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Quoted

FDI screening

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FDI screening

1. Introduction¹

An increasing number of jurisdictions are subjecting (foreign) investments to prior screening by means of a system known as ‘foreign direct investment screening’ (**FDI screening**). This topic is also high on the agenda in the Netherlands and the European Union and efforts are made to implement a new mechanism for FDI screening.

On 19 March 2019 the European Parliament adopted the FDI Screening Regulation², which entered into force on 11 October 2020. Under the FDI Screening Regulation, certain information on investments from countries (outside the European Union) that form a risk to public order of a Member State may be exchanged between Member States and the European Commission (**Commission**). The Commission can also give written comments and advice to a Member State on an intended investment.

On 24 January 2024, the Commission proposed a new EU regulation on FDI as part of a broader effort to enhance the EU’s economic security. The draft proposal introduces several significant changes to the current FDI Screening Regulation. The Dutch government anticipated the FDI Screening Regulation by enacting the Investments, Mergers and Acquisitions Security Screening Act (*Wet veiligheidstoets investeringen, fusies en overnames*, **Vifo Act**) which entered into force in 2023. The Vifo Act introduced a general mechanism for FDI screening in the Netherlands, based on which - under conditions - certain investments must be notified to the Dutch Investment Review

Agency (*Bureau Toetsing Investerings* - **BTI**). The BTI acts as the coordination point for implementing the investment screening system in the Netherlands. The agency operates under the responsibility of the Minister of Economic Affairs (the **Minister**). The BTI is the body in the Netherlands whose task is to assess whether notifications of investments, mergers and acquisitions form a potential risk to national security.

In addition to the abovementioned general mechanism for FDI screening, the Dutch legislator is working on sector-specific FDI screening as the protection of vital processes in certain sectors requires more customised solutions. On 1 October 2020 a new, sector-specific investment screening entered into force for the telecommunications sector through the Telecommunications Sector (Undesirable Influence) Act (*Wet Ongewenste Zeggenschap Telecommunicatie*, **WOZT**). In addition, specific investment screening mechanisms for the energy sector are included in the Gas Act and the Electricity Act 1998, which will be replaced by the newly adopted Energy Act (*Energiewet*) applicable as from 1 January 2026. The Energy Act modernizes and merges the Gas Act and Electricity Act 1998 and stipulates a lower notification threshold for transactions concerning electricity production installations. Furthermore, as of 1 January 2024, parties participating in a tender to obtain a permit to operate in an offshore wind energy area, as well as changes in (control over) permit holders of wind farms that are not yet operational, are subject to investment screenings under the Offshore Wind Energy Act (*Wet windenergie op zee*).

¹ Please note that this is an update of the Quoted edition 154 of May 2023.

² Regulation (EU) 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, *OJEU* 2019, L 79 (**FDI Screening Regulation**).

Moreover, the Dutch government has introduced a new sector-specific bill aimed at strengthening and regulating the defence and security industry in the Netherlands (*Wet weerbaarheid defensie en veiligheid gerelateerde industrie*, the **Defence Resilience Act**). It is designed to complement existing legislation, including the Vifo Act, and seeks to mitigate national security risks that may arise from foreign influence or control through acquisitions and investments in key defence suppliers. The bill is expected to be submitted to the House of Representatives in the first quarter of 2026.

In this edition of Quoted we explain the reasons for introducing FDI screening in the Netherlands and the scope and the application of the Vifo Act as the general framework for FDI in the Netherlands, and the relevant sector-specific legislation.

2. Why FDI screening in the Netherlands?

Traditionally, the Netherlands has an open economy, strongly intertwined with international trade and investment. 'Free market' has always been an important basic principle. This image is beginning to change, both in the Netherlands and at a European level, particularly due to shifting geopolitical relations. Against this background, there is increasing concern in the Netherlands too that the acquisition of control in companies is not always motivated purely on commercial grounds, but that buyers act on the basis of geopolitical motives. Foreign states attempt to be increasingly assertive in promoting their own interests, and in doing so have fewer scruples in exploiting the openness that characterises our society and economy. This could be in the form of influencing the Dutch government's decision-making processes and stealing company secrets, but also through foreign influence by economic means. Strategic investments and acquisitions, whether or not through companies controlled by a state outside the EU, are examples of this.

As a consequence of globalisation and digitisation, geopolitics, economics and security have become increasingly intertwined. New (digital) technologies have become more important or even indispensable for the functioning of our society. It is therefore not

surprising that it is precisely in these sectors that there is concern about undesirable foreign interference.

The Covid crisis and the war in Ukraine have also accelerated the implementation of FDI screening mechanisms at both a European and national level. This is partly driven by the fear that companies in financial distress as a result of the crisis may be vulnerable to undesired investments and acquisitions.

3. The FDI Screening Regulation

3.1 The FDI Screening Regulation

The FDI Screening Regulation does not contain a harmonised FDI screening mechanism for the entire EU, nor does it oblige Member States to introduce a national FDI screening mechanism. However, the FDI Screening Regulation does contain a cooperation mechanism for screening direct investments (coming from outside the EU) in the 27 Member States. When a Member State screens such a direct investment, it must actively provide information to the Commission and the other Member States. Furthermore, a Member State may pass on comments to another Member State and to the Commission if this Member State considers that a planned direct investment in another Member State may have consequences for its own security or public order, or if it possesses relevant information in connection with this investment. The Commission may issue an opinion addressed to the Member State conducting the FDI screening in response to comments from Member States or on its own initiative. All other Member States shall be informed on the comments from Member States and/or an opinion of the Commission.

Although such opinions are not binding, under the FDI Screening Regulation the Netherlands is expected to take utmost account of the comments from other Member States and the advice of the Commission. The FDI Screening Regulation does not provide for the option to impose a sanction on a Member State. The final decision about a foreign direct investment remains solely the responsibility of the Member State concerned.

In order to regulate certain elements of the FDI Screening Regulation and to comply with the obligations arising from the FDI Screening Regulation, an Implementation Act entered into force on 4 December 2020, designating the Minister as the contact point in the Netherlands.³ The contact point is responsible for exchanging information with other Member States and with the Commission.

3.2 Proposal to revise the FDI Regulation

On 24 January 2024, the Commission published the “Advancing European Economic Security” communication⁴, which included a proposal for a new regulation on the screening of foreign investments. The proposal aims to address shortcomings identified in the current FDI Screening Regulation, as highlighted in an OECD study⁵ and a special report by the European Court of Auditors⁶. It would make investment screening mandatory for all EU Member States and extend the EU screening cooperation mechanism to include EU-based investors that are ultimately controlled by non-EU parent companies. Under the current FDI Screening Regulation, greenfield investments, where a foreign investor establishes a new business or facility, are excluded from the scope. The Commission proposed to bring them within the Regulation’s reach. Furthermore, a minimum set of activities would be defined for mandatory screening across all Member States, and the cooperation mechanism itself would be reinforced and harmonized, with clearer rules on which cases must be notified and the timing of such notifications. The proposal further allows for ex-officio reviews of non-notified investments for up to 15 months after closing and foresees a cooperation period of two to three months to help align national review timelines. It also introduces a non-exhaustive list of risk factors linked to both the investment and the investor, along with limited procedural safeguards or “soft due process rights”.

On 8 May 2025, the European Parliament reviewed the Commission’s proposal and adopted an amended lighter version, while the Council adopted its own amended text. Negotiations between the Commission, Parliament, and Council are now underway to agree on a final text. As the legislative process currently remains in its early stages, the adoption and entry into force of the new FDI Screening Regulation are not expected in the near future.

4. The Investments, Mergers and Acquisitions Security Screening (Vifo) Act

The Vifo Act is applicable to the acquisition of ‘control’ over all or a part of vital providers, administrators of a business campus or companies active in the area of sensitive technology (‘target companies’). Acquiring or increasing ‘significant’ influence in target companies active in the area of highly sensitive technology also fall within the scope of the Vifo Act. The aim of the legislator is to subject major investments in vital providers and target companies active in the area of sensitive technology to a duty to notify.

By including a duty to notify and other obligations arising from the Vifo Act, the legislator focuses on the following risks: undesirable strategic dependence, disruption to the continuity of vital processes and impairing the integrity and exclusivity of knowledge and information.

³ Act of 18 November 2020 providing for rules on the implementation of Regulation (EU) 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 (Act implementing the FDI Screening Regulation) (Bulletin of Acts and Decrees 2020, 491).

⁴ [COM\(2024\) 22 final](#)

⁵ [Framework for Screening Foreign Direct Investment into the EU | OECD](#)

⁶ [Special report 27/2023: Screening foreign direct investments in the EU | European Court of Auditors](#)

4.1 The duty to notify

4.1.1 Change of control or acquisition of or increase in significant influence

Under the Vifo Act, there is a duty to notify to the Minister any acquisition activities that lead to a change of control in (parts of) vital providers, administrators of a business campus or companies “being active in” the area of sensitive technology. The definition of the term ‘control’ is aligned with the identical definition in competition law. Article 26 of the Competition Act (*Mededingingswet*) defines ‘control’ as follows: *‘For the purposes of this chapter, the term ‘control’ refers to the ability of exercising decisive influence on an undertaking having regards to the considerations of fact or law involved.’* Control can be acquired through investment, but also through mergers, divisions, creating a joint venture or the transfer of vital assets of the target company.

On 22 August 2025, the BTI amended its guidelines to clarify the interpretation of the term “being active in” the area of sensitive technology.⁷ A new provision specifies that a company which procures a semi-finished product from a supplier, where that product qualifies as a dual-use or military item under Article 8(1) of the Vifo Act, or as a product incorporating highly sensitive technology under Article 8(3), and subsequently processes or installs it into a finished product without applying the technical knowledge required to manufacture the semi-finished product itself, is not considered to be engaged in sensitive technology under the Vifo Act. However, if the company substantially modifies the semi-finished product or sensitive technology, or integrates it into other products in a way that exposes or reveals its structure or technical details during processing or installation, the company is deemed to be active in sensitive technology. In addition, the guidelines now include illustrative examples at the end of the document, covering specific areas such as photonics, semiconductor technologies, and high-assurance technologies.

These examples are intended to further delineate the scope of activities falling under the Act and provide greater clarity for companies operating in these sectors.

A duty to notify also exists when acquiring or increasing significant influence, exceeding certain threshold values, in target companies active in the area of highly sensitive technology. Concerning the term ‘significant influence’, the Vifo Act provides for the opportunity to establish various notification thresholds by means of an order in council (*algemene maatregel van bestuur*), where ‘significant influence’ is deemed to have been obtained, namely when acquiring 10%, 20% or 25% of the number of votes to be cast at the general meeting of the target company. These lower thresholds have been declared applicable to target companies that are active in the area of highly sensitive technology in the Decree establishing further the scope of application of the Vifo Act in the area of sensitive technology (**Decree on the Scope of Application of Sensitive Technology**). In this context, the legislator has chosen - in view of the substantially greater risks to national security - to apply all notification thresholds for acquiring and increasing significant influence on target companies that are active in the area of highly sensitive technology. This means, that significant influence is already acquired or increased if 10% of the votes at a general meeting are acquired and a notification must be made (again) if the interest is increased to 20% to 25% of the votes. The legislator deems this justified, because a step-by-step increase in a shareholding or equivalent form of influence can be a strategic choice of the acquirer gradually to become a dominant investor, and by doing so to be able to change the company’s strategy. By adopting these threshold values, each time a threshold is reached it can be analysed whether (i) there are risks to national security and (ii) whether (new) mitigating rules need to be imposed. ‘Significant influence’ also exists if a company has made a commitment to a third party to promote the appointment or removal of one or more directors nominated by that third party.

⁷ The document can be consulted online (in Dutch) via: <https://www.bureautoetsinginvesteringen.nl/documenten/2025/08/22/handleiding-actief-zijn-op>.

Hence, if the target company is involved in sensitive technology, a duty to notify only exists if control is acquired. If a target company is, however, involved in highly sensitive technology, a duty to notify exists if there is a change to or acquisition of significant influence as well as in the case of acquiring control.⁸

An acquisition activity only falls within the scope of the Vifo Act if it concerns an acquisition of a vital provider, an administrator of a business campus or a company that is active in the area of sensitive technology. If there is any doubt as to whether a particular activity falls within the scope of the Vifo Act, the BTI can be asked to give an informal opinion.

4.1.2 Vital providers

The first category of target companies, vital providers, are companies that operate, manage or provide a service, the continuity of which is of vital importance to Dutch society. These processes are designated as 'vital' because any failure or interruption of such a process could lead to serious social disruption and form a threat to national security in the Netherlands.

Under the current wording of the Vifo Act, certain providers of: (i) the transport of heat, (ii) nuclear installations, (iii) air transport, (iv) port activities, (v) banking services, (vi) infrastructure for the financial markets and (vii) extractable energy are considered as providers of vital processes.

The Vifo Act provides the opportunity, in urgent cases, to temporarily qualify certain categories of providers as 'vital' by order in council. Such an amendment must

subsequently always ultimately be regulated by law, this in order to safeguard the involvement of parliament in making such amendments.

4.1.3 Administrator of a business campus

The second category of target companies that fall within the scope of the Vifo Act are administrators of a business campus. An administrator of a business campus is an undertaking that manages a premises on which a collection of businesses is active and where public and private undertakings collaborate on technologies and applications that are of economic and strategic importance for the Netherlands. With respect to the circumstances under which a party is to be regarded as the operator of a business campus, the Ministry of Economic Affairs has issued guidance in the Policy Rule on the Administrator of a Business Campus within the meaning of the Vifo Act (*Beleidsregel beheerder bedrijfscampus in de zin van de Wet veiligheidstoets investeringen, fusies en overnames*).⁹ The reason for adding this category was the sale of the High Tech Campus Eindhoven to a Singaporean state-owned company. In this context, it was considered that innovation is a public interest and that business campuses, where public and private undertakings collaborate on technologies and applications, are of economic and strategic importance for the Netherlands and therefore must be protected from undesirable acquisitions.

4.1.4 Sensitive technology

The third category of target companies includes companies active in the area of sensitive technology. This includes in any case strategic goods (dual-use and military) of which the export is subject to export controls. Dual-use goods are goods with both a civil and military use, such as nuclear products, but also certain forms of microprocessors, cameras,

⁸ Annex 3 to the Decree on the Scope of Application of Sensitive Technology (*Besluit Toepassingsbereik Sensitieve Technologie*) lists the technologies that are deemed to be highly sensitive.

⁹ Policy Rule of the Minister of Economic Affairs and Climate dated June 7, 2024, No. WJZ/41089308, providing interpretation of the definition of a manager of a business campus as referred to in Article 1 of the Investment, Merger and Acquisition Security Screening Act. The Policy Rule defines an administrator of a business campus as an undertaking that manages a premises on which a collection of businesses is active, where public and private undertakings collaborate on sensitive technologies, and the administrator has a certain influence on the safety of the business campus. The latter is based on risk matrixes and risk-based scoring charts.

navigation equipment and material processing. In this context, alignment is sought with the list of strategic goods contained in Regulation (EC) 428/2009¹⁰, with Regulation (EU) 2021/821¹¹ for dual-use items and for military goods as referred to in Article 2 of the Implementing Regulation for Strategic Goods 2021 (*Uitvoeringsregeling strategische goederen 2021*) (**EU Export Lists**).¹² The purpose of alignment with the EU Export Lists is to identify specific technologies for which notification is required, irrespective of whether an export licence has been obtained. The Vifo Act offers the option through an order in council to exempt or actually designate technologies as sensitive technologies. The rapid pace of technological development of sensitive technology is such that the legislator deems it necessary to be able to act quickly if the level of threat for the national security or public order would change too fast. As a result, it must be assessed with each investment whether a relevant order in council has been announced. The Decree on the Scope of Application of Sensitive Technology currently includes, for example, quantum technology, photonics technology, semi-conductor technology and High Assurance producers as sensitive and highly sensitive technologies. This list is expected to be extended by the end of 2025, as the Minister of Economic Affairs has proposed to include six additional sectors under the Vifo Act; artificial intelligence, biotech, advanced materials, nanotechnology, sensor technology, navigation technology and medical isotopes.¹³ In addition, the notes to the Decree state how activities that qualify as highly sensitive technologies will be monitored. In this context, aspects that will be examined include significant dependency of certain technology and the extent of uniqueness and difficulty in reproducing it.

It is also important to note that a notification obligation in respect of a target that is active in the area of dual-use could not only exist if contracts regarding dual-use goods are

concluded by the Dutch target company or if such goods are directly offered by the Dutch target company. What is particularly important is whether the Dutch target company has access to such goods. It is in that respect also important whether the target company or other group companies have entered into contracts with the Ministry of Defence.

4.1.5 Notification to the Minister

The application of the regime is compulsory and suspensory (stand-still), which means that approval must be obtained before closing. A transaction that falls within the scope of the Vifo Act must be notified to the BTI that comes under the Minister. The duty to notify rests on both the acquirer and the target company. Based on a risk analysis, the Minister will announce within eight weeks of receiving the notification that (i) no screening decision is required or (ii) the parties concerned must submit a request for a screening decision. Reference is made to paragraph 4.2 for further information on the factors which the Minister will take into account in his or her assessment.

4.1.6 Screening on the Minister's own initiative

If an acquisition activity has taken place without observing the duty to notify, or if an earlier screening was based on incorrect or incomplete information, the Minister may order the parties concerned, within three months of him or her becoming aware of this activity or the incorrectness or incompleteness of the information in the notification, to file a (correct and complete) notification within a reasonable period of time. If such notification is not timely filed, the Minister may, on his or her own initiative, perform a (new) assessment and make a screening decision.

¹⁰ Council Regulation (EC) no. 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items.

¹¹ Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast).

¹² Reference is also made to the list of goods to which the Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment (OJEU 2008, L 335) applies. The position paper was amended in April 2025 to strengthen controls over the export of military technology and equipment and enhancing cooperation and alignment among Member States under the Common Foreign and Security Policy (CFSP).

¹³ Decree amending the Decree on the Scope of Sensitive Technology as a result of changed geopolitical relations (chain ID WGK27224).

The Minister may also on his or her own initiative make a screening decision if an acquisition activity takes place for which a notification was initially filed, but for which the required screening decision was subsequently not requested, even though the Minister had ordered such.

4.2 Screening criteria and powers of the Minister

The Minister will take various factors into account when assessing the intended investment, such as the transparency of the ownership structure, the geopolitical situation of the country of origin of the direct and indirect investor, current sanctions against the investor and the investor's track record in operating the relevant vital process or the security of sensitive technology that it already has, or has had, under its control. These assessment factors and criteria are used to make a risk analysis of the acquisition activity. If the Minister determines that an acquisition activity would entail risks to national security, it can first of all impose mitigating measures to the implementation of the acquisition. As a last resort, an acquisition activity may be prohibited.

4.2.1 Mitigating measures and prohibition

First and foremost, the legislator states that the investment screening will be applied in such a way that it minimizes any economic impediments to acquisition activities. However, in the case of risks to national security, the Minister may attach certain mitigating measures to the intended acquisition activity in order to prevent any risks to national security, or to limit them to an acceptable level. These are rules with potentially far-reaching consequences. The Minister may, for example, prohibit certain services or the sale of certain goods or impose the obligation that certain technologies, source codes, genetic codes or knowledge (i) are handed over to the State or a third party in the Netherlands for safekeeping, and (ii) in the case of acute risks to certain vital processes of security interests, made available, temporarily or otherwise, to third parties. The Minister may also incorporate a supervisory board for the Dutch target company and/or set up a security committee or appoint a security officer who reports to the Minister any breaches of the

restrictions. If the risks to national security cannot be mitigated sufficiently by imposing further requirements or conditions, the Minister will prohibit the intended acquisition activity.

4.2.2 New assessment in the event of changing circumstances

In exceptional circumstances, the Minister has the power to re-assess an investment that has already been screened and approved. Once an investment has been cleared, a change in circumstances may lead to new significant risks to national security. This could for instance be a change of power in the country of the holder of control of a vital provider active in energy storage. If the new regime is hostile towards the Netherlands or exercises actual influence on the owner of the Dutch supplier, this could have severe consequences for national security, as a result of which a new assessment would be required. A new assessment will be made within six months of the Minister being informed of the abovementioned risk and may only be performed after approval by the Council of Ministers. If the acquirer or target company demonstrates that damages will be suffered as a result of the screening decision that exceed the normal societal risk, and which disproportionately affects the party compared to others, the Vifo Act provides for a right to compensation.

4.3 Timing

In principle, the Minister will announce within eight weeks of receipt of the notification whether a screening decision is required. This period may be extended by a maximum of six months. If a screening decision is needed, the parties must submit a request for this, after which this decision must also be made within eight weeks of submitting the request. Similarly, this period may be extended by six months, less the extension period used for the earlier announcement (i.e. the announcement of the Minister whether a screening decision is required).

If the Minister requests additional information, the waiting period will be deferred by the length of time that the Minister waits to receive the information concerned ('stop the clock' questions). Finally, it is still possible to extend the period once more, by a maximum of

three months, if this is necessary in order to comply with the FDI Screening Regulation. Generally speaking, a potential extension of the period by six months will be sufficient to take account of any comments by other Member States or advice from the European Commission within the context of the Regulation. It may be, however, that it will only be discovered at a very late stage that a foreign direct investment is involved within the meaning of the Regulation, because initially it appeared to concern an investor from within the EU.

4.4 Consequences of failure to comply with duty to notify and prohibition

4.4.1 Legal consequences of failure to comply with duty to notify

Acquisitions and investments subject to the Vifo Act may not take place before the Minister has issued a statement that no screening decision is required or a positive screening decision has been taken. Any breach of the duty to notify will lead, amongst other things, to a direct suspension of certain shareholders' rights that the acquirer has obtained, such as voting rights and rights to obtain information. Only the right to the proceeds of the company, such as dividends, remains intact. In addition, the Minister may appoint one or more persons who can issue orders to the target company to enforce the suspension. Furthermore, in the case of investments in providers of vital processes the Minister may appoint one or more persons to replace the board or management of the target company if a suspension is imposed and there is a risk of abuse or the collapse of the target company. Such restrictions will lapse if the screening decision is positive.

4.4.2 Legal consequences of the prohibition

Investments made contrary to a prohibition issued by the Minister are void (*nietig*), unless the activity took place on a stock exchange, in which case the investment or acquisition must be reversed otherwise. Where appropriate, the Minister may order the parties to take the necessary action to prevent the undesired effects of the activity or to reverse the activity. Acquisition activities other than investments (including mergers), are voidable (*vernietigbaar*), such to the extent these activities have not been settled via and through a securities settlement system.

Investments and acquisitions that have not been screened before they take place, but which have a prohibition imposed on them at a later date (for example, because initially the parties had wrongly failed to notify) will not be declaring void.¹⁴ However, the Minister does have the option of ordering the parties to carry out the necessary activities to prevent the undesirable effects of the acquisition activity or to reverse the acquisition activity. In addition, the Minister may choose to annul (*vernietigen*) the acquisition activity by means of a court judgment.¹⁵ Which route the Minister chooses will depend on the circumstances of the case, where the legislator has considered that the reversal obligation increases the recognisability and actual effectiveness of the measure compared to an annulment of the acquisition activity.

If the acquirer (or, in certain cases, the target company) does not reverse the acquisition activity, the Minister, after having given a reasonable period within which to comply, has exclusive and irrevocable powers on behalf of and at the expense of the acquirer or target company to dispose of its shares in accordance with the order or otherwise to give effect to the order given. The proceeds of the sale will accrue to the (former) acquirer. Further rules may be laid down in or pursuant to an order in council with regard to the

¹⁴ This situation may arise if an activity has not been notified, when a decision is taken on the basis of incorrect or incomplete information or in the case of serious risks to national security that demand a review.

¹⁵ Sometimes it is best for the acquirer or the target company if the Minister intervenes swiftly by means of imposing an order and makes it clear to the parties what next steps are to be taken. Sometimes the situation is so complex that an independent screening by the court will be required to deal with the case properly and proportionately, such e.g. when a large number of interests play a role and weighing them up is a complex matter.

period during which this power is exercised and the manner in which the proceeds, if any, will be distributed to or benefit the acquirer.

Supplementary to the reversal or the annulment of the transaction, the Minister may impose an administrative penalty of up to EUR 870,000 or, if this does not result in an appropriate punishment, up to 10% of the turnover of the companies concerned.

5. Telecommunications Sector (Undesirable Influence) Act

5.1 Introduction

As of the introduction of the WOZT on 1 October 2020, the Minister has the power to prohibit a party from acquiring and maintaining 'controlling interest' (*overwegende zeggenschap*) in a Dutch company active in the telecommunications sector, if in the opinion of the Minister this leads to a threat to the public interest. To maintain an overview of qualifying acquisitions in the telecommunications sector, the WOZT provides for a duty to notify. Under the WOZT this duty to notify applies if (i) 'controlling interest' is acquired in (ii) a 'telecommunications undertaking' (*telecommunicatiepartij*) and (iii) this leads to 'relevant influence' in the telecommunications sector.

5.2 The duty to notify

5.2.1 Controlling interest

Both acquiring or maintaining 'controlling interest' falls within the scope of the WOZT. Controlling interest exists if it provides actual control over the telecommunications undertaking. This is the case if, for example, a party (i) alone or acting in concert, directly or indirectly, possesses at least 30% of the votes in the general meeting, (ii) alone or acting in concert can appoint more than half of the directors or members of the supervisory board

or (iii) is a priority shareholder. It is noteworthy that, unlike the Vifo Act, on the basis of the wording of the WOZT an asset transaction (where control is obtained over the actual business i.e. the assets and not so much in the legal entity) does not fall within the scope of the WOZT at present. It remains to be seen whether this will remain the case.

5.2.2 Dutch telecommunications undertakings

A telecommunications undertaking is a branch office¹⁶ or a legal entity, sole trader (*eenmanszaak*) or undertaking established in the Netherlands, being a provider, or holder of controlling interest in a provider, of (i) an electronic communications network or electronic communications service, (ii) a hosting service, internet hub, trust service or data centre (with the exception of data centres primarily for the undertaking's own use), or (iii) a category of networks or services designated by an order in council.

If the parent company is established abroad, and the subsidiary in the Netherlands, the WOZT applies only to the subsidiary. This does not mean, however, that changes of control in the foreign parent company falls entirely outside the scope of the WOZT. If the parent company retains controlling interest in the Dutch telecommunications undertaking and the parent company is subject to a takeover, this will also lead to a change of control in the subsidiary. If the new owner of the parent company can pose a risk to the public interest, the Minister may prohibit the (indirect) acquisition and/or holding of dominant control in this telecommunications undertaking. This means that there is also duty to notify under the WOZT in case of a takeover of a foreign parent company that holds a Dutch telecommunications undertaking (similar to Dutch competition rules, for example).

5.2.3 Relevant influence in the telecommunications sector

To determine whether controlling interest leads to 'relevant influence' in the telecommunications sector, it is important to consider what the consequences would be

¹⁶ A branch office is taken to mean part of a legal entity not established in the Netherlands, which is permanently present in the Netherlands and does not have its own legal personality.

if this control were to be used to cause harm. In this respect, no relevance is attached to whether the acquirer or holder of controlling interest actually intends to cause such harm.

Relevant influence in the telecommunications sector exists, for example, if abuse or the deliberate failure or collapse of a telecommunications undertaking can lead to (i) an unlawful infringement of the confidentiality of the communication or an interruption of the internet access service or telephone service for more than a certain number of end users to be determined by order in council, (ii) an interruption to the availability or control of services and applications to be determined by order in council that are delivered via the internet, in so far as those services exceed a threshold value to be determined by order in council, or (iii) an interruption to the availability, reliability or confidentiality of a product or service to be designated by order in council for the benefit of the General Intelligence and Security Service (AIVD), the Military Intelligence and Security Service (MIVD) or a public task in the area of defence, law enforcement or emergency response.

The relevant thresholds for the above criteria are laid down in the Undesirable Influence Telecommunication Decree that has been in force since 1 October 2020 (the **Decree**).¹⁷ Under the Decree, relevant influence is assumed to exist if, for example, the acquired telecommunications undertaking, alone or together with other telecommunications undertakings that are held by the acquiring party, is the provider of (i) internet access services or telephone services to more than 100,000 end users in the Netherlands, (ii) internet hubs to which more than 300 autonomous systems are connected, (iii) data centre services with a power capacity of more than 50MW, (iv) hosting services for more than 400,000 domain names and (v) electronic communication services or network services of the General Intelligence and Security Service, the Ministry of Defence,

the Military Intelligence and Security Service, the National Coordinator for Counterterrorism and Security or the National Police. With regard to the last category, the duty to notify does not depend on the size or the nature of the electronic communication services or network services that are delivered to these government services.

5.3 Assessment criteria and powers of the Minister

The Minister will take various factors into account when assessing the intended investment, such as the transparency of the ownership structure, the geopolitical situation of the country of origin of the investor, current sanctions against the investor, and the investor's track record in running businesses in the sector - these assessment criteria are comparable with the Vifo Act. If existing or future control in a telecommunications undertaking by a particular party can lead, in the opinion of the Minister, to a threat to the public interest, he or she will prohibit it, or approve it under certain conditions precedent with respect to maintaining or acquiring controlling interest in this telecommunications undertaking.

First, persons or entities that are subject to certain measures on the grounds of sanction laws or international treaties may pose a threat to the public interest.¹⁸ In addition, if the Minister becomes aware or if there are grounds to suspect that the investor is a state, entity or person who intends to influence a telecommunications undertaking in order to facilitate abuse or deliberate failure or collapse, a prohibition will be imposed on that party. The same applies for an investor who is under the influence of or controlled by such a state or person. If the investor's track record is such that the risk is substantially increased that the consequences referred to above will arise, that could also be regarded as a threat to the public interest. In addition thereto, if the identity of the investor cannot be established

¹⁷ Decree of 22 September 2020, providing for rules to implement Chapter 14a of the Telecommunications Act (*Besluit van 22 september 2020 houdende regels ter uitwerking van hoofdstuk 14a van de Telecommunicatiewet*).

¹⁸ These are persons, states and entities that are subject to restrictive measures pursuant to Chapter VII of the Charter of the United Nations, Article 215 of the Treaty on the Functioning of the European Union and the Sanctions Act 1977. This could include states that pursue a geopolitically motivated investment strategy or those that do not endorse the principles of the democratic state under the rule of law. It could also include persons who belong to terrorist or criminal organisations.

or the investor does not cooperate, or cooperate sufficiently, with the investigation, these are grounds for imposing a prohibition.

5.3.1 Prohibition on acquisition

If the Minister takes the view that the forthcoming controlling interest in a telecommunications undertaking may lead to a threat to the public interest, the Minister will impose a prohibition. The Minister may, instead of imposing a prohibition, also decide to impose measures upon the acquirer or holder that will result in the Minister's initial objections no longer applying. These mitigating measures may be discussed in consultation with the acquirer or holder and/or included by the Minister as conditions in the decision.

5.3.2 Prohibition on holding controlling interest

The Minister may also prohibit, apart from the acquisition of controlling interest, the holding thereof. This includes, for example, the situation where the duty to notify has not been complied with and the Minister has become aware that a certain (unknown) acquirer has acquired controlling interest in a telecommunications undertaking. Changes in geopolitical relations can also result in a foreign shareholder, who was previously considered innocent, to nevertheless become a threat to the public interest. If a prohibition on holding controlling interest is imposed, the acquirer's interests must be reduced or terminated so that it no longer holds controlling interest.

5.4 Timing

Notification of the intended acquisition of controlling interest in a telecommunications undertaking that leads to relevant influence in the Dutch telecommunications sector must be filed at least eight weeks before the date of the intended investment. For telecommunications companies that are listed on a stock exchange, the notification must be filed no later than the announcement of a public takeover bid. Following receipt of a notification of the intended investment, the Minister will begin an investigation.

The purpose of this investigation is to determine whether there are grounds for a prohibition.

The Minister will in principle render his or her decision within eight weeks. The Minister can extend this period by six months if a further investigation is required. The decision-making period will be suspended if the Minister requests additional information (and therefore invokes a 'stop the clock'): for his or her own investigation or because the European Commission or another Member State so requests under the FDI Screening Regulation. The statutory period under the WOZT can extend to around eight months - excluding suspensions.

If a prohibition on acquiring controlling interest does not directly or indirectly follow a notification, a prohibition on holding controlling interest can be imposed no later than within eight months after the Minister has taken note of the facts or circumstances on the grounds of which he takes the view that they may threaten the public interest.

5.5 Legal consequences of failure to notify or a prohibition

Failure to notify an investment subject to the notification obligation, or failure to notify it in time, is subject to an administrative penalty of up to EUR 900,000. Moreover, an investment that has not been notified can still be prohibited. As with the Vifo Act, only the acquisition of controlling interest in breach of a prohibition will lead to the investment being void, unless it is made through a stock exchange, in which case the investment or acquisition must be reversed otherwise. Failure to notify an acquisition of controlling interest does not in itself result in the acquisition becoming void, but the Minister may order the acquiring party to reduce its control in the telecommunications undertaking to such an extent that it no longer holds controlling interest.

It should be noted that the penalty for failing to notify an investment that requires notification under the WOZT can potentially be much lower than a penalty under the Vifo Act (which can be up to 10% of the turnover of the relevant company). Certainly in the

case of larger investments, a potential penalty of EUR 900,000 may not always have the desired deterrent effect. Naturally, non-compliance with the WOZT can also lead to significant reputational damage. The Minister also has certain powers to intervene retrospectively, such as suspending shareholders' rights and appointing persons to replace the management of a telecommunications undertaking as long as the controlling interest has not yet been reduced or terminated. If a shareholder fails to dispose of its shares, the Minister can even irrevocably authorise and require the telecommunications undertaking to sell the shares of the holder of control on the latter's behalf and at its expense.

6. The Gas Act and the Electricity Act 1998 (until 2026)

6.1 Introduction

Considering the significance of gas and electricity for the economy as whole, as well as the crucial role they play in ensuring security and reliability of supply, it becomes evident that any disruption in the provision of these resources poses a substantial risk to national security. This risk is further magnified by the heavy reliance of other essential service providers on gas and electricity. Consequently, the Gas Act and the Electricity Act 1998 included a mandatory duty to notify the Minister of Economic Affairs in case of a change of control, acknowledging the critical nature of maintaining uninterrupted supply. The notification obligations included in both the Gas Act and the Electricity Act 1998 are both a direct implementation of the 'third energy package, a comprehensive framework established by the European Union to improve the functioning of the internal energy markets.¹⁹

6.2 Scope of the duty to notify

Under the Gas Act, a change of control in an (any, i.e. irrespective of its size or function) LNG installation²⁰ or an LNG company must be notified to the Minister.

Under the Electricity Act 1998, a change of control in a production installation with a nominal electric potential of more than 250 MW or a company that manages a production installation²¹ with a nominal electric potential of more than 250 MW must be notified.

As for the Vifo Act, the definition of the term 'control' is aligned with the identical definition in competition law.²²

6.3 Timing

The notification must be made, in writing, no later than four months before the date of the intended change of control. The parties involved must provide the following information in the notification: (i) information on the installations and relevant parties involved in the change, (ii) information about the intended change of control, (iii) information about the financial position of the acquiring party and (iv) information about the intentions of the undertakings concerned, the underlying strategy of the acquiring party and the track record of the acquiring party in the sector for electricity production or LNG.

It should be noted that the four-month period does not constitute a waiting period (standstill) and that the notification is therefore not suspensory. However, if closing takes place within the four-month period, there is a risk that the Minister imposes a prohibition or attaches conditions to the transaction. In such a scenario, the concentration is

¹⁹ 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).

²⁰ In the Gas Act, LNG installation is defined as follows: 'an installation used to liquify gas, or for the import, shipping or regasification of liquid gas, including supporting services and temporary storage that are required for the regasification process and the subsequent supply to the transport system, with the exception of the parts of the installation that are used for storage.'

²¹ In the Electricity Act, production installation is defined as follows: 'an installation, comprising one or more production units, for generating electricity.'

²² Reference is made in Article 86f of the Electricity Act 1998 and in Article 66e of the Gas Act to Article 26 of the Competition Act.

voidable. As the Minister will not issue a decision if there are no concerns, there is no possibility for third-party stakeholders to file objections or appeals if the Minister does not impose a prohibition or conditions. If the Minister determines that there is no need for further requirements, this will be communicated informally to the relevant parties as soon as possible. In practice, this informal communication typically occurs within two months from the date of the notification, as it is assumed that the Commission will need two months to assess the prohibition or conditions against the European rules of free movement (see below) and the entire assessment process (including the assessment by the Commission) may not exceed four months.

6.4 Assessment by the Minister

The Minister may attach conditions to or prohibit the intended change of control. This decision will depend on the outcome of the assessment of the risks to public order or the security of provision or supply following the change of control. When making the assessment, the Minister will focus on aspects as the financial reliability of the undertakings concerned, the way in which the undertakings concerned are managed and controlled, and the degree of transparency in its business operations. The track record of the party or parties involved will also be considered with respect to ensuring safety and their technical expertise for reliably conducting the relevant activities.

If it is decided to prohibit the change of control, impose further conditions or take other restrictive measures, these measures must be compatible with Article 36 of the Treaty on the Functioning of the European Union. This means that the measures must be justified on the grounds of protecting public morality, public order, public safety, health and a number of other justifications.²³

The burden of proof to demonstrate that public safety and the security or reliability of supply are at stake rests with the Minister. If the Minister intends to take measures,

these must be approved by the European Commission. These intended measures must be accompanied by a thorough justification. If the Commission does not then respond within two months, the Minister may proceed to take the intended measures. The Minister's decision to impose measures or prohibit the transaction is subject to objection and appeal.

6.5 Legal consequences of failure to notify

If a change of control is not notified, the change may be declared void by the court. This can only be done by way of a court ruling, and not by an extrajudicial declaration. This is because it is considered important to have clarity as to whether the change of control can continue. It is felt undesirable for the parties involved to have legal uncertainty about the agreements made in the context of the change of control. By laying down that a court ruling is always required to declare the change void, this uncertainty is removed. It is important for all parties involved to be clear about the procedures to be followed in the notification.

Since the change of control is therefore potentially voidable, the notification is not optional and failure to notify can have far-reaching consequences. Both the Minister and other parties with an interest in the matter can bring an action for annulment in court. The Electricity Act 1998 and the Gas Act do not provide for a statute of limitations in this respect, which means that a non-notified transaction remains at potential risk for an undetermined period.

7. The Energy Act

The Gas Act and the Electricity Act of 1998 will be replaced by the newly adopted Energy Act, which will take effect on 1 January 2026. In light of the significant increase in electricity demand and the shift towards decentralized, sustainable, and renewable energy sources, the legislation became outdated and required modernization. The main purpose of the new

²³ Explanatory memorandum to the Amendment to the Electricity Act 1998 and to the Gas Act (implementation of directives and regulations in the area of electricity and gas).

regulation is to establish a solid framework for the energy transition and to ensure a safe, reliable, and affordable energy supply.

The Energy Act consolidates the two previous acts and introduces a lower notification threshold for transactions involving electricity installations. With respect to LNG, any proposed change of control over an LNG installation, over an LNG operator or companies managing an LNG system must be notified. With respect to electricity, notification is required of any change of control whereby a production installation exceeding in aggregate 100MW or a company operating (in Dutch: *beheert*) one or more production plants with an aggregate nominal electrical capacity exceeding 100 MW must now be notified. Unlike the Electricity Act 1998, the Energy Act therefor requires the notification of a change of control in a company or a group of companies operating several smaller production installations with an aggregate capacity exceeding 100 MW. The aggregate capacity for which the control is acquired by one party, is decisive. therefor.

Failure to submit a timely notification under the Energy Act may result in fines of up to EUR 1,030,000 or 10% of the worldwide turnover, as well as the potential annulment of the transaction. Notifications must be submitted to the Ministry of Climate and Green Growth, established in 2024 to support the Ministry of Economic Affairs.

8. The Offshore Wind-Energy Act

In line with the new Energy Act responding to changes in electricity usage, the Dutch government has proposed an amendment of the Offshore Wind Energy Act providing legal basis for an already existing executive regulation that in the assessment of an offshore wind production permit application, the potential risks for public safety and security of supply may be taken into account. According to the explanatory note to this legislative proposal now pending in the First Chamber, the objective is to anchor the authority to deny such application on these grounds in formal legislation

The Offshore Wind Energy Act already contained a notification requirement for a transfer of (an interest in) an offshore wind production permit. In its assessment of such notification, the Minister takes into account the same criteria as for the application for such permit and therefore the potential risks for public safety and security of supply may also be taken into account in respect of such transfer. The Offshore Wind Energy Act does not provide for a specific notification requirement for a change of control in the permit holder for an offshore wind farm.

According to the explanatory note to the aforementioned executive regulation, the generic requirements under the Electricity Act 1998, respectively, the Energy Act apply to a change of control in the permit holder for an operational offshore wind farm. For such offshore production installations, the thresholds (250/100MW) are in practice not relevant (as from 1 January 2026) as all Dutch offshore wind farms are larger than 108 MW and exceed the 100 MW threshold, with the modern farms being built in terms of GWs. The explanatory note inadvertently raises the issue whether these notification requirements already apply in the development phase, as it wrongly appears to assume a change of control notification requirement in the Offshore Wind Energy Act. As such requirement does not exist, this gives room to the debate whether it is possible to avoid notification by changing control before Commercial Operation Date (COD) of a wind farm.

8.1 Assessment by the Minister

Since the Offshore Wind-Energy Act does not contain an independent assessment framework in case of change of control, transfer of permit or shares, the information is assessed on the same grounds as the initial permit application. The permit holder must submit the information required under this regulation regarding the party to whom the permit (or shares) is (are) to be transferred. Attention will be paid to the financial reliability of the applicant involved, the manner in which the company is governed and managed, and the degree of transparency in its operations.

In addition, the BTI has since 2024 the power to conduct a national security test (*veiligheidstoets*), during which considerations will be given to potential risk to public safety, security of supply and delivery. More specifically, information must be submitted regarding the applicant's governance structure, intentions and underlying strategies, and experience in the electricity production sector. If the transferee of the permit (or shares) is a consortium, this information must be provided for each participant in the consortium. Since the authority is aware of the potential effect this new instrument might have on future and current foreign investments into the Dutch economy, the assessment is supposed to be conducted in a clear and transparent matter.

Currently the *Lex Silencio Positivo* applies, meaning that automatic approval is assumed if the Minister does not decide within 6 weeks of the notification that a permit (or shares) is (are) transferred to another party. However, a separate legislative amendment is being prepared to align this with the BTI's assessing time of maximum 8 weeks plus the possible extension if indications are found of potential threats to national security. Nevertheless, no stand still obligation applies meaning that the closing can take place while the BTI is in the process of review, although this comes with the risk that the BTI may prohibit the transaction or impose further conditions on its approval of the transfer or change of control.

Indeed, if concerns exist regarding one of the assessment criteria further requirements might be imposed in order for the Minister to approve the transfer or the approval might be given conditionally.

8.2 Legal consequences of failure to notify

In case of security concerns the Minister will not give his approval to the transfer of shares or the permit. In addition, the Minister has the power to amend or revoke a permit in case the information or documents provided with the notification prove to be inaccurate or

incomplete, or if the financial capabilities of the permitholder change (which could be the material effect of a change of control in the permit holder). The permitholder will receive a written notice providing the possibility to respond. In addition, to the revocation, which is deemed as the last resort, administrative action may be taken or administrative fines might be imposed. In case the violation is classified as an economic offence according to the Economic Offences Act (*Wet op de economische delicten*), fines may be imposed up to EUR 900.000 or more, depending on the severity of the offense. Furthermore, the Minister might suspend the right to operate a wind farm until the situation is rectified. Apart from that, the permitholder may be held liable for any damages or risks to public safety or energy supply and security resulting from the unauthorized transfer.

9. The consequences in practice (M&A)

9.1 Track record of the FDI screening regime

The BTI's second annual report provides an overview of investigations conducted in 2024 under the Vifo Act and sector-specific investment screening in the telecommunications, gas, electricity and offshore wind sectors.

In total, the BTI received 69 new notifications under the investment screening system in 2024, of which 14 either fell outside the scope of the Vifo Act or were withdrawn by the notifying party. Additionally, the BTI issued 14 informal opinions on whether a transaction required assessment. In 2024, the BTI completed 70 investigations (including 14 carried over from the previous year). Most were conducted under the Vifo Act, with one under the Telecommunications Act, one under the Gas and Electricity Act of 1998, and seven under the Offshore Wind-Energy Act.

In contrast to the previous year, in which no transactions were prohibited, the Minister exercised this power once. However, when compared to the 51 approved investments

(including three subject to conditions) and the 14 notifications that were either withdrawn or deemed out of scope, this prohibition does not seem necessarily significant.²⁴ This brings the intervention rate of the Dutch authority to 6 percent, up from 2 percent the previous year, but still below the EU average of 11 percent.

What is clear, the Dutch FDI regime will have an increasing impact on transaction planning and execution. Notably, the regime is not limited to cross-border deals, since purely domestic transactions (i.e. where both the target company and the acquirer are Dutch) are also subject to review. In 2024, approximately 40% of reported transactions involved Dutch acquirers, and another 40% involved acquirers from outside the EU. Another trend to observe is that in around 50% of the reported transactions in 2024, the buyer was a strategist rather than a purely financial investor (such as an private equity fund or a sovereign wealth fund), suggesting an increased scrutiny by the BTI in transactions where the buyer is a competitor, customer, or supplier, particularly in sectors considered vital to national security.

9.2 Early analysis

Carrying out a due diligence investigation can give an insight as to whether that investment will fall within the scope of the Vifo Act or the sector-specific investment screening mechanisms. Taking into account the subsequent consequences, it is important to perform an adequate analysis early in the transaction process.

Notifications to the BTI are not publicly filed and the authorities' decisions are not made available to the public, therefore it remains unclear which factors are considered particularly relevant, and which are considered during the assessment. Therefore, the consideration remains that during the due diligence investigation, it will not be possible to determine with a full degree of certainty whether an investment falls within the scope of the abovementioned regulations. In such a case, the BTI may be able to provide clarity.

The BTI acts as a coordination point for the implementation of the investment screening system and falls under the authority of the Minister. The BTI has published manuals in order to provide more clarification in regards to when an internal restructuring qualifies as an acquisition activity (*Handleiding Interne herstructureren*), when a company is actually active in (highly) sensitive technologies (*Handleiding Vermogensbestanddelen*), and when the acquisition of one or more assets qualifies as acquisition activity (*Handleiding Actief zijn op*) and thus falls within the scope of the Vifo Act. Even though these manuals might provide some guidance, questions still might remain. The BTI is in practice willing to advise, on a no-names basis, on whether certain activities are subject to a duty to notify. The Vifo Act even specifically states that the Minister will, on request, provide information about the application of all or part of the Vifo Act. This consultation can even be sought after an order for action has been imposed from the BTI.

If there is a risk that an investment falls within the scope of the sector-specific legislations or the Vifo Act, it is recommended making an assessment of the profile of potential buyers and the likelihood that these potential buyers will be subject to the Minister imposing mitigating measures or a prohibition of the transaction. Especially in auction processes, the profile of the bidders that are invited or that are selected for a next phase are an important factor to take into account in assessing the deal certainty of the transaction.

9.3 Mitigating measures

If there is a duty to notify under the sector-specific legislations or the Vifo Act, it is a logical choice to intertwine such a notification with the relevant antitrust provisions in the transaction documentation (such as a Share Purchase Agreement). Obtaining clearance from the Minister for the investment will then usually be a condition precedent for transfer of the shares and payment of the purchase price.

²⁴ Since the decisions are not public, it can only be assumed that national security concerns in this case could not be mitigated through commitments.

It is recommended giving specific consideration to the obligation of parties to proceed with the investment if the Minister imposes mitigating measures to his approval (known as 'hell or high water' clauses). The Vifo Act imposes an obligation on the Minister, in the event of a risk to national security, to first attempt to prevent or mitigate this risk by imposing certain requirements or conditions to the acquisition activity. As briefly described above, some of these mitigating measures may have far-reaching consequences for buyers. For example, (i) prohibiting certain forms of services or sale of certain goods, (ii) prohibiting certain assets from being part of the transaction, or (iii) requiring depository receipts to be issued for all or some of the shares, may be unacceptable conditions for some buyers. Similarly, the mandatory incorporation of a separate supervisory board for a Dutch subsidiary is a change in corporate governance that may have a material impact on a shareholder's control within the group.²⁵

The mitigating measures have a direct impact on the buyer's post-investment control and/or the value of the target company. It will therefore have to be agreed between the parties which mitigating measures may or may not be acceptable to a buyer.

10. Conclusion

In response to the tense geopolitical developments, a mechanism for screening investments has been implemented on both a European and national level.

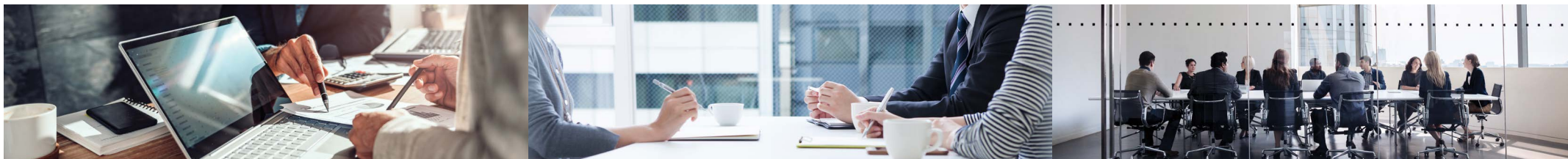
This system of investment screening in the Netherlands involves the WOZT, the Gas Act, the Electricity Act 1998 (from 2026 onwards the Energy Act), the Offshore Wind Energy Act, and the general screening based on the Vifo Act. Noteworthy are the large number of open norms and the discrepancies these laws contain. For example, an asset transaction is currently not notifiable under the WOZT, and a relatively low maximum penalty of EUR 900,000 applies under the WOZT if the duty to notify is violated, while a penalty under the Vifo Act can be up to 10% of the turnover.

The Dutch screening regime is increasingly becoming a critical factor in transaction practice, with clear indications that its scope and enforcement is expanding rather than narrowing. With one transaction having been prohibited and multiple ongoing investigations into transaction where there might be talk of *gun jumping*,²⁶ investors should anticipate enhanced regulatory scrutiny. For each investment, it will be important to understand, through proper due diligence, the risks whether the investment may fall within the scope of the Vifo Act, the Gas Act, the Electricity Act 1998 (subsequently the Energy Act), the WOZT, or the Offshore Wind Energy Act. The same applies to other jurisdictions, where similar laws have been or are being introduced. It will be necessary to assess whether the profile of the buyer provides for a (high) risk that the Minister would impose mitigating measures or a prohibition. Especially in auction sale processes, such an analysis will be relevant for the selection of bidders invited to the process or which will be invited to a next round.

²⁵ The applications referred to here represent only a few examples. The list of mitigating measures that the Minister can impose has many measures that potentially could be extremely onerous for the parties. The measures deal with control and value, but also on the possibility, or lack thereof, to consolidate financial figures or structure them for tax purposes. See for further possibilities Article 23 and Artikel 24 Vifo Act.

²⁶ Gun jumping occurs when parties complete a transaction without obtaining the prior approval of the Minister (i.e. confirmation that no screening decision is required or the screening decision has been issued). For premature closing, parties run the risk of administrative fines up to EUR 1,030,000 or 10% of the company's turnover. The BTI proactively monitors compliance and contacts businesses several times per month on average in case that it found indications that a transaction may not have been properly notified.

The Minister's ability under the Vifo Act to impose mitigating measures or a prohibition retrospectively may be unacceptable for a buyer. For investments that have a risk of being subjected to mitigating measures or a prohibition retrospectively, this could lead to complex contractual reversal obligations, for which an appropriate solution will have to be implemented on a case-by-case basis. In any case, it is important for the time being that parties in transactions pay adequate attention to FDI regulations and comparable foreign legislation and regulations.



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