Foreign Direct Investment Regimes in Europe

The Netherlands
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Scope of FDI Regime: Transactions subject to review

Foreign Direct Investment screening in the Netherlands is currently governed by the following laws:

- Article 66e of the Gaswet and the Regeling Melding wijziging zeggenschap Elektriciteitswet 1998 en Gaswet
- Chapter 14a of the Telecommunicatiewet and the Besluit Ongewenste Zeggenschap Telecommunicatie

In addition, there is a proposed legislation (the proposal was published on 8 September 2020) regarding FDI screening that, if passed into law, will apply retroactively to transactions as of June 2020. The current estimated expectation is that the law will be passed by Q2 2021.
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Scope of FDI Regime: Transactions subject to review

Does the law relate to acquisitions in only certain sectors or specific activities?

The laws mentioned above relate to the following sectors or activities:

- The Telecommunicatiewet and the Besluit Ongewenste Zeggenschap Telecommunicatie concern the telecoms sector.
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Does the law relate to acquisitions in only certain sectors or specific activities?

• The announced legislation will have a broader application as it will concern vital processes and vital infrastructure that are considered essential in the sense that failure or disruption would cause serious harm to the Netherlands.

A list of services is provided on the website of the National Coordinator for Security and Counterterrorism (in Dutch) and concerns (as of 23 October 2020): transport and distribution of electricity; production, transport and distribution of gas; oil supply; internet- and data services; internet access and internet traffic; voice- and text messaging services; place and time establishment services using Global Navigation Satellite System (which includes GPS); water supply and water management; air traffic management; shipping management; railroad transport; road transport; production, processing and storage of (petro-)chemicals and/or nuclear material; certain financial services (OTC payment, mass non-cash payment, inter-banking payment, securities trading); emergency call services; police; basic registration of persons and organisations and transaction infrastructure for basic registration information; electronic messaging and information to citizens; identification and authentication of citizens and companies; defence.
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Scope of FDI Regime: Transactions subject to review

Does the law relate to acquisitions in only certain sectors or specific activities? (continued)

- In addition, the announced legislation will concern:
  - The development of high-quality technology that affects national security (likely products that are already subject to export controls, e.g., military products and products that can have both a military and non-military application, so-called dual use goods)
  - Additional sectors/services may be added by the government, for instance services relating to the provision of healthcare services.
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Scope of FDI Regime: Transactions subject to review

Can minority stakes be caught?

**Elektriciteitswet 1998 and Gaswet:** Only changes of control are caught (as it is interpreted in the context of the Dutch merger control rules which are the same as the EU merger control rules in this context).

**Telecommunicatiewet:** Yes, the regime applies to acquisitions of controlling influence which is the case if the acquirer, post-transaction:

- Has 30% of the votes in the shareholders meeting of the target company, alone or together with other shareholders acting in concert (directly or indirectly);
- The capacity to nominate or dismiss, directly or indirectly, alone or together with others acting in concert, more than half of the board of directors;
- Owns one or more shares giving a special statutory right of control;
- Can consider the telecom company as a subsidiary;
- Is as a shareholder liable towards the creditors of the telecom company;
- Has sole proprietorship.

**Announced legislation:** Yes, the proposed regime will apply to acquisitions of (joint) control and to acquisitions or increases of significant influence (the government will be able to determine voting-threshold for specific categories of undertakings).
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Scope of FDI Regime: Transactions subject to review

What types of transactions are subject to review?

Elektriciteitswet 1998 and Gaswet:
• any controlling investment in a facility with a nominal production capacity of 250 MW or more, or in a company managing such facility; and
• any controlling investment in a LNG-facility or a LNG-company.

Telecommunicatiewet:
• An electronic communications network or service;
• A hosting service, internet node, trust service or data centre, with the exception of data centres solely or primarily for personal use; or
• A category of networks or services designated by order in the council.

Announced legislation:
• All actions (incl. in particular investments) resulting in a direct or indirect change of control (acquisitions, mergers and creations of JVs) or in an acquisition or increase of significant influence
• Acquisitions of assets
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Thresholds

**Elektriciteitswet 1998 and Gaswet**: There are no thresholds.

Telecommunicatiewet

- Offer internet or telephone services to more than 100,000 end-users in the Netherlands;
- Offer a mobile communication network with more than 100,000 end-users in the Netherlands;
- Offer a internet hub to which more than 300 autonomous systems are connected;
- Offer data centre services with a power capacity of more than 50 MW;
- Offer hosting services to more than 400,000 .nl domains;
- Offer a qualified trust service;
- Offer an electronic communication service or network, a datacentre service or trust service to the intelligence, defence, military, security, anti-terrorism and police services/authorities; or
- if the above quantitative thresholds are not reached individually but, in combination, exceed 1 whereby:
  - The number of internet and telephone end-users is divided by 100,000;
  - The number of connections to an internet hub is divided by 300;
  - The consumption by the data centres is divided by 50; and
  - The number of .nl domains for which hosting services are provided is divided by 400,000.
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Thresholds

*Announced legislation*: No thresholds.
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Procedure

Is the regime mandatory (i.e. are parties obliged to notify of the transaction)?
All of the regimes mentioned are/will be mandatory.

Is the regime suspensory (i.e. must parties wait for an approval decision before completing a transaction)?

Elektriciteitswet 1998 and Gaswet: Yes, because the notification must be made no later than 4 months before the envisaged change of control. The government can prohibit the transaction or impose conditions for reasons of public security or security of supply.

Telecommunicatiewet: Yes, because the notification must be made no later than 8 weeks before the envisaged implementation. If the acquisition relates to a public bid on a listed telecoms company, the notification must be made at the same time as the public bid.

Announced legislation: The regime will contain a notification obligation as well as a post-closing review (the post-closing review will have retroactive application to transactions as of June 2020). As regards the notification obligation, an envisaged transaction that falls within the scope of the proposed bill will have to be reported to the Minister of Economic Affairs prior to the relevant transaction.
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Procedure

What is the timing between an approval decision being issued and the commencement of a review by the authority?

Elektriciteitswet 1998 and Gaswet: At least 4 months.

Telecommunicatiewet: The government must decide within 8 weeks after notification whether a prohibition is imposed. For further investigation, this term can be extended with 6 months. Moreover, this term is suspended (i) the moment additional information is requested up until the information is provided and (ii) the moment the government has indicated its intention to prohibit the transaction up until the point when the notifying party has made its comments on that intention or up until the term for making comments has passed (whatever is earlier). After this term, no prohibition can be imposed unless incorrect or incomplete information was provided or facts or circumstances causing public interest concerns have become known to the government after the decision not to prohibit.

Announced legislation: Within eight weeks (which can be extended with a reasonable term and no longer than 3 months if the transaction falls within the scope of Regulation 2019/452 and otherwise no longer than 6 months) of the notification, the Minister will assess the envisaged transaction. This term will be suspended the moment additional information is requested up until the information is provided.
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Procedure

How long does the authority have to commence a review before it loses jurisdiction to do so?

Elektriciteitswet 1998 and Gaswet; Telecommunicatiewet: See above.

Announced legislation: See above. As regards the post-closing review, in relation to transactions that were not notified or that were notified with false or misleading information, the government will be able to ask the parties to (re)notify up until 3 months after it became aware of the transaction or of the false/misleading nature of the provided information. For large risks for the national security, a transaction can be re-reviewed up until 6 months after the government became aware of the large risks.

Are there penalties for failing to notify or failing to abide by the authority’s ruling?

Elektriciteitswet 1998 and Gaswet: An implemented transaction that was not notified can be annulled in court.

Telecommunicatiewet: Failure to comply with the telecoms notification obligations may result in an injunction forcing compliance or a fine. In the absence of a notification, the government can prohibit the transaction within 8 months starting from the date that the facts and circumstances that cause the authority to have public interest concerns, became known to the government. Non-compliance with the authority’s ruling causes the nullity of the legal actions taken.

Announced legislation: Yes, fines up to 10% of the worldwide turnover in addition to nullity of the transaction or replacement of management.
The new legislation in relation to acquisitions in the telecoms sector is the result of an attempt by América Móvil to take over KPN, a leading Dutch telecommunications company, in 2013. The government decided to take measures to prevent that investors acting on the basis of geo-political intentions would acquire such controlling stake which could be abused to put pressure on the Dutch government by threatening to destabilize public order or to violate confidentiality of communications.
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