

Quoted



FDI screening in the Netherlands

(new, updated version of the Quoted 142 dated October 2021)

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1. Introduction

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 as soon as possible.

On 19 March 2019 the European Parliament adopted the FDI Screening Regulation¹, 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.

This summer (currently expected to be around 1 June 2023) the Investments, Mergers and Acquisitions Security Screening Act (*Wet veiligheidstoets investeringen, fusies en overnames*, **Vifo Act**) will enter into force. The Vifo Act introduces 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 and Climate (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. A legislative proposal is also being drafted for sector specific investment screening for the defence industry, the aim being to prevent risks to national security arising through certain acquisitions and investments in essential defence suppliers. This legislative proposal is expected to be submitted to the Lower House in 2023.

In this edition of Quoted we explain the reasons for introducing FDI screening in the Netherlands and the scope and the (likely) application of the Vifo Act, the WOZT, the Gas Act and the Electricity Act 1998.

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

¹ 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**).

as a result of the crisis may be vulnerable to undesired investments and acquisitions.

3. 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.² The contact point is responsible for exchanging information with other Member States and with the Commission.

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, whereby the legislator is assuming that this will involve roughly 30 cases a year.

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

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 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.

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

² 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).

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.

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.³

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. 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

³ 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.

use, such as nuclear products, but also certain forms of microprocessors, cameras, navigation equipment and material processing. In this context, alignment is sought with the list of strategic goods contained in Regulation (EC) 428/2009⁴ and military goods as referred to in Article 2 of the Implementing Regulation for Strategic Goods 2021 (*Uitvoeringsregeling strategische goederen 2021*) (**EU Export Lists**).⁵ 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. 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.

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 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.

5 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.

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.⁶ 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.⁷ 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 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.

4.5 Retrospective effect

An important element is the retrospective effect of the Vifo Act that has been announced. Acquisitions and investments that have been made since 8 September 2020 may be screened with retrospective effect if they could have consequences for national security. This reference date is a means for ensuring, against the background of the Covid crisis, that investors will not circumvent the application of the Vifo Act by entering into acquisition activities just prior to it entering into force. The imposition of a prohibition with retrospective effect (on an acquisition that has already taken place) does of course have far-reaching consequences for private control and ownership structures. The Minister appreciates that this retrospective screening gives him or her a drastic remedy and confirms that these powers will therefore be used with restraint.

The Minister can order the parties involved to file a notification up to eight months after the Vifo Act enters into force. Thus, this authority relates solely to acquisition activities that have taken place between 8 September 2020 and the day of entry into force.⁸ If the parties fail to carry out the order, the Minister may also 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*)

6 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.

7 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.

8 As pointed out in section 4.2.2, the Minister also has the authority to re-assess an investment in the event of changing circumstances within six months of the Minister being informed of new significant risks to national security.

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 office⁹ 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 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**).¹⁰ 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

9 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.

10 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*).

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.¹¹ 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 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

¹¹ 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 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

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 incorporate a mandatory duty to notify authorities 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 two EU directives. These directives are integral components of the 'third energy package, a comprehensive framework established by the European Union. The purpose of this package is to improve the internal energy market. If this market functions well, it creates opportunities for economic growth and contributes to a stable and sustainable energy regime.¹²

6.2 Scope of the duty to notify

Under the Gas Act, a change of control in an LNG installation¹³ 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 installation¹⁴ 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.¹⁵

12 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).

13 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.'

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

15 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.

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. In such a scenario, the concentration is voidable. Since the notification is not suspensory, 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 to the relevant parties as soon as possible. In practice, this communication typically occurs within two months from the date of the notification, as it is assumed that the Commission requires a two-month period 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 impose further requirements on the intended change of control. The Minister may also decide to prohibit the change of control. The Minister will proceed to do so if he or she is of the opinion that there are 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 requirements 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 justifications¹⁶

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 measures. The Minister's decision to impose measures 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.

¹⁶ 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).

7. The consequences in practice (M&A)

7.1 General

Due to the relatively recent entry into force of the WOZT and the draft status of the Vifo Act, it is still unclear how the Minister will put this new FDI screening regime into practice. It is nevertheless obvious that both bills will have an impact on investments that fall within their scope.

7.2 Early analysis

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

There is still no standing practice regarding the application of the WOZT and the Vifo Act, and there is a risk 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 either 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. For questions around the application of the WOZT, 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. The BTI will provide a handbook containing descriptions of cases that fall within the scope of the Vifo Act.

If there is a risk that an investment falls within the scope of the WOZT 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.

7.3 Mitigating measures

If there is a duty to notify under the WOZT 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 (SPA)). 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.

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 depositary 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.¹⁷

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. Also important in this respect is that the Vifo Act is currently still in draft form and changes in the current list of mitigating measures may still follow.

7.4 Post-investment prohibition

It has been explained above that the WOZT and the Vifo Act grant the Minister the right to impose mitigating measures or a prohibition after an investment has been completed. The most relevant circumstance in this respect is the retrospective effect of the Vifo Act up to 8 September 2020.

¹⁷ 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.

Despite the fact that the Minister has confirmed that he will exercise this power with restraint, there is a risk that a transaction that has (or will) be completed as of 8 September 2020 may still be subjected to implementing mitigating measures or a prohibition of the transaction, which would result in an obligation to reverse or annulment of the transaction.

The Vifo Act provides little explanation of how such (reversal) obligations should be implemented in practice. The BTI indicated upon an informal request, that the reversal obligation does not imply a reversal of the entire deal, but an obligation for the buyer to sell (part of) its shareholding. It is questionable how this relates to the potential annulment of the transaction. Additionally, the forced sale of (part of) a shareholding may be a risk that is difficult to accept for a buyer. To avoid ambiguity, discussions and unwanted consequences as a result of such (reversal) obligation, it may be considered to include arrangements to that end in the SPA. Such obligations are complex in practice and various aspects should be considered, such as (i) how the seller's liquidity can be secured for repayment of the purchase price, (ii) how the parties allocate the risks that have arisen in the interim period and (iii) the impact on other transaction documentation (such as financing documentation and insurance documents). For private equity sellers, a possible reversal obligation under the Vifo Act deserves particular attention as they generally forthwith return the sale proceeds to the underlying fund or investors.

As well as reversal obligations, negative financial consequences for one of the parties can be mitigated by means of (reverse) break fees¹⁸ and associated schemes. In order to limit the risk of being unable to repay the purchase price, it may be decided to agree to pay part of the purchase price at a later date.

The longer the risk exists that the investment will be prohibited retrospectively, the more difficult it is to make agreements on how to reverse it. Both parties benefit from quick confirmation that the deal will not be subject to further mitigation measures or a prohibition. The legislator has partly provided for this in the Vifo Act by laying down that where an acquisition activity took place before the Vifo Act coming into force, the Minister may only order the parties concerned within 8 months of the Vifo Act entering

into force to file a notification. In addition, if an investment has already been made, the Minister must decide within three months of becoming aware of that investment whether there is a duty to notify. The parties could therefore choose to inform the Minister of the investment as soon as possible after the Vifo Act enters into force, so that they would have clarity on whether or not a notification is required three months after the Vifo Act enters into force.

8. Conclusion

In response to the tense geopolitical developments, a mechanism for screening investments is being 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 and the general screening based on the Vifo Act, which is expected to enter into force around 1 June 2023. 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. It remains to be seen how the Minister will implement and enforce this new legislation in the coming years.

It is clear that these new laws will have a significant impact on the transaction practice. 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 or the WOZT. 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.

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 prohibited

18 A break fee is a fee payable by a party in case such party is unable to complete the transaction. A reverse break fee is a break fee that would be payable by the buyer.

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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