iclg

Foreign Direct Investment Regimes 2025

Sixth Edition

Contributing Editors:
Samuel Beighton & Bernardine Adkins
Gowling WLG

glg Global Legal Group

Expert Analysis Chapters

Q&A Chapters

Q&A Chapters Continued

iclg

Netherlands


Gerrit Oosterhuis


Jori de Goffau


Yvo de Vries

Houthoff

1 Foreign Investment Policy

1.1 What is the national policy with regard to the review of foreign investments (including transactions) on national security and public order grounds?

The Netherlands remains one of the world's most attractive destinations for Foreign Direct Investments ("**FDI**"). It offers foreign investors a stable political climate, a developed economy, a highly qualified labour force, transparent tax guidance and an excellent communications infrastructure. Foreign investments are welcomed across industries, including in the extensively privatised utilities sector. Investors are actively supported by the Netherlands Foreign Investment Agency ("**NFIA**").

At the same time, the Netherlands is intensifying its review of FDI inflows. This is mainly caused by the strong rise of Chinese investments in the Netherlands and Europe in general over the past decade. The COVID-19 pandemic has added urgency: in April 2020, the government announced the introduction of general FDI screening, which has resulted in the entry into force of the Vivo Act (*Wet veiligheidstoets investeringen, fusies en overnames*) introducing screening for all acquisitions and investments in sectors that are considered vital for national security and public policy on 1 June 2023 ("**Vifo Act**").

In general, Parliament has shown a bit more hostility to foreign investment in sensitive sectors than the government.

1.2 Are there any particular strategic considerations that the State will apply during foreign investment reviews? Is there any law or guidance in place that explains the concept of national security and public order?

Acquisitions and attempts at acquisitions in the recent past have shown that, even though the Netherlands is in general very welcoming to FDI, acquisitions of companies that are considered crown jewels of the Dutch economy may meet political resistance.

There is no specific guidance in place that explains the concept of national security and public order. National security is defined in the Vifo Act with reference to the concept of national security under the Treaty on the European Union and the concept of public security and essential interest of its security under the Treaty on the Functioning of the European Union. In particular, it concerns the continuity of critical processes, maintaining the integrity and information of critical or strategic importance for the Netherlands, and preventing unwanted strategic dependence on other countries.

The Dutch Investment Review Agency (*Bureau Toetsing Investeringen*, the "**BTI**") has informally stressed that even in case of states with a different geopolitical agenda, it will not necessarily seek to block investments: it will try to craft remedies to allow as many investments as possible. However, the BTI will be particularly careful in case the targeted business is a crucial building block in a particular Dutch industrial eco-structure.

1.3 Are there any current proposals to change the foreign investment review policy or the current laws?

The Dutch Minister of Defence has published a bill regarding the resilience of the Dutch defence technological and industrial sector. The bill will introduce a sector-specific test, which will also entail *ex ante* screening, to complement the Vifo Act. The scope of the current version of the bill encompasses target companies active with specific military items and target companies that are substantial suppliers to the Dutch defence forces. The bill was open for consultation until 1 September 2024.

In February 2024, a motion was passed in Dutch Parliament, designating the vegetable and seed improvement sector as a sensitive technology under the Vifo Act, as protecting these companies is of vital importance for national security. As it was passed unanimously, we expect the government to co-operate with this motion.

2 Law and Scope of Application

2.1 What laws apply to the control of foreign investments (including transactions) on grounds of national security and public order? Does the law also extend to domestic-to-domestic transactions? Are there any notable developments in the last year?

Incoming FDI is controlled in the electricity, gas and telecommunications sectors, through sector-specific provisions in the Mining Act (*Mijnbouwwet*), the Electricity Act (*Elektriciteitswet*), the Gas Act (*Gaswet*), the implementing Regulation for notification of changes of control of the Electricity Act 1998 and the Gas Act (*Regeling melding wijziging zeggenschap Elektriciteitswet 1998 en Gaswet*), and finally the Telecommunications Act (*Telecommunicatiewet*).

The Vifo Act introduces a general FDI screening mechanism that applies to all sectors that are not covered by the

sector-specific screening mechanism. The Vifo Act entered into force, together with the Decree on the scope of application of sensitive technology (*Besluit toepassingsbereik sensitieve technologie*), as well as the Decree on the security test for investments, mergers and acquisitions (*Besluit veiligheidstoets Investeringen, fusies en overnames*) on 1 June 2023. The Decrees contain (i) rules on the scope of application of sensitive technologies, and (ii) further technical rules. The Decree on the scope of application of sensitive technology delineates the scope of the sensitive technologies category and provides that a filing obligation for minority shareholdings will only apply to the newly created category of "highly sensitive" technologies. The Decree on the security test for investments, mergers and acquisitions provides further technical rules elaborating on several technical aspects that are necessary to implement the Vifo Act and what information must be included in the filing under the Vifo Act.

Notification obligations apply irrespective of the nationality of the investor, so both to foreign-to-domestic and to domestic-to-domestic transactions. The nationality of the buyer will only play a role in the material assessment of an investment.

The most important development of 2024 as regards applicable law was the publication of several guidelines clarifying the interpretation of the Vifo Act by the Ministry of Economic Affairs and Climate and the BTI. The guidelines address (a) internal restructurings,[1] (b) acquisition of assets,[2] and (c) the scope of the concept of "active with" sensitive technologies.[3] In addition, the Ministry published policy rules specifying which types of business campus management activities are in scope of the Vifo Act.

2.2 What kinds of foreign investments, foreign investors and transactions are caught? Is the acquisition of minority interests caught? Is internal re-organisation within a corporate group covered? Does the law extend to asset purchases?

Vifo Act

The Vifo Act applies to investments in companies established in the Netherlands when the company is (i) involved in vital processes, (ii) active with sensitive technologies, or (iii) a manager of a business campus.

The Vifo Act catches all mergers and demergers, acquisitions and other investments that result in (a) a change of control over a relevant company, (b) the acquisition of a relevant company, or (c) in case of highly sensitive technologies, an acquisition or increase of significant influence over a relevant company. Asset purchases are also captured if those assets are essential for the company to function as a vital provider or as a sensitive technology enterprise, or if the acquisition of the assets implies the acquisition of significant activities in the Netherlands. An internal re-organisation within a corporate group is captured when the above conditions are met. The BTI has clarified that only the situation where the ultimate ownership of a business remains the same at all times throughout the reorganisation process will be considered an internal re-organisation. Cases where a third party temporarily obtains significant influence or control – even if only very briefly – must be notified to the BTI.

The Vifo Act aims to complement sectoral screening mechanisms (see below) as it applies to any investment that is not caught by specific sectoral review mechanisms.

Telecommunications sector

Sector-specific screening applies to telecommunications companies, which are defined as branch offices, legal entities or any other type of company established in the Netherlands, active as a provider or holder of a controlling interest in a provider of an electronic communications network or a hosting service, internet node, trust service or data centre that exceeds certain thresholds. An investor is deemed to have a controlling interest in the telecommunications company if it:

(i) either directly or indirectly, individually or jointly with other persons, holds at least 30% of the votes in its general meeting;
(ii) has the right to appoint or dismiss more than half of the members of its management or supervisory boards even if all persons entitled to vote cast their votes;
(iii) holds one or more shares granting special rights of statutory control;
(iv) holds a branch office that is a telecommunications operator;
(v) is liable as a partner (*vennoot*) for debts of the company acting under its own name; or
(vi) is the owner of a sole proprietorship.

The law does not capture asset purchases.

Gas and electricity sector

The privatisation of Dutch companies responsible for the national high-voltage grid and the national transmission network is prohibited. Under the Electricity Act, notice must be given to the Minister of all transactions resulting in a change of control of an electricity production plant with a capacity of at least 250 megawatts. The same type of notification obligation is provided for in the Gas Act in relation to a change of control over Liquefied Natural Gas ("**LNG**") plants. For the definition of change of control, reference is made to the Competition Act, from which follows that (a) control can be acquired by the acquisition of shares or assets, and (b) that minority shares can give rise to a duty to notify, but only if they give control as defined in the Competition Act.

Mining sector

The Mining Act (*Mijnbouwwet*) provides that the Dutch state will be entitled to 40% of the proceeds of any mining concession, possibly through a 40% stake in the relevant entity. Greenfield investments and transfer of permits under the Mining Act will be assessed under a separate procedure relating to obtaining (or keeping) a permit under the Mining Act.

2.3 What are the sectors and activities that are particularly under scrutiny? Are there any sector-specific review mechanisms in place?

For the sector-specific provisions, please refer to question 2.2.

The Vifo Act covers investments in undertakings (i) involved in vital processes, or (ii) active with sensitive technologies, and (iii) managers of business campuses.

Vital functions and processes

The Vifo Act and its explanatory memorandum specifically mention what functions and processes are considered vital and give examples of companies that are relevant, namely heating network operators, activities in relation to storage, production and processing of nuclear materials, KLM, Schiphol Airport (including all activities related to air traffic management, passenger and luggage handling), the Rotterdam Port

Authority, banks, financial market infrastructure and companies active with natural gas exploration, transport and storage. In addition, whilst not explicitly mentioned in the Vifo Act, but rather in its explanatory memorandum, water management (drinking water and the management of water (resources)) is also considered a vital process. Additional vital processes can be added; however, any addition must be confirmed by an order in council followed by a formal law. The Minister informed Parliament that the possibility of including businesses in the agricultural sector as vital suppliers will be considered. Other current candidates are companies that are active with road and rail transport infrastructure.

Business campus

Before the Dutch Parliament passed the Vifo Act, a last-minute amendment was incorporated that adds "managers of business campuses" as a category of vital suppliers under the Vifo Act. A business campus is defined as an area with public–private partnerships for working on technologies and applications that are of economic and strategic importance to the Netherlands. The amendment was made as a result of the public debate surrounding the acquisition of High-Tech Campus Eindhoven by GIC, a Singaporean investment fund. In 2024, policy rules were published enabling a more detailed assessment of which campus management activities are in scope. Particularly relevant are managers that can decide on access to facilities and knowledge, clearances and managing the exchange of knowledge between parties active on the campus. A campus is in scope if it hosts at least one party that is active with sensitive technology.

Sensitive technologies

Regarding sensitive technologies, the Vifo Act confirms that military and dual-use technologies as defined in the EU Dual-Use Regulation (EU 2021/821) and the EU Military Goods List (2020/C 85/01) are caught. The Decree on the scope of application of sensitive technology (please refer to question 2.1) specifies and expands the scope of the sensitive technologies category. It adds the following technologies: quantum mechanics; semi-conductor technologies (including know-how regarding production, industrial production machines and design software); high-assurance technologies; and photonics. In addition, the decree excludes a small number of technologies and dual-use items from the scope of the Vifo Act, even if they are included in the EU Dual-Use Regulation. It concerns products that are widely available, such as certain graphite and ceramic materials and certain composite structures and laminates.

Finally, the decree defines a category of "highly sensitive" technologies, comprising the newly added areas of semiconductors, quantum mechanics, high-assurance identification and photonics, as well as some of the technologies already covered by the Dual-Use Regulation and the Military Goods List. See question 3.1 for the lower notification threshold that applies to this category.

2.4 Are terms such as 'foreign investor' and 'foreign investment' defined in the law?

The terms foreign investor and foreign investment are not defined in the Vifo Act. Such definitions are not necessary, as the Vifo Act catches all mergers and demergers, acquisitions, and other investments, whether by foreign or domestic investors, that result in (a) a change of control over a relevant company, (b) the acquisition of a relevant company, or (c) – only in case of very sensitive technologies – the acquisition or increase of significant influence over a relevant company.

2.5 Are there specific rules for certain foreign investors (e.g. non-EU/non-WTO), including state-owned enterprises (SOEs)?

At the moment, there are no special rules for SOEs or other foreign investors. The Vifo Act explicitly captures both foreign and domestic investors. Under the Telecommunications Act and the Vifo Act, the fact that a company is an SOE is one of the factors that may imply a threat to national security and is considered in the FDI review.

2.6 Is there a local nexus requirement for an acquisition or investment? If so, what is the nature of such requirement (sales, existence of subsidiaries, assets, etc.)?

All sector-specific regulations, by their very nature, require a local nexus. Under the Vifo Act, relevant companies are target companies that are established in the Netherlands. The explanatory memorandum to the Vifo Act clarifies and expands the scope of the targets that the Vifo Act captures. It stipulates that the place of establishment should not be interpreted formally as a statutory requirement, but this criterion rather aims to capture entities that conduct actual economic activities in the Netherlands. The place of establishment should be based on the geographical location of the activities and management, irrespective of its legal form. Hence, the Vifo Act will apply even if no Dutch legal entity is acquired, as long as the acquisition results in control or relevant influence over significant in-scope activities or assets.

In relation to the nature of such local nexus, the BTI made some very relevant clarifications in its recent guidance documents. The BTI does not consider the following types of activities as being "active" with sensitive technologies: (a) in relation to military and dual-use items (hence excluding very sensitive technology), the supply or production of semi-finished products that do not themselves qualify as a military or dual-use; and (b) in relation to all (very) sensitive technology, end-users, retailers, importers, exporters, middlemen and wholesalers that do not have production facilities, know-how or (IP)-rights required to make improvements, adaptations or changes to such sensitive technology. The only exception to this category is end-users of High Assurance Products. Research institutions such as universities, academic hospitals and others in principle do not fall within scope if such institution is active with very high-level background research (for example Technology Readiness Level ("**TRL**") 1). On the other hand, research and development activities may be in scope if they are close to commercialisation (for example TRL 9).

2.7 In cases where local presence is required to trigger the review, are outward investments and/or indirect acquisitions of local subsidiaries and/or other assets also caught (e.g. where a parent company outside of the jurisdiction is acquired which has a local subsidiary in the jurisdiction)?

Both direct and indirect acquisitions are caught if the requisite degree of control or significant influence over relevant activities located in the Netherlands is acquired. Outward investments (i.e. with no Dutch local nexus) are not captured by the regime.

3 Jurisdiction and Procedure

3.1 What conditions must be met for the law to apply? Are there any financial or market share-based thresholds?

The Vifo Act applies to all mergers and demergers, acquisitions, and other investments, whether by foreign or domestic investors, that result in a change of control of any company established in the Netherlands which is (i) deemed essential for the continuity and resilience of vital processes, (ii) active in the field of sensitive technology, or (iii) the manager of a business campus.

Change of control mirrors the definition of control used in EU and Dutch competition law.

In addition, any investment leading to the acquisition or increase of significant influence over companies based in the Netherlands active in the field of "highly" sensitive technology is captured by the Vifo Act.

Acquiring or increasing significant influence occurs where one person or entity may cast at least 10%, 20% or 25% of the votes in the target's shareholders meeting or gains the power to appoint or dismiss directors.

There are no financial or market share-based thresholds.

3.2 Do the relevant authorities have discretion to review transactions that do not meet the prescribed thresholds?

No, although the relevant authorities have the possibility under the Vifo Act to alter the significant influence thresholds, the designation of categories of vital companies, and sensitive technologies by a ministerial decree. Alterations to the designation of categories of vital companies must subsequently be enacted by a formal law.

In practice, the BTI tends to call-in transactions where there is uncertainty whether the thresholds are met and in many occasions the easiest way forward for parties is to co-operate and notify. In April 2024, the Court of Rotterdam ruled against the BTI in a case where the BTI had required the parties to notify while it had not established a change of control. The court ruled for the claimant, finding that the BTI cannot rely solely on reasonable suspicions to require a notification. It must also establish that there has been a change in control within the meaning of the Vifo Act.

3.3 Is there a mandatory notification requirement? Is it possible to make a notification voluntarily? Are there specific notification forms? Are there any filing fees?

If the transaction is in scope of the Vifo Act or the sector-specific regimes, notification is mandatory. A notification under the Telecommunications Act and the Vifo Act shall be submitted using a prescribed notification form and must be accompanied by the information and documents specified therein (see question 3.7). There is no specific notification form for notifications under the Electricity Act and the Gas Act. However, the information that a notification shall contain is specified and should be submitted insofar as available at the time of notification.

Filings under sector-specific regimes are mandatory and no filing fees are due. Similarly, filings under the Vifo Act are mandatory and not subject to a filing fee.

The legislation does not formally foresee the possibility of voluntary filings, although in practice the BTI is quite willing to receive voluntary filings.

3.4 Is there a 'standstill' provision, prohibiting implementation pending clearance by the authorities? What are the sanctions for breach of the standstill provision? Has this provision been enforced to date?

Under the Vifo Act, there is a standstill provision that prohibits the execution of a notifiable transaction before the Minister (a) has indicated that no review decision is required, or (b) approves the transaction. The Minister may grant an exemption from the standstill obligation after the party obliged to notify has notified the transaction or the intention to carry out the acquisition activity. Failure to comply with the standstill provision may result in a fine of up to EUR 900,000 or up to 10% of the parties' turnover.

There is no standstill provision in place in the sector-specific regulations (i.e. the Gas Act, Electricity Act and Telecommunications Act); however, under the Telecommunications Act, a notification must be made at least eight weeks prior to closing. However, there remains the risk that the transaction must be reversed if the Minister prohibits the notifiable transaction.

3.5 In the case of transactions, who is responsible for obtaining the necessary approval?

Under the Gas Act and the Electricity Act, both the investor and the seller are responsible for notifying the transaction. Under the Telecommunications Act, only the party acquiring relevant influence in the telecommunications sector is responsible for the notification.

Under the Vifo Act, both the investor and the target company are responsible for the notification of the transaction. The investor, however, cannot be held responsible for a failure to notify the transaction where it could not have known that a notification was required (for example, as a result of confidentiality constraints on the target company). In such cases, only the target company is responsible for the notification of the transaction.

3.6 Can the parties to the transaction engage in advance consultations with the authorities and ask for formal or informal guidance (e.g. whether a mandatory notification is required, or whether the authority would object to the transaction)?

Informal guidance is not explicitly provided for under the Gas Act, Electricity Act and Telecommunications Act; however, Dutch authorities are usually willing to speak with companies informally. It is possible to discuss a case, regardless of the general or sector-specific regime, in advance with the BTI on an informal basis. It is not expected that the authorities will provide their objections to any transaction upfront.

Under the Vifo Act, the BTI will provide further guidance on the scope of the Vifo Act as soon as possible. Where appropriate, information on the scope of the Vifo Act will be provided in a manual. As explained in question 2.1, the BTI has so far published three such guidance documents.

3.7 What type of information do parties to a transaction have to provide as part of their notification?

According to the Regulation for notification of changes of control of the Electricity Act 1998 and the Gas Act, a notification must contain information covering:

(i) the installations and relevant parties involved;
(ii) the intended change in control;
(iii) the financial position; and
(iv) the strategy intentions and past performance.

Under the Telecommunications Act, the party acquiring relevant influence in the telecommunications sector only needs to notify the BTI of the intention to acquire a controlling interest in a telecommunications company. A notification must contain information covering:

(i) information on the parties (i.e. investor and target) and their representatives;
(ii) a description of the business activities of the parties including information regarding its telecommunications services and networks and the jurisdiction of the activities;
(iii) information on the proposed acquisition of control, including the participating interests of the shareholders, the control structure after the acquisition, the transaction value, the financial institutions involved in the transaction and the economic motives of the transactions; and
(iv) all relevant facts and circumstances that may have a role in the assessment of the transactions, such as ties with foreign governments, financial, fiscal and criminal information as well as information of other authorities (including foreign) on the investor and target.

The Decree on the security test for investments, mergers and acquisitions (please refer to question 2.1) specifies that the following information must be included in the notification:

(a) information on the notifying parties and their representatives;
(b) information regarding the proposed acquisition, increase or acquisition of significant influence or change of control;
(c) information on the ownership structure and ownership relations of the notifying parties;
(d) information on the products and services that the notifying parties offer;
(e) the country in which the head office of the acquirer is situated;
(f) an overview of the legal entities, legal forms and statutory seat of the legal entities of the acquirer; and
(g) other information necessary for the assessment referred to in section 3.5 of the Vifo Act (i.e. the assessment of the risks, please refer to question 4.3).

3.8 What are the risks of not notifying? Are there any sanctions for not notifying (fines, criminal liability, invalidity or unwinding of the transaction, etc.) and what is the current practice of the authorities?

An unnotified transaction under the Gas Act or the Electricity Act will be null and void.

Under the Telecommunications Act, the BTI may impose a fine of up to EUR 900,000 where there was a late notification or a failure to notify the transaction. If the acquisition of a controlling interest poses a threat to public interest, the BTI may either completely prohibit the transaction or prohibit it under suspensive conditions.

Under the Vifo Act, if a transaction is implemented before the assessment by the BTI has taken place, a fine of up to EUR 900,000 or 10% of the turnover in the calendar year preceding the infringement of the companies involved may be imposed.

Alternatively, if a transaction is within the scope of the Vifo Act, but has not been notified, the BTI may undertake an assessment *ex officio*. The BTI shall have the right to order the parties to submit a (new) filing within three months after it has become aware that a transaction should have been notified, or that incomplete or incorrect information has been provided in the notification.

A transaction executed despite the BTI's decision to prohibit the transaction is void. In the event that the prohibited acquisition took place through a stock exchange, it is subject to annulment. Under these circumstances, the BTI may also impose a fine of up to EUR 900,000 or 10% of the turnover of the companies involved in the year preceding the infringement.

3.9 Is there a filing deadline, and what is the timeframe of review in order to obtain approval? Is there a two-stage investigation process for clearance? On what basis will the authorities open a second-stage investigation?

Under the Telecommunications Act, the BTI must decide within eight weeks after receiving the notification whether to approve, prohibit or refer the transaction for an in-depth investigation. If no decision is made before the deadline, approval is deemed granted. If further investigation is required, the BTI may extend the deadline by up to six months. If the BTI requests additional information, the total timeframe is suspended until this information is received.

Under the Electricity Act and the Gas Act, the notification must be made ultimately four months prior to the date of expected change in control. There is no statutory deadline within which the BTI must decide on the notification.

The Vifo Act notification procedure to the BTI is a two-phase system:

(i) Phase I runs from the day the investor submits the notification. A (first) decision should be taken within eight weeks, but this period can be extended by six months. Phase I ends with an announcement by the BTI, either that no review is necessary or – in case the investment may pose a risk to national security – that an evaluation decision is required.
(ii) Phase II runs when the investor submits a request for an evaluation decision. The decision period in Phase II is another eight weeks and can also be extended up to six months, although the time used by the BTI in Phase I will be deducted from Phase II, with the total extension not exceeding six months.

As is the case with notifications under the Telecommunications Act, the total timeframe is suspended if the BTI requests additional information.

Finally, an additional three-month extension period may be added if the notification must be shared with the European Commission and other Member States under the EU FDI Regulation.

3.10 Can expedition of review be requested and on what basis? How often has expedition been granted?

There is no legal provision that allows parties to request an expedited review, nor is it likely that an (informal) request will be honoured.

3.11 Can third parties be involved in the review process? If so, what are the requirements, and do they have any particular rights during the procedure?

Third parties are not involved in the review process and do not have any formal participation rights.

3.12 What publicity is given to the process and how is commercial information, including business secrets, protected from disclosure?

According to the Telecommunications Act (Article 14a.4 sub 7), a prohibition shall be communicated to the party to which the prohibition is addressed and to the party concerned. In addition, all prohibitions will be published on the internet by the BTI. There is no similar provision in the Gas Act and Electricity Act.

Decisions under the Vifo Act may potentially be published following the granting of a request made in terms of the Government Information (Public Access) Act.

If decisions contain confidential information, that should not be made public, parties have the opportunity to indicate this to the BTI and the reason why it should not be made public (e.g. confidential business or manufacturing data) in case a request is made under the Government Information (Public Access) Act. Based on the limited information available at this point in time, approval decisions do not contain any (or very little) insight into the BTI's analysis.

3.13 Are there any other administrative approvals required (cross-sector or sector-specific) for foreign investments?

There are no other administrative reviews in the Netherlands specifically aimed at foreign investments. Transactions may also fall under the competition law merger control review. In addition, an overlap may exist with application of the EU Regulation on Foreign Subsidies.

4 Substantive Assessment

4.1 Which authorities are responsible for conducting the review?

The Minister of Economic Affairs and Climate Policy issues the decisions under the Electricity Act, the Gas Act, the Telecommunications Act and the Vifo Act. The department that is set up to actually perform these reviews is the BTI.

4.2 What is the applicable test and what is the burden of proof and who bears it?

Under the Gas Act and Electricity Act, the BTI may prohibit an envisaged transaction or impose conditions on grounds of public safety or security of supply and therefore bears the burden of proof. Under the Telecommunications Act, the BTI can prohibit an envisaged transaction if it poses a threat to the public interest. This would be the case notably if wilful termination of the relevant services by the acquirer would cause a breach of the confidentiality of communications, an unacceptable interruption of online services to the public in general, or to defence and security services in particular.

Under the Vifo Act, the BTI will assess whether an investment poses a risk to national security and the BTI therefore bears the burden of proof. National security is defined with reference to the concept of national security under the Treaty on the European Union and the concept of public security and essential interest of its security under the Treaty on the Functioning of the European Union. In particular, it is concerned with the continuity of critical processes, maintaining the integrity and information of critical or strategic importance for the Netherlands, preventing unwanted strategic dependence on other countries.

Companies are expected to cooperate with the authorities and provide sufficient information to enable the BTI to carry out its assessment. The degree to which the investor cooperates with the authorities will be a factor in the assessment.

4.3 What are the main evaluation criteria and are there any guidelines available? Do the authorities publish decisions of approval or prohibition?

The BTI will consider the following main criteria when evaluating whether an investment poses a risk to national security:

- the investor's ownership structure;
- the degree of transparency regarding the investor's identity;
- whether the investor has committed crimes;
- ties to governments that have other geopolitical agenda's than the Netherlands and its allies;
- restrictions under national and international law; and
- the security situation in the acquirer's country or region of residence.

Other assessment criteria are specific to the investment, such as the exploitation track record in the case of the acquisition of vital infrastructure, and the track record of the acquirer on information security in case of an investment in sensitive technology.

Under the Telecommunications Act, all prohibitions will be published. There is no similar provision in the Gas Act and Electricity Act. Decisions under the Vifo Act may potentially be published following the granting of a request made in terms of the Government Information (Public Access) Act. All prohibition decisions will be published. Based on the limited information available at the time of writing, approval decisions do not contain any (or very little) insight into the BTI's analysis.

4.4 In their assessment, do the authorities also take into account activities of foreign (non-local) subsidiaries in their jurisdiction?

Activities of foreign subsidiaries may be considered in the review process, for instance, when assessing whether an envisaged transaction poses a threat to the public interest.

Under the Electricity Act and the Gas Act, the parties must provide information about the past performance of the acquirer in the electricity or gas industries. Other subsidiaries, including non-local subsidiaries, could be relevant in this information.

4.5 How much discretion and what powers do the authorities have to approve or reject transactions on national security and public order grounds? Can the authorities impose conditions on approval?

The BTI has considerable leeway to assess national security

risks based on one or more criteria as provided in the Vifo Act (see question 4.3).

Under the Telecommunications Act, the BTI has broad powers to prohibit the acquisition of a controlling interest in a telecommunications company if it finds facts or circumstances indicating a public interest threat (see question 4.2).

If the BTI considers a prohibition, the parties may offer remedies to remove the objections of the BTI. These remedies can be included as conditions in the clearance decision of the BTI.

Under the Gas Act and Electricity Act, the BTI may impose conditions on grounds of public safety or security of supply (see question 4.2).

4.6 Is it possible to address the authorities' objections to a transaction by the parties providing remedies, such as by way of a mitigation agreement, other undertakings or arrangements? Are such settlement arrangements made public?

The BTI's objections may be addressed by offering remedies. In fact, a transaction will only be prohibited if the risks identified cannot sufficiently be resolved by remedies.

Possible remedies include:

- regulating access to sensitive information;
- appointing employees in key positions according to security or integrity policies;
- appointing a security officer or committee with the authority to block access and report back to the BTI;
- bundling the sensitive activities in a Dutch entity;
- offering certain services and goods with limitations;
- appointing a separate supervisory board for the Dutch entity; and/or
- maximising the amount of shares that may be acquired or the obligation to certify the shares.

The Vifo Act also provides specific remedies for the acquisition of sensitive technology. Those include the obligation to transfer to or share certain technology, source code, genetic code, or knowledge with a third party or the Dutch state as well as the duty to notify the BTI before activities are transferred to third countries – after which the Dutch state may decide to acquire the technology or require licensing on fair, reasonable and non-discriminatory conditions.

The BTI may appoint a third party to monitor compliance with any remedies. Based on the limited information available at the time of writing, approval decisions do not contain any (or very little) insight into the BTI's analysis.

4.7 Can a decision be challenged or appealed, including by third parties? On what basis can it be challenged? Is the relevant procedure administrative or judicial in character?

A decision prohibiting the acquisition of a controlling interest under the Telecommunications Act, the Gas Act or the Electricity Act is open to administrative objection and appeal that can then be challenged in court under the Dutch General Administrative Law Act. Under the Telecommunications Act, if the BTI intends to impose a prohibition, it must ask the telecommunications party for its views on the intended decision. Also, in the Gas and Electricity domain, the BTI will usually give companies the opportunity to give their views on the proposed prohibition.

A decision under the Vifo Act is a decision under the Dutch General Administrative Law Act and is open to reconsideration by the BTI (administrative objection), followed by appeal proceedings at the Rotterdam District Court and the Trade and Industry Appeals Tribunal ("**CBb**"). This process is also open to third parties, individually and directly concerned by a decision under the Vifo Act.

During appeal proceedings, the administrative court will review the lawfulness of decisions (*ex tunc*) without performing its own investigation. The court will attach significance to the observance of the principles of due care and adequate reasoning in the decision-making process.

4.8 Are there any other relevant considerations? What is the recent enforcement practice of the authorities and have there been any significant cases? Are there any notable trends emerging in the enforcement of the FDI screening regime?

Due to the novelty of the FDI screening procedures, the BTI has not yet developed an extensive enforcement practice. Nevertheless, during the first year of enforcement, the BTI showed a pragmatic and reasonable approach. This is in line with expectations, as the Explanatory Memorandum to the Vifo Act states that the Netherlands wishes to continue to attract FDI.

So far, the BTI seems critical of influence by investors from the usual suspects of the various European investment screening regimes, Russia, China and some Middle Eastern countries. The BTI is particularly thorough when examining influence of actors indirectly through investment funds. Fund managers investing in relevant sectors in the Netherlands should prepare the donors of their funds that they may not remain incognito.

The BTI also has a clear preference that parties perform a precautionary notification, even when it is not clear that the thresholds are met. As set out above, the Court of Rotterdam has recently ruled against this practice.

The BTI has made use of its powers to call in retroactively transactions that were closed in the period from 8 September 2020 until the entry into force of the Vifo Act. The number of such cases seems quite low, probably not more than 10. The power to call-in transactions retroactively had a limited duration, namely eight months from the entry into force of the Vifo Act on 1 June 2023. This power has therefore lapsed on 1 February 2024.

Finally, it seems that the BTI acts independently from the political debate so far. Public sources do not show any BTI prohibition that has become *res judicata*.

Endnotes

1 *Handleiding toepassing Hoofdstuk 2 Wet vifo – "interne herstructureringen"*, December 2023, (https://www.bureautoetsinginvesteringen.nl/binaries/bureautoetsinginvesteringen/documenten/publicaties/2023/12/13/handleidingen/Interne+herstructureringen.pdf) (only in Dutch).

2 *Handleiding toepassing Hoofdstuk 2 Wet vifo – "vermogensbestanddelen"*, December 2023, (https://www.bureautoetsinginvesteringen.nl/binaries/bureautoetsinginvesteringen/documenten/publicaties/2023/12/13/handleidingen/Vermogensbestanddelen.pdf) (only in Dutch).

3 *Handleiding toepassing Hoofdstuk 2 Wet vifo – "actief zijn op"*, December 2023, (https://www.bureautoetsinginvesteringen.nl/binaries/bureautoetsinginvesteringen/documenten/publicaties/2023/12/13/handleidingen/Actief+zijn+op.pdf) (only in Dutch).

Gerrit Oosterhuis advises on Dutch and EU competition law as well as FDI regimes. He heads the Brussels office of Houthoff. His practice focuses on merger notifications and encompasses cartel investigation and stand-alone competition litigation. He also advises on complex distribution practices, joint ventures and cases concerning abuse of dominance.
Gerrit represents clients from a wide range of sectors, including many from the food, consumer products, energy and automotive sectors. Gerrit has considerable experience with notifications of complex transactions to the competition authorities and the authorities in charge of the screening of foreign investments, as well as with the coordination of such notifications in multiple jurisdictions. He enjoys being hands-on and providing practical, pragmatic solutions.

Houthoff
Bischoffsheimlaan 15 Box 8.1
1000 Brussels
Belgium

Tel: +32 2 507 98 13
Email: g.oosterhuis@houthoff.com
LinkedIn: www.linkedin.com/in/gerrit-oosterhuis-a585294

Jori de Goffau is a senior associate with Houthoff. Jori assists in cross-border cartel, abuse of dominance, FDI and regulatory cases in a wide array of sectors. These sectors include media and telecommunications, public transportation, technology (offshore, semiconductors) and agriculture. He has a practical and hands-on approach and enjoys providing clients with optimal solutions and strategies. Jori assists in transactions, and internal company and public authority investigations. Moreover, he assists in civil stand-alone and administrative procedures. In relation to merger control and FDI, he has considerable experience in handling cross-border transactions in various industries and jurisdictions.
In 2020, Jori was seconded to the Netherlands Authority for Consumers and Markets (ACM). He is a member of various associations, including the Dutch Competition Law Association (VvM) and the Dutch FDI Association (VVI). Jori publishes regularly on Dutch and EU competition law.

Houthoff
Gustav Mahlerplein 50
1082 MA Amsterdam
Netherlands

Tel: +31 20 605 69 74
Email: j.de.goffau@houthoff.com
LinkedIn: www.linkedin.com/in/joridegoffau

Yvo de Vries specialises in competition law and EU law. Yvo focuses, in particular, on merger control notifications with the EU Commission and the Netherlands Authority for Consumers and Markets, and FDI matters. He is experienced in cartel investigations and EU antifraud investigations, and also advises on EU regulatory law matters.
Both in private practice and his past career as a government agent before the European Court of Justice, Yvo has extensively litigated various competition and other EU law disputes (including State aid and subsidy matters) before the EU courts. He also worked in-house at Philips International, advising on cartel cases, and on competition law and compliance issues.

Houthoff
Gustav Mahlerplein 50
1082 MA Amsterdam
Netherlands

Tel +31 20 605 60 27
Email: y.de.vries@houthoff.com
LinkedIn: www.linkedin.com/in/yvo-de-vries

Houthoff is a leading independent Dutch law firm, with offices in Amsterdam, Brussels, London, Rotterdam and New York, as well as representatives in Houston, Shanghai, Singapore and Tokyo. We have over 300 lawyers, civil law notaries and tax lawyers, who work collaboratively to ensure we are there for our clients when they need us most.
We focus on highly complex transactions and dispute resolution. We always look beyond today and find the long-term solution.
We are consistently listed as a top-tier firm by international legal directories, including *Chambers and Partners*, *The Legal 500* and *IFLR1000*.
Houthoff's EU & Competition Team assists companies, institutions and governments in procedures before the Dutch government, the Netherlands Authority for Consumers and Markets, the European Commission, foreign authorities and the relevant courts. Our expertise includes merger control and FDI screening procedures, State aid, and investigations into cartels or abuse of dominance.

www.houthoff.com

HOUTHOFF

iclg International Comparative Legal Guides

The **International Comparative Legal Guides** (ICLG) series brings key cross-border insights to legal practitioners worldwide, covering 58 practice areas.

Foreign Direct Investment Regimes 2025 features two expert analysis chapters and 30 Q&A jurisdiction chapters covering key issues, including:

- Foreign Investment Policy
- Law and Scope of Application
- Jurisdiction and Procedure
- Substantive Assessment

The International Comparative Legal Guides are published by: glg Global Legal Group