

Investment screening in the Netherlands

On 1 June 2023, the 'Investments, Mergers and Acquisitions Security Screening Bill' (Vifo Act) entered into force. This new general investment screening regime may impact transactions concerning certain companies located or active in the Netherlands. In this brochure we provide an overview of the content of the Vifo Act and its implications for investors and potential sellers considering a transaction that is covered by this new investment screening regime.

COVERED TARGET UNDERTAKINGS

Type of undertakings

The Vifo Act applies to undertakings based in the Netherlands that are vital suppliers, operators of high tech campuses or undertakings active in the field of sensitive technology (so called "target undertakings").

If the target undertaking is located outside the Netherlands but has control over a vital supplier or operator of a high tech campus in the Netherlands, or control or significant influence over a Netherlands-based company involved in sensitive technology, the Vifo Act also applies.

Retroactive effect

The Vifo Act will have a partial retroactive effect. This applies only to investments made after 8 September 2020 in vital sectors and certain sensitive technologies (no new categories).

However, the retroactive effect does not concern an active notification obligation: the Minister can only order a notification within eight months after the date that the Vifo Act entered into force.

✔ retroactive effect

✘ no retroactive effect

Vital suppliers

Continuity of services vital to Dutch society:

- heat networks
- gas storage
- main transport hubs
- extractable energy
- nuclear installations
- banking services
- financial markets



Sensitive technology

- dual use products that require an export licence on the basis of Art. 3(1) Regulation (EU) 2021/821*
- military goods as indicated in the EU Common Military List

*some of these goods may be excluded by ministerial decree



Operators of high tech campuses

Sites for public-private cooperation relating to technologies that are of economic and strategic importance to the Netherlands.



Highly sensitive technologies*

Quantum, photonic technology, semiconductor technology and high-assurance products

*as designated by secondary legislation (the Sensitive Technology Decree)



Possible future legislation to expand the scope of 'vital suppliers'.



Possible future legislation.



THE SCOPE OF THE VIFO ACT

Covered transactions

The Vifo Act applies to certain 'acquisition activities' with respect to target undertakings. A distinction can be made between (a) general acquisition activities and (b) the acquisition or increase of significant influence.

(a) general acquisition activities

- acquisitions, mergers, fully functional joint ventures, demergers and asset transfers;
- Specific forms of acquisition of control

Applying to targets that are **vital suppliers, operators of high tech campuses** and undertakings active in the field of **sensitive technology**.

The Vifo Act is 'country neutral' and applies regardless of the acquirer's country of origin. This means that the rules do not only apply to acquisition from abroad, but also to acquisition activities within the Netherlands.

(b) the acquisition or increase of significant influence

The acquisition or increase of significant influence in a target undertaking active in one of the technologies designated as **highly sensitive** will also trigger a notification obligation. "Significant influence" concerns:

- the possibility of the acquirer to exercise at least 10%, 20% or 25% of the votes in the general meeting* or;
- the right to appoint or dismiss one or more board members.

*Notification is required only for acquisitions or increases of significant influence that meet the applicable threshold. For example, if both the 10% and 20% thresholds apply to a certain category of undertakings, an increase from 12% to 17% does not require notification, while an increase from 12% to 21% must be reported.

PROCEDURAL ASPECTS

Notification

Any intention to carry out an acquisition within the scope of the Vifo Act must be notified by either the acquirer or the target company to the Bureau Toetsing Investeren (BTI), which is part of the Ministry of Economic Affairs and Climate Policy.

Standstill obligation

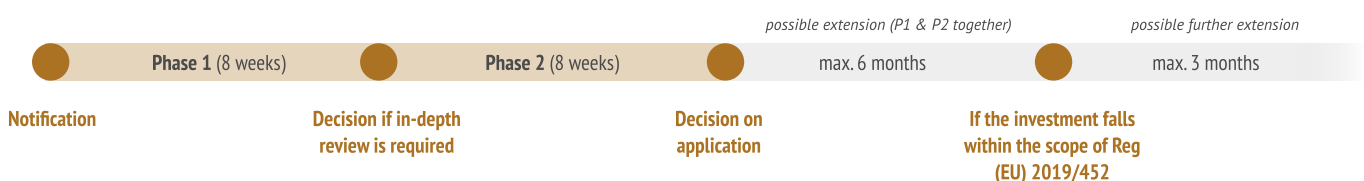
An acquisition activity may not take place before the Minister of Economic Affairs and Climate (the Minister) has indicated that no in-depth review is required or the Minister has issued an assessment decision following an in-depth review. Failure to comply with the standstill obligation may result in a fine of up to 10% of the relevant undertaking's turnover. An exemption exists for when the public interest is at stake.

Review period

After receipt of a notification the Minister decides within eight weeks whether an in-depth review is required.

If an in-depth review is necessary, the Minister shall decide on the application within eight weeks. These deadlines can be extended if further investigation is required (with max. six months in total). The review period can be extended by an additional three months if the activity in question falls within the scope of Regulation (EU) 2019/452.

If the Minister requests additional information, the review period is suspended under a stop-the-clock provision.



SUBSTANTIVE ASSESSMENT

What does the substantive assessment entail?

Upon receiving a notification, the Minister will evaluate the potential of the investment to pose a threat to national security. Should such a possibility arise, the Minister will conduct an in-depth review of the proposed transaction and its potential risk to national security.

The concept of national security concerns the security interests that are essential within the Netherlands for the democratic legal order, security and other important state interests or social stability, provided that they relate to the interface of economy and security. These interests are explicitly referred to as:

- maintaining the continuity of vital processes;
- preserving the integrity and exclusivity of knowledge and information of critical or strategic importance to the Netherlands;
- preventing undesirable strategic dependence of the Netherlands on other countries.

What factors are taken into account in the assessment?

The factors that are taken into account in the assessment of the criterion **risk to national security** include inter alia:

- the transparency of the ownership structure of the acquirer;
- relationships and / or the security situation in the acquirer's country.

The following factors are also taken into account when assessing an **acquisition activity involving a vital supplier** (non-limitative):

- the acquirer's track record with respect to vital processes and / or;
- the reputation of the state in which the acquirer is a resident / has its head office or is under the influence of offensive programmes aimed at disrupting or affecting certain processes.

The following factors are also taken into account when assessing an **acquisition activity involving sensitive technology** (non-limitative):

- the acquirer's track record with respect to sensitive technology and / or;
- the acquirer's motives for the acquisition activity.

SECTOR SPECIFIC FDI SCREENING RULES

Sector-specific regimes take precedence

If both the Vifo Act and a sector-specific screening regime with a focus on national security are in effect, there is no need for a separate notification under the Vifo Act.

Sector specific regimes are already in place for inter alia telecoms and energy.

**For more information,
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