Kluwer Competition Law Blog

Act against undesired control in the telecom sector in the Netherlands: new notification requirement and power to block transactions

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Introduction

On 19 May 2020, the Act against undesired control in the telecom sector ("**Act**") was adopted by the Dutch Parliament. The Act introduces a notification requirement applicable to anyone who has the intention to acquire 'a controlling interest' in a 'telecom party' if such interest results in 'relevant influence' in the telecom sector. If the controlling interest may result in a 'threat to the public interest', the Dutch Minister of Economic Affairs and Climate Policy ("**Minister**") shall prohibit the acquiring or holding of such controlling interest or impose a ban subject to suspensive conditions.

The purpose of the Act is to prevent the acquisition of controlling interests in telecom parties if this may threaten the public interest in the Dutch telecommunications sector. While the Act was prompted by the attempt to takeover KPN by América Móvil in 2013, the Act has wider implications as it affects not only KPN but also other parties. The Act is of relevance to anyone wishing to acquire control in a Dutch telecom provider, hosting service, Internet node, trust service or data centre.

In this article, a bird's-eye view of the Act and the potential overlap with merger notification procedures under competition law is provided.

What does the Act entail?

The Act stipulates that a party that has the intention to acquire 'a controlling interest' in a 'telecom party' must notify this to the Minister if that control leads to 'relevant influence' in the telecommunications sector. The notification must be submitted to the Minister not later than eight weeks before the envisaged execution of this intention. If the intention regards a public offer with respect to a listed telecom party, the notification must be made not later than at the time of announcement of the public offer. The Minister shall then decide within eight weeks whether the transaction will be prohibited although this period can be extended if further investigation is required.

The notification requirement does not apply to so-called anti-takeover foundations, which are generally intended to prevent undesired takeovers.[1]

Important definitions

Telecom party

The definition ‘telecom party’ also includes parties other than providers of telecommunications networks and services. It can apply to a branch office or a legal entity, sole proprietorship (*eenmanszaak*) or a company established in the Netherlands that is a provider or holder of a controlling interest in a supplier of an electronic communications network or service, a hosting service, an Internet node, a trust service or a data centre. Data centres which are solely or primarily for personal use are not covered by the Act. Furthermore, an additional category of networks or services may be designated as a telecom party subject to the Act by a Governmental order (*Algemene Maatregel van Bestuur*). To date, no such Governmental order was published.

Controlling interest

A ‘controlling interest’ exists if the party after the acquisition has, for example, at least 30% of the votes in the general meeting of a legal person or if it can appoint or dismiss more than half of the managing directors or supervisory directors of a legal entity, or if it has a special statutory right of control.[2]

Relevant influence

A transaction can only be blocked if there is an imminent ‘threat to the public interest’. A threat to the public interest can only exist if the controlling interest leads to ‘relevant influence’ in the telecommunications sector.[3] This includes abuse or deliberate outage of the telecom network which could lead to an unlawful breach of the confidentiality of communication, or an interruption of an Internet access service or telephone service. Another example is the interruption of the availability or reliability of a hosting service, Internet node, trust service or a data centre. A prohibition may also be imposed if the Minister believes that there is a threat to national security, defence, the enforcement of the legal order or (emergency) assistance.

The rules apply only if the thresholds to be determined by Governmental order are exceeded and/or it concerns products and services specified therein. A draft Governmental order **(“draft”)** laying down the thresholds has been consulted in February 2020. It follows from the draft that in case of an Internet access service or telephone service, for example, relevant influence only exists if the service is offered by the relevant telecom party to more than 100,000 end users. In the case of a hosting service, Internet node, trust service or a data centre, the draft includes technical criteria that are to be used to determine whether the Act applies. Those criteria basically boil down to including only those parties with a market share of more than 6%. Data centre services, for example, are only included if they offer a minimum power capacity of 40 MW. A combination of services can also lead to the thresholds being exceeded; even if the thresholds for each service separately are not met.

The draft Governmental order has yet to be finalized and needs to be submitted to Parliament first.

A threat to the public interest

As set out above, a transaction can only be blocked if there is a threat to the public interest. This means that the envisaged transaction must lead to relevant influence, as set out above.

Furthermore, one of the following conditions must be met:

(a) the transferee or holder is an unwanted person or a State, entity or person of which is known or for which there are grounds to suspect that it has an intention to cause abuse or deliberate outage to the network;

(b) the transferee or holder has close ties with or is under the influence of a State, entity or person as referred to under (a), or a person in respect of whom there are grounds to suspect such links or influence;

(c) the transferee or holder has a record such that it significantly increases the risk that the consequences referred to in under (a) to (d) of the definition of relevant interest will occur;

(d) the identity of the actual holder or transferee cannot be established; or

(e) the transferee or holder does not cooperate, or cooperates insufficiently, in the investigation of the conditions under (a) through (d).

Please note that even if there are no indications that one of these conditions apply, a notification requirement can still exist. Wether there is ‘a threat to the public interest’ is only relevant for determining whether the transaction can be blocked. It is irrelevant for determining whether a notification requirement exists. After all, a notification requirement already exists if it concerns the acquisition of ‘a controlling interest’ in a ‘telecom party’ which leads to ‘relevant influence’.

A ban may apply to existing shareholders

It is important to note that the Minister can prohibit new as well as existing shareholders transactions. A ban may be imposed within eight months of the Minister becoming aware of threatening circumstances. In that case, the telecom party will have to investigate its shareholder. The House of Representatives added to the Act that the telecom party may submit its views which the Minister must take into account. Besides, the Minister will always ask for the views of the parties concerned if he intends to impose a ban.

What are the consequences of a prohibition?

In short, if the Minister imposes a prohibition, the rights of control of the party concerned are suspended. A subsequent acquisition of control is invalid, unless executed via a stock exchange. The party concerned must reduce its shareholder package to 30%. If this party refuses to do so, the telecom party involved will have to carry out the task.

The Minister may also designate a person whose instructions must be followed. The House of Representatives has added to the Act that the managing directors and supervisory directors of the telecom party are not liable for the decisions of the designated person.

Blocking a transaction as a final resort

The Explanatory Memorandum to the Act explains that it is expected that it will rarely be necessary to impose a ban, or a fine for failure to notify a proposed acquisition of a controlling interest on time.

Furthermore, the Minister may alternatively also impose a ban subject to suspensive conditions.

This possibility was added at the last moment by means of a Proposal of Amendment. According to the explanatory note, adding this less radical option makes it clear that a ban is really a last resort tool and that the Minister has the possibility, where appropriate, to impose mitigating measures on the companies concerned so that a prohibition is suspended subject to compliance with these conditions.

This did not prevent the House of Representatives from asking the Minister in a motion to use a prohibition as a means of last resort, especially with respect to annulling ownership with retroactive effect.

Supplier relations are also affected

Initially, the Act contained a prohibition on entering into a contract with a telecom party if this would result in a third party acquiring so-called sustainable management power (*duurzame beheersmacht*) over the network or services. This prohibition received many objections from the sector. The provision was subsequently deleted but was later added to the Telecommunications Security and Integrity Decree ("**Decree**") of November 2019. This decree states that the Minister may oblige a telecom provider not to use a named supplier for certain network components if this poses a risk to the safety and integrity of the network. In that case, there must be a suspicion that that party wants to abuse the network or allow it to fail or has close ties with a state that could do so. This Decree also applies to existing services. The Minister may oblige the telecom provider to terminate or replace certain services.

The Act and the Decree contain far-reaching regulations that have an impact on the investment climate in the telecom sector and on supplier relations. The criteria for relevant influence and determining when there is a threat to the public interest leave ample room for interpretation. Furthermore, the scope of the Act can easily be extended in a Governmental order. However, such a Governmental order must be submitted to the Parliament through a strict control procedure ("*zware voorhangprocedure*"). At this point the parliament can still choose to arrange the matter in an Act.

Interaction with competition law

Those who are familiar with the competition rules will have noticed after reading the above that there are (or seem to be) many similarities between the notification requirement under the Act and the notification requirement under the merger control procedures. To begin with, the competition rules also interfere with the freedom of businesses. For example, under the Dutch Competition Act it is forbidden to put a merger, acquisition or joint venture exceeding certain thresholds into effect before this has been notified to the ACM and subsequently four weeks have elapsed.

Definition of Control

A concentration is understood to mean, amongst others, the direct or indirect acquisition of 'control': a term which is also used in the Act. In the assessment of control, competition law examines the possibility of exercising 'decisive influence' over the activities of an undertaking based on factual or legal circumstances. Decisive influence may exist where strategic decisions or decisions relating to the long-term policy of the undertaking can be taken or blocked. For example, regarding the approval of the business plan, major investments, the budget, major changes in the activities or objectives of the undertaking and the appointment or dismissal of managing directors.

To that extent, the term ‘control’ thus overlaps with the term ‘controlling interest’ in the Act. Under the Act, controlling interest exists if the party can appoint or dismiss more than half of the managing directors or supervisory directors of a legal entity.

However, the term ‘control’ under the Act and the competition rules seem to overlap only partially. For example, the Act contains an exhaustive enumeration of controlling interests, while under EU and Dutch competition law this list is non-exhaustive. In determining whether ‘decisive influence’ exists, all the facts and circumstances are taken into account on a case-by-case basis. For example, under the Act controlling interest exists if a party holds at least 30% of the votes of a general meeting. Under competition law, decisive influence is generally presumed if the undertaking concerned holds at least 50% of the votes. Otherwise, additional circumstances are required to show that decisive influence exists.

This difference between the Act and the competition rules might not be that surprising since the Act requires ‘controlling’ interests, whereas the Dutch Competition Act requires ‘decisive’ influence.[4]

Thresholds

Furthermore, a concentration within the meaning of the Dutch Competition Act only needs to be notified if certain thresholds have been exceeded. As explained above, the threshold values for the Act are still to be determined by Governmental order. The thresholds under the Dutch Competition Act and the draft Governmental order differ from each other as the Competition Act thresholds are based on the turnover of the company, whereas the thresholds included in the draft Governmental order are based on the number of customers of the company or operational criteria.

Procedural aspects

In addition, the Act introduces its own procedure, with its own formalities and deadlines. Under the Dutch Competition Act, the notification phase lasts four weeks and the licensing phase thirteen weeks. Under the Act the Minister has a period of eight weeks to decide whether to impose a ban in response to a notification.

Moreover, under the Dutch Competition Act a standstill obligation exists during the assessment period. Such a standstill obligation has not been included in the Act. Acquisition of controlling interests is permitted without prior approval. However, if the parties proceed with the intended transaction before the Minister has decided on the notification, they will run the risk that the transaction must be rescinded. Practice will have to show how this possibility interferes with mergers in the meantime approved under the Dutch Competition Act, particularly in view of legal certainty. According to the Minister, subjecting the holding or acquisition of a controlling interest in a telecommunications party to an ex ante or ex post-test pursuant to the Act is in any event compatible with the EC Merger Regulation.

The Minister has indicated that he will monitor merger notifications made to the Dutch Competition Authority pursuant to Article 34 of the Competition Act as well as notifications made to the Dutch Financial Markets Authority in order to spot any transactions which need also to be notified under the Act.

Final remarks

Parties intending to acquire a controlling interest in a telecom party in the Netherlands will have to be aware of this new notification requirement that might apply in addition to the notification requirement under the Dutch Competition Act. Investors will in any event have to prepare for the fact that they will have to notify transactions and that the Minister will assess the content of these transactions. It is important for investors to look closely at the Act.

When the Act will enter into force is not yet known.

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This blog is based on the Dutch article written by Feyo Sickinghe and Mariska van de Sanden available here and drafted with the help of Manuela Cox, Bird & Bird (Netherlands) LLP.

See also regarding the proposal for this Act the blog How to avoid unwanted guests – Dutch proposal to protect its critical communications providers of 7 March 2019 by Elske Raedts (Freshfields Bruckhaus Deringer).

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[1] Article 14a.2 paragraph 1 Act. In the takeover attempt of KPN by América Móvil, Stichting Preferente Aandelen B (an anti-takeover foundation) of KPN made use of a call option. This gave the foundation 49.9% of the voting rights in shareholders' meetings and successfully prevented América Móvil from obtaining more than 50% of the voting rights. Such measures are usually taken on a temporary basis.

[2] Other examples of controlling interest include having a branch office, being a telecom party, or becoming fully liable as a partner towards creditors for the debts of the company acting under its own name, or being the owner of a one-man business (*eenmanszaak)*. See also Article 14a.3 Act.

[3] In addition, several requirements are posed as to the (background of the) acquirer or holder that must be met, before there could be a threat to the public interest. See article 14a.4 paragraph 2 of the Act for these requirements.

[4] In practice, however, the Minister may take other, additional circumstances into account. For example, if the other shareholder holds 70% of the votes, as a result of which the acquiring party with 30% of the votes does not in fact have a "controlling interest". In such a case, the Minister may be less likely to conclude that there is a threat to the public interest justifying a ban.

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