencies in the COVID-19 pandemic – have dramatically changed perceptions. An important effect of the existence of the EU FDI Screening Regulation is its contribution to a robust political impetus in the many Member States that had hitherto perceived investment screening with reservation.[118] This is the case for the Netherlands. The introduction of broader mechanisms to prevent acquisitions that may threaten the Netherlands' essential security interests had been pondered since at least 2014 and under consideration for many years but was not finalised until very recently.[119] The pressure from the EU level served as a significant catalyst for its final establishment in the Netherlands. In contrast, the US review mechanism evolves over time in response to constant domestic concerns over various foreign investors, which has been reflected in the motivations for each previous amendment. From this perspective, the Dutch review mechanism possesses a lesser degree of inherent demand for a security focus from the outset. This explains why the Dutch government takes a more prudent approach in setting its screening rules. In practice, this can be reflected in its relatively low level of participation within the EU FDI screening framework. The Netherlands is not among the most active participants in the information exchange under the EU cooperation mechanism and screening. In 2022, more than 90% of cases in the EU were notified by five Member States: Austria, France, Germany, Italy and Spain.[120] The Netherlands fell into the category of countries that submitted only 0-4 notifications out of 423 notifications.[121]

In the US, the government's emphasis has shifted from cooperation to competition since the global economic and financial crisis in 2008. In recent years, the US has focused more on its hegemony and technology leadership, and the balance in investment policy has tilted gradually toward the security side. As it turns out, a state's perception of threat is directly related to power: as power expands, so too does the perception of threat.[122] In today's international system, the US has the most and worries the most, too. A significant factor contributing to this shift is the emergence of China as the US's economic and strategic competitor.[123] Trump's trade war with China raised the fundamental issues of confrontation or cooperative competition. The US gradually relies on national security as a cover for populist and protectionist policies and restricts unwanted investments. To some extent, this explains the US' extended national security scope, growing strategic considering factors and discrimination against a 'country with special concern' in its review process. At the same time, these diverse rationales behind the Netherlands and the US are reflected in their distinct screening approaches and procedures.

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[118] OECD, 'The Framework for the Screening of Foreign Direct Investment into the Union - Assessing Effectiveness and Efficiency' (OECD 2022), at 15.
[119] A report "Between naivety and paranoia", published in April 2014 by the National Coordinator for Anti-terrorism and Security considered national security concerns in the context of foreign takeovers of enterprises in vital sectors; *See also*, OECD, 'Acquisition- and Ownership-Related Policies to Safeguard Essential Security Interests: Current and Emerging Trends, Observed Designs, and Policy Practice in 62 Economies' (2020), at 142.
[120] European Commission, 'Third Annual Report on the Screening of Foreign Direct Investments into the Union' (2023) COM(2023) 590 final 14.
[121] *Ibid.*
[122] Christopher J Fettweis, 'Nothing to Fear but Fear Itself: The National Security Policy of the United States' in Michael Clarke and others (eds), *The Palgrave Handbook of National Security* (Springer International Publishing 2022), at 108.
[123] Anthea Roberts, Henrique Choer Moraes and Victor Ferguson, 'Toward a Geoeconomic Order in International Trade and Investment' (2019) 22 Journal of International Economic Law 655, at 661.

4.1 Divergence in Scope of the Screening

The scope of the screening system reflects the different rationales behind the legislation and leads to varying understandings of public interest and national security. The scope of the foreign investment screening system is different in terms of the investors it encompasses and the investment activities it covers. The Dutch system aims for a narrower scope to ensure the reduction of required screenings for investments and additional legal certainty for investors. In contrast, the US consistently broadens the range of covered transactions and even plans to extend screening to outbound investments.

Firstly, regarding covered investors, the Dutch system provides equal screening for national and foreign investors, while the US system is solely for foreign entities. The Dutch system does not differentiate based on nationality or place of residence, ensuring non-discrimination for all acquirers, whether they are from third countries, EU Member States or the Netherlands. As a result, similar restrictions will also impact domestic and EU investors, fundamentally avoiding the Dutch screening policy to include other political considerations excessively. In contrast, the US national security review is specialised for foreign investors based on nationality instead of the place of residence. Foreign companies under the US national security review rules are those organised under a foreign state's laws or those whose principal place of business is outside the US. Very differently, a company that can demonstrate that US nationals ultimately own a majority of its equity interest is not considered a foreign entity.[124] The CFIUS also pays more attention to 'country with special concern', and China has been confirmed to be part of it.[125] The potential bias in this review process makes it easier to become a guise for other political intentions.

Secondly, in terms of the covered target companies, in the Netherlands, besides sector-specific screening in the energy and telecommunication sectors, the general screening only covers three types of target companies: (a) a vital supplier, (b) an operator or manager of a company campus; or (c) a company active in the field of sensitive technologies. While the US system does not give specific limitations on target companies, any transactions that may threaten the US's national security can be covered. Thirdly, regarding the covered transactions, they both include controlling and non-controlling situations. However, under the Dutch system, non-controlling cases only exist in the area of certain highly sensitive technologies. In the US system, non-controlling investment can be in specific target US businesses related to sensitive personal data, critical technology or critical infrastructure if it may threaten national security.

Besides, the US aims to expand the scope further and, as a pioneer, include outbound investment screening, to prevent US capital from flowing towards America's strategic competitors' relevant defence and security sectors. On 9 August 2023, President Biden signed another Executive Order titled 'Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concerns', mandating the establishment of an outbound investment regulatory regime.[126] In this Executive Order, the President identified one country – China – as a country of concern. The concern is not only that Chinese companies garner US capital but also that capital flows are accompanied by significant technological and knowledge transfers. The President may update the list of countries of concern in the future. The EU Commission seems to be following up on the prospect and has

[124] 31 CFR Parts 800 and 801, Provisions Pertaining to Certain Investments in the United States by Foreign Persons, Federal Register, Vol. 85, No. 12, 17 January 2020, https://home.treasury.gov/system/files/206/Part-800-Final-Rule-Jan-17-2020.pdf

[125] Executive Order 14105, 88 F.R. 54867, 9 August 2023.

[126] *Ibid*.

announced that it will explore outbound investment screening, but how the Netherlands will react to this change is still unknown.

4.2 Divergence in the Definition of National Security and Assessment Criteria
The essence of national security review lies in the understanding of 'national security', and the varying scope determines the extent of restrictions and impact on foreign investors. The Dutch Vifo Act provides an exhaustive list of security risks, with no possibility for further extension. Besides, The definition of national security in the Dutch screening mechanism is in line with the concept in EU law, which was interpreted narrowly. In addition to invoking an overriding reason of public interest or a treaty exception, a justification of a barrier to the internal market requires that the regulation is proportionate. In doing so, it must be examined whether the measures are suitable for achieving the intended objective and do not go beyond what is necessary. It must be clear that no other less drastic measures can achieve the same goal.[127] Therefore, the various powers to the Minister by the Vifo Act need to be evaluated based on the particular public interest they address and with consideration for proportionality.

Contrary to that, the nature of the CFIUS review in the US is highly subjective. The broad definition of national security combined with open-ended lists of considering factors give CFIUS considerable discretion to be exercised in the assessment. There is a lack of clear threshold requirements. In recent years, the US has been prone to consider economic security and use national security mechanisms to sustain its economic edge and leadership. Besides, excessive congressional involvement and the potential politicisation of the CFIUS process invite more criticisms.[128] Particular transactions have raised concerns and led to a political reaction from Congress.[129] Although members of Congress do not have the authority to block any transaction they suspect directly, they are likely to generate media attention by spreading their concerns about the strategic threat of foreign ownership through letters, reports or statements.[130]

The Dutch investment screening system is based on more objectively verifiable facts and circumstances. The EU FDI Screening Framework only requires that the Member States consider potential effects on specific sectors, such as critical infrastructure, critical technologies or supply of essential inputs, in determining whether foreign direct investment will likely affect security or public order. Most Member States have used a similar way in their system.[131] However, the Dutch screening mechanism goes considerably further than those of other EU Member States and the US regarding prior disclosure and transparency. It includes subdivisions into different assessment factors and measures relevant to vital providers and companies in the field of sensitive technology, respectively. The Dutch system also has clearer procedural thresholds and substantive tests for risk assessment. If the evaluation of the relevant Ministers has shown that there is a risk to national security, this will be stated in the assessment decision, and it will also be explained why the measures imposed – i.e. the requirements imposed or regulations or prohibition – are proportionate and effective to manage the identified

[127] Explanatory Memorandum to the Vifo Act, *supra* n. 85, at 67-70.
[128] Edward M. Graham, *Politicization of the CFIUS Process*, US national security and foreign direct investment, Institute for International Economics (2006), at 123.
[129] B. Canes-Wrone, et al., *Foreign direct investment screening and congressional backlash politics in the United States*, 22 BRITISH JOURNAL OF POLITICS & INTERNATIONAL RELATIONS (2020), at 1.
[130] Adam Broder, *The Consequences of a Politicized CFIUS Process*, FTI Consulting, 2 October 2017, available at https://fticommunications.com/en/the-consequences-of-a-politicized-cfius-process/.
[131] de Kok, *supra* n. 81, at 48.

risks. In that context, the review decision must also state the reasons and factors based on which the identified risks have been assessed.[132]

However, CFIUS maintains confidentiality regarding information given to it by parties involved in a transaction and does not disclose that a transaction has been submitted for review. The specifics of the CFIUS evaluation are often opaque, and the Committee generally keeps this information under wraps. Although CFIUS provides Congress with annual reports containing in-depth details of all the reviewed transactions for that period, most parts of the annual report are classified. An unclassified version is available to the public but only covers some overall statistics. Specific deal-level information is not included. Therefore, the public is withheld information to evaluate the grounds on which the decisions of CFIUS and the President are based. As discussed above, the US President can only intervene to halt or forbid a transaction if there is convincing evidence that the foreign entity taking control could pose a risk to national security and no other US laws are sufficient or suitable to safeguard national security. However, in practice, all executive orders issued by Presidents to prohibit certain transactions only include the wording that these two conditions have been satisfied, while no grounds or very opaque grounds are attached to the decision. In the case of *Ralls vs. the Committee on Foreign Investment in the United States* before the D.C. Circuit, CFIUS had been sued for not providing access to at least some of the evidence relied upon by the President and CFIUS when conducting national security reviews.[133] In the absence of transparent and explicit justifications for negative review decisions, foreign investors are unable to evaluate potential risks in their transactions adequately, and there are no insights gained for future investors.

4.3 Divergence in Screening Procedures

Based on the relative effectiveness in detecting potential national security risks and the cost of the review process, two different mechanisms are employed in the Netherlands and the US: the *ex-ante* mandatory and the voluntary notification system. While the differing foreign investment volumes in these markets serve as a significant, if not the most crucial, factor explaining this divergence, it also underscores their distinct attitudes toward the review logic. The Dutch screening system is an *ex-ante* assessment of proposed acquisition activities, which means a mandatory notification obligation for all covered investors. The Minister can check beforehand whether specific control or significant influence entails risks. Particularly in the field of national security protection, irreversible consequences can occur where *ex-post* assessment or mitigation is insufficient, and sometimes, there is no opportunity to reverse the implications for national security. Under a mandatory notification system, investors are relieved of the responsibility to independently assess whether their transactions present a national security risk. Instead, it becomes the government's duty to evaluate all covered transactions. In other words, to prevent an overwhelming burden, governments will strive to minimise the scope of covered transactions, ensuring a manageable workload and the efficient protection of national security. Therefore, the mandatory notification requirement, to some extent, determines the relatively narrower setting of covered transactions under the Dutch national security review regime.

Differently, the CFIUS process in the US is primarily based on a voluntary notice system, and mandatory notification is only required in certain circumstances. Parties to a transaction are allowed to decide whether to file a notice to CFIUS. In practice, however, it does not mean that investors can easily ignore and walk away from this screening restriction. If a transaction has

[132] Explanatory Memorandum of the Vifo Act, *supra* n. 85, at 43.
[133] *Ralls Corp. v. Committee on Foreign Investment in the US*, 758 F.3d 296 (D.C. Cir. 2014).

been reviewed or investigated and CFIUS has concluded that there are no unresolved national security concerns, this transaction then qualifies for a 'safe harbour'.[134] In this situation, a new round of review will not be initiated by CFIUS unless the parties submit any false or misleading material information to the Committee or materially breach a mitigation agreement.[135] Therefore, in seeking certainty, many parties considering that their potential investment is suspected may choose to submit a notice to CFIUS seeking approval before closing a transaction to take advantage of the statutory 'safe harbour' and avoid subsequent review.[136] For those acquisitions that fall in the scope of covered transactions but do not notify CFIUS, they remain indefinitely subject to possible divestment or other appropriate actions by CFIUS or the President, even after the transaction has been concluded. This voluntary notification system also determines a much broader scope of national security and covered transactions in the US, allowing CFIUS to select and assess transactions it deems to pose a higher risk to national security.

4.4 Divergence in the Possibility of Judicial Review

There is a divergence between the Netherlands and the US regarding whether screening decisions are subject to judicial review. The possibility of judicial review under the Dutch system is to align with the EU law. The EU FDI Screening Regulation includes justiciability as a minimum requirement for all Member States with an investment screening system.[137] To meet the requirement, the new Dutch general screening system provides the possibility of recourse against screening decisions. Under the Dutch system, the reasons for the review decision must always show why the measure or set of measures in question is or are the most appropriate. By explaining the considerations, the assessment decision must clarify the relationship between the risk and the imposed measure. This review decision can be objected to and appealed and can be contested in the Dutch administrative court.[138]

However, this is different in the US. According to the CFIUS legislation, the President's decisions and the accompanying findings cannot be reviewed by the judiciary.[139] This matter stems from the separation of powers in the US Constitution and involves certain political questions that are for the President or Congress alone to decide.[140] US courts frequently use this 'political question doctrine' to decline to reach the merits of national security cases, instead deferring to the decision of the executive branch. This has been the subject matter of the *Ralls* case, which was the first lawsuit in the history of CFIUS.[141] In this instance, the Court of Appeals used the political question doctrine to affirm that the President's decisions are determinations that cannot be subjected to judicial review. Only the procedure for deciding a transaction's outcome might be reviewable to ensure it aligns with the Constitution's Due Process Clause.[142] Due process mandates that the government supplies the involved parties

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[134] Executive Order 11858 7(f), 40 F.R. 20263, 7 May 1975.
[135] 50 U.S.C. App. 4565(b)(1)(D).
[136] Daniel C. Schwartz & Jennifer K. Mammen, *The Role of CFIUS in International Business Transactions*, INT'L BUS. LJ (2017), at 116.
[137] Article 3.5 of the EU FDI Screening Regulation.
[138] Article 52 of the Vifo Act, objections against the Minister's decisions are allowed to appeal to the District Court of Rotterdam (administrative law sector), and an appeal is possible to the Trade and Industry Appeals Tribunal.
[139] Section 721 of the Defence Production Act of 1950, 50 U.S.C. App. 4565 (e)(1).
[140] Haldor Mercado, 'Resolving National Security Questions: A Comparative Analysis Of Judicial Review In The United States, Israel, And Europe' 51, at 601.
[141] *Ralls* case, *supra* n. 133. The Court of Appeals also held that Ralls, a Chinese-owned company, was subject to due process rights.
[142] Jackson, *supra* n. 22, at 22.

with specific non-classified data used to block the transaction and an opportunity to respond to those national security concerns.[143] The court held that the President Order deprives Ralls of its interests without due process of law.[144] However, this can only ensure that foreign investors are safeguarded in matters related to procedures. Without the possibility of judicial review, the substantial rights of foreign investors cannot be adequately protected under US law.

5. Conclusion

In principle, the Netherlands and the US have all gained plenty of benefits from FDI and welcoming foreign investments will still be their basic policy. But with the changing global environment, they have also taken action to update their screening system. Different laws, governing structures, and historical frameworks, all of which influence how they view and handle national security issues. One with a long history and extensive experience stands in contrast to another that has just begun its general screening. The comparison shows that the Netherlands and the US have their tilt and preferences in the balance between the traditional open investment climate and the requirement to protect national security. American policy shifted to a security focus and further amended to preserve its hegemony and technology leadership, while the Dutch remained strong supporters of free trade on the international stage. They seemed at opposite ends of the spectrum.

The final establishment of a general screening mechanism in the Netherlands is a result of a blend of external pressure and internal requests. There are certainly domestic concerns and discussions regarding potential national security risks related to foreign investment, but the pressure from the EU level serves as a stronger political impetus. Without the push from the EU Commission, the Dutch government might not have implemented this system so soon. The Dutch government has adopted a prudent attitude toward the use of national security exceptions, and the Dutch investment review system is designed to create as few economic barriers as possible. As part of the EU, the Netherlands needs to consider not only its own interest but also the union's interest as a whole. Currently, the EU is contemplating adopting a similar approach to the one the US is using, emphasising economic security strategy, competitiveness, and strategic autonomy. It is still unclear how and to what extent the Netherlands will follow and adjust its policy. In contrast, the US review mechanism is more inherently established and evolves over time in response to constant domestic concerns over various foreign investors. Entangled in the crisis of US-China competition and changing global geopolitics, the US places more emphasis on the security side.

It is difficult, if not impossible, to have a unified investment screening mechanism for all countries, as each has its emphasis and understanding of 'national security'. However, due to geopolitical dynamics, economics and security have become more closely interwoven in recent years, and more governments, including the US, are prone to take advantage of the obscurity of the national security concept to champion economic nationalism under the guise of entrenched national interests, to achieve other geoeconomics and strategic goals. It is easy to think that a narrower scope is no longer possible. The growing misuse of national security will jeopardise the global order established in the last few decades. The Dutch screening system seems to provide a different example, showing that from a purely legal perspective, it is feasible to have a more strict investment screening mechanism with a narrow definition of 'national security' and more objective criteria.

[143] The ruling by the US District Court for the District of Columbia in the case of *Ralls vs. the Committee on Foreign Investment in the United States*, at 37-38. *See also* Schwartz & Mammen, *supra* n. 136, at 121.
[144] *Ibid,* at 47.