

# FOREIGN INVESTMENT REVIEW

## Netherlands



# Foreign Investment Review

Consulting editors

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Quick reference guide enabling side-by-side comparison of local insights, including into law, policy and relevant authorities; procedure, including thresholds and timelines; substantive assessment, including interagency and international consultation, remedies and rights of challenge and appeal; relevant recent case law; and other recent trends.

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### Netherlands



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## LAW AND POLICY

### Policies and practices

What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

Foreign investment review (FIR) laws currently in place in the Netherlands are relatively liberal, and apply to specific sectors only (eg, energy and telecommunications). The notification requirement resulting from these FIR laws typically applies irrespective of the nationality of the acquirer (ie, there is no exemption for investors based in, for example, the Netherlands or the European Union (EU)). We are not aware of precedents in which the Dutch state prohibited or imposed far-reaching remedies based on FIR legislation. However, the Dutch state has intervened in attempted acquisitions of Dutch companies using more informal powers (eg, political opposition or a direct investment by the Dutch state itself).

In June 2021, the Dutch government announced the introduction of a broad Dutch National Security Investment Act (the NSI Act), to be adopted and still subject to change, covering investments in vital infrastructure and sensitive technology in the Netherlands. The NSI Act will introduce a new FIR framework in addition to the current ones set out in sector-specific legislation. The NSI Act is likely to enter into force in the first half of 2022. The notification requirement resulting from the NSI Act will apply irrespective of the nationality of the acquirer too.

*Law stated - 16 January 2022*

### Main laws

What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals and investors on the basis of the national interest?

There is currently no comprehensive, overarching framework regarding FIR in the Netherlands; FIR laws currently in place in the Netherlands apply to specific sectors only. Leaving aside EU and Dutch general merger control rules – which are not discussed in the responses to this chapter, the main laws currently in force in the Netherlands containing FIR-related provisions are:

- the Dutch Electricity Act 1998 (Electricity Act);
- the Dutch Gas Act (Gas Act);
- the Dutch Financial Supervisory Act (Financial Supervisory Act);
- the Dutch Gambling Act (Gambling Act);
- the Dutch Healthcare Market Regulation Act (Healthcare Act);
- the Dutch Mining Act (Mining Act); and
- the Dutch Telecommunications Act, as amended by the Dutch Act on undesired control telecommunications (Telecommunications Act).

*Law stated - 16 January 2022*

### Scope of application

Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

The scope of application of these laws is the following:

- Electricity Act: any change of control (as defined in the Dutch Competition Act (Competition Act)) in a generating facility with a nominal electrical capacity of more than 250MW, or in an undertaking operating a generating facility with a nominal electrical capacity of more than 250MW. Minority interests that do not confer – positive or negative – control, and therefore do not result in a change of control are not caught.
- Gas Act: any change of control (as defined in the Competition Act) in a liquefied natural gas (LNG) facility or an LNG company. Minority interests that do not result in a change of control are not caught.
- Financial Supervisory Act: any acquiring or increasing of a qualifying holding in certain targets in such a way that an upper limit (as referred to in the Financial Supervisory Act) is reached or exceeded. Simply put, a qualifying holding is any direct or indirect interest of at least 10 per cent of the issued capital. A relevant target includes, for example, a bank, an investment firm and an insurer with their registered office in the Netherlands. Therefore, minority interests above certain percentage thresholds (as defined in the Financial Supervisory Act) are caught.
- Gambling Act: any change to the ownership and control structure of the permit holder to organise remote games of chance (under the Gambling Act), the group to which it belongs or its ultimate beneficial owner.
- Healthcare Act: a healthcare provider (as defined in the Healthcare Act) that normally has 50 or more persons providing healthcare is part of a concentration (as defined in the Competition Act). A healthcare provider in this regard is an undertaking that provides care, or a service as defined by or under healthcare regulatory legislation (ie, the Dutch Health Insurance Act, the Dutch Long-Term Care Act and the Dutch BIG Act). Minority interests that do not result in a change of control are not caught.
- Mining Act: any change to the direct and indirect control of a permit holder under the Mining Act, where such a change concerns (1) half or more of the voting rights in a shareholders' meeting, or (2) the appointment, suspension or dismissal of half or more of the directors, supervisory directors or partners. Minority interests that meet the latter requirement are caught.
- Telecommunications Act: any change in predominant control in a telecommunications party, where such control results in relevant influence in the telecommunications sector. Predominant control is broadly defined. Minority interests that comprise at least 30 per cent of the votes in a general meeting of a legal entity are caught.
- NSI Act (not yet in force): certain acquisition activities in relation to a target company established in the Netherlands that is either a vital provider, or an undertaking active in the field of sensitive technology. The NSI Act defines vital providers (eg, in the field of the transportation of heat, nuclear energy, air transport, banking, infrastructure for the financial market, recoverable energy, gas storage) and in the port area. Sensitive technology includes (1) dual-use products – ie, goods that can be used for both civilian and military use – that are subject to authorisation for their export under Regulation (EC) No. 428/2009 and (2) military goods as referred to in the Dutch Strategic Goods Implementation Regulation 2012. Changes of control (as defined in the Competition Act) are caught. However, in the case of a target undertaking active in the field of sensitive technology, the acquisition or increase of significant influence – which is below the level of control – by an acquirer is equally caught. The NSI Act sets out that such acquisition or increase may occur in different ways. For example, where a person can cast 10 per cent of the votes of the general meeting in a target undertaking. Therefore, certain minority interests that do not result in a change of control are caught.

*Law stated - 16 January 2022*

## Definitions

How is a foreign investor or foreign investment defined in the applicable law?

The Dutch Implementing Act to Regulation (EU) 2019/452 (EU FIR Regulation) refers to the EU FIR Regulation for a definition of foreign direct investment (FDI). The Dutch Implementing Act does not contain a definition of foreign

investor or foreign investment.

In the EU FIR Regulation, foreign investor means 'a natural person of a third [ie, non-EU] country or an undertaking of a third country [ie, non-EU], intending to make or having made a [FDI]'. FDI means:

The Electricity Act, Gas Act, Financial Supervisory Act, Gambling Act, Healthcare Act, Mining Act, Telecommunications Act and NSI Act (not yet in force) do not contain relevant definitions in this regard, and any notification requirements resulting from them apply regardless of nationality. For completeness, the Telecommunications Act, and the NSI Act do contain references as such to the EU FIR Regulation.

*Law stated - 16 January 2022*

### **Special rules for SOEs and SWFs**

Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

Currently, there are no special FIR rules in the Netherlands for investments made by SOEs and SWFs.

For completeness, on 5 May 2021, the European Commission (EC) adopted a proposal for a Regulation on foreign subsidies distorting the EU market.

*Law stated - 16 January 2022*

### **Relevant authorities**

Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

The competent authorities are set out below:

- Electricity Act, Gas Act, Telecommunications Act, and NSI Act (not yet in force): The Dutch Minister of Economic Affairs and Climate (Minister). However, in practice, the Dutch Investment Review Office (BTI) – which falls under the Dutch Ministry of Economic Affairs and Climate (Ministry) – acts as a coordinator for these acts.
- Financial Supervisory Act: The Dutch Central Bank (DNB) in most cases, and in some instances the European Central Bank.
- Gambling Act: The Dutch Gambling Authority (Ksa).
- Healthcare Act: The Dutch Healthcare Authority (NZa) (although a legislative proposal is pending in the Netherlands regarding transferring this task to the Dutch Competition Authority (ACM)).
- Mining Act: A notification needs to be submitted before Energie Beheer Nederland BV, an entity fully owned by the Dutch state, and whose shares are administered by the Ministry (EBN). EBN advises the Minister on the application of the Mining Act.

*Law stated - 16 January 2022*

Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

There would appear to be some discretion given some rather open-ended terms set out in the Dutch legislation.

For example, under the Electricity Act and the Gas Act, a transaction may be prohibited or conditionally approved based on considerations of public safety, security of supply or security of delivery.

*Law stated - 16 January 2022*

## PROCEDURE

### Jurisdictional thresholds

What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

Filings are mandatory under the Electricity Act, Gas Act, Financial Supervisory Act, Gambling Act, Healthcare Act, Mining Act, Telecommunications Act and Dutch National Security Investment Act (the NSI Act) (not yet in force).

The jurisdictional thresholds are the following:

- Electricity Act: any change of control in a generating facility with a nominal electrical capacity of more than 250MW, or in an undertaking operating a generating facility with a nominal electrical capacity of more than 250MW.
- Gas Act: any change of control in a liquefied natural gas (LNG) facility or an LNG company.
- Financial Supervisory Act: any acquiring or increasing of a qualifying holding in a relevant target.
- Gambling Act: any change to the ownership and control structure of the permit holder to organise remote games of chance, the group to which it belongs, or its ultimate beneficial owner.
- Healthcare Act: a healthcare provider that normally has 50 or more persons providing healthcare is part of a concentration.
- Mining Act: certain changes to the direct and indirect control of a permit holder under the Mining Act.
- Telecommunications Act: any change in predominant control in a telecommunications party, where such control results in relevant influence in the telecommunications sector. A telecommunications party is – simplified – a provider of an electronic communications network or service, or a hosting service, internet node, trust service, or a data centre not for own use. De facto, the criteria set out in the Dutch Telecommunications Decree to define relevant influence act in practice such as jurisdictional thresholds to a telecommunications party. The thresholds relate to providing:
  - an internet access service or telephone service to more than 100,000 end users in the Netherlands;
  - an electronic communications network over which internet access services or telephone services are offered to more than 100,000 end users in the Netherlands;
  - an internet node to which more than 300 autonomous systems are connected;
  - data centre services with a power capacity of more than 50MW;
  - hosting services for more than 400,000 .nl domain names;
  - qualified trust service;
  - an electronic communications service or electronic communications network, data center service or trust service to the Dutch General Intelligence and Security Service, the Dutch Ministry of Defence, the Dutch Military Intelligence and Security Service, the Dutch National Coordinator for Counterterrorism and Security, or the Dutch National Police Service; or
  - a combination of services as referred to in the first five subsections above, which add up together to a threshold value.
- NSI Act (not yet in force): Certain acquisition activities in relation to a target company established in the Netherlands that is either a vital provider or an undertaking active in the field of sensitive technology.

*Law stated - 16 January 2022*



## National interest clearance

What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees? Is filing mandatory?

There are no filing fees under the Electricity Act, Gas Act, Healthcare Act, Mining Act, Telecommunications Act and NSI Act (not yet in force). Under the Financial Supervisory Act, in most cases there are filing fees. There are filing fees under the Gambling Act too.

Information on the availability of standard forms or the information to be provided in the context of a filing is set out below:

- Electricity Act, Gas Act: the Appendix to the Dutch Electricity Act and Gas Act Regulation sets out the information that a filing must contain. Information needs to be provided, inter alia, on the following topics: the facilities and relevant parties involved in the transaction, the proposed change in control, the financial position of the acquirer, the parties' intentions and the acquirer's strategy and past performance.
- Financial Supervisory Act: the Dutch Prudential Rules Decree sets out the information that must be submitted. This includes, for example, a statement of the size of a qualifying holding and documentation showing the financial position and the legal group structure of the investor. The website of the DNB provides a secure online form.
- Gambling Act: the website of the Dutch Gambling Authority (Ksa) provides a secure online form. The following information needs to be provided: a description of the change, the date on which the change takes – or took – effect, the permit number and contact details of a contact person.
- Healthcare Act: a standard form for a filing is available on the website of the Dutch Healthcare Authority (NZa). Information needs to be provided on, inter alia, the following topics: the organisations involved in the concentration, an assessment of the impact of the transaction and crucial care aspects of the concentration (if and where applicable).
- Mining Act: we are not aware of a standard filing form or guidance that sets out the information that a filing must contain.
- Telecommunications Act: the Appendix to the Dutch Telecommunications Regulation sets out the information that a filing must contain. Among other things, information needs to be provided on the following topics: the investor, the group and the telecommunications parties, the proposed acquisition of control, any public interest features, and EU-related aspects.
- NSI Act (not yet in force): we are not aware of the existence of a standard form currently, but our understanding based on the Explanatory Memorandum to the NSI Act is that the information to be provided will be similar to that required under the regime of the Telecommunications Act (see above).

For reference, pursuant to the EU Foreign Investment Review (FIR) Regulation, the Netherlands must report notifications by non-EU investors to other EU member states and the EC. If a notification is caught under the FIR Regulation, an applicant is requested to submit additional information. A standard form in this regard is available.

*Law stated - 16 January 2022*

Which party is responsible for securing approval?

Information on the party responsible for securing approval is set out below:

- The Electricity Act, Gas Act: any change of control must be notified by one of the parties involved in the change of control (ie, the investor or the target).
- The Financial Supervisory Act: the investor is responsible for securing approval.
- The Gambling Act: the permit holder under the Gambling Act – ie, the target – must notify in the event of any change to its ownership and control structure, the group to which it belongs, or its ultimate beneficial owner.
- The Healthcare Act: one or more healthcare providers that are part of a concentration. Depending on the transaction structure, this implies that either an investor, the target or both are responsible for securing approval.
- The Mining Act: the permit holder under the Mining Act – ie, the target – must notify in the event of certain changes to its direct and indirect control.
- The Telecommunications Act: the investor is responsible for securing approval. However, if the target is bound by a secrecy obligation regarding the provision of telecommunications services (eg, to the Dutch National Police), the target is not allowed to disclose this to an investor. In that case, the investor may not know that its intended investment is notifiable. In such a scenario, the notification duty falls on the target to which the secrecy obligation applies.
- The NSI Act (not yet in force): the reporting obligation will apply to both the investor and the target. However, the investor will be exempted from the obligation to report if the investor cannot know that the investment is subject to a notification obligation due to a secrecy obligation of the target.

*Law stated - 16 January 2022*

## Review process

How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

Anticipated timelines are set out below:

- The Electricity Act, Gas Act: a notification must be made at least four months prior to the envisaged date of completion of a transaction. The decision period is also four months. However, a notification and the corresponding review process do not have suspensory effect – ie, there is no standstill obligation – meaning that a transaction can be implemented prior to a decision of the Minister. Nevertheless, a transaction would have to be undone or remedies with retroactive effect would have to be implemented if the Minister were to decide to block or conditionally approve a transaction.
- The Healthcare Act: although there is no hard deadline for submitting a notification, the Healthcare Act regime has suspensory effect. The review period is four weeks in principle, subject to suspension in case of information requests. If a decision cannot be made within this period, the NZa will inform the applicant or applicants of this and indicate a new period within which the decision can be made. In urgent cases, and upon request, an exemption from the suspensory effect may be granted by the NZa.
- The Financial Supervisory Act: the decision period is, in principle, 62 working days, subject to suspension in the case of information requests. The decision period can also be extended with a maximum of 30 additional working days in certain other situations.
- The Gambling Act: a notification must be made within two weeks of the change becoming known or of the change occurring (ie, the filing can be done post-closing).
- The Mining Act: a notification must be made within four weeks after a change to the direct and indirect control of a permit holder under the Mining Act (ie, the filing is post-closing).
- The Telecommunications Act: a notification must be made at least eight weeks prior to the envisaged date of completion of a transaction, or no later than at the date of the launch of a public offer. The review period is eight weeks in principle, subject to suspension in the case of information requests. This review period can be extended

by another six months in the case of an in-depth review, also subject to stop-the-clock information requests. A notification and the corresponding review process do not have suspensory effect. However, a transaction that is completed and subsequently prohibited is, in principle, null and void.

- The NSI Act (not yet in force): although the expectation is that there will, in principle, be no hard deadline for submitting a notification, the NSI Act regime will have suspensory effect. It is envisaged that the review period will be eight weeks, which can be extended by six months in the case of in-depth review. The review period can be suspended in the case of information requests. In certain limited cases, and upon request, an exemption from the suspensory effect may be granted by the Minister.

*Law stated - 16 January 2022*

**Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?**

The Electricity Act, Gas Act and Telecommunications Act do not apply a standstill obligation. However, a transaction would have to be undone or remedies with retroactive effect would have to be implemented if the Minister were to decide to block or conditionally approve a transaction. Additionally, under the Telecommunications Act, failure to notify in a timely manner may lead to a fine of up to €900,000.

The Healthcare Act and Financial Supervisory Act apply, and the NSI Act (not yet in force) is expected to apply, a standstill obligation. Under the Healthcare Act, sanctions are an administrative order or an order subject to a penalty and a maximum administrative fine of €500,000 or, if greater, 10 per cent of an undertaking's turnover in the Netherlands. Under the Financial Supervisory Act, sanctions include a fine with a maximum of €5 million – unless recidivism – subject to a statutory maximum cap of 10 per cent of the undertaking's net turnover in the prior year, and suspending the exercise of voting rights. Expected sanctions under the NSI Act are nullity, respectively voidability, of a transaction and the imposition and enforcement of an order to undo the effects of a transaction.

Under the Gambling Act and the Mining Act, a notification can be done post-closing.

*Law stated - 16 January 2022*

## **Involvement of authorities**

**Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?**

Pre-filing dialogues or meetings are typically not expected unless the notification is of a complex nature.

Having said that, in connection with the Electricity Act, Gas Act, Telecommunications Act and NSI Act (not yet in force), it is possible to discuss a case in advance with BTI on an informal basis. DNB encourages contact under the Financial Services Act. In connection with the Gambling Act, the Ksa indicates on its website that it does not have the capacity to provide guidance to individual parties. Questions about the care-specific merger control test under the Healthcare Act can be discussed with the NZa pre-notification. An informal view of the NZa can equally be obtained. Under the Mining Act, EBN is available to discuss questions on an informal basis.

*Law stated - 16 January 2022*

When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

Other than the information provided in response to other questions in this questionnaire, we are not aware of further methods or procedures that facilitate or expedite clearances in the Netherlands in any meaningful way.

*Law stated - 16 January 2022*

What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to pre-merger review?

Although the Electricity Act, Gas Act and Telecommunications Act do not apply a standstill obligation, a transaction would have to be undone or remedies with retroactive effect would have to be implemented if the Minister were to decide to block or conditionally approve a transaction.

Under the NSI Act (not yet in force), the Minister is expected to have the power to retroactively review certain transactions that took effect after 8 September 2020. This retroactive application of the NSI Act was proposed to deter opportunistic investors from quickly acquiring an interest prior to the NSI Act entering into force.

*Law stated - 16 January 2022*

## **SUBSTANTIVE ASSESSMENT**

### **Substantive test**

What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

The substantive test is the following:

- Electricity Act, Gas Act: a transaction may be prohibited or conditionally approved based on considerations of public safety, security of supply, or security of delivery.
- Financial Supervisory Act: a declaration of no objection will be unconditionally granted, unless:
  - the reliability of the investor is not beyond doubt;
  - the investor is not suitable in view of its reputation;
  - the financial soundness of the investor – considering the business activities of the financial undertaking – is not guaranteed;
  - as a result of the qualifying holding, the target will be unable to continue to comply with the prudential rules set out in the Financial Supervisory Act;
  - there are good reasons to suspect that, in connection with the proposed transaction, money is being, has been or is attempted to being laundered or terrorism financed, or that the transaction increases the risk thereof; or
  - incomplete or incorrect information has been provided by the investor.
- Gambling Act (Ksa): the Ksa primarily assesses the reliability of the acquirer based on their intentions, actions, and antecedents.
- Healthcare Act (NZa): the NZa withholds its approval of a concentration, or conditionally approves it if:
  - clients, staff and other stakeholders have not been involved in a careful manner in the preparation of a concentration;

- the opinions and recommendations of clients, staff and other stakeholders have not been considered convincingly and in a well-reasoned way in the decision on the concentration;
- as a result of the concentration, the continuity of certain forms of care is endangered; or
- the impact assessment does not provide sufficient insight into the expected effects of the intended concentration.
- Mining Act: not applicable; the Mining Act deals in this regard with whether a security must be given or provided.
- Telecommunications Act: a transaction may be prohibited or conditionally approved where it may lead to a threat to the public interest. A threat to the public interest can exist if the predominant control leads to relevant influence in the telecommunications sector, and one of five circumstances set out in the Telecommunications Act is met (eg, that the acquirer is an undesirable person or is a state, entity, or person known or for which there are grounds to suspect that it intends to influence a telecommunications party to enable abuse or intentional interference). Relevant influence, in turn, is defined in the Telecommunications Act and the Telecommunications Decree. Simply put, relevant influence in the telecommunications sector in this regard exists if abuse or intentional failure of a telecommunications party can lead to interruption of the availability, reliability or confidentiality of services.
- Dutch National Security Investment Act (NSI Act) (not yet in force): a transaction may be prohibited or conditionally approved where it leads to the realisation of one or more risks to national security. For the definition of national security, the NSI Act refers to the Treaty on EU, the Treaty on the Functioning of the EU, and in particular to:
  - maintaining the continuity of vital processes;
  - maintaining the integrity and exclusivity of knowledge and information of critical or strategic importance to the Netherlands; or
  - preventing undesirable strategic dependence of the Netherlands on other countries.

In assessing whether a transaction may result in a risk to national security, multiple factors set out in the NSI Act, considered together, are taken into account. Additionally, under the NSI Act, the Minister is expected to have the power to assess whether a transaction that took place prior to the entry into force of the NSI Act, but after 8 September 2020 (ie, retroactive effect), could pose a risk to national security.

*Law stated - 16 January 2022*

**To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?**

The EU Foreign investment review (FIR) Regulation introduced an EU-wide FIR cooperation framework through which the EC and the EU member states – including the Netherlands – can coordinate their actions on FIR. The elements of the EU FIR Regulation in this regard are not discussed in further detail in the responses to this questionnaire.

*Law stated - 16 January 2022*

### **Other relevant parties**

**What other parties may become involved in the review process? What rights and standing do complainants have?**

The competent authority may, in principle, ask third parties questions if and where this is reasonably necessary for the assessment of a notification. Such questions do not normally suspend the review period. Insofar as the competent

authority intends to issue a negative decision and to base its decision in part on the input of third parties, the competent authority will send this input to the notifying party with a request for its views.

*Law stated - 16 January 2022*

## **Prohibition and objections to transaction**

### **What powers do the authorities have to prohibit or otherwise interfere with a transaction?**

The authority has the following powers to prohibit or otherwise interfere with a transaction:

- The Electricity Act, Gas Act: a transaction may be prohibited or conditionally approved. A transaction that was not notified or not notified in a timely manner is voidable by judicial decision.
- Financial Supervisory Act: a transaction may be prohibited or conditionally approved. Sanction for not notifying a transaction or not notifying it in a timely manner include a fine with a maximum of €5 million – unless recidivism – subject to a statutory maximum cap of 10 per cent of the undertaking's net turnover in the prior year, and the suspending of the exercise of voting rights.
- Gambling Act: the Ksa can impose an order subject to a penalty, or suspend or revoke the permit.
- Healthcare Act: a transaction may be prohibited or conditionally approved. A transaction that was not notified or not notified in a timely manner may be sanctioned with an instruction, an administrative order or an order subject to a penalty, and/or a maximum administrative fine of €500,000 or, if greater, ten percent of an undertaking's turnover in the Netherlands.
- Mining Act: if a transaction is potentially detrimental to a security provided – or to be provided – and a notification has not been submitted within four weeks after closing, a transaction is voidable by court order upon application by EBN (or a co-permit holder).
- Telecommunications Act: a transaction may be prohibited or conditionally approved. A transaction that is completed and subsequently prohibited is, in principle, null and void. The Minister can also order the person to whom a prohibition has been imposed to reduce or terminate its predominant control within a reasonable term, so that there is no longer predominant control.
- NSI Act (not yet in force): a transaction may be prohibited or conditionally approved. Expected sanctions under the NSI Act are nullity respectively voidability of a transaction, and the imposition and enforcement of an order to undo the effects of a transaction.

*Law stated - 16 January 2022*

### **Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings or agreeing to other mitigation arrangements?**

Yes, under the Electricity Act, Gas Act, Financial Supervisory Act, Gambling Act, Healthcare Act, Telecommunications Act and NSI Act (not yet in force), it is possible to offer commitments to remedy or avoid the authorities' objections to a transaction.

For example, under the NSI Act (not yet in force), remedies may include commitments relating to: the handling of sensitive information of customers, goods and/or services by the target; establishing a security committee or appointing a security officer authorised to restrict or prohibit access to or transmission of information; imposing an obligation that certain technology, source code, genetic code, or knowledge be deposited with the state or a third party in the Netherlands and only be made available, possibly temporarily, in the event of acute risks to certain vital processes or security interests.

For completeness, the prohibition of a transaction is typically considered an *ultimum remedium* – ie, a remedy of last resort – in the Netherlands.

*Law stated - 16 January 2022*

## **Challenge and appeal**

Can a negative decision be challenged or appealed?

Yes, a negative decision – ie, a prohibition decision or a conditional clearance decision – is always one that is subject to review in an objection proceeding, and that – subsequently – may be challenged before the Dutch administrative courts.

*Law stated - 16 January 2022*

## **Confidential information**

What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

In its notification, a notifying party can indicate which information is confidential and why it should not be disclosed (eg, because it concerns a business secret). It depends on the Dutch act and the type of decision – negative or positive – whether the public authority will intend to publish its decision, as well as the notification form. For example, under the Healthcare Act, decisions by the NZa are published as a standard practice, and in the event of a positive decision, the notification form (excluding exhibits) too. Under the NSI Act (not yet in force), the expectation is that a prohibition decision and a conditional clearance decision will become public, whereas notifications will not become public. Prior to publication, the authority will usually give parties an opportunity to indicate the information that would need to be redacted because of confidentiality. In addition, there are ways to try to stop publication of a decision.

The Dutch Freedom of Information Act is also relevant, as third parties may want to try to get access to information in the file of an authority. For completeness, the EU FIR Regulation also sets out some rules in relation to the confidentiality of information.

A breach of confidentiality by an authority constitutes a violation of written or unwritten rules or is punishable under Dutch law. A person suffering losses directly as a result of such breach could also try to bring a claim for damages.

*Law stated - 16 January 2022*

## **RECENT CASES**

### **Relevant recent case law**

Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

We are not aware of recent precedents in which the Dutch state prohibited or imposed far-reaching remedies based on the Electricity Act, Gas Act, Financial Supervisory Act, Gambling Act, Healthcare Act, Mining Act or Telecommunications Act. As such, there are no three recent cases in the Netherlands worth mentioning.

*Law stated - 16 January 2022*

## UPDATE AND TRENDS

### Key developments of the past year

Are there any developments, emerging trends or hot topics in foreign investment review regulation in your jurisdiction? Are there any current proposed changes in the law or policy that will have an impact on foreign investment and national interest review?

In June 2021, the NSI Act was introduced. The NSI Act is likely to enter into force in the first half of 2022. However, the Minister will have the power to retroactively review certain transactions that took effect after 8 September 2020.

A proposed law in relation to foreign investment review in the defence industry is also currently pending in the Netherlands.

The BTI was relatively recently set up.





Finally, in May 2021, the EC adopted a proposal for a Regulation on foreign subsidies distorting the EU market.

*Law stated - 16 January 2022*



## Jurisdictions

	<b>Australia</b>	Gilbert + Tobin
	<b>Austria</b>	Barnert Egermann Illigasch Rechtsanwälte
	<b>Cambodia</b>	Tilleke & Gibbins
	<b>Canada</b>	McCarthy Tétrault LLP
	<b>China</b>	Global Law Office
	<b>Denmark</b>	Bech-Bruun
	<b>European Union</b>	Allen & Overy LLP
	<b>France</b>	White & Case LLP
	<b>Germany</b>	Blomstein
	<b>India</b>	AZB & Partners
	<b>Indonesia</b>	Nagashima Ohno & Tsunematsu
	<b>Italy</b>	Gianni & Origoni
	<b>Japan</b>	Tokyo International Law Office
	<b>Laos</b>	Tilleke & Gibbins
	<b>Malaysia</b>	Nagashima Ohno & Tsunematsu
	<b>Mexico</b>	White & Case LLP
	<b>Myanmar</b>	Tilleke & Gibbins
	<b>Netherlands</b>	Greenberg Traurig LLP
	<b>New Zealand</b>	Russell McVeagh
	<b>Norway</b>	CMS Kluge
	<b>Spain</b>	White & Case LLP
	<b>Sri Lanka</b>	Tiruchelvam Associates
	<b>Sweden</b>	Bokwall Rislund Advokatbyrå
	<b>Switzerland</b>	Lenz & Staehelin
	<b>Thailand</b>	Nishimura & Asahi

	<b>United Kingdom</b>	Preiskel & Co LLP
	<b>USA</b>	Cleary Gottlieb Steen & Hamilton LLP
	<b>Uzbekistan</b>	Winfields
	<b>Vietnam</b>	Tilleke & Gibbins