

Alert | Corporate/Antitrust Litigation & Competition Regulation



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Dutch Investment Review Act Passes Dutch House of Representatives

This GT Alert covers the following:

- Dutch Investment Review Act gives the Dutch government significantly enhanced powers to scrutinize and intervene in certain acquisitions that could harm national security.
- The Act confers broad powers, including in relation to acquisitions of minority interests in certain entities and acquisitions of certain assets.
- The Act is also likely to have retroactive effect.

On April 19, 2022, the proposed Dutch Investment Review Act (*Wet veiligheidstoets investeringen, fusies and overnames*) (**Act**) passed the Dutch House of Representatives (*Tweede Kamer*) with 148 out of 150 votes in favor. The Act aims to protect Dutch national security by introducing a test for acquisition activities resulting in a change of control (as defined in the Dutch Competition Act) over vital providers, or companies active in the field of sensitive technology. Additionally, the acquisition or increase of significant influence – which is below the level of control – may be affected by the Act. The Act sets out that such acquisition or increase may occur in different ways, *e.g.*, where a person can cast 10% of the votes of the general meeting in a target company. Therefore, the Act covers certain minority interests that do not result in a change of control.

In this GT Alert we highlight some key aspects of the Act.

Note that outside of the Act, some other sector-specific investment review regimes (*e.g.*, in relation to energy and telecommunications) in the Netherlands are also in place.

Vital Providers and Sensitive Technology

The Act defines vital providers, which include businesses operating in heat transportation, nuclear energy, air transport, banking, financial market infrastructure, recoverable energy, gas storage, and in the port area. Owners of business campuses were also added because of a last-minute amendment. Additional vital providers can be added by ministerial decree.

The Act specifies categories of sensitive technologies. These include dual-use items for which an export license is required (*i.e.*, goods, software, and technology that can be used for both civilian and military applications). By ministerial decree, dual-use and military items can be excluded as sensitive technologies, and other technologies may be designated as such.

Notification Obligation

The Act provides that a notification obligation applies to both investors and target companies. However, an investor will be exempted from its notification obligation if such investor would not be able to reasonably know that the investment is subject to a notification obligation because the target company is subject to a duty of confidence (*e.g.*, because of national security reasons applicable to the target company under a separate regime).

Screening Process

The Dutch Minister of Economic Affairs and Climate must issue a review decision within eight weeks of receiving a notification. The Minister may extend the initial period by a reasonable term of up to six months if further investigation is required. If the Minister requires additional information, the period will be suspended until the requested information is provided.

In the case of foreign direct investment, as defined under [Regulation \(EU\) 2019/452](#), the period will be extended by a maximum of three months.

If no review decision has been made within the statutory period, the transaction or investment will be permitted by operation of law.

The Act provides an extensive list of factors the Minister may consider. Following review, the Minister will decide whether the investment is permissible. In exceptional circumstances, the Minister can reassess an investment, even if it was approved in first instance. Such exceptional circumstances are applicable in cases of serious security risks or an increased threat to Dutch sovereignty.

Expected consequences of carrying out unauthorized acquisition activities under the Act are: nullity or voidability of a transaction, and the imposition and enforcement of an order to undo the effects of a transaction.

Conclusion: Implications for M&A Transactions and Next Steps

Once adopted, the Act may impose an extra burden on M&A transactions and lead to investments taking longer to complete. Where a party intends to make an investment, it needs to consider whether such investment is within scope of the Act. A notification obligation under the Act comes on top of any separate notification requirements under the EU or Dutch merger control regime.

Under the Act, the Minister is also expected to have the power to retroactively review certain transactions that took effect after Sept. 8, 2020. This retroactive application of the Act was proposed to deter opportunistic investors from quickly acquiring an interest prior to the Act entering into force. As such, the Act already must be considered in relation to currently proposed transactions.

As a next step, the Dutch Senate (*Eerste Kamer*) will debate the Act in a specialized committee. This will be followed by plenary debate and voting. In principle, the Dutch Senate may only pass or reject the Act, but not amend it. The Act could take effect later in 2022.

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