

## Competition Law



# 5 things you need to know about the Dutch Vifo Act

## Intro

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On 1 June 2023, new obligations came into force introducing the Screening of Investments, Mergers and Acquisitions Act (Wet veiligheidstoets investeringen, fusies en overnames, 'Vifo Act'). The Vifo Act stems from the European FDI Screening Regulation. Wrongful failure to report is subject to heavy fines: EUR 900,000 or 10% of annual turnover, whichever is higher. Violation of the notification obligation can also result in suspension of acquired shareholder rights such as voting rights and access to information. These are the five things you need to consider now that the Act has entered into force.

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**#1** A notification obligation applies to certain investments or acquisitions

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**#2** Beware of lower thresholds for significant influence

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**#3** The Vifo Act applies regardless of the investor's nationality

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**#4** A notifiable transaction is subject to a standstill obligation

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**#5** The act has (limited) retrospective effect

# #1

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**Notifications under the Vifo Act have to be made to the Bureau Toetsing Investerings (BTI), which is part of the Ministry of Economic Affairs and Climate Policy.**

## A notification obligation applies to certain investments or acquisitions

A notification obligation applies to transactions seeking to acquire control over providers of vital infrastructure, companies active in sensitive technology or managers of business campuses in the Netherlands. Providers of vital infrastructure include providers of heat transport, nuclear energy, air transport and aircraft ground handling (Schiphol Airport), port area (Port of Rotterdam), banking, financial markets infrastructure, gas extraction, and gas storage. Sensitive technologies particularly entail dual-use products and military goods.

The intended acquisition must be notified to the Investment Review Agency (Bureau Toetsing Investerings, 'BTI'). After notification, the transaction will be reviewed to determine whether it poses a risk to national security. The concept of national security is interpreted broadly in the Vifo Act. The screening focuses primarily on the acquiring entity and the parties controlling the acquiring entity (such as the *Ultimate Beneficial Owner*).

# #2

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**The Vifo Act defines significant influence with reference to a system of threshold values: 10%, 20% and 25% of the number of votes that may be cast at the target company's GSM.**

## Beware of lower thresholds for significant influence

If a target company is active in the field of highly sensitive technologies in the Netherlands, investors acquiring a significant influence or increasing their position in the target company must notify such transaction. The term 'highly sensitive technology' is further defined in the Decree on the Scope of Application Sensitive Technology ([Besluit toepassingsbereik sensitieve technologie](#)) and includes specifically designated technologies: quantum technology, photonics technology, semiconductor technology and high assurance technology.

Significant influence may already be present if 10% of the voting rights are acquired, or an existing position is increased to, respectively, 20% and 25% or similar influence is acquired through other means. Significant influence may also be present in the event a third party is granted the right to a binding nomination, appointment and/or dismissal of one or more board members.

## #3

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**It is irrelevant whether the acquirer is from an EU member state or any other country.**

## The Vifo Act applies regardless of the investor's nationality

The nationality of the acquirer is irrelevant for the application of the Vifo Act and the obligations under this act. Even if the acquirer is a Dutch company (or other EU acquirer), the filing obligations may apply.

## #4

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**The standstill obligation means that an investment activity cannot be carried out prior to receiving clearance.**

## A notifiable transaction is subject to a standstill obligation

If a notification must be made, the transaction cannot be implemented prior to receiving clearance. The assessment of the notification can consist of two phases: first, a screening phase, and then, if necessary, a review phase. If the BTI concludes that the investment poses a risk to national security, the BTI may order the parties to the transaction to accept remedies, or in extreme cases, prohibit the transaction.

## #5

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**Transactions carried out between 8 September 2020 and 1 June 2023 can fall within scope of the notification obligations until 1 February 2024.**

## The act has (limited) retrospective effect

Transactions carried out between 8 September 2020 and 1 June 2023 can retroactively fall within scope of the notification obligations until eight months after the Act's entry into force (until 1 February 2024). If the BTI deems review of an already completed transaction necessary, the parties to such transaction will be requested to file a (retrospective) notification. Acquisitions in some sectors are not subject to this retrospective effect of the Vifo Act (e.g. managers of business campuses).

## Any questions?

Wondering if your transaction may be subject to the Vifo Act? Or would you like to discuss the implications of this new legislation for your transaction or business? Please do not hesitate to reach out to our team.

## About the Competition team

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At NautaDutilh, we understand the importance of navigating the complex landscape of competition law when it comes to joint ventures, mergers, acquisitions and other cooperations. Our team is well-versed in both EU and national competition law across a wide range of market sectors, allowing us to provide comprehensive and practical advice to our clients.

## Contact

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