

POSITION PAPER REGARDING ROUND TABLE DISCUSSION ON DRAFT LEGISLATION 'UNDESIRED CONTROL IN THE TELECOM SECTOR'¹ - MAY 16, 2019, DUTCH PARLIAMENT, THE HAGUE

VodafoneZiggo underlines the need for network integrity and safety, however we would like to make the Economic Affairs committee aware of our general concern, that the proposed provisions to the Dutch Telecommunications Act ("Telecommunicatiewet") would negatively impact the investment climate of the Dutch telecommunications sector and therefore have a direct negative effect on the deployment of future mobile and fixed gigabit networks (like 5G).

Summary (Dutch)

- VodafoneZiggo wenst haar algemene bezorgdheid kenbaar te maken met betrekking tot de voorgenomen wetwijziging, met name als het gaat om het negatieve effect op het investeringsklimaat voor de Nederlandse telecomsector en het directe effect hiervan op de toekomstige uitrol van mobiele en vaste gigabit netwerken (zoals 5G).
- Buitenlandse investeringen zijn essentieel voor de Nederlandse telecomsector. Buitenlandse investeerders zijn al decennialang succesvol actief op de Nederlandse telecommunicatiemarkt. Dank zij hen is het gelukt om de huidige telecominfrastructuur van wereldklasse tot stand te brengen.
- Voor lange-termijn investeerders zijn juridische zekerheid en voorspelbaarheid van groot belang. Zonder deze waarborgen zullen zij minder snel geneigd zijn om te investeren.
- Het opleggen van belemmeringen voor investeringen, zoals deze voorgestelde wet, is onverstandig, zeker nu er in de nabije toekomst grote investeringen nodig zijn voor de uitrol van nieuwe technologieën.
- Deze voorgestelde wet is niet nodig. Bestaande wet- en regelgeving (Nederlandse én Europese) bevat al afdoende waarborgen om ongewenste zeggenschap in de Nederlandse telecomsector te voorkomen.
- VodafoneZiggo deelt de bezwaren tegen de voorgestelde wet die door de Raad van State naar voren zijn gebracht. In aanvulling daarop willen we specifiek aandacht vragen voor de volgende bezwaren:
 - De minister krijgt een grote discretionaire bevoegdheid om te oordelen over voorgestelde overnames in de telecom sector zonder dat hiervoor een duidelijk gedefinieerd begrippen- en beoordelingskader aanwezig is. Besluiten van de Minister kunnen hiermee op basis van politieke sentimenten in plaats van feiten worden genomen;
 - Het op elk moment in de tijd nietig kunnen verklaren van een overname op basis van 'nieuwe' informatie;
 - Het creëren van een regeling met veel open einden en veel ruimte voor latere invulling door middel van lagere regelgeving zoals AMvBs;
 - Het eenzijdig door de Minister aanwijzen van een persoon die alleen de leiding krijgt over een telecommunicatiepartij zonder dat op deze persoon enige aansprakelijkheid rust;
 - Belangrijke interne bedrijfsbesluiten, zoals het outsourcen van netwerkmanagement of diensten, vallen onder het vereiste van voorafgaande toestemming van de minister. Dit heeft ingrijpende gevolgen voor de bedrijfsvoering.
- Een oplossingsrichting, indien additionele wetgeving toch nodig zou blijken, zou kunnen liggen in VVGB verklaring (Verklaring van Geen Bezwaar), zoals in de financiële sector in gebruik, of het systeem zoals dat in de Elektriciteits- en de Gaswet wordt gehanteerd.

¹ In Dutch: 'wet ongewenste zeggenschap telecommunicatie', see, <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2019/03/05/wetsvoorstel-ongewenste-zeggenschap-telecommunicatie-versie-nader-rapport/wetsvoorstel-ongewenste-zeggenschap-telecommunicatie-versie-nader-rapport.pdf> for further details of the proposed legislation.



General response to legislative change

The proposed changes to the Dutch Telecommunications Act (*Telecommunicatiewet*, "TW") as it stands, have the potential to disrupt the current investment climate in the Netherlands. Already, this climate is at risk, due to falling (mobile) revenues, exponential growth of data usage and more regulatory pressure on telecoms operators. It is obvious, that additional scale and a level playing field in the telecoms market are necessary to overcome these challenges. Foreign investments in Dutch telecommunications infrastructures have been vital so far, as they have in large part enabled the current world class Dutch telecoms infrastructure. Going forward, foreign investments are also much needed to fund future fixed and mobile gigabit networks in the Netherlands.

For (foreign) investors contemplating long term investments, legal certainty is a key factor in deciding whether or not to invest. Unfortunately the proposed changes would have a detrimental effect on that precious legal certainty.

Due to the proposed provisions, shares of Dutch telecom parties and related services (hosting, service providers, trust service, internet exchanges, etc.) will be much less easily transferable, and more difficult to acquire by foreign companies. This would potentially have a negative impact on the value of these companies, would lead to a definite increase of the administrative burdens of ownership and of the total cost of capital and – most importantly – directly impede foreign investment flowing towards the sector. It would also reduce the freedom to do business by requiring ministerial approval for outsourcing agreements regarding network, services or parts thereof.

If we do not act carefully, the proposed changes in the TW may even lead to divestments, or deferment of investments due to risks incurred by foreign owners of Dutch telecom companies. This would have an obvious negative effect on the further expansion and maintenance of the Dutch telecommunications infrastructures and the top tier position that the Netherlands currently enjoys². Especially now, as we stand on the brink of a new round of investments to fund the deployment of future gigabit networks in the Netherlands, there is a clear need to attract foreign capital to be invested in Dutch telecom infrastructure, rather than create new hurdles for these investments. Creating these additional obstacles for investment will essentially kill the future of our best in class current networks – and with that the promise of a gigabit society.

The greatest areas of concern for VodafoneZiggo are:

- 1) The lack of an extensive burden of proof on the minister seeking to ban the acquisition of vital telecommunications infrastructures.
- 2) The potential retroactive effect of the proposed provisions. For example, the ministerial powers to repeal a decision and block, or reverse ('annul') acquisitions based on 'new' information at any point in time, even up to eight months after discovery of this new information. This leads to an increase of legal uncertainty.
- 3) Furthermore, the proposed provisions appear to be open-ended, with much legislative headroom to be filled at a later stage and laid down in delegated law ('Executive Order', or AMvB in Dutch), which do not fall under parliamentary scrutiny, creating even more legal and investment uncertainty. Examples are the definition of 'telecommunication party' ('telecommunicatiepartij') and the definition of 'relevant influence' ('relevante invloed'), which lack further explanation and are key for the interpretation and application of the law.

² <https://ec.europa.eu/digital-single-market/digital-economy-and-society-index-desi> and <http://p3networkanalytics.com/portfolio-item/netherlands-3/>



- 4) The appointment of a temporary director by the minister, who would be in charge of a large/ listed telecommunications company without any form of liability towards his/ her actions, is unnecessary and undesirable.
- 5) A final point of concern is that virtually all outsourcing of network and services management or parts thereof – including to group companies – appear to fall within the scope of this proposed draft legislation. This essentially would require that such major, internal business decision by market parties would need to be approved by the minister. This could have a negative effect on the introduction and speed of mobile and fixed gigabit network roll-out and sector innovation.

Adequate existing legislation and regulations

VodafoneZiggo believes that existing laws and regulations are sufficient to achieve the intended protection of national vital telecommunications infrastructures for the purpose of 'protecting the public interest'. We therefore concur with the advice from the Council of State (Raad van State) in this matter.

After all, this protection is already provided by, among others, the Dutch Telecommunications Act (e.g. current chapters 11 (protection of personal data), 11a (continuity), and chapter 14 (exceptional circumstances)). Although these provisions are mostly aimed at daily operations of telecommunications providers, this, in line with the advice of the Council of State, is in our view where the root of the problem lies. Evidently a national government would want to ensure integrity and continuity of telecom services, but the share of capital in a company owned by a foreign investor does not necessarily have a direct (negative) influence on the integrity and continuity of the service, as the Council of State also states.

Furthermore, in the European legislative framework, there are several provisions that enable Member States to act in case of undesired control over companies when public order or security is deemed to be at risk. For example, TFEU, Art. 65, paragraph 1b - gives Member States the right to impose capital and payment movement restrictions when it comes to protecting public order or public security. In this regard, we also refer to Regulation (EU) 2019/452 on the screening of foreign investments. Hence, the risk that an undesired acquisition could not be dealt with within the existing national, or European legal frameworks hence seems very implausible.

In addition, a large part of the Dutch telecommunications infrastructures are already (co) owned by foreign companies such as Liberty Global, Vodafone Group and Deutsche Telekom. These parties are long-term investors in telecommunications infrastructures in the Netherlands. Every single merger and acquisition by these parties on the Dutch market has undergone advanced and extensive merger control scrutiny by either the European Commission and / or the national regulator (in the Netherlands: ACM). In the case of incumbent KPN, the question may arise, given the distribution of the shares, whether or not KPN is already de facto a foreign-owned company as among others, Blackrock, Norges Bank, Franklin Mutual Series Funds, America Movil, Brookfield are direct investors with a significant stake in KPN. As explained above, the significant levels of foreign direct investment in the telecommunications sector have been a key contributor to the world class status of Dutch telecommunications networks and services today.

In our opinion, the proposed legislation is not proportional to the intended results, in view of the risks of introducing these new rules for the telecommunication sector and the potential negative impact it will have on the legal certainty and investment climate in the Netherlands.



Potential solutions to concerns

In view of the common, liberalized European telecommunications market, harmonized regulation at the EU level is necessary to ensure a level playing field (cf. also the recently published Regulation (EU) 2019/452 (screening for foreign investments) within the increasingly international oriented telecommunications sector. In other words, a diverging legal and regulatory approach between EU member states should be avoided.

At the very minimum, the decision whether or not a potential acquisition is blocked, or reversed, should be in the hands of an independent authority/regulator, such as the ACM. Chances are that clearing decisions of (future) acquisitions in the Dutch telecom sector, as proposed by the current draft legislation, will be highly politicized. This in turn causes an increase in legal uncertainty and therefore market uncertainty, which as pointed out above, will have a negative impact on the investment climate in the Netherlands. Moreover, it is unclear how this would support long-term integrity and safety of vital infrastructures.

If decision-making at the Ministerial level is deemed necessary, there are already several existing systems with better and more practical solutions, like the 'declaration of no objection' (VVGB). The VVGB system has been successfully in place in the financial sector for some years now. The advantage of this system is that it is not at odds with current EU regulations (cf. the serious doubts made by the Dutch Council of State on the proposed legislation on this point), but in fact based on it: Directive 2007/44/EC (i.e. procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector). Another alternative could be the arrangement that is currently in use in the Dutch Electricity & Gas Act (Elektriciteits- en de Gaswet - nadere regels omtrent een onafhankelijk netbeheer) regarding continuity and integrity of electricity and gas services.

At the very least, AMvBs need to be further formalized, made transparent and sent together with the draft bill to Parliament for open debate. We would very much like to call upon government to share AMvBs with Parliament in order for Parliament to have a better understanding of where the government is heading and to carry out their parliamentary oversight, when and where concerns may arise.

In sum, VodafoneZiggo is a joint venture of two longstanding investors in the Dutch telecom sector, i.e. Vodafone Group (since 1994, Libertel) and Liberty Global (since 2001, UPC)³. Based on the above-mentioned arguments, VodafoneZiggo is strongly against the implementation of the draft legislation 'undesired control in the telecom sector' in its current form. Naturally, we are available to engage constructively with the government to try to find solutions that would suit both our goals.

³ Vodafone Group has operations in the following countries: Albania, Australia, Congo, Czech Republic, Egypt, Germany, Ghana, Greece, Hungary, India, Ireland, Italy, Kenya, Lesotho, Malta, Mozambique, Netherlands, New Zealand, Nigeria, Portugal, Romania, South Africa, Spain, Tanzania, Turkey and the UK.
Liberty Global has operations in the following countries: Belgium, Czech Republic, Germany, Hungary, Ireland, Netherlands, Poland, Romania, Slovakia, Switzerland and the UK