

THE NETHERLANDS INTRODUCE A DRAFT ACT ON UNDESIRE CONTROL IN TELECOMMUNICATIONS

A [draft Act](#) on undesired control in telecommunications (*Wet ongewenste zeggenschap telecommunicatie*) has been submitted to Dutch Parliament on 5 March 2019, aiming to prevent undesired parties gaining control over telecommunications parties in the Netherlands.

INTRODUCTION

The draft Act introduces powers for the Minister of Economic Affairs and Climate Policy (the **Minister**) to block an acquisition leading to predominant control over a Dutch telecommunications party and to intervene in the existing ownership of such control, where such control is acquired or held by an undesired person.

The draft Act relates to the control of telecommunications parties, which comprise not only providers of electronic communications networks and services, but also providers of hosting services, data centres, trust services and internet exchange points.

The draft Act provides that predominant control (*overwegende zeggenschap*) in any event concerns (1) the possession (solely or jointly) of at least 30 percent of the (direct or indirect) voting rights, (2) the ability to name more than half the board members, or (3) the ability to exercise control through special governance rights. Although seemingly similar to the concept of control under merger control rules, the draft Act may allow for a lower threshold to assume control than is the case under such rules.

PROHIBITION TO HOLD OR OBTAIN PREDOMINANT CONTROL

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 to public interests**. Such a threat can only be assumed if the predominant control leads to a "relevant influence in the telecommunications sector", and:

- (i) the controlling person is a state, entity or natural person of which it is known or in respect of which there are grounds to suspect that it intends to influence a telecommunications party to enable misuse or intentional outage of that party;
- (ii) the controlling person has close ties with or is under the influence of any such aforementioned state, entity or person;
- (iii) the controlling entity has a track record that significantly enhances the risk that a relevant influence can be exerted;
- (iv) the identity of the controlling person cannot be determined; or
- (v) the controlling person does not cooperate (sufficiently) with an investigation into any of the aforementioned circumstances.

Key issues

- The Minister will be able to prohibit the acquisition or continued possession of a predominant control in respect of telecommunications parties on grounds of national security or public order.
- A mandatory and suspensory pre-closing notification obligation will be introduced for the acquisition of predominant control over telecommunications parties, and the Minister will be able to block such acquisition.
- The draft Act still has to pass through the Dutch Parliament and is expected to give rise to considerable discussion and amendments. It may therefore take some time before it enters into force.

A **relevant influence in the telecommunications sector** is deemed to exist if the misuse or outage of a telecommunications party can lead to:

- (a) an unlawful infringement of the confidentiality of communications or a disruption of access to the internet or telephone services affecting a (still to be determined) minimum number of end users;
- (b) an interruption in the availability or verification of a significant part of the services and applications provided through the internet; or
- (c) a significant interruption of the availability, reliability or confidentiality of designated products or services deployed for public tasks in the area of national security, defence, law enforcement or emergency services (which includes the Dutch General Intelligence and Security Service and the Military Intelligence and Security Service).

These consequences are to be clarified by the Minister in further regulation and the Minister can also identify additional undesired consequences. It should be noted that EU law requires that the conditions under which such a prohibition may be imposed must be justifiable, objective and pursue an overriding public interest, to ensure that any restrictions to fundamental freedoms comply with the Treaty of the Functioning of the European Union.

PRE-CLOSING NOTIFICATION OBLIGATION

Any party that intends to acquire predominant control over a telecommunications party will need to notify the Minister if the acquisition would lead to relevant influence in the telecommunications sector.

The Minister will have **eight weeks after notification** to decide whether it will prohibit the proposed acquisition. As this is also subject to so-called "stop-the-clock questions", it may in practice take longer than eight weeks. If the Minister is of the opinion that further investigation is required, the term may be **extended by six months**.

After the term set for the Minister's decision has expired or the Minister has indicated that no prohibition will be imposed, the Minister will only be able to prohibit the change of control if (i) the information provided in the notification proves to be incorrect or incomplete, or (ii) the facts and circumstances underlying the Minister's decision that public interests may be threatened only become known after the decision was taken not to impose a prohibition.

Failure to comply with the notification requirements and other violations of the obligations in relation to the draft Act, may be penalised by a fine up to EUR 900,000.

CONSEQUENCES OF A PROHIBITION

If a prohibition is imposed upon a notification with regard to a particular transaction to acquire predominant control, the subsequent transaction conferring such control will be **null and void**, except where control is acquired through public stock exchange transactions. The latter exception aims to safeguard the functioning of financial markets, which could be endangered if stock exchange transactions were to be rendered void by operation of law.

In any event, however, whether predominant control is gained through stock exchange transactions or otherwise, or where an undesired party already possesses such control, the effect of a prohibition will be, that:

- (1) the controlling person will need to **reduce or terminate its control** as required to eliminate its predominant control within a reasonable period of time set by the Minister;
- (2) the controlling person **is not permitted to exercise its voting or other rights** relating to its shareholding, membership or participation in the telecommunications party (except as regards rights to distributions from dividends and reserves) until such time as the predominant control is eliminated; and
- (3) if the controlling person fails to eliminate its predominant control within the prescribed period of time, the telecommunications party concerned is **exclusively and irrevocably authorised and obliged to assign and transfer the shares** of the controlling person in its name and for its account, or to otherwise eliminate the predominant control.

CONCLUSION

This draft Act is exemplary for the growing concerns around the world about the security of networks and information systems that underpin vital elements of society or the economy. As such, the draft Act fits with other legislation such as the EU Directive on security of network and information systems (Directive (EU) 2016/1148) and the proposed EU Regulation on a framework for screening of foreign direct investments into the European Union (COM(2017) 487) which also aim to address concerns in relation to the security, integrity and availability of critical infrastructure and technologies. The latter Regulation may in fact bring about an overarching framework for the draft Act, setting additional terms and conditions for the manner in which the possession and acquisition of predominant control is regulated under the draft Act and enabling the European Commission and other Member States to express their views and issue comments in respect of the application of the Minister's powers under the draft Act (see also our recent [briefing](#)).

In any event, the draft Act must still pass through Dutch Parliament and, also in light of the heavy criticism voiced by the Dutch Council of State in respect of the draft Act, it is likely that it will give rise to considerable discussion and further amendments.

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