Client Alert

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Netherlands: How the new Screening Act is increasing the scope of enforcement

Overview of regime

Introduction

Although often viewed as one of the most open economies in Europe, the broader European policy push for more foreign direct investment (FDI) screening has also given momentum to the Dutch legislator to design and implement the very first Dutch cross-sector FDI screening regime. On 1 June 2023, the Act on Security Screening of Investments, Mergers and Acquisitions ("**Vifo Act**") entered into force.

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The first few months of active enforcement have shown that both the regime and the Dutch Investment Screening Bureau (BTI) are somewhat unpredictable but are nonetheless steadily evolving to greater maturity. That said, relatively ill-prepared notifications lead to extended transaction timelines and greater uncertainty can be avoided with timely, adequate, and serious preparation. If anything, it is strongly advised that FDI regimes are taken as seriously as the (albeit better known) merger control processes.

The Vifo Act covers a broad range of transaction activities in a number of sectors deemed vital to national security in the Netherlands as well as in relation to operators of business campuses and companies active in the field of sensitive technologies. If a particular transaction is within the scope of the Vifo Act, it will require mandatory and suspensory notification to the BTI, which is part of the Dutch Ministry of Economic Affairs and Climate, such that an ultimate decision on a particular notification can be taken by the Minister of Economic Affairs and Climate. The Vifo Act is investor-agnostic, meaning essentially that all triggering transactions require notification regardless of the origin of the investor (or investors).

A much-discussed feature of the Vifo Act is that the Minister could retroactively review transactions that took effect after 8 September 2020 and before the entry into force of the Vifo Act. This possibility applied until eight months after the Act entered into force. To date, it is publicly known that the Minister of Economic Affairs and Climate investigated whether it could, perhaps under its retroactive powers of investigation, review the acquisition of the Dutch semiconductor developer Nowi by Nexperia (owned by Wingtech Technology in China), which predated the entry into force of the Vifo Act. It was no great surprise when the Minister confirmed on 27 November 2023 that it is not possible for transactions relating to semiconductor technology to be reviewed retroactively. However, transactions involving semiconductor technology taking place after entry into force of the Vifo Act may well require a mandatory notification and be subject to significant scrutiny.

The Vifo Act complements sector-specific regimes in relation to the telecommunications, electricity, and gas sectors. These regimes are also enforced by the BTI on behalf of the Minister of Economic Affairs and Climate. Other activities and sectors that are currently not within the scope of these regimes may be added in the future through the normal parliamentary legislative process in relation to new or amended legislation and, in certain circumstances, also by ministerial decree under the Vifo Act.

A new sector-specific regime in relation to the defense industry is understood to be forthcoming, with the aim of replacing the existing limited regime covering certain defense contracts; however, as yet, very little detailed information about its scope and timing is publicly available. For the sake of completeness, although not strictly a foreign investment or national security screening regime, there is also a regime specific to Dutch healthcare, which allows the Dutch Healthcare Authority primarily to verify that proposed acquisitions involving healthcare providers do not threaten crucial care being provided in the Netherlands.

The overview below focuses on the Vifo Act and therefore does not include any detail about the sector-specific regimes. Nevertheless, where relevant, any sector-specific divergence from the cross-sector regime is noted.

Scope of the Vifo Act

The Vifo Act provides for a mandatory notification requirement for a broad range of acquisition activities in target undertakings that are active in vital processes, sensitive technology, or as operators of business campuses.

For the Vifo Act to apply, relevant activities of the target undertaking must take place in the Netherlands. This is understood to include situations where either the target undertaking's policy is determined in the Netherlands or its economic activities are carried out in the Netherlands. As such, sales activities or assets, or both, in the Netherlands could be sufficient to trigger a notification obligation. The target undertaking's legal form, where it sits in the target undertaking group organization chart, or the location of registered offices are not relevant.

The Vifo Act applies regardless of the nationality of the investor. It does not distinguish between Dutch and non-Dutch or EU and non-EU investors. Put differently, there are no exemptions for Dutch or any other investor from 'friendly' jurisdictions. Any transaction that falls within the scope of the Vifo Act will therefore have to be notified, regardless of the origin of the investors.

The Act distinguishes between three types of relevant activities:

- Providers of services deemed vital to the Netherlands
- Companies active in sensitive technologies
- Operators of business campuses

The first category covers service providers, or their essential assets, in relation to vital processes that, if disrupted, affected or removed, would result in serious social disruption in the Netherlands. The Vifo Act currently provides for a relatively short list, which may be supplemented in due time. It currently includes the following processes and operators:

- District heating: transport of district heating.
- Nuclear energy: either (or both) the holder of an authorization based on the Dutch Nuclear Energy Act or any other undertaking subject to confidentiality obligations under the Dutch Nuclear Energy Act Confidentiality Decree.
- Amsterdam airport: (1) Royal Schiphol Group NV (the airport owner and management company) or any of its group companies; (2) an air carrier holding one-third or more of available annual slots (currently KLM); and (3) companies active in the supply, storage, and processing of fuel.
- Rotterdam seaport: Harbour Master's Division of the Port of Rotterdam Authority.
- Credit institutions: banks with a corporate seat in the Netherlands that qualify as significant in accordance with Article 17d(a) of the Decree on the Prudential Rules for Financial Undertakings and Article 6(4) of Council Regulation (EU) No. 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank (ECB) concerning policies relating to the prudential supervision of credit institutions – in short, a bank that meets any of the following criteria: (1) the total value of its assets exceeds EUR 30 billion; (2) the ratio of its total assets over the gross domestic product of the Netherlands exceeds 20 per cent, unless the total value of its assets is below EUR 5 billion; or (3) following a notification by its national competent authority that it considers such an institution of significant relevance with regard to the domestic economy, the European Central Bank makes a decision confirming that significance following its own comprehensive assessment, including a balance sheet assessment of that credit institution.
- Trading facilities: the operator of a trading facility in the Netherlands that accounts for 50 percent or more of the nominal value of all securities traded in the Netherlands.
- Financial market infrastructure: (1) central counterparties as defined in Article 2(1) of Directive 648/2012 Regulation (EU) No. 648/2012 on over-the-counter derivatives, central counterparties, and trade repositories; (2) a clearing house or financial institution that processes more than a billion domestic and cross-border transactions per year; (3) a clearing and settlement institution; or (4) a central institute with a seat in the Netherlands.
- Natural gas extraction: a holder of authorization of natural gas extraction at the Groningen gas field (currently NAM) or GasTerra.
- Natural gas storage: a holder of authorization for the storage of natural gas based on Article 9a of the Gas Act or storage of any substance (such as carbon dioxide) more than 100 meters below the surface.

The second category is more open-ended and thus potentially broader in scope. It covers undertakings that are active in sensitive technologies. The Vifo Act does not define what it means to be 'active' in this area; this ambiguity creates uncertainty in practice and guidance from the BTI would therefore be welcome. According to the Vifo Act, 'sensitive technologies' comprise:

- Dual-use items that are listed in Annex I to Regulation (EU) 2021/821 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (the EU Dual-Use Regulation) 2021/821; from the long list in Annex I to that Regulation, only very few items have been excluded as in-scope for the purposes of the Vifo Act by ministerial decree.
- Military goods that are listed in the European Union common military list.
- Quantum technology, photonics technology, semiconductor technology, and 'high assurance' products; these technologies have been designated by ministerial decree as 'highly sensitive technologies'.

The third category is rather specific. For a long time, this was not part of the government's initial legislative proposal but it was included after discussions and amendments submitted in Parliament, triggered by broader public discontent following the sale of the High Tech Campus in Eindhoven (where companies including Philips and ASML originated) to a Singaporean state-owned company that was not subjected to investment screening a few years earlier. As a direct result of this, operators of business campuses are now also in scope. These are defined as undertakings that manage a property on which a collection of companies operate and where public and private actors collaborate on technology and applications that are of economic and strategic importance to the Netherlands.

The Vifo Act allows for amendment of the activities that are in scope and it would seem likely that additional categories of in-scope activities will be added in due time, in line with trends in other jurisdictions in the European Union.

In terms of what transactions may trigger notification requirements, the starting point is essentially that – regardless of legal construct or label (e.g., whether an acquisition, merger, joint venture, demerger, or asset transfer) – all transaction activities resulting in a direct or indirect, **de jure** or **de facto** change of control over relevant activities in the Netherlands lead to a notification requirement. The concept of 'control' is borrowed from EU and Dutch competition laws as applied for merger control purposes. It essentially entails the ability to exercise decisive influence directly or indirectly, either based on a shareholding or otherwise (on a **de facto** basis), over the target undertaking. This applies across the board for the three categories identified above.

The triggering threshold under the Dutch sector-specific telecommunications regime deviates from this in the sense that transactions that lead to a change in 'predominant control' may trigger notification requirements. Predominant control under the terms of the Dutch Telecommunications Act may be found if an investor acquires more than 30 percent of voting rights or special voting rights in relation to the target Dutch telecommunications party.

However, for companies active in designated 'highly sensitive technology' in the Netherlands, the triggering threshold is lower than control. For this special category, it is sufficient if 'significant influence' is acquired or increased. Significant influence can exist if as little as 10 percent, 20 percent, or 25 percent of voting rights can be exercised or if there is a right to appoint or dismiss one or more board members. What is more, increases between these steps (e.g., staggered acquisitions or stake-building) lead to recurring notification obligations. The legislator's rationale for including a lower triggering threshold in relation to highly sensitive technology is that relevant companies may involve start-ups, scale-ups, and other relatively smaller companies that require (venture) capital at more or less regular intervals – investments that do not necessarily lead to changes in control but are still desirable to review from the government's perspective.

Finally, the Vifo Act and related regulations do not explicitly exclude internal reorganizations or restructurings from the need to notify. It would seem unlikely that the BTI would want to review reorganizations or restructurings if they are purely internal in the sense that there would be no (1) change in control in terms of the ultimate controlling entity, (2) change in ultimate beneficial owner and (3) third-party investor involved. Although no indication thereof is publicly available, we understand that the BTI aims to publish a communication or guidance on this topic by the end of 2023.

Review process under the Vifo Act

If an envisaged transaction falls within the scope of the Vifo Act, a mandatory and suspensory notification to the BTI must be made. The notification requirement is suspensory such that the stand-still obligation prohibits parties from closing a transaction prior to having received a clearance decision or before the statutory review period lapses. In addition to specific rules about public offer scenarios, a waiver of the stand-still obligation may be granted upon request if, for example, there is a risk of

economic, physical, or social harm or financial instability if the notifiable transaction is not implemented in a timely way (e.g. if insolvency of a target undertaking is imminent).

Jumping the gun can expose both parties involved to considerable risks. Not notifying transactions that should be notified or implementing notified transactions before having obtained approval, can lead to *ex officio* review proceedings, interim orders, and significant administrative fines of up to 10 percent of the relevant undertaking's turnover.

By way of contrast, the regimes specific to the electricity, gas, and telecommunications sectors do not have a formal stand-still obligation. In practice, however, most parties will await relevant approvals before proceeding with the implementation of their transaction. Notifications under the electricity and gas regimes should be made at least four months prior to the envisaged closing of the transaction. A notification under the telecommunications regime should allow at least eight weeks between notification to the BTI and envisaged closing. Experience shows that these processes can easily take longer than the indicated periods; for example, through the use of stop-the-clock information requests.

It is somewhat surprising that the Vifo Act stipulates that the obligation to notify rests on both the acquirer and the target. The rationale for this by the legislator was that there may well be scenarios where the target undertaking is under such strict confidentiality obligations that they can only be respected if the target undertaking directly and bilaterally interacts with the BTI, without direct insight or involvement of the investor. In practice, however, it is typically the acquirer that takes the lead in responsibility for notifications. The sector-specific electricity and gas regimes take a similar approach but the sector-specific telecommunications regime deviates by explicitly prescribing that the acquiring undertaking should make the notification.

A standard notification form issued by the Minister for Economic Affairs and Climate must be completed. The form contains extensive disclosure requirements regarding the transaction structure, the parties as well as any (ultimate controlling) parents involved and their origin, respective activities, track record, and relationships with government entities.

Upon notification, the BTI will review notified transactions and coordinate with relevant government ministries, other national authorities, or departments for their views as may be relevant for a specific transaction (the intelligence services, the Authority for Consumers and Markets, etc.). Following its review, the BTI will enable the Minister of Economic Affairs and Climate to decide whether or not to allow the transaction.

There is no formal or informal requirement to engage in prenotification discussions with the BTI (in contrast with, for example, those held with the European Commission under the EU Merger Regulation). Experience to date, however, shows that the BTI is rather willing to engage informally to various degrees on matters of jurisdiction as well as substance. Parties may thus benefit from such an approach prior to formal notification, in particular in relation to transactions that may have a substantive profile of elevated complexity. The effect on the transaction timeline is still difficult to predict, however, as there is no more or less accepted market practice in place yet and the BTI, as a relatively new authority itself, is still gaining experience with each new case.

Once notified, the statutory review period is as follows. A first phase review may last up to eight weeks and, if a further in-depth investigation is required, a second phase review may last up to an additional eight weeks. The BTI makes use of stop-the-clock questions that temporarily halt the statutory review period until the questions have been answered satisfactorily. Experience shows that even notified transactions without clear elevated substantive risk profiles can easily require various rounds of stop-the-clock questions, which thus may lead to *de facto* extended review periods.

In addition, both phases can be extended by up to six months (in total) where, for example, additional time for review or additional information is required. Any extension during the first phase will also count and be deducted from any extension in the second phase (i.e., the total maximum extension for both phases together is six months).

A further maximum three-month extension may be applied if the relevant acquirer is a non-EU investor that would trigger the EU FDI Regulation, which permits the sharing of the notification with the European Commission and other Member State FDI authorities for their views and thoughts on it. If a non-EU investor is involved, the BTI will request the parties to complete a Form B notification in English for circulation under the EU FDI Regulation.

In terms of substantive assessment, the Vifo Act regime is meant to:

- Ensure the uninterrupted functioning of vital processes
- Maintain and safeguard knowledge relating to sensitive technologies
- Avert the creation of undesirable strategic dependencies

Against that background, the BTI attempts to identify the presence or absence of risks to Dutch national security. Various factors will be taken into account, including in any event the following (in no particular order):

- The specific sensitivity of the activities of the target undertaking
- The investor's ownership structure and relationships
- The investor's track record, including in the same sector (or sectors) as the target undertaking
- The investor's criminal record (if applicable)
- The investor's rationale for pursuing the transaction
- Stability and security in the investor's country or region of origin
- The relevance of sanction regimes, whether the investor is directly or indirectly subject to restrictive measures on the basis of national or international law, such as Chapter 7 of the Charter of the United Nations, as well as other geopolitical drivers.

If a notification is shared with the European Commission and the FDI authorities of other Member States under Article 6 of the EU FDI Regulation, the BTI may receive substantive comments from the other Member States or an opinion from the European Commission (or both). If it does, the BTI and the Minister of Economic Affairs and Climate must give the comments due consideration but the substantive review of any notified transaction ultimately remains at the discretion of the Minister.

Having completed the national security risk assessment, the Minister of Economic Affairs and Climate must decide whether to allow the investment either unconditionally or with commitments (for example, additional security requirements or the appointment of a security officer). If the national security risks cannot be remedied, the Minister may decide to prohibit the transaction. Any such decision is subject to judicial review.

The Vifo Act stipulates that the Minister of Economic Affairs and Climate may in exceptional circumstances reassess a transaction that has taken place, even after having previously issued a positive decision. Such a reassessment may be initiated if a threat of a serious risk to national security is perceived in the form of either a potential social disruption with economic, social, or physical consequences or a direct increased real threat to Dutch sovereignty. The Minister must do so no later than six months after becoming aware of the risk.

Insights into recent enforcement practices and current trends

The experience of active enforcement of the Vifo Act during the first few months since it entered into force is that the BTI reviews notified transactions in an increasingly detailed manner. The information disclosure requirements are extensive and burdensome, as detailed information is requested about ultimate beneficial ownership and foreign state ownership as well as involvement, political exposure, compliance with existing sanctions, the commission of offenses, past bankruptcies or moratorium proceedings, privacy violation, and worldwide acquisition activities during the last five years, among other things. In certain circumstances, even passive investors (such as limited partners in private equity funds) without any controlling rights, but accounting for capital commitments as low as 2.5 percent, may be scrutinized and subjected to significant and burdensome disclosure requirements. The alleged interest of the BTI in this respect lies in identifying the potential special *de jure* or *de facto* rights of non-controlling parties with origins that have a higher risk profile.

This practice makes the review timeline unpredictable too, even in transactions that do not obviously have any elevated risk profile as regards activities involved or the investor's profile. Even after various rounds of more or less neutral stop-the-clock questions and thus relatively late in the first phase process, it is not unheard of that notifying parties may receive an indication that the BTI wants to make use of its formal option to extend the first phase review to a maximum of six months.

Furthermore, EU Member State authorities are likely to speak confidentially to each other about transactions under review, even when the window for a formal exchange of views under the EU FDI Regulation has lapsed.

Finally, the experience of interaction and communication with the BTI is professional, pragmatic, and as transparent as it says it can be. More legal certainty in the market may be achieved by giving further generic insight into the processes behind the curtains as well as by providing further guidance, for example on internal restructurings or the notion of being active in sensitive technologies. Instrumental in sub-optimal legal certainty is the fact that decisions under the Vifo Act (and sector-specific regimes) are not published.

Investors looking to invest in the Netherlands would do well to assess as early as possible in the round whether a Dutch FDI filing is required and how that may affect any envisaged transaction, at least in terms of deal certainty and the transaction timeline. Investors would ideally have a comprehensive and up-to-date detailed overview of parties connected with them and their respective origins, track record and exposure to (semi-)governments so that review timelines are anticipated and managed up front as well as they can be.

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