

Dutch Foreign Direct Investment Screening Regime Enters Into Force

July 4, 2023

On June 1, 2023, the Dutch foreign direct investment (“FDI”) screening regime entered into force, introducing a mandatory and suspensory screening regime for direct and indirect investments in companies in the Netherlands by European (including Dutch) and non-European investors.

The regime is governed by the Act on Security Screening of Investments, Mergers and Acquisitions (*Wet veiligheidstoets Investerings, fusies en overnames* or “Vifo Act”)¹ and is enforced by the Bureau for Investment Screening (*Bureau Toetsing Investerings*) (“BTI”), which is part of the Ministry of Economic Affairs and Climate Policy.² It complements existing sector-specific FDI regimes in electricity, gas, and telecommunications, which will continue to apply.³

The Vifo Act has been a long time coming: after a public consultation in September 2020 and a legislative proposal in June, 2021, the Vifo Act was ultimately approved by the Senate on May 17, 2022. It subsequently took more than a year for the Vifo Act to enter into force.

The regime comes at a time of increased attention to national security risks pertaining to investments and export. A proposal for a defense-specific investment screening regime is expected later this year.⁴ And on June 30, 2023, the Government published a decree subjecting advanced production machinery for semi-conductors to export control.⁵ Per September 1, 2023, the export of such machinery will require a license.

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¹ Available in Dutch, at: <https://zoek.officielebekendmakingen.nl/stb-2022-215.html>.

² The formal decision-maker is the Minister of Economic Affairs and Climate Policy (the “Minister”).

³ Undesirable Control in Telecommunications Act (*Wet ongewenste zeggenschap telecommunicatie*), available in Dutch at: <https://zoek.officielebekendmakingen.nl/stb-2020-165.html>; Electricity Act 1998 (*Electriciteitswet 1998*), available in Dutch at: <https://wetten.overheid.nl/BWBR0009755/2022-10-01>; Gas Act (*Gaswet*), available in Dutch at: <https://wetten.overheid.nl/BWBR0011440/2022-10-01>. Vifo Act, Article 5, 1(b).

⁴ Response by the Minister of Defense of March 21, 2023 to House of Representatives questions, *Tweede Kamer, vergaderjaar 2022-2023, Aanhangsel 1947 (response to question 10)*.

⁵ *Regeling geavanceerde productieapparatuur voor halfgeleiders*. Available in Dutch, at: <https://zoek.officielebekendmakingen.nl/stb-2023-172.html>.
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Scope

The Vifo Act applies to direct or indirect⁶ investments in companies established in the Netherlands that provide a vital service, manage/operate a business campus, or are active in (highly) sensitive technology:

- **Vital services** are services, the continuity of which is vital to Dutch society.⁷ Vital services include: (i) heat networks; (ii) nuclear energy; (iii) energy extraction; (iv) gas storage; (v) air transport (including Schiphol airport, ground-handling services, and KLM); (vi) activities related to the Rotterdam Port, (vii) banks with registered offices in the Netherlands; and (viii) certain financial market infrastructure providers, such as trading platforms. Additional services may be designated as “vital” by decree.⁸
- **A business campus** constitutes an area on which different companies are active and where there is public-private cooperation on technologies and applications that are of economic and strategic importance to the Netherlands,⁹ such as the High Tech Campus Eindhoven.
- **Sensitive technology** includes dual-use goods that require an export authorization under EU Regulation 2021/821 and military goods included in the EU Common Military List.¹⁰ This list may be expanded or reduced by decree. The May 4, 2023 Decree on Sensitive Technology¹¹ excluded certain dual-use goods from FDI screening.¹²

Conversely, quantum technology, photonic technology, semiconductor technology, and high-assurance technology products were added as “sensitive technologies”. Together with certain additional dual-use and military goods,¹³ these four technologies were also designated as “highly sensitive technologies”. As discussed below, highly sensitive technologies are subject to a lower jurisdictional threshold.

The Vifo Act covers the following types of direct or indirect¹⁴ investments:

- **Acquisitions of control.** The Vifo Act generally applies to acquisitions of control of undertakings, including through mergers, joint ventures, acquisitions of assets or stock, and demergers. The concepts of “control” and “undertaking” are ultimately based on European competition law, meaning that the relevant criterion is whether a company acquires decisive influence over another company;
- **Lower threshold for investments in “highly sensitive technology”.** A notification is required if the acquirer obtains “significant influence” in a company active in highly sensitive technology, *i.e.*, where it (i) has at least 10% of voting rights at the target’s general meeting; or (ii) can appoint or dismiss one or more of the target’s board members (regardless of his or her participation in the share capital and voting rights).¹⁵ An increase of voting

⁶ The Vifo Act also applies to investments in target companies outside the Netherlands that have control over a company established in the Netherlands that is active in one of the qualifying activities of the Vifo Act (for highly sensitive technology the threshold is ‘significant influence’).

⁷ Vifo Act, Article 7.

⁸ This is the responsibility of the Minister.

⁹ Vifo Act, Article 1.

¹⁰ Vifo Act, Article 8(1).

¹¹ This decree specifies the scope of application of the Vifo Act for sensitive technology. *Besluit van 4 mei 2023 tot het nader bepalen van het toepassingsbereik van de Wet veiligheidstoets*

investeren, fusies en overnames op het gebied van sensitieve technologie or “Sensitive Technology Decree”. Available in Dutch, at: <https://zoek.officielebekendmakingen.nl/stb-2023-172.html>.

¹² These include composite structures and laminates, and explosive charges, devices and components. *See* Sensitive Technology Decree, Article 2.

¹³ Sensitive Technology Decree, Articles 3 and 4.

¹⁴ Vifo Act, Article 2.

¹⁵ Vifo Act, Article 4. This includes when the investor obtains or increases such rights by means of a shareholders agreement.

rights held to 20% and 25% will require a separate notification.

- **Country-neutral.** Both investments by EU (including Dutch) and non-EU investors are covered;
- **Investments in the Netherlands.** The Vifo Act applies to investments in targets established in the Netherlands, *i.e.*, that have their place of activity in and are effectively managed from the Netherlands, irrespective of the location of their statutory seat.¹⁶ This requires a careful case-by-case assessment; and
- **Temporal scope.** In principle, the Vifo Act applies to transactions that close after June 1, 2023. However, a transaction in vital services and sensitive technologies that closed after September 8, 2020, but before the entry into force of the Vifo Act, may be called in for mandatory notification if it raises national security concerns.¹⁷ The BTI may only use this option sparingly¹⁸ and only until the end of January 2024. It is said to be considering “*a handful of transactions*” for retroactive application.¹⁹ This likely includes the recent acquisition of Nowi, a Dutch microchip startup, by Chinese-owned semiconductor maker Nexperia.²⁰

¹⁶ Explanatory Memorandum accompanying the rules introducing a test concerning acquisition activities that may pose a risk to national security given their effect on vital providers or companies operating in the field of sensitive technology (“Explanatory Memorandum”), p. 128-129. Available in Dutch, at: <https://zoek.officielebekendmakingen.nl/kst-35880-3.html>. This is intended to capture situations where the incorporation of an undertaking abroad is a legal fiction (*e.g.*, the foreign seat only carries out administrative tasks and the actual decision making takes place in the Netherlands).

¹⁷ Vifo Act, Article 58. Business campuses and the (very) sensitive technologies designated in the Decree on Sensitive Technology are not subject to retroactive application of the Vifo Act.

¹⁸ Explanatory Memorandum, p. 126.

¹⁹ “Een vraaggesprek met Ivo Nobel over investeringstoetsing, het toetsingsbureau BTI, de

Notification

Reportable transactions are subject to a mandatory notification to the BTI. There is no filing deadline. The review has suspensory effect and transactions may only close following approval.

Both the acquirer and target have a duty to notify. In practice, however, it will often be the acquirer that takes charge of the notification with the target’s cooperation. The duty to notify falls solely on the target if the acquirer could not have known that the target is involved in areas that require notification due to the target’s confidentiality obligations.

Notifications are free of charge and follow a prescribed notification form that requires information regarding the proposed transaction, the companies involved and their ownership structure (including any state interest), as well as the acquirer’s national security track record (*e.g.*, whether the acquirer is subject to sanctions or has been implicated in crimes), and a list of acquisitions in the past five years.²¹

Failure to notify a transaction, closing before approval, or the provision of incorrect or misleading information may result in a fine of up to € 900,000 or 10% of the target or acquirer’s worldwide turnover.²² The BTI may also impose a periodic penalty payment to coerce parties to provide outstanding information or submit a

Wet Vifo en de WOZT,” Tijdschrift voor Mededingingsrecht in de Praktijk 2023/03, p. 27.

²⁰ Response by the Minister of Economic Affairs and Climate of December 23, 2022 to House of Representatives questions, *Tweede Kamer, vergaderjaar 2022-2023, Aanhangsel 1161 (response to questions 3-5)*.

²¹ The prescribed notification form is similar to a short form notification under the Dutch merger control regime. Regulation Security Screening of Investments, Mergers and Acquisitions, Annex 1. Available in Dutch, at: <https://wetten.overheid.nl/BWBR0048210/2023-06-01#Bijlage1>.

²² Vifo Act, Article 51. The provision of false information can also lead to criminal sanctions. The BTI may also suspend an acquirer from exercising its control rights. Vifo Act, Article 30.

filing. The head of the BTI has publicly stated that these rules will be strictly enforced.²³

Review process

The Vifo Act seeks to limit risks to national security stemming from acquisitions by state actors that can disrupt the continuity of vital processes, the integrity and exclusivity of knowledge and information that is of critical importance to the Netherlands, or create an undesirable strategic dependency of the Netherlands on other states.²⁴

For that purpose, the BTI will review the acquirer's ownership structure (including any foreign state interest), the security situation in its home jurisdiction, whether the acquirer is subject to sanctions or has been implicated in crimes, and the acquirer's cooperation, or lack thereof, during the review process.²⁵ The BTI will also assess other considerations depending on whether the transaction involves vital services (*e.g.*, whether the acquirer has a good track record managing the relevant vital process) or sensitive technology (*e.g.*, whether the acquirer's home jurisdiction has an export control regime).²⁶

The review process consists of two eight-week phases:

- In Phase 1, the BTI undertakes a risk assessment as to whether the investment gives rise to a risk to national security.²⁷ If no such risk is identified, the BTI will not require an in-depth review and the transaction is approved.

- If a risk to national security is deemed to arise, the BTI will inform the notifying parties, inviting them to submit a separate request for an assessment decision.²⁸ The submission of such a request triggers an in-depth Phase 2 review.

The review process can be extended by six months in total: an extension in Phase 1 is deducted from the extension available in Phase 2. The review is suspended if the BTI requests additional information. The review process can be further extended by up to three additional months under the EU foreign investment cooperation mechanism.²⁹

If, at the end of Phase 2, the BTI concludes that the transaction raises national security risks, it can impose remedies or prohibit the transaction. The Vifo Act provides a non-exhaustive list of potential remedies, including, *inter alia*, the imposition of additional security requirements regarding access to sensitive information and the transfer of those parts of the target that are part of vital processes to a separate Dutch subsidiary.³⁰ The BTI's decisions are subject to appeal.³¹

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²³ “Een vraaggesprek met Ivo Nobel over investeringstoetsing, het toetsingsbureau BTI, de Wet Vifo en de WOZT,” *Tijdschrift voor Mededingingsrecht in de Praktijk* 2023/03, p. 28.

²⁴ Explanatory Memorandum, p. 2.

²⁵ Vifo Act, Article 19.

²⁶ Vifo Act, Articles 20-21.

²⁷ Vifo Act, Article 1.

²⁸ This is in line with the Dutch merger control regime, which requires the parties to submit a long form notification if the Consumer and Market Authority (*Autoriteit Consument en Markt*) opens an in-depth Phase 2 review.

²⁹ The BTI will notify the European Commission and other Member States of any direct investment by a non-EU investor as soon as it becomes clear that a non-EU investor is involved. The European Commission and other Member States may subsequently submit comments or an opinion. Vifo Act, Article 12.

³⁰ Vifo Act, Articles 23 and 24.

³¹ Vifo Act, article 52; General administrative law Act (*Algemene wet bestuursrecht*), Annex 2, Articles 7 and 11. Available in Dutch at: <https://wetten.overheid.nl/BWBR0005537/2023-06-01>.