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by

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Abstract

The Dutch framework for investment screening consists of a general Security Screening Act, as well as sector-specific investment screening mechanisms in the gas, electricity and telecommunication sectors under the Dutch Gas, Electricity and Telecom Acts. For the defence industry the Dutch government has announced to introduce a sector-specific investment screening mechanism for as well.

In each case, a notification must be made to the Ministry of Economic Affairs and Climate Policy. The assessment will be made by the Investment Screening Bureau (*Bureau Toetsing Investeringen*) within the Ministry. The Minister is responsible for taking the decision.

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1. Political Background

Dutch investment policy has long been characterised by a strong international orientation and a liberal policy towards foreign investments. Consequently, until recently there was no general investment screening regime, with the exception of a sector-specific investment screening in the energy sector, and a financial-regulatory screening regime for investments in financial institutions. Due to geopolitical developments, the Dutch government and parliament decided to implement a framework for investment screening. On 1 June 2023, a general investment screening mechanism entered into force (*Wet veiligheidstoets investeringen, fusies en overnames*) (the **Security Screening Act**).[1] In addition, a sector-specific investment screening regime for the telecom sector entered into force already on 1 October 2020.

Successive Dutch governments have consistently stressed the importance of the open investment climate in the Netherlands. Prior to the adoption of the Security Screening Act, the Dutch government had for a long time been opposed to the introduction of a general screening mechanism on the basis of national security or public policy, citing concerns regarding legal certainty and the importance of the open investment climate of the Netherlands.[2] Until recently, the position has been that public interests in the Netherlands were sufficiently safeguarded by means of generally applicable and sector-specific legislation.[3] In sector-specific legislation, investment screening obligations already applied to targeted undertakings, such as acquisitions of power plants with a capacity of more than 250 Mw, acquisitions of LNG

[1] This note is partly inspired by and based on De Kok, J (2021) Investment Screening in the Netherlands. Legal Issues of Economic Integration 48(1): 43-66 and partly on the overview of Dutch legislation in: Roscam Abbing F.A., Geursen W.W., and De Grave, D.J.M. (2023) An interview with Ivo Nobel on investment review in the Netherlands. Mededingingsrecht in de Praktijk 2023/3(8).

[2] See, for instance, *Verslag van een schriftelijk overleg over de investeringstoets op risico's voor de nationale veiligheid*, 28 januari 2020, Kamerstukken II 2019-2020, 30 821, nr.101 and *Investeringstoets op risico's voor de nationale veiligheid*, 29 november 2019, Kamerstukken II 2019-2020, 30 821, nr. 97.

[3] Brief van de Ministers van Financiën en Economische Zaken, Kamerstukken II 2009-2010, 31 350, nr.7; Brief van de Ministers van Financiën en Economische Zaken, Kamerstukken II 2009-2010, 31 350, nr.8; Brief van de Ministers van Financiën en Economische Zaken, *Sovereign Wealth Funds,* 15 februari 2008, Kamerstukken II 2007–2008, 31 350, nr. 1; Brief van de Ministers van Economische Zaken en van Financiën, *Staatsfondsen,* Kamerstukken II 2007–2008, 31 350, nr. 6

installations or certain large telecommunication providers that meet certain quantitative thresholds.[4]

The first origin of the Dutch framework for investment screening finds its origin in the implementation of the EU's third energy package in 2009.[5] The third energy package in particular aimed at a separation of the transport of electricity and gas on the one hand and the production and supply activities on the other. Thereby seeking to ensure non-discriminatory access of producers and suppliers to the electricity and gas networks and improving the security of supply and the investment climate.[6] The directives of this third energy package oblige Member States to take measures to ensure a level playing field, provided that those are in line with EU law and have been approved by the European Commission.[7] In particular, under the Dutch Electricity and Gas Acts, the Minister of Economic Affairs and Climate Policy (the **Minister**) has the competence to screen acquisitions of (large) power plants with a capacity of more than 250 Mw and LNG installations on the basis of public security or security of supply. To date, the Minister has not prohibited or restricted any transactions in the energy sector, nor have any transactions resulted in significant societal or parliamentary concerns or discussions.[8]

The subsequent introduction of investment screening in the Dutch telecommunication sector can be traced back to the failed hostile takeover by KPN, the formerly state-owned telecom incumbent, by Mexico-based América Móvil in 2012-2013. In the aftermath of the failed acquisition, the governmental response was discussed at various occasions in the Dutch Parliament. Questions were raised, amongst others, on whether the government had sufficient

[4] For completeness, acquisitions of Dutch financial institutions require approval by the Dutch central bank (the DNB).
[5] Consisting of Directive 2009/72/EC, Directive 2009/73/EC, Regulation EC no 713/2009, Regulation EC no. 714/2009 and Regulation EC No 715/2009.
[6] As summarized in the Dutch parliamentary history, Memorie van Toelichting bij Wijziging van de Elektriciteitswet 1998 en van de Gaswet (implementatie van richtlijnen en verordeningen op het gebied van elektriciteit en gas), Vergaderjaar 2010-2011, Kamerstukken II 2010-2011, 32 814, nr.3.
[7] According to the explanatory memorandum to the act implementing the third gas and electricity directives, the notification regime of Art. 66e of the Gas Act is intended to implement Art. 47 of Directive 2009/73/EC concerning common rules for the internal market in natural gas (OJ EU 2009, L211/94) and the notification regime of Art. 86f of the Electricity Act intends to implement Art. 43 of Directive 2009/72/EC concerning common rules for the internal market in electricity (OJ EU 2009, L211/55); Memorie van toelichting bij Wijziging van de Elektriciteitswet 1998 en van de Gaswet (implementatie van richtlijnen en verordeningen op het gebied van elektriciteit en gas), Kamerstukken II, 2010-2011, 32 814, nr.3, p. 38 and 49 .
[8] For further information on the Dutch parliamentary process, see De Kok, J (2021) Investment Screening in the Netherlands. Legal Issues of Economic Integration 48(1): 43-66.

competences to intervene in order to protect vital infrastructures. Members of parliament expressed concerns that KPN owned a significant part of the critical telecommunication infrastructure and could easily end up in foreign hands.[9] It would not be until 2020, after the adoption of the EU FDI Screening Regulation[10] that the Dutch Parliament adopted the Act on undesirable control in the telecom sector (*Wet ongewenste zeggenschap telecommucniatie*), amending the Dutch Telecom Act.

This sector-specific legislation for the telecommunication sector reignited a more general debate on whether foreign investments, in particular originating from China, should be placed under greater scrutiny for their potential impact on security, the government decided to introduce a bill containing an overall screening framework by means of the Security Screening Act. The rise in acquisitions of European companies possessing key technologies by Chinese companies was considered particularly problematic because of fears that such investments are linked to the implementation of geopolitical objectives. While the Security Screening Act does not just apply to Chinese or other foreign investments, but to any investor irrespective of nationality (even domestic investors), the legal-historic background illustrates that the geopolitical developments relating to China were pivotal in the ultimate change of policy position that resulted in the Security Screening Act. [11]

In addition, the Dutch State has demonstrated to be willing to take ad hoc measures when it considers certain foreign investments to be undesirable. For example, prior to the entry into force of the Security Screening Act, the Dutch State decided to invest in the Dutch shipbuilder IHC together with private Dutch and Belgian companies. According to the Dutch government the reason to invest in IHC was, amongst others, that it has a strategic and innovative role in

[9] For example, answers from the Dutch government to questions by MP Oosenbrug on reports regarding the hostile takeover of KPN by América Móvil (Appendix to the Proceedings, Kamerstukken II 2013-2014, no 534) and the Motion by MPs Bontes and Klever on preventing vital infrastructure from falling into foreign hands (Kamerstukken II 2012-2013, 29 628, no 411).
[10] Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union (OJ 2009, L79 I/1).
[11] See, for instance, the explanatory memorandum, Tweede Kamer, Memorie van toelichting bij Wet veiligheidstoets investeringen, fusies en overnames, Vergaderjaar 2020-2021, 35 880, nr.3; Brief van de Minister van Justitie en Veiligheid, 18 april 2019, Kamerstukken II 2018-2019, 30 821, nr. 72.

maritime manufacturing industry.[12] It has been reported that the public-private investment in IHC prevented foreign investment from China.[13]

Another case which demonstrates willingness to take ad hoc measures was the last-minute amendment of the Security Screening Act made by Members of Parliament; only six days before the bill was put to vote to include managers of business campuses under the scope of the Security Screening Act. This amendment was made in reaction to the acquisition of the real estate and real estate management of the High Tech Campus Eindhoven by a Singaporean state-owned enterprise, the investment fund GIC.[14] At such a campus, public-private partnerships between companies and universities work together in the area of technologies and applications. It has been reported that Philips, one of the tenants at the campus, was successful in blocking the sale of the real estate to a Chinese investor in an earlier stage, but that the sale to the Singaporean investor could not be blocked, since the acquisition by the Dutch State was considered too expensive.[15] As a consequence of this amendment, acquisition of managers of business campuses have been brought under the scope Security Screening Act as a separate category.[16] Given that the amendment was adopted after the acquisition of the High Tech Campus Eindhoven by GIC, the acquisition could not be screened under the Security Screening Act.

Lastly, certain critical utilities are publicly owned. For a limited number of these publicly owned utilities companies, Dutch law provides for a prohibition on private ownership. For example, drinking water utilities and the operators of electricity and gas distribution systems are state owned enterprises.[17] Private companies are prohibited to operate drinking water utilities.[18]

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[12] Letter from the Minister of Finance to Parliament on the State's contribution to the continuity of the company IHC, 30 April 2020 (TK 2019-2020, 35300-XIII, nr. 102).
[13] 'Nederlands-Belgisch consortium wil Chinezen buiten de deur houden bij scheepsbouwer IHC', *Financieel Dagblad* 24 januari 2020.
[14] Amendment by MPs Van Dijk and Amhaouch (TK 2021–2022, 35 880, nr. 16, p. 2)
[15] 'Project Panda: hoe 'kroonjuweel' High Tech Campus toch in buitenlandse handen kwam', *Financieel Dagblad* 11 februari 2022.
[16] An earlier version of the amendment had proposed to include the operators of business campuses in the list of what is considered to be a vital provider (TK 2021–2022, 35 880, nr. 10).
[17] Under the Dutch Drinking Water Act (*Drinkwaterwet*) these are characterised as qualified companies (*gekwalificeerde rechtspersoon*) (Art. 1(1) Drinking Water Act). See also Article 93 of the Electricity Act of 1998 and Article 85 of the Gas Act. By way of further background, see also Joined Cases C-105/12 to C-107/12 *The Netherlands v Essent et al* (ECLI:EU:C:2013:677).
[18] Article 15 of the Dutch Drinking Water Act (*Drinkwaterwet*). This prohibition was introduced by the amendment to the Water Supply Act (*Wijziging van de Waterleidingwet (eigendom waterleidingbedrijven)*; Stb. 2004, 517). See also Article 93 of the Electricity Act of 1998 and Article 85 of the Gas Act.

These prohibitions were introduced in the wake of the privatisation of energy companies, which were sometimes a multi-utility company offering drinking water as well. To illustrate the political background of such prohibitions, the introduction of the prohibition for water drinking utilities can serve as an example. Members of Parliament urged the government to propose a statutory prohibition on private ownership before private investors could indeed invest water utilities, which was considered undesirable. In cases where a prohibition on private ownership exists, there is no screening mechanism for foreign investment in place, since limitations on private ownership are already prescribed by law and do not need to be prescribed by a decision after screening of an investment.

2. Overview of Domestic Screening Mechanisms

The investment screening framework consists of a Security Screening Act, as well as sector-specific investment screening mechanisms in the gas, electricity and telecommunication sectors under the Dutch Gas, Electricity and Telecom Acts. The Dutch government has also announced another sector-specific screening mechanism for companies that form part of the Dutch defence industry.[19]

In each case, a filing must be made to the Ministry of Economic Affairs and Climate Policy. The assessment will be made by the Investment Screening Bureau (*Bureau Toetsing Investeringen*) within the Ministry. This bureau advises the Minister who is responsible for taking the decision.

In addition to these investment screening mechanisms, some Dutch legislation provides for investment screening in an indirect manner. That is the case when there is a change of control in (a) a holder of a specific licence; or (b) in a company which has concluded a contract with the Ministry of Defence. As a result of these arrangements, the investment as such cannot be prohibited, but the target company could lose its licences or defence contract when the investment is considered undesirable. Therefore, such mechanisms can be considered to be an indirect way of investment screening.

[19] The Ministers of EZK and Defence have informed the Parliament that companies that provide products, goods, services and/or know-how to the Ministry of Defence form part of the 'Dutch defence technological and industrial basis' and that investments in such companies should be screened for the potential impact on national security. See *Uitkomsten van de ex ante analyse van de Nederlandse defensie technologische en industriële basis (NLDTIB)*, 30 december 2019, Kamerstukken II 2019-2020, 31 125, nr.108.

For example, when there is a change of control in the company which has a licence to operate a gas production facility under the Dutch Mining Act (*Mijnbouwwet*), the investment screening is linked to the relevant licences. A holder of a licence has to notify changes in control. When in such a case the screening of the investment is considered undesirable, this cannot lead to prohibiting the investment itself, but the licence might be revoked as an ultimate remedy. The entity that holds the Groningen gas field concession and entities that have an underground gas storage permit under the Dutch Mining Act are now specifically covered by the Investment Screening Act. Similarly, the General Security Requirements for Defence Contracts (*Algemene Beveiligingseisen Defensieopdrachten 2019*) oblige contractors to notify any change in their ownership in order to prevent undesirable control. Companies active in the area of military or dual use technologies are now specifically covered by the Investment Screening Act, discussed below.

The Dutch legislature has also adopted a separate act for the implementation of the obligations on the Dutch state under the EU FDI Screening Regulation (*Uitvoeringswet screeningsverordening buitenlandse directe investeringen*). This implementation act appoints the Minister as a contact point in the sense of Article 11 of the EU FDI Screening Regulation. The Minister will perform the obligations resulting from Articles 6 and 7 EU FDI Screening Regulation, such as notifying the European Commission and contact points in other Member States of (a) intended investments from third countries in the Netherlands and (b) his intention to issue a screening decision in relation to intended investments from third countries. After it has been ascertained that an intended investment in the Netherlands is envisaged to be carried out by an investor from a third country, the Minister will notify the European Commission and the contact points in other Member States of the intended foreign investment.[20]

2.1. Security Screening Act

2.1.1. Scope of application

The Security Screening Act applies to qualifying investments in target companies established in the Netherlands which fall within one of the three categories introduced by the act: (i) undertakings which are considered ‘vital providers’; (ii) undertakings that are active in the area of sensitive technologies; and (iii) business campuses. Investments which meet specified thresholds of voting rights or control, and which fall within one of those three categories must

[20] Commentary to Article 8 in the Explanatory Memorandum to the implementation act of the EU FDI Screening Regulation (Kamerstukken II 2019–2020, 35 502, nr. 3, p. 26).

be notified to the Minister. The screening mechanism does not only apply to foreign investors, but applies all investors, including those from the Netherlands.

Vital providers (i.e. critical infrastructure companies) are: regional district heating operators, nuclear power companies, the operator of one thirds of the available slots at Schiphol (i.e. KLM), Schiphol Airport and ground handling service providers, the Rotterdam Port Authority, banks with a registered office in the Netherlands, significant banks, a security exchange on which more than half of the securities in the Netherlands are traded (i.e. Euronext Amsterdam), central counterparties, clearing institutions that settle more than one billion transactions, financial institutions that settle more than 1 billion transactions, central securities depositories and settlement companies that settle more than 120 million transactions per year, the company that holds the permit for the exploitation of the Groningen gas field (i.e. NAM), the company designated to sell gas to the national gas transmission system operator (i.e. GTS), and companies active in the area of gas storage. The government can designate additional categories of 'vital suppliers' by means of government decree.

Sensitive technologies are military goods based on the EU Common Military List and dual use items covered by the EU Dual Use Regulation 2021/821. In addition, the Dutch government has expanded the list of sensitive technologies by means of government decree to include semiconductor technology, quantum technology, photonics and 'High Assurance' information security products. The Dutch government may designate additional categories of sensitive technologies by means of government decree. The Dutch government considered that it offered more flexibility to list those sensitive technologies in a decree, rather than an act itself.

Business campuses are campuses where multiple companies work together in public-private partnerships in the area of technologies and applications that are of economic and strategic importance to the Netherlands. These, for instance, include the High Tech Campus Eindhoven.

The Security Screening Act applies to acquisitions of control (within the meaning of EU merger control), mergers, the creation of full function JVs and acquisitions of "essential assets" (i.e. those that are critical to the target business).

In the case of highly sensitive technology companies, acquisitions of minority shareholdings of 10%, 20% and 25% and an acquisition of the right to appoint one or more board members are also caught by the regime. Highly sensitive technologies include semiconductor technology, quantum technology, photonics and 'High Assurance' information security products and various (specific) items under the EU Dual Use Regulation 2021/821. Increasing significant

influence over highly sensitive technology companies, e.g. from 10% to 20% and from 20% to 25%, can also trigger a notification obligation.

2.1.2. Screening test

The central test of the screening is whether a qualifying investment may lead to a risk to national security. National security is defined broadly as:

1) national security as referred to in Article 4(2) of the Treaty on the European Union (TEU);
2) public security as defined in Articles 45(3), 52(1) and 65(1)(b) of the Treaty on the Functioning of the European Union (TFEU);[21]
3) the essential interests of state security as defined in Article 346(1)(a) of the TFEU (such as (a) the protection of interests in the Netherlands that are essential for the survival of the democratic legal order; (b) security other important interests of the state; or (c) the maintenance of social stability),

insofar as these relate to the interface between the economy and security, namely:

i. maintaining the continuity of vital processes;
ii. preserving the integrity and exclusivity of knowledge and information with critical or strategic significance for the Netherlands; or
iii. the prevention of undesirable strategic dependencies of the Netherlands on other countries.

In the assessment of whether a qualifying investment can result in a risk to national security, the Minister takes into account the transparency of the ownership structure and relations, whether the acquirer is or controlling persons or entities are subject to the UN, EU or Dutch sanctions lists, whether the acquirer has committed certain serious crimes, whether the acquirer sufficiently cooperates and/or has provided incurred information, and reasons for providing incorrect information. The assessment also takes into account the security situation in the country of the acquirer, or the countries in the surrounding region.

Furthermore, for investments in vital suppliers, the Ministry considers the acquirer's the track record in relation to the vital process and the financial solvability for future investments in the

[21] The explanatory memorandum to the act refers to specific caselaw of the European Court of Justice: ECJ, 14 March 2000, C-54/99, Scientology, ECLI:EU:C:2000:124, par. 17 and ECJ, 18 June 2020, C-78/18, Commission/Hungary, ECLI:EU:C:2020:476, par. 88–96.

vital process in order to guarantee its continuity. The assessment also takes into account the situation in the acquirer's home country, in particular whether such country has offensive programmes aimed at disrupting the integrity, security, safety or availability of the relevant vital process, whether such country is bound by relevant treaties and decisions of international organisations, and the track record of the country in complying with such treaties.

As for investors in sensitive technology, the Minister will consider the acquirer's track record regarding the security, trade or use of sensitive technology, the compliance with regulations on security, redactions (e.g. of state secrets) or export control, the acquirer's motives for carrying out the acquisition activity, notably if those are usual business economic motives, and whether the acquirer has a track record that makes it plausible that the acquirer will exercise a strategic power position with regard to the availability, pricing or further development of this technology that are not usual business economic motives and practices.

Also in this respect, the acquirer's home state is considered, in particular, whether that state has an export control policy in place and its track record, whether there is an adequate and transparent separation between civil and military research and development programmes, or whether the home state has offensive programmes aimed at acquiring sensitive technologies to gain a technological or strategic power position.

2.1.3. Procedure

A notification is mandatory. The purchaser and target company are jointly responsible to fulfil this obligation by notifying jointly or in mutual consultation. Approval must be obtained prior to the closing of the transaction. This creates a standstill obligation. An exemption from the standstill obligation may be requested if the standstill obligation would result in a threat to economic, physical, or societal interests. No pre-notification is required. In case of doubt about the applicability of the Security Screening Act, parties may informally consult with the Investment Screening Bureau.

If a qualifying investment took place without a notification, the Minister can oblige the parties to make a notification within a reasonable term, after which the screening will take place. The Minister must oblige the parties to notify within three months after the transaction has become known to the Minister. It must be noted that this a discretionary power of the Minister. Consequently, the Minister is not obliged to require the parties to notify.

A breach by the parties of this obligation is subject to a fine. The amount of the fine depends on the circumstances with a maximum of EUR 900,000 or 10% of the annual turnover if that is

considered more appropriate. Violation of the notification obligation results in immediate suspension of acquired shareholder rights such as exercising voting rights and access to information. The shareholder may still receive dividends.

If the Minister finds that incorrect or incomplete information has been provided in the notification, it may, within three months of discovery, order the notifying company to make another notification with a reasonable time. A fine with a maximum of 10% of the turnover of the company concerned may also be imposed.

The Minister has eight weeks to decide on a notification, but can extend this period by up to six months (phase 1). If a formal screening decision must be taken (phase 2), the Minister has an additional eight weeks to decide. It can extend this period by up to six months, provided that any time extension used in phase 1 is deducted, so that the total extension does not exceed six months. A “stop-the-clock” applies if the Investment Screening Bureau requests information from the parties. Moreover, the timeline in phase 1 or in phase 2 (if applicable) can be extended by another three months if the cooperation framework under the EU FDI Screening Regulation applies because a third country investor is involved. The Minister makes the necessary notifications under the EU FDI Screening Regulation as soon as it becomes clear that the investment is carried out by a third country investor. This might already be the case in phase 1, but can also in phase 2 in the event the existence of a third country investor is ascertained only at a later stage. The Minister also has the competence to re-assess a qualifying investment in exceptional cases where the circumstances changed. This is for example the case, when the security situation or stability in the country where the investor is established has deteriorated.

The Security Screening Act allows for investments that have taken place since 8 September 2020 to be called in by the Minister for a screening if the investment could pose a threat to national security. The Minister may use such powers for a period of eight months following the entry into force of the Act (which took place on 1 June 2023). The reason for the limitation of retroactive effect to 8 September 2020, is that the draft Security Screening Act was submitted to the public for consultation on that date. Given that this draft did not yet include the additional sensitive technologies that were later appointed by means of government decree and managers of business campuses, investments in these additional sensitive technologies cannot be screened retroactively. Legislation with retroactive effect is exceptional in the Netherlands. The Minister has confirmed that this power to call in completed transactions retroactively will be used only in exceptional circumstances.

2.1.4. Outcome

The Minister can approve the transaction, approve it under conditions, or prohibit the transaction.

Conditions may consist of remedies such as additional security protocols, policies or commissions, placing certain sensitive activities in a separate entity established in the Netherlands, behavioural restrictions on commercial conduct, prohibition to acquire certain parts of the target undertaking or reduction of shareholding. For acquisitions of sensitive technologies, such measures could also consist of the following: obligation to store certain technology, source code or genetic codes with a third party, prior approval rights for the Minister regarding a decision to terminate or move part of the business to a third country, or licensing based on fair, reasonable and non-discriminatory (FRAND) access for certain IP rights to third parties.

A prohibition will only be imposed if the national security risks cannot be mitigated by means of remedies.

2.2. Gas and Electricity Acts

2.2.1. Scope of application

The Gas Act applies to acquisition of control in an LNG-facility or in an LNG-business. The Electricity Act applies to acquisitions of control in a power plant having an electrical power output of 250MW or more or a company operating such power plant.

The Acts apply to all investors, irrespective of their nationality. Control is interpreted in line with the concept of control in EU merger control law.

2.2.2. Screening test

The screening tests are public security and supply security. This entails screening of the financial solvability of the investor involved, the way in which the investor is managed and controlled and the degree of transparency of its operations. In addition, the track record of investor involved is screened for the reliability of future supply. This includes its experience in safeguarding security and its technical expertise in relation to running an LNG-business/-facility or power plant.

2.2.3. Procedure

The notification must be made by one of the parties to the transaction. The notification is mandatory but not suspensory in nature. The notification must be made 4 months prior to closing.

2.2.4. Outcome

The Minister may approve impose conditions or prohibit the transaction.

2.3. Telecom Act

2.3.1. Scope of application

The Telecom Act applies to acquisitions of a "controlling interest" in a telecommunication party that has "relevant influence" in the Dutch telecom sector.

Relevant influence exists if an undertaking offers:

- an internet access or telephone services to more than 100,000 end users in the Netherlands, for which purpose, each fixed internet or telephone services access to private persons is counted as 2 end users, each fixed internet service to business users as 8 end users, and each mobile internet service or phone service is counted as 1 end user;
- an electronic communication network over which more than 100,000 end users in the Netherlands are offered internet access services or telephone services;
- an internet hub on which more than 300 autonomous systems are connected in the Netherlands;
- data centre services in the Netherlands with a power capacity exceeding 50 MW;
- hosting services of more than 400,000 .nl domain names;
- qualified trust services in the Netherlands; or
- an electronic communication service, electronic communications network, data centre service or trust service to the Dutch General Intelligence and Security Service, Ministry of Defence, Military Intelligence and Security Service, National Coordinator for Counterterrorism and Security or the Dutch National Police.

A "controlling interest" is defined as: (a) the acquisition of >30% of the votes in the general assembly of shareholders; (b) the right to appoint or dismiss more than half of the members of the management board or supervisory board; (c) the acquisition of shares with a special

statutory right of control; (d) the acquisition of a branch office that is a telecommunication party; (e) becoming a partner in a partnership (*vof* and *cv*).

2.3.2. Screening test

The acquisition of the "controlling interest" in the "telecom undertaking" must result in a threat to the public interest. A threat to the public interest can only exist in case:

- the investor is an undesired person or a state, entity or person for which it is known or for which there are reasons to suspect that he has the intention to influence the telecommunication party to enable misuse or intentional outage;
- the investor has close connections with, or is under influence of a state, entity or person as meant under (a), or there are grounds to suspect such connections or influence;
- the investor has such reputation that the risks mentioned under the relevant influence criteria are significantly increased;
- the identity of the investor cannot be determined;
- the investor does not cooperate sufficiently with the investigation.

2.3.3. Procedure

A notification must be made by the purchaser 8 weeks prior to the acquisition of control. Specific rules apply for public offers. A standstill obligation does not apply, but if the parties close the transaction while the Minister is still screening the investment, the parties run the risk of an obligation to unwind the transaction partially or wholly if they close prior to approval.

The Minister in principle has 8 weeks to decide on the transaction after notification. A 6-month investigation can be opened if further investigation is required. A stop-the-clock may apply if the Investment Screening Bureau has any additional questions relating the notified transaction.

Moreover, the timeline can be extended by another three months if the cooperation framework under the EU FDI Screening Regulation applies because a third country investor is involved.

2.3.4. Outcome

The Minister may prohibit the acquisition of a controlling influence prior to or after the acquisition of control.

In addition, the Minister may prohibit an undesired person or entity from holding existing controlling influence for a period 8 months after the Minister becomes aware of facts or circumstances that national security or public order may be threatened after the acquisition of

the interest. A person or entity having a controlling interest may become undesirable after the investment has already been made. According to the explanatory memorandum to the act, this may be the case if the telecommunication party has been acquired by a foreign undertaking or due to geopolitical changes.

If the holding of an interest is prohibited, the controlling rights, including voting rights and the right to participate in the general assembly of shareholders cannot be exercised. The investor keeps his right to dividends. The Minister will oblige the holder of a controlling interest to reduce his interest in the telecommunication party within a certain period. The target company may be authorised to sell the shares of the undesired shareholder if the shareholder does not sell its shared within the prescribed period. The Minister can furthermore appoint a third party, whose instructions the target company must follow.

3. Developments to follow

The Dutch government has announced another sector-specific screening mechanism for companies that form part of the Dutch defense technological and industrial base.[22] Details on this proposal have not been made public to date.

The Ministry will prepare a guidance document (*beleidsregel*) for the screening of managers of business campuses under the Security Screening Act.[23] As noted above, business campuses are campuses where multiple companies work together in public-private partnerships in the area of technologies and applications that are of economic and strategic importance to the Netherlands.

Otherwise, no legislative changes are expected in the near future.

[22] The Ministers of EZK and Defence have informed the Parliament that companies that provide products, goods, services and/or know-how to the Ministry of Defence form part of the 'Dutch defence technological and industrial basis' and that investments in such companies should be screened for the potential impact on national security. See Uitkomsten van de ex ante analyse van de Nederlandse defensie technologische en industriële basis (NLDTIB), 30 december 2019, Kamerstukken II 2019-2020, 31125, nr.108.

[23] Further information is available in Dutch via https://zoek.officielebekendmakingen.nl/blg-1068493.pdfand https://zoek.officielebekendmakingen.nl/blg-1068492.pdf

Annex 1: Relevant laws, ordinances, regulatory guidelines

- Act on the security screening of investments, mergers and acquisitions (*Wet veiligheidstoets investeringen, fusies en overnames*)
- Decree on scope of application sensitive technology (*Besluit toepassingsbereik sensitieve technologie*)
- Ministerial decree on security screening of investments, mergers and acquisitions (*Regeling veiligheidstoets investeringen, fusies en overnames)*
- Gas Act (*Gaswet*)
- Electricity Act (*Electriciteitswet)*
- Ministerial decree notifications change of control Electricity Act 1998 and Gas Act (*Regeling melding wijziging zeggenschap Elektriciteitswet 1998 en Gaswet*)
- Telecom Act (*Telecommunicatiewet*)
- Decree on undesirable control telecommunications (*Besluit ongewenste zeggenschap telecommunicatie*)

Annex 2: Relevant administrative and court cases

There have been no relevant administrative and court cases in the Netherlands.

Annex 3: Relevant literature

English literature:

- De Kok, J (2021) Investment Screening in the Netherlands. Legal Issues of Economic Integration 48(1): 43-66.
- Roscam Abbing F.A., Geursen W.W., and De Grave, D.J.M. (2023) An interview with Ivo Nobel on investment review in the Netherlands. Mededingingsrecht in de Praktijk 2023/3(8)

Dutch literature:

- Immerzeel, M.H.J.M. (2023) Industriepolitiek en toetsing van overnames voor nationale veiligheid: vooruitblik op de Wet veiligheidstoets investeringen, fusies en overnames. Ondernemingsrecht 2023/67 (10/11). 463-470.

- De Kok, J. and Van de Kooij, A. (2023) Het Nederlandse stelsel voor investeringstoetsing. Mededingsrecht in de Praktijk 2022 (4). 4-11.
- Koster, H. (2023) Investeringstoetsing door de Wet veiligheids-toets investeringen, fusies en overnames. O&F (1). 10-20.
- Oosterhuis G. and Korneeva-Offerman O (2023) Wet Vifo tegen de achtergrond van de Europese regelgeving. Nederlands tijdschrift voor Europees Recht (1-2). 7-14.
- Reuder B.M.M., Baneke M.R. and Heurkens T.M.J (2022) Foreign direct investment screening in Nederland – Wet Vifo. Ondernemingsrecht 2022/74 (21). 289-293.

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