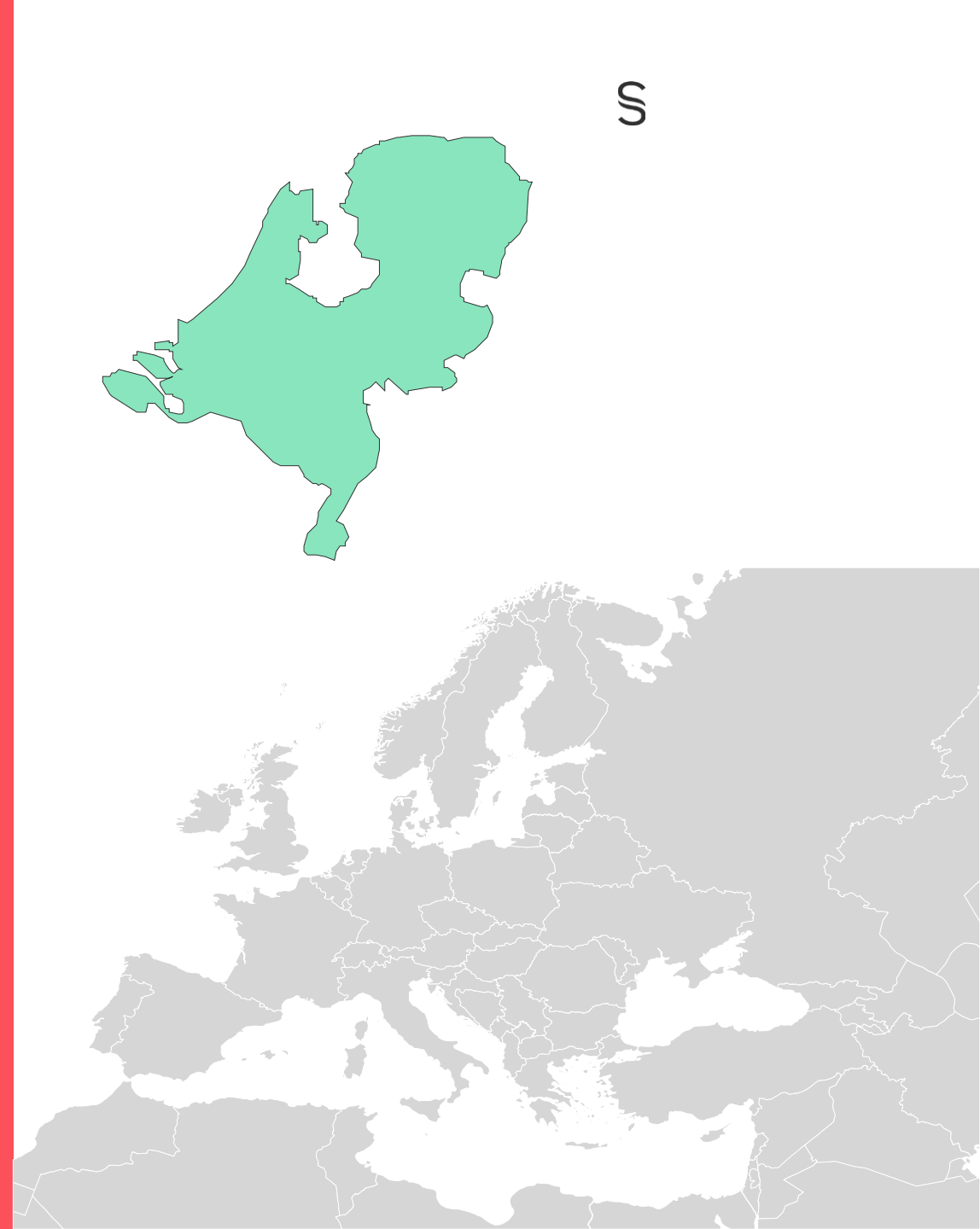


SIMMONS' COMPETITION/ANTITRUST PRACTICE

Foreign Direct Investment Regimes in Europe

The Netherlands



The Netherlands

Contents

§

- Scope of FDI Regime: Transactions subject to review
- Thresholds
- Procedure
- Impact on M&A
- Contacts

The Netherlands

§

Scope of FDI Regime: Transactions subject to review

- In the Netherlands a general FDI regime exist that complements sector specific investment screening regimes to ensure the protection of national security
- General FDI screening covering all sectors is laid down in the *Wet Veiligheidstoets investeringen, fusies en overnames* (“Vifo Act”) that entered into force on 1 July 2023 and applies retroactively to transaction completed after 8 September 2020, so post-closing review is possible
- Further details have been set in two governmental decrees on the Vifo Act: *Besluit veiligheidstoets, investeringen, fusies en overnames* (Decree on Security Review on Investments, Mergers and Acquisitions) and *Besluit Sensitive technologie* (Decree on Sensitive Technology)
- Sector specific FDI regimes continue to exist in the telecom, gas and electricity sectors in which case the Vifo Act does not apply: Article 86f of the *Elektriciteitswet 1998* (Electricity Act 1998), Article 66e of the *Gaswet* (Gas Act), Chapter 14a of the *Telecommunicatiewet* (Telecommunications Act)

The Netherlands

§

Scope of FDI Regime: Transactions subject to review

- The Minister of Economic Affairs and Climate is responsible for the FDI regimes
- In practice, notifications must be submitted to the *Bureau Toetsing Investeringsen* (Investment Assessment Agency: “BTI”), which is part of the Ministry of Economic Affairs and Climate
- The Vifo Act concerns vital processes which are considered essential in the sense that failure or disruption would cause serious harm to the Netherlands
- Under the Vifo Act investments in target undertakings within its scope must be notified to the BTI and a standstill obligation applies
- The Vifo Act applies equally to Dutch, EU and non-EU investors, so even if the investor is a Dutch or EU company, a notification obligation may apply

Scope of FDI Regime: Transactions subject to review

What target undertakings are covered by the Vifo Act?

It applies to three types of so-called “target undertakings”:

- **Undertakings that are vital suppliers:** undertakings that provide services of which the continuity is vital to Dutch society, including heat transport, nuclear energy, air transport, banks, financial market infrastructure, extractable energy, and gas storage.
 - **Undertakings that are active in sensitive technologies:** i) dual-use products of which the export is subject to a license requirement pursuant to Article 3(1) of EU Regulation 2021/821 or ii) military products. In the Decree on Sensitive Technology some dual-use products have been excluded from the scope of the Vifo Act and other technologies have been added (quantum technology, photonics technology, semiconductor technology and high-assurance technology). The Decree also designates certain dual use products, military products, quantum technology, photonics technology, semiconductor technology and high-assurance technology as “highly” sensitive technologies. The retroactive effect of the Vifo Act does not apply to technologies that have been added to the list of sensitive technologies in this Decree.
 - **Operators of business campuses:** undertakings that manage an area in which a collection of (other) undertakings is active and where public-private partnerships are engaged in technologies and applications that are of economic and strategic importance to the Netherlands.
- For the Vifo Act to apply, the target undertaking must be established in the Netherlands, which means that its actual place of business is the Netherlands or that it is effectively managed from the Netherlands. The legal form and the location of the undertaking’s registered office are, therefore, not decisive.
- A target that is itself not a target undertaking as defined above, but which has control or significant influence over a Netherlands-based undertaking that is a vital provider, that is an operator of a business campus, or that is active in sensitive technology, must also be classified as a target undertaking and falls within the scope of the Vifo Act.

The Netherlands

§

Scope of FDI Regime: Transactions subject to review

What types of transactions are subject to review?

Vifo Act:

- Any transaction resulting in a direct or indirect change of control in a target undertaking: acquisitions, mergers, establishment of full function joint ventures, division of undertakings, asset transactions, other legal acts that result in the acquisition of control in a target undertaking;
- Any transaction resulting in the acquisition or increase of a significant influence over an undertaking active in the field of a highly sensitive technology (Vifo Act in conjunction with the Decree on Sensitive Technology). “Significant influence” is a lower threshold than “control” in the aforementioned point, see slide 7.
- A transaction concerning an undertaking that is active in the field of a technology that does not qualify as highly sensitive technology and that is not excluded in the Decree on Sensitive Technology, is subject to notification if it leads to a change of control in the first point.

Electricity Act 1998 and Gas Act:

- Any transaction resulting in a change of control in a facility with a nominal production capacity of 250 MW or more, or in a an undertaking managing such facility; or
- Any transaction resulting in a change of control in a LNG-facility or a LNG-company.

Telecommunication Act:

- Any transaction resulting in predominant and relevant control in an electronic communications network or service;
- Any transaction resulting in predominant and relevant control in a hosting service, internet node, trust service or data centre, with the exception of data centres solely or primarily for personal use; or
- Any transaction resulting in predominant and relevant control in a category of networks or services designated by governmental decree.

The Netherlands

§

Scope of FDI Regime: Transactions subject to review

Can minority stakes be caught?

Vifo Act:

- Changes of control fall within the scope of the Act. Since “control” is interpreted in the same sense as in Dutch merger control, which is similar to EU merger control, minority stakes can under circumstances amount to control.
- As mentioned in slide 6, for investments in undertakings that are active in the field of highly sensitive technology a lower threshold applies: acquisition or increase of a significant influence falls within the scope of the Vifo Act. Which sensitive technology qualifies as “highly sensitive technology” is defined in the Decree on Sensitive Technology (see slide 5). In case of highly sensitive technology significant influence exists if the acquirer post-closing can exercise at least 10% of the votes at the general meeting or has the ability to appoint/dismiss one or more board members. An increase of voting rights held to 20% and 25% will require a separate notification.

Electricity Act 1998 and Gas Act:

- Changes of control fall within the scope of these Acts. Since “control” is interpreted in the same sense as in Dutch merger control, which is similar to EU merger control, minority stakes can under circumstances amount to control.

The Netherlands

§

Scope of FDI Regime: Transactions subject to review

Telecommunication Act:

The regime applies to acquisitions of predominant control which is the case if the acquirer, post-transaction:

- Directly or indirectly holds 30% of the votes in the shareholders meeting of the target company, alone or together with other shareholders acting in concert;
- Has the right to appoint or dismiss, directly or indirectly, alone or together with others acting in concert, more than half of the board of directors or supervisory board;
- Holds one or more shares with a special statutory right of control;
- Has a subsidiary in the Netherlands that qualifies as a telecom party;
- Is as a shareholder liable towards the creditors of the telecom company;
- Has sole proprietorship.

The Netherlands

Thresholds

§

Vifo Act:

- There are no thresholds relating to turnover. A notification obligation exists if certain transactions concern an undertaking that is i) a vital supplier, ii) active in the field of sensitive technology or iii) an operator of a business campus.

Electricity Act 1998 and Gas Act:

- There are no thresholds relating to turnover. All transactions falling within the scope of the acts, regardless of their size, trigger a notification obligation.

Telecommunication Act

Transactions are only subject to notification when the acquired telecom undertaking either:

- Offers internet or telephone services to more than 100.000 end-users in the Netherlands;
- Offers a mobile communication network with more than 100.000 end-users in the Netherlands;
- Offers an internet hub to which more than 300 autonomous systems are connected;
- Offers data centre services with a power capacity of more than 50 MW;
- Offers hosting services to more than 400.000 .nl domains;
- Offers a qualified trust service;
- Offers 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.

The Netherlands

Procedure

§

Is the regime mandatory (i.e. are parties obliged to notify of the transaction)?

Yes, under all regimes a notification is mandatory. Under the Vifo Act transactions completed after 8 September 2020 but before 1 July 2023 may be reviewed by the Minister, but there is no obligation to notify such transactions unless the Minister request so.

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

Vifo Act:

This regime is suspensory, which means that a transaction may only be completed if the Minister approves the transaction. The approval may be subject to conditions. However, it is possible to apply for a derogation of this standstill obligation when the public interest is at stake. For public bids, a notification must be submitted simultaneously with the public bid. In case of acquisition under universal title of goods in a target undertaking, notification must be made within two weeks after the acquisition.

Electricity Act 1998 and Gas Act:

A transaction must be notified no later than 4 months before completion. Although a notification obligation exist, the regime is not suspensory, which means that a transaction may be completed before a decision is taken by the Minister. The Minister can prohibit the transaction or impose conditions for reasons of public security or security of supply.

The Netherlands

Procedure

§

Telecommunication Act:

Although a notification obligation exist, the regime is not suspensory, which means that a transaction may be completed before a decision is taken by the Minister. A transaction must be notified no later than 8 months before completion. 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. The Minister can prohibit the transaction or impose conditions for reasons of public interest.

If a transaction has not been notified, the transaction may be prohibited within 8 months after the Minister becomes aware of the facts or circumstances on the basis of which the public interest may be threatened.

The Netherlands

Procedure

§

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

Vifo Act:

After notification, the transaction can be assessed in a two-phase process:

- **Phase 1** starts after a notification is submitted. The Minister must take a decision within 8 weeks after a notification, although this term can be extended by up to 6 months and may be further extended by an additional 3 months if the transaction falls within the scope of EU Regulation 2019/452. If additional information is requested, the term will be suspended up until the information is provided. In this phase the Minister must decide if an in-depth review is required, which is the case if a transaction may lead to a risk to national security.
- **Phase 2** starts after a request for a review decision is submitted. A decision must be taken within 8 weeks after the request is submitted. This term may also be extended by 6 months and be further extended by an additional 3 months if the transaction falls within the scope of EU Regulation 2019/452, however any extension of the term in phase 1 must be deduced from the extension in phase 2. If additional information is requested, the term will be suspended up until the information is provided. The Minister can prohibit a transaction if it leads to a risk to national security or approve the transaction either unconditionally or with commitments.

The Netherlands

Procedure

§

Elektriciteitswet 1998 and Gaswet:

The Minister decides within four months whether to prohibit or take measures in respect of a transaction. If a prohibition or measures are deemed necessary, they must be submitted to the European Commission for approval within that period, and the Commission must take a decision within two months. If the Minister does not impose a prohibition or measures, the parties will be informed as soon as possible.

Telecommunicatiewet:

The Minister must decide whether a prohibition is imposed within 8 weeks after notification. This term may be extended by 6 months for further investigation. Moreover, this term will be suspended from (i) the date on which additional information is requested up until the information is provided and (ii) the date on which the government announces 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 (whichever is earlier). After this term, a prohibition may not be imposed unless incorrect or incomplete information was provided or facts or circumstances giving rise to public interest concerns become known to the government after the decision not to prohibit the transaction has been taken.

The Netherlands

Procedure

§

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

Vifo Act:

See above. Furthermore, post-closing review is relevant:

- If a transaction is completed following a notification but without prior approval in phase 1 or phase 2, the Minister will review the transaction *ex officio* within 8 weeks of becoming aware of the completion. This term may be extended by 6 months and by an additional 3 months if the transaction falls within the scope of EU Regulation 2019/452.
- If a completed transaction is not notified, or if a notified transaction is approved on the basis of false or misleading information, the parties may be requested to (re)notify the transaction within 3 months of the date on which the Minister becomes aware of the transaction or reasonable doubts arise as to the nature of the information provided. Alternatively, the Minister may decide to review the transaction *ex officio* within 8 weeks. This term may be extended by 6 months and by an additional 3 months if the transaction falls within the scope of EU Regulation 2019/452.
- If there is a potential social disruption with economic, social or physical consequences or an immediate increased real threat to Dutch sovereignty, an approved transaction may be subject to a re-review. The re-review must be carried out within 6 months of the government becoming aware of such risks. The Minister will either confirm that a review decision is not required or issue an *ex officio* review decision.
- If the transaction is completed after 8 September 2020, the Minister may still require the parties to notify the transaction if there are reasonable grounds to assume a risk to national security. The Minister may impose this obligation for up to 8 months after 1 June 2023. This retroactive application of the Wet Vifo does not apply to operators of business campuses and sensitive technologies designated in the Decree on Sensitive Technology.

The Netherlands

Procedure

§

Electricity Act 1998, Gas Act, Telecommunication Act:

See slide 13.

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

Vifo Act:

There are a number of possible sanctions for failure to notify or other infringements, for instance: transactions may void or set aside by a court, control rights may be suspended, the board or management of the target company may be replaced or superseded, the transaction may be forcefully unwound, fines of up to 10% of the group's worldwide turnover may be imposed.

Electricity Act 1998 and Gas Act:

A completed transaction that has not been notified may be annulled by a court decision.

Telecommunication Act:

There are a number of possible sanctions for failure to notify or other infringements, for instance: transactions may be void, control rights may be suspended, the board or management of the target undertaking may be replaced or superseded, fines of up to € 900,000 of the turnover may be imposed.

The Netherlands

Impact on M&A

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In cases where an acquisition or transaction is subject to the prior authorisation procedure of the Vifo Act, the parties should take into account the process of obtaining the required approval, which may take several months, when planning the transaction and timelines.

In addition, where the transaction falls within the scope of the Vifo Act regime, parties should be aware that completion is by no means certain, as the Minister has the power to block the deal or to impose further conditions that could make the transaction unattractive to the parties.

Moreover, if an acquisition or transaction is subject to notification obligation of the Electricity Act 1998, Gas Act, or Telecommunication Act, it is highly recommend that parties await approval before completing the transaction. Although the regimes of the Electricity Act 1998, Gas Act, and Telecommunication Act are not suspensive in nature, transactions being completed without approval run the risk of being (retroactively) prohibited and face mandatory unwinding.

The Netherlands

Contacts

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