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How to avoid unwanted guests – Dutch proposal to protect its critical communications providers

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Last week the Dutch government made international headlines with its share acquisition in Air France-KLM Holding (increasing its stake to 14%). According to the Dutch the acquisition was justified to have a seat at the table when it comes to the role of the Netherlands (read Schiphol) as an aviation hub to protect the public interests in securing jobs and economic activities.

Now this week, again the Dutch government shows that also the Netherlands, a country traditionally on the forefront of the free market principles, is more and more tempted by protectionism. The Bill "Unwanted control telecommunications" (*Wet ongewenste zeggenschap Telecommunicatie,* ***Bill***) proposes to amend the Dutch Telecommunications Act in order to protect the Dutch telecommunications sector from undue interference. It does so by introducing a pre-closing blocking right for the Minister in case of an envisaged take-over of a so-called "telecommunications party" (*telecommunicatiepartij).*

Events that triggered debate on protection

While the Bill does not distinguish between national, EU and/or non-EU acquirers, it is without a doubt motivated to avoid hat national critical communications companies fall into the hands of non-Dutch players.

América Móvil's attempt to take over former state-owned and incumbent telco KPN in 2013 was in fact the first trigger of political debate about the need to have protective measures in place to avoid certain take overs in vital sectors.

Today, the Minister of Economic Affairs and Climate (***Minister***) can **overturn a merger prohibition** by the Dutch Authority for Consumer and Market (*Autoriteit Consument en Markt,* ***ACM***) pursuant to art. 47 of the Dutch Competition Act, if "*compelling reasons of general interest*" (*gewichtige redenen van algemeen belang*) exist that outweigh the expected restriction on competition are present. These may include state security, substantial employment with long-term effect or the efficiency interest of economies of scale in order to cope with competition in foreign markets.[1] However, this provision does **not** give the Minister the authority to **overturn a merger approval** by ACM.

The former government coalition considered pre-closing review measures too burdensome on

companies and inappropriate to deal with the underlying concerns (continuity and security of communication services). But the debate was reinforced after the take-over of the Dutch cyber security specialist Fox-IT by the British NCC Group in January 2017. Subsequently, the current government coalition Rutte-III agreed in the coalition accord that some form of test needed to be introduced for take-overs in vital sectors. And so it came.. Despite a negative advice of the State Council (the constitutional advisory body of the Dutch government),[2] on 5 March 2019, Mona Keizer, the Secretary of State of the Ministry of Economic Affairs and Climate submitted the Bill to Parliament.

The proposed protective measures

In short, the two most relevant elements of the Bill are the following:

In the first place, **procedurally**, a pre-closing notification obligation is imposed on the party that wishes to acquire or hold "predominant" control over a telecommunications party if this acquisition would lead to "relevant influence" in a telecommunications party (see art. 14a.2).

The Minister will need to decide within a term of eight weeks after notification whether a prohibition is required. This term is subject to a *stop-the-clock* in case of questions. And if the Minister considers further investigation is required, the term may be extended by six months. During this period the transaction cannot close. A change of control in violation of a prohibition is in principle null and void and non-notification will be subject to a fine of EUR 900,000.

In the second place, **substantively**, the Minister will have the authority to prohibit the acquisition or holding of predominant control in a telecommunications party if this would lead to a threat of national security or public order (see art. 14a.4).

The term *telecommunications party* does not only cover service providers of mobile- and fixed telephony and internet. Also for instance data centers, cyber security providers and internet exchange points (i.e. such as the Amsterdam-IX, one of the largest IXPs worldwide) qualify as telecommunications parties under the Bill (see art 14a.1).

The Bill provides that *predominant control* concerns in any event (i) acquisition of at least 30 percent of the voting rights (sole or in consort), (ii) the ability to name over half of the board members or (iii) the ability to exercise control as a result of special reserved matters (see art. 14a.3). This concept is thus fairly similar to the concept of control under merger control rules, but note that a shareholding of 30% is a triggering event, even if no *de facto* control is vested in this shareholder.

The Explanatory Memorandum sets out that nowadays access to internet, data traffic and telephony has become a basic need. Therefore, failure or unreliability of such services could potentially lead to social unrest in and economic damage. Dutch companies that control critical communications services should therefore be protected against the threat of undue pressure by a shareholder, which could lead to the disruption of critical communication services. Accordingly, to ensure the continuity, reliability and security of telecommunication services and infrastructure in the Netherlands acquisitions of such companies are caught by the notification obligation.

Under which conditions an envisaged acquisition may actually be blocked (i.e. what actually

constitutes "*relevant influence*" and therefore "*a threat to national security or public ord*er") is still to be further developed in lower legislation and does not form a part of this proposal. Based on EU law, these conditions must be justifiable, objective and pursue an overriding public interest to ensure (as the Explanatory Memorandum also recognises) that the restrictions, which this Bill may effectively cause to the fundamental freedoms are in compliance with the Treaty of the Functioning of the European Union.

Given the Bill still has to go through Parliament and the Senate, it will obviously take quite a while before these rules can impact the investment landscape in the Netherlands (and it is to be seen in which form exactly). But interesting, if the Bill would in some form be adopted and when applied to foreign acquirers, the proposed regime would most likely also fall within the scope of the new EU Regulation on the framework for screening of foreign direct investments into the European Union which was adopted by the European Parliament on 14 February 2019. And so, other Member States would also be able to express their views on potential acquisitions of control over Dutch critical communications services providers.

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[1] There are no precedents of the Minister ever making use of this power (although in the context of the recent announcement of potential merger between the Dutch postal services incumbent PostNL and Sandd this option has been buzzing through the parliamentary hall ways in case ACM would intend to block this merger, which would practically create a monopolist in relation to traditional postal services).

[2] The State Council criticises the Bill for only focusing on control over the companies concerned without proposing any safeguards regarding the underlying aim; ensuring reliability and continuity of critical communication services in the Netherlands.

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