Baker & McKenzie

Doing Business in the Netherlands

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Doing Business in the Netherlands

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Table of Contents

Introduction 1

Baker & McKenzie Amsterdam N.V. 2

The Netherlands 5

1.1 Country and cities 7
1.2 Infrastructure, traffic and transport 9
1.3 Government 11
1.4 Economy 12
1.5 Dutch people and culture 15

Legal Forms of Doing Business 20

2.1 Branch 20
2.2 Subsidiary 21
2.3 Branch versus subsidiary 22
2.4 Cooperative (*Coöperatie*) 23
2.5 European company/*Societas Europaea* ("SE") 24
2.6 *Societas Cooperativa Europaea* ("SCE") 25
2.7 Partnership 25
2.8 Formal foreign companies 26

Tax Benefits of Regional Headquarters/Coordination Centers 27

3.1 General advantages 27
3.2 Tax ruling 28
3.3 Holding of shares 30
3.4 Group financing and group licensing 31

The Subsidiary 34

4.1 Incorporation of N.V. and B.V. 34
4.2 Incorporation of a cooperative 35
4.3 Capitalization 36
4.4 Transfer of shares and membership interest 36
4.5 Shareholders' register and members' register 37
4.6 Issuance of new shares 38
4.7 Board of managing directors 38

4.8 Board of supervisory directors 39
4.9 Proxy holders 39
4.10 Large companies regime 40
4.11 Developments 41

Reporting, Auditing, Publication Requirements 44

5.1 Financial statements 44
5.2 Director's report 45
5.3 Accounting principles 46
5.4 Other information 46
5.5 Language 47
5.6 Currency 47
5.7 Classification 47
5.8 Exemption for group companies 48
5.9 Consolidated accounts 49
5.10 Auditing requirements 50

Corporate Governance Code 51

6.1 Principles and best practice provisions 52
6.2 Compliance and enforcement of the code 52
6.3 Management board 53
6.4 Supervisory board 54
6.5 Shareholders and general meeting of shareholders 56
6.6 Financial reporting 57

Sales Support, Distribution and Production 59

7.1 Liaison office 59
7.2 Sales support 59
7.3 Production 60

Commercial Contracts 61

8.1 General Dutch contract law 61
8.2 General terms and conditions 62
8.3 Consumer protection/Consumer sales 63
8.4 Consumer authority 64
8.5 Agency agreements 65
8.6 Distribution agreements 66
8.7 Franchise agreements 67

Real Estate 68

9.1 Ownership 68
9.2 Land register 68
9.3 Other rights and obligations 69
9.4 Construction and renovation 70
9.5 Environmental aspects and soil pollution 71
9.6 Leases 72
9.7 Public housing 73

Competition Rules and Free Movement of Goods 74

10.1 EU competition rules 74
10.2 Dutch Competition Act 76
10.3 Public procurement rules 80
10.4 Import and export: free movement of goods 84
10.5 The European Economic Area 85
10.6 Standardization 85

Intellectual Property 86

11.1 Copyright 86
11.2 Neighboring rights 88
11.3 Protection of databases 88
11.4 Trademarks 89
11.5 Designs and models 91
11.6 Trade names 92
11.7 Patents 92
11.8 IP Enforcement 95
11.9 Anti-counterfeit measures 96
11.10 IP protection of software and (IT) hardware 96
11.11 Advertising 99
11.12 Advertising and freedom of expression 101
11.13 Unfair competition 102
11.14 Trade secrets 102
11.15 Assignment, licensing and pledge 102
11.16 Treaties and general European legislation 103

ICT and e-commerce 104

12.1 General 104
12.2 Technology transfer 104

12.3 ICT agreements and standard terms 105
12.4 Sector-specific alternative dispute resolution ("ADR") 106
12.5 Shrink-wrap license agreements 106
12.6 Source code escrow 106
12.7 The Internet and e-business 107
12.8 Encryption 109
12.9 Computer crime 109
12.10 Online gambling 110

Data Protection 111

13.1 General 111
13.2 Data retention 112

Internet, Technology and Telecommunications 113

14.1 Registration requirement for providers of public networks and telecommunications services 113
14.2 Numbers 113
14.3 Service numbers 114
14.4 Net neutrality 115
14.5 Legal interception 115
14.6 Data retention 116
14.7 Unsolicited communications (spam) 116
14.8 Cookies 117
14.9 Data breach notification 118

Labor Law 119

15.1 Term 119
15.2 Noncompetition clause 120
15.3 Termination 121
15.4 Works council 130

Social Securities and Pensions 134

16.1 The social security system 134
16.2 National insurance 134
16.3 Premiums 136
16.4 Welfare provisions 137
16.5 Employees' insurance 138
16.6 The Dutch Pension System 141

16.7 Pension developments in the Netherlands ____ 147

Visas, Residence Permits and Work Permits for Non-EU Nationals ____ 152

17.1 Executive summary ____ 152
17.2 Key government agencies ____ 152
17.3 Visit to the Netherlands not exceeding 90 days ____ 152
17.4 Visit to the Netherlands exceeding 90 days ____ 154
17.5 Work permit ____ 156
17.6 Highly skilled migrants ____ 158

Personal Income Tax ____ 160

18.1 General ____ 160
18.2 2001 Personal Income Tax Act ____ 161
18.3 Business profits in income tax ____ 161
18.4 Income from employment ____ 162
18.5 Income tax ruling ____ 162
18.6 Levy of taxes ____ 165
18.7 Income tax rates ____ 166
18.8 Substantial interest ____ 167

Corporate Income Tax ____ 169

19.1 Subsidiaries ____ 169
19.2 Branches ____ 174
19.3 Branch versus subsidiary ____ 176
19.4 Dutch participation exemption ____ 177
19.5 Capital gains ____ 182
19.6 Limitations on deductions of interest ____ 183
19.7 Flow-through entities ____ 189
19.8 Anti-dividend stripping ____ 190
19.9 Tax incentives ____ 193
19.10 Losses ____ 195
19.11 Liquidation ____ 197
19.12 Mergers and demergers ____ 197
19.13 Fiscal unity ____ 200
19.14 Fiscal investment institution ____ 201
19.15 Exempt investment institution ____ 203
19.16 Transfer pricing regime ____ 204
19.17 Competent authority/Arbitration convention ____ 209

19.18 EEIG and SE 211
19.19 EU Interest and Royalty Directive 212
19.20 EU Savings Directive 213
19.21 EU Parent-Subsidiary Directive 213
19.22 EU Merger Directive 214
19.23 Summary of the Netherlands' Bilateral Tax Treaties 211

Other Taxes 218

20.1 Value-added tax ("VAT") 218
20.2 Real estate transfer tax 225
20.3 Withholding tax on dividends 226
20.4 Interest and royalties 227

International Distribution Centers/Customs Facilities 228

21.1 Bringing goods into free circulation 229
21.2 Use of customs procedures 232
21.3 Customs warehouses 232
21.4 Customs bonded transport 233
21.5 Processing 234
21.6 Specific use 235
21.7 Authorized economic operator ("AEO") 235
21.8 VAT and excises 236

Investment Incentives 239

22.1 Tax incentives 239
22.2 (International) investment enhancing credits 240
22.3 Innovation box: reduced CIT rate 242
22.4 R & D 242

Lending and Taking Security 245

23.1 Lending in the Netherlands 245
23.2 Dutch law security 251
23.3 Structuring the priority of debts 262
23.4 Agent and trust concepts 263
23.5 Debt trading and transfer mechanism 264

Financial Regulations

24.1 Exchange control regulations ____ 266
24.2 Regulated financial activities ____ 267
24.3 Money laundering ____ 281

Liability

25.1 Liability ____ 284
25.2 Contractual liability ____ 284
25.3 Non-contractual liability ____ 286
25.4 Compensation ____ 289
25.5 Period of limitation of action ____ 290

Dispute Resolution

26.1 Jurisdiction ____ 292
26.2 Course of the court proceedings ____ 293
26.3 Summary proceedings ____ 294
26.4 Prejudgment attachment ____ 296
26.5 International enforcement ____ 296
26.6 European enforcement order for uncontested claims ____ 297
26.7 European payment orders ____ 298
26.8 European small claims ____ 299
26.9 Collective action ____ 299
26.10 Collective settlement of mass damages ____ 300
26.11 Inspection or taking copies of certain identifiable documents instead of full discovery ____ 301
26.12 Preliminary witness hearing and expert opinion ____ 302
26.13 Arbitration ____ 302
26.14 Mediation ____ 303

Energy Law

27.1 General market situation ____ 304
27.2 EU legislation/unbundling/liberalization ____ 305
27.3 Key institutions ____ 307
27.4 Oil & gas ____ 308
27.5 Electricity ____ 313
27.6 Climate change ____ 317
27.7 Energy efficiency ____ 319

Appendix I

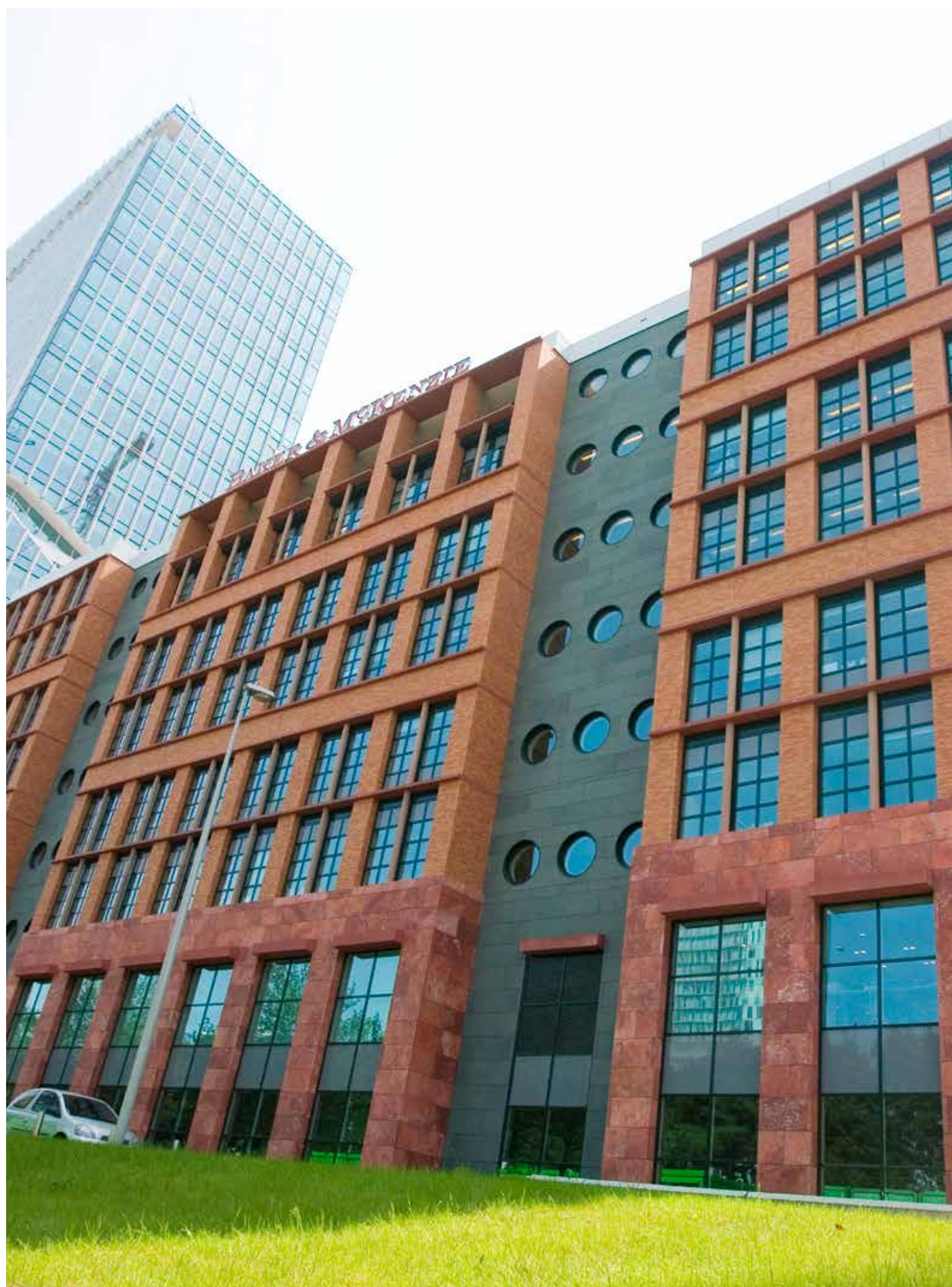
Procedure for Incorporating a Dutch N.V., a B.V. or a Cooperative _____ 321

Appendix II

Overview of Tax Rates for Inbound Income under Dutch Tax Treaties __ 322

Appendix III

Amsterdam Practice Groups, Specialist Teams, Industry Groups and Country Desks _____ 329



Introduction

It is with pleasure that we present the latest annual publication, "Doing Business in the Netherlands 2016" of Baker & McKenzie Amsterdam.

Doing Business in the Netherlands is your personal guide to the Dutch legal and taxation system. It covers a wide array of topics, such as the main aspects of corporate law, real estate law, employment law, tax law, energy law and many other legal issues and regulations of relevance.

For over 65 years, Baker & McKenzie Amsterdam has assisted international companies that are looking for investment opportunities in the Netherlands, and has advised Dutch and international companies that are already conducting business in this country.

Throughout this time, we have always been particularly committed to understanding and furthering our clients' business goals. The extensive experience and knowledge we have gathered over the years form the basis of this guide.

Should you require further information about any of the topics covered in this guide, or any support in relation to your new or already established business in the Netherlands, we would be delighted to assist you.

Casper Banz
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Baker & McKenzie Amsterdam N.V.

Baker & McKenzie Amsterdam is a leading provider of legal, tax and notary services. With over 65 years of experience practicing national and international law, we offer Dutch and foreign multinationals unequalled counsel, both locally and across borders. Our innovative, independent and pragmatic way of thinking and working help you seize opportunities, minimize risks and solve business issues.

We are the first law firm in the Netherlands to join a multinational network, offering our services in a fully integrated manner. Today, we are regarded as one of the country's leading providers of legal services. With more than 180 legal professionals, Baker & McKenzie Amsterdam provides high-end legal and tax advice to a large number of the world's most dynamic and successful organizations.

Baker & McKenzie is known for having a deep understanding of the language and culture of business, as well as an uncompromising commitment to excellence. Our dedicated professionals understand and serve clients with a shared set of values and high-quality standards, providing innovative solutions wherever our clients are and whatever their needs are.

1.1 Multidisciplinary teams for your industry

Because we think across borders from a legal, tax and business perspective, we have created Industry Groups for a number of industries, in which multidisciplinary teams of lawyers, tax advisors and civil-law notaries from different practice groups share industry knowledge and experience with each other to guarantee giving you advice of the highest quality.

1.2 Innovative ways to inform you

We use a variety of new media methods, including online videos, electronic newsletters, electronic bibles and a collaborative extranet.
To provide you with more in-depth knowledge in person, we organize seminars, conferences and roundtables on a broad variety of interesting

topics. We can even arrange an exclusive in-house training especially tailored for you and your organization. These tools and events give you easy access to the latest legal and business developments in the timeliest manner, allowing you to take the appropriate actions when necessary.

1.3 Commitment to diversity

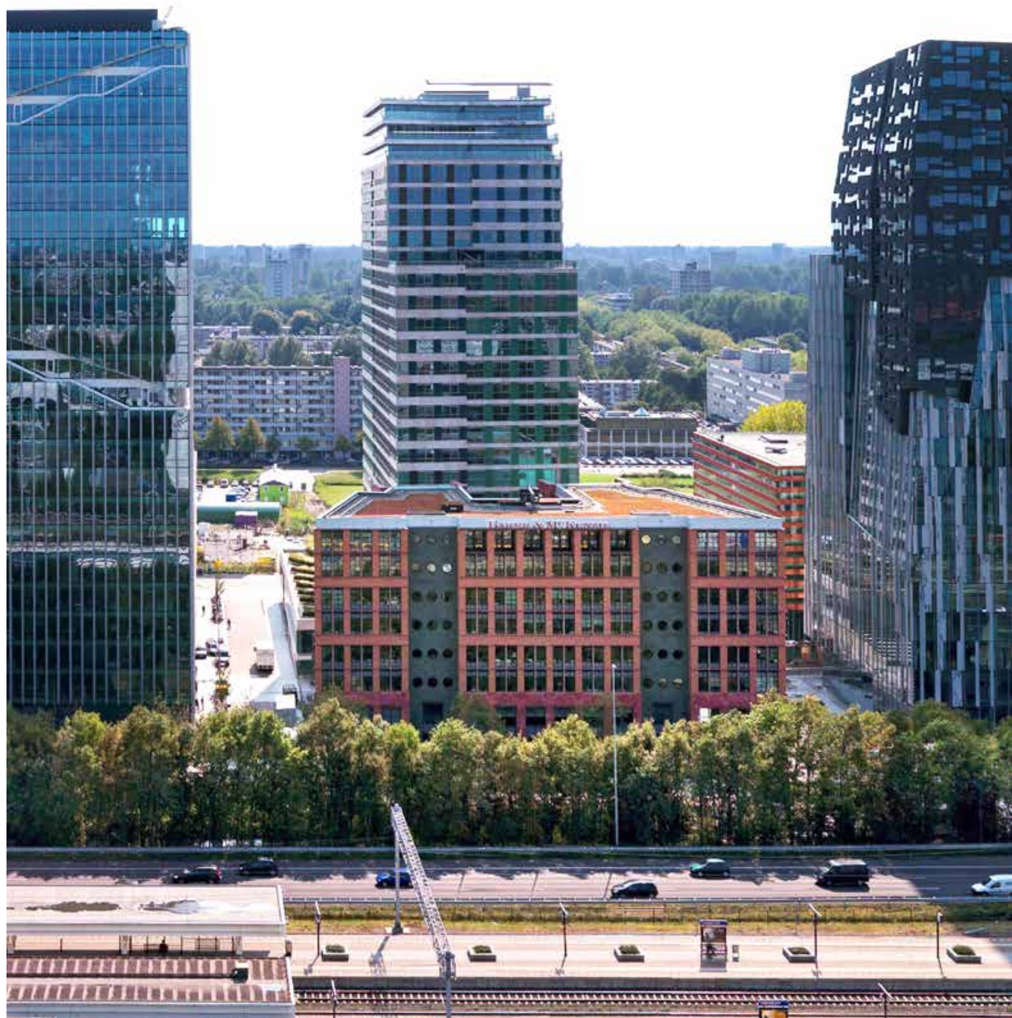
Within Baker & McKenzie, diversity is a business imperative in order for us to be a successful practice in today's competitive global market. That is why we have, among other initiatives, signed the "Charter Talent to the Top" together with prominent employers and several members of the Dutch government. By signing this charter, we have committed ourselves voluntarily, but not without engagement, to increase the number of females at the top of our organization.

1.4 Caring for people and society

Preserving cultural inheritance and participation in pro bono and community services are part of the core values of Baker & McKenzie. We support financially the charitable organization Het Rijksmuseum Amsterdam (Dutch National Museum). Moreover, our professionals play an active role within these associations, such as by being board members.

1.5 The Baker & McKenzie House

The Baker & McKenzie House, located at the Zuidas in the Amsterdam business district, is designed and operated to reduce the overall impact of the built environment on human health and the natural environment. We efficiently use energy, water and other resources. We continuously strive to mitigate our CO_2 footprint by reducing the amount of paper used, reducing our professionals' usage of airplanes and cars, and purchasing environment-friendly goods, such as eco-friendly cleaning products.



1

The Netherlands

General Information	
Location	Western Europe, bordering the North Sea, between Belgium and Germany
National language	Dutch
Capital city	Amsterdam
Seat of government	The Hague
Currency	Euro (EUR)
Climate	Temperate; maritime; cool summer and mild winter
International dialing code	+31
Internet domain	.nl

The Netherlands is one of the best places in Europe to conduct business, according to the Economist Intelligence Unit's ("EII") latest business environment rankings. One of the most important reasons is the highly educated, flexible and motivated workforce in the country. Despite that, labor costs are not an important factor in making the decision to locate business in the Netherlands. There are numerous favorable factors, which include: (i) the fact that employment contracts are becoming more flexible; (ii) the rules for admitting knowledge workers to the Netherlands are becoming more relaxed and (iii) the government's customized approach to tax facilities has become a major advantage.

Furthermore, the country's central geographical position, combined with its accessibility through excellent infrastructure and logistics services, entices numerous European, American and a growing number of Asian companies to establish their European head offices in the Netherlands. This is why more than 400 of the 500 largest companies in the world have their offices in the country.

In this chapter, we give you a glimpse of the excellent business environment that the Netherlands offers.

1.1 Country and cities

Land Information	
Population	17,001,884 (as of 29 March 2016)
Total area	41,500 km2
Land	33,800 km2
Water	7,700 km2
Land below sea level	26%
Administrative regions	12 provinces: Drenthe, Flevoland, Friesland, Gelderland, Groningen, Limburg, Noord-Brabant, Noord-Holland, Overijssel, Utrecht, Zeeland, Zuid-Holland
Largest cities	Amsterdam: 799,278 inhabitants Rotterdam: 616,294 inhabitants The Hague: 505,856 inhabitants Utrecht: 321,916 inhabitants

Kingdom of the Netherlands

The Netherlands is a kingdom, officially known as the Kingdom of the Netherlands. It consists of the Netherlands itself and three islands in the Caribbean Sea, which are: (i) Aruba; (ii) Curacao and (iii) Sint Maarten. After the dissolution of the Netherlands Antilles on 10 October 2010, the three Caribbean islands of Bonaire, Saint Eustatius and Saba became special municipalities of the Netherlands.

The Netherlands in its entirety is often referred to as "Holland," although North and South Holland are actually only two western coastal provinces that have played a dominant role in the country's history.

Delta of three major rivers

The Netherlands lies on the delta of the following three major rivers: (i) the Rhine; (ii) the Meuse and (iii) the Scheldt. It owes its existence to feats of hydraulic engineering. A quarter of the Netherlands' land area lies below sea level. The low-lying areas consist mainly of "polders," which are flat stretches of land surrounded by dikes where the water table is controlled artificially. From as early as the 16th century, windmills have been used not just to keep the land dry, but also to drain the entire inland lakes. Since controlling water requires many parties to meet and plan together, it has forced them to learn how to work as a team. The Dutch are proud of their water management skills. Their struggle to keep the land dry has helped them develop a can-do attitude. That is why their European partners and the broader international community regard the Dutch as bridge builders and often ask them to serve as such.

1.2 Infrastructure, traffic and transport

Traffic and Transport 2014	
Main airport	Amsterdam Schiphol Airport
Number of (air) passengers	55 million
Passenger destinations	296
Air freight capacity	1.6 million tons
Main seaport	Port of Rotterdam
Annual throughput	465 million tons
Main Internet hub	Amsterdam Internet Exchange

The Netherlands has excellent infrastructure and logistics services, with good roads and world-class public transport services, thanks to its close-knit network of trains, buses and trams. Due to its first-rate logistics and technological infrastructure, the Netherlands is also classified as one of the most "wired" countries in the world, taking part as a dynamic force in electronic commerce, communications and outsourcing.

Amsterdam Airport Schiphol

In 2014, Amsterdam Airport Schiphol provided direct connections to 296 European and intercontinental airports. With passenger numbers totaling 55 million, Amsterdam Airport Schiphol is Europe's fourth largest airport in terms of passenger number, is No. 4 in (air) transport movements and ranks third in terms of cargo volume.

Main port and distribution center

The Netherlands plays an important role as a main port and distribution center for companies operating worldwide because of its favorable location by the North Sea. The port of Rotterdam is one of the main ports and counts as among the largest logistic and industrial hubs of Europe. With an annual throughput of 465 million tons of cargo, Rotterdam is by far the largest seaport of Europe. Rotterdam's position may be attributed to

its excellent accessibility via the sea, hinterland connections and the many companies and organizations that are active in the port and industrial complex. The port area is about 12,500 hectares (land and water, of which about 6,000 hectare is industrial sites, including Maasvlakte 2). The length of the port area is over 40 km.

Amsterdam Internet Exchange

The Amsterdam Internet Exchange (AMS-IX) is one of the largest Internet hubs in Europe. After New York and London, Amsterdam is the most connected city in terms of broadband capacity. Interconnecting hundreds of networks by offering professional IP exchange services, AMS-IX serves a very diverse and unique mix of Internet companies, including international carriers, mobile operators, content providers, voice-over IP parties, application providers, hosting companies, television broadcasters and other related businesses.

Gateway to Europe

These different systems of infrastructure are some of the reasons the Netherlands is often called the "Gateway to Europe." As the gateway to Western and Eastern Europe, the Netherlands enables companies to serve markets in the current and future member states of the European Union ("EU"), the Middle East and Africa.

1.3 Government

Head of state	King Willem-Alexander
Head of government	Prime Minister Mark Rutte
Form of government	Constitutional monarchy
Seat of government	The Hague

The Netherlands was one of the first parliamentary democracies. Among other affiliations, the country is a founding member of the EU, NATO, OECD and WTO. It also forms the Benelux economic union with Belgium and Luxembourg. The Netherlands itself is a constitutional monarchy, with a parliamentary system in which the government consists of the king, the ministers and the state secretaries. For historical reasons, The Hague is the seat of government, but Amsterdam is the capital.

Dutch Parliament

Parliament is made up of the following two houses: (i) the Senate and (ii) the House of Representatives. The Senate has 75 indirectly elected members, who only have the power of veto in the legislative process. The House of Representatives, on the other hand, has 150 members elected directly by the people.

1.4 Economy

Macroeconomic Figures, 2014	Value
Gross domestic product ("GDP")	EUR638.476 billion
GDP growth	0.8%
Inflation rate	0.3%
Total workforce	8,896,000
Unemployment rate	7.4%

The Dutch economy has a strong international focus, with the country being one of the EU's most dynamic centers of trade and industry.

Trade (Import and Export), 2014	
Exports	EUR433.405 million
Export country comparison to the world	5
Exports - commodities	Food and live animals; beverages and tobacco; crude materials; inedible substances, except fuels, mineral fuels, lubricants relative materials, animal and vegetable oils, chemicals; machinery and transport equipment; miscellaneous manufactured articles
Imports	EUR382.416 million
Import country comparison to the world	8

Trade (Import and Export), 2014	
Imports - commodities	Food and live animals; beverages and tobacco; crude materials; inedible substances, except fuels, mineral fuels, lubricants relative materials, animal and vegetable oils, chemicals; machinery and transport equipment; miscellaneous manufactured articles

The Netherlands' exports totaled EUR433.405 million in 2014. Dutch prominence in European exports can be attributed mainly to transit exports to other European countries. In this sense, the Netherlands really is the gateway to Europe for many products from other regions. Half of the exports are transit ones.

1.5 Dutch people and culture

The People	
Total population	17,001,884
Languages	Dutch (official), Frisian (official)
Life expectancy (born in 2013)	Men: 79.4 years; women: 83.0 years
Nationalities	200

1.5.1 People

The Dutch themselves are a surprising people. They live, all 17 million of them, on 41,500 square kilometers of land, which is just a little more than half the size of Scotland. The Netherlands is thus one of the world's most densely populated countries. Dutch professionals are internationally oriented and are among the most multilingual in the world, enabling them to operate successfully in companies in any industry, serving customers across the globe. Another distinctive fact is the attractive cultural climate. Dutch people are anti-authoritarian, innovative and open-minded.

The Rijksmuseum in Amsterdam.

1.5.2 Arts, culture and science

The Netherlands is a country with a rich cultural and traditional heritage. The arts, in every form, flourish in the country, which has outstanding museums and an impressive variety of classical and innovative music, as well as theater.

Dutch Masters

The Netherlands has had many well-known painters. The 17th century, when the Dutch republic was prosperous, was the age of the "Dutch Masters," such as Rembrandt van Rijn, Johannes Vermeer, Jan Steen, Jacob van Ruysdael and many others. Famous Dutch painters of the 19th and 20th centuries were Vincent van Gogh and Piet Mondriaan. M. C. Escher is a well-known graphics artist. Willem de Kooning was born and trained in Rotterdam, although he is considered to have reached acclamation as an American artist.

The Netherlands is the country of philosophers Erasmus of Rotterdam and Spinoza. All of Descartes' major works were also done in the Netherlands. Dutch scientist Christiaan Huygens (1629-1695) discovered Saturn's moon (Titan) and invented the pendulum clock. Antonie van Leeuwenhoek , also a Dutch scientist, was the first to observe and describe single-celled organisms with a microscope. Jan Hendrik Oort (1900-1992) was a Dutch astronomer who made significant contributions to the understanding of the Milky Way and was also a pioneer in the field of radio astronomy. The Oort cloud, the Oort constants and the asteroid, 1691 Oort, were all named after him.

Museums

With almost 1,000 museums, the Netherlands has the highest museum density in the world. Some of the most famous are: (i) the Rijksmuseum in Amsterdam; (ii) the Vincent van Gogh Museum also in Amsterdam; (iii) the Museum Boijmans-Van Beuningen in Rotterdam; (iv) the Mauritshuis in The Hague and (v) the Het Loo Palace in Apeldoorn. Outstanding collections of modern and contemporary art may be seen at the Stedelijk Museum in Amsterdam, the Kröller-Müller Museum in Otterlo, and the Bonnefanten Museum in Maastricht.

Dutch creative climate and Dutch design

Dutch design is famous around the world. The minimalist, economical approach that characterizes Dutch design attracts many young designers, architects and artists, who come especially to Amsterdam to work in a climate of artistic freedom, dialog and innovation.

The Netherlands is also renowned for its architecture and exceptional urban development. Nearly 62,000 buildings are listed as monuments, which the government protects and for which maintenance it helps pay for. The world's planners and architects flock here to learn about Dutch solutions for crowded countries.

Holidays

National holidays are important in the Dutch culture. Several holidays have a rich history and have been celebrated for a very long time, with some of them having strong cultural ties to local regions. For instance, King's Day, which the Dutch celebrate in April, is an annual holiday in honor of King Willem-Alexander. On May 5, Liberation Day is celebrated, which marks the end of the Second World War. Each year, numerous festivals, concerts and other activities are organized on Liberation Day and an official day-off is granted in honor of this holiday once every five years. St. Nicholas (Sinterklaas) is a very popular mythical figure, in whose honor feasts, for children and adults alike, are held. Sinterklaas' arrival is in November and his birthday is celebrated on December 5. Celebrations include gatherings with family and friends, the exchanging of presents and treats and the performance of festive songs dedicated to St. Nicholas. This is not an official public holiday as many businesses and people dedicated to St. Nicholas tend to be busy arranging the festivities during this time of year.

1.5.3 Did you know...

- The Netherlands and Holland are one and the same place?
- Twenty-six percent of the Netherlands is under sea level?
- Holland still has 1,156 old-fashioned working windmills?
- The International Court of Justice (at the Peace Palace) and the International Criminal Court are both situated in The Hague?

- Holland has nearly 35,000 km of cycle paths?
- Holland is the second biggest exporter of agricultural produce, preceded only by the US, even though only 3 percent of the Dutch population works in the agriculture sector?
- The Dutch are among the tallest people in the world?
- Amsterdam was built entirely on piles?
- There are 18 million bicycles and 7.9 million cars in the Netherlands?
- Amsterdam is the capital, but the government is in The Hague?
- Nearly 200 nationalities live in the Netherlands?
- Rotterdam is one of the largest ports in the world?
- Nieuwerkerk aan den Ijssel, which is the lowest point in Holland, is 6.74 m below sea level?
- Gezelligheid is a typical Dutch word for which there is no good equivalent in other languages and which stands for pleasant social gatherings and a fine atmosphere?
- Holland has more than 4,400 km of navigable rivers, canals and lakes?
- The Dutch saying "Act normally, that's crazy enough" fits the Dutch like a glove?
- There is no country in the world where more licorice is consumed than in the Netherlands: 32 million kilos per year?
- The Netherlands has approximately 1.6 million cows, which together produce 12.2 billion liters of milk?
- On average, the Dutch eat 20.4 kilos of cheese per person per year?
- Nearly 600 million kilos of cheese are exported per year?

2

Legal Forms of Doing Business

A company may engage in business in the Netherlands through: (i) a Dutch holding company; (ii) a subsidiary or (iii) a branch. Compared with the laws in many other EU countries, Dutch corporate law provides a flexible and liberal corporate framework for the organization of branches and subsidiaries by nonresident companies or private individuals. There are no special restrictions on foreign-owned companies planning to start a business in the Netherlands.

2.1 Branch

The organization of a branch of a foreign company in the Netherlands does not require prior governmental approval. The foreign company should file the following documents and data with the Trade Register of the Chamber of Commerce:

- For the branch:
  - The name of the branch
  - The principal place of business of the foreign company
  - A short description of the actual business activities
  - The branch's number of employees
  - The full address of the branch
  - The trade registry extract or its local equivalent
  - The articles of association of the foreign company

- For the directors of the foreign company:
  - The full name of the directors
  - Their address
  - Their date and place of birth
  - Their nationalities and authority to represent the foreign company

- Their signatures
- Certified copies of their identity cards (passport or driver's license)

- For the branch manager (no residency requirement):
  - The branch manager's full name
  - The branch manager's address
  - The branch manager's date and place of birth
  - The branch manager's nationality
  - The branch manager's extent of power and authority to represent the branch
  - The branch manager's signature
  - A certified copy of the branch manager's identity card (passport or driver's license)

- The annual accounts of the foreign company filed locally are also to be filed with the Trade Register of the Chamber of Commerce.

2.2 Subsidiary

Dutch law distinguishes between two types of limited liability companies: (i) public companies (*naamloze vennootschap met beperkte aansprakelijkheid* or "N.V.") and (ii) private companies with limited liability (*besloten vennootschap met beperkte aansprakelijkheid* or "B.V."). The main differences between these two entities are as follows:

- B.V.s (as opposed to N.V.s) cannot issue bearer shares.
- N.V.s with bearer shares can be listed at the Dutch Stock Exchange. If certain conditions are met, the shares in a B.V. could be listed as well.
- N.V.s must have a minimum issued and paid-in capital of EUR45,000. For B.V.s, no minimum issued and paid-in capital is required, as long as at least one share is issued to a person or legal entity other than the B.V. or its subsidiaries.
- The nominal value of shares in B.V.s (as opposed to N.V.s) may be denominated in another currency other than the euro.
- B.V.s, as opposed to N.V.s, can issue shares without voting or profit rights.

- B.V.s are subject to less strict capital and creditor protection rules than N.V.s. For example, B.V.s do not need to acquire an auditor statement for contributions in kind.
- Holders of a certain class of B.V. shares may appoint, suspend and dismiss their “own” managing director. Holders of a certain class of N.V. shares may only have nomination rights in relation to the appointment of managing directors (these nomination rights may be overruled at the general meeting of shareholders).

A Dutch subsidiary may be established and owned by one or more shareholders that may be either individuals or legal entities, regardless of their nationalities. A single-member company is an N.V. or a B.V. in which all shares are held by a single legal entity or a private individual. The sole shareholder must be registered with the Trade Register of the Chamber of Commerce.

The issuance and transfer of registered shares and the transfer of a restricted right to the shares (for instance, a right of pledge) require the execution of a notarial deed before a Dutch civil law notary in the Netherlands. This obligation does not apply to N.V.s with shares or share certificates that are in bearer form or are officially listed on a regulated stock exchange.

2.3 Branch versus subsidiary

The most important difference between a branch and a subsidiary lies in the exposure to liability. A subsidiary has limited liability. As a result, a shareholder, in principle, is liable only to the extent of its capital contribution. A branch, on the other hand, is not considered a separate legal entity. As a result, the foreign company can be fully liable for all the obligations to which the branch is bound. That being said, the liability of a branch (including the liability of its manager and directors) depends on the rules and regulations that govern the liability of the foreign subsidiary, which will absorb the liability of the branch.

Under Dutch law, directors and officers of a subsidiary can benefit from extensive protection from personal liability. In the event of willful misconduct or gross negligence that leads to the bankruptcy of a subsidiary, directors can be held liable by third-party creditors. Furthermore, third-party creditors may hold a director of a Dutch company liable, pursuant to damages they have suffered as a result of an action arising from wrongful trading.

Manufacturing, warehousing and rendering of services may be carried out by both types of operations. Holding, finance and licensing operations are better conducted by a subsidiary, since it is able to benefit from tax treaties. The circumstances and relevant factors must be considered each time before a final decision is made as to which type of legal entity is used in the Netherlands.

2.4 Cooperative *(Coöperatie)*

Although historically used by agricultural groups, the Dutch cooperative is currently often used as a legal entity in international holding structures. The main reasons are its favorable tax treatment and its corporate flexibility. A cooperative is an association established as a cooperative by a notarial deed. Unlike N.V.s or B.V.s that have shareholders, cooperatives have members. At incorporation, the cooperative must have at least two members (leden). By law, the cooperative's objective is to provide for certain material needs of its members under an agreement concluded with them in the course of the business it conducts or causes to be conducted, and for the benefit of its members. If a cooperative is used in a holding structure, its objective generally is to make profits through investments. To achieve this, the cooperative enters into contribution agreements with its members, pursuant to which the members contribute capital (e.g., cash or other assets) to the cooperative. In exchange for these contributions, the capital accounts maintained for each member are credited. A cooperative may distribute profits among its members. The members' entitlement to the cooperative's profits is usually relative to their respective contributions.

2.5 European company/*Societas Europaea ("SE")*

The following are the four ways to incorporate an SE, a company that has a legal personality and is, in many respects, comparable to a Dutch N.V.:

- Through a legal merger between two companies based in different EU member states
- Through the incorporation of an SE as a holding company for two companies based in two different EU member states or with subsidiaries in two different EU member states
- Through the incorporation of an SE as a subsidiary of either of the following:
  - Two companies based in two different EU member states
  - An SE
- Through a legal conversion from an N.V. into an SE

Only legal entities may form an SE; private individuals may become a shareholder of the SE after its incorporation. An SE may transfer its registered office from one EU member state to another.

In addition, a group that has companies throughout the EU may now create a uniform management structure by forming an SE, since SEs may opt for a one-tier or two-tier board system.

Dutch SEs are governed by Dutch corporate law as well as by EU law (i.e., Council Regulation No. 2157/2001) and can be used for the same purposes as B.V.s and N.V.s. SEs can also be listed on a Dutch or foreign stock exchange. Furthermore, SEs can transfer their legal seat, as well as their principal place of business to other member states within the EU.

Finally, the SE can benefit from the same tax regime that is applicable to N.V.s and B.V.s once an SE is organized under the laws of the Netherlands.

2.6 *Societas Cooperativa Europaea ("SCE")*

An SCE is currently able to operate across all member states of the EU on the basis of registration in one member state. It may be incorporated by any of the following:

- Five or more private individuals or legal entities that reside in or are governed by the law of at least two member states
- A merger of legal entities that have their corporate seats and head offices in one of the member states, and where at least two of the entities involved are governed by the law of at least two member states
- A conversion of a cooperative into an SCE

The principal objective of an SCE is to satisfy its members' needs. Contrary to the Dutch cooperative, the SCE has a subscribed share capital of at least EUR30,000. Membership in the SCE is gained through ownership of shares in the capital of the SCE. Just like the SE, the SCE may transfer its legal seat and registered office from one EU member state to another.

2.7 Partnership

A partnership, whether general (*vennootschap onder firma* or "VOF") or limited (*commanditaire vennootschap* or "CV"), may be formed by two or more partners that may either be private individuals or legal entities. The parties conclude a partnership agreement and the partnership (not the contract) must be registered with the Trade Register of the Chamber of Commerce. The partners in a general partnership are jointly and severally liable for all obligations of the partnership. Pursuant to a limited partnership, however, the limited or "silent" partner is liable only up to the amount of its capital contribution, provided that the partner does not, in any way, take part in the representation of the partnership *vis-à-vis* third parties. The general partner is registered with the Trade Register. The limited partner is not.

A special partnership form is the European Economic Interest Grouping ("EEIG") or the *Europees economisch samenwerkingsverband* ("EESV"), which seeks to foster cooperation between entrepreneurs in Europe. The EEIG is a legal form based on a European statute. An EEIG formed under Dutch law has a legal personality and enjoys fiscal transparency throughout the European Economic Area ("EEA"). It is suitable for joint venture activities as well as specific intra-group purposes. There are no restrictions on foreign nationals entering into a partnership with Dutch residents. The formation of an EEIG requires at least two partners, which may comprise partnerships that are residing within the EEA.

2.8 Formal foreign companies

According to the Formal Foreign Companies Act ("FFCA"), a company that is incorporated under any law other than Dutch and that conducts its business entirely or almost entirely in the Netherlands without having any further real ties with the state under whose law it was incorporated is considered a formal foreign company.

Under the FFCA, the management of a formal foreign company is obliged to register its deed of incorporation, articles of association, the number under which the company is registered and the details of the sole shareholder (if applicable) with the Trade Register of the Chamber of Commerce in the Netherlands. Furthermore, formal foreign companies must file their annual accounts with the Trade Register of the Chamber of Commerce. However, companies that are subject to the laws of the EEA are exempt from most of the provisions of the FFCA.

3

Tax Benefits of Regional Headquarters/ Coordination Centers

Regional headquarters or coordination centers are generally established to supervise the operations of European and often Middle Eastern and African ("EMEA") subsidiaries. Among the typical activities of regional headquarters are: (i) sales and marketing coordination; (ii) administration and accounting; (iii) cash management; (iv) central billing; (v) re-invoicing (vi) advertising and public relations and (vii) group financing and licensing. In most cases, the Netherlands is the preferred location for central sales and distribution activities in EMEA and beyond. The Dutch company could then operate as a principal (or base) company. If desired, rulings can be obtained to confirm the tax consequences well in advance and for an agreed amount of time, which will be further discussed in this chapter. The Netherlands offers a central location in Europe, excellent airport facilities, a sophisticated banking system, highly skilled and multilingual employees and adequate office spaces. In addition, several tax advantages are available to both companies and expatriates.

3.1 General advantages

The Netherlands has the most extensive tax treaty network among all EU member states. Regional headquarters may apply these treaties in collecting dividends, interest and royalties from subsidiaries and other group companies. The international focus is also reflected in the Dutch tax system, with the participation exemption and the absence of withholding tax on interest and royalties. The Dutch Tax Administration is consistent, approachable, transparent and focused on finding solutions within the parameters laid down in legislation, policy and case law. This includes giving businesses certainty in advance on proposed juridical acts including foreign investment decisions. Expatriates who are temporarily assigned to

a Dutch office may qualify for a special tax regime known as the 30 percent ruling.

As a general rule, Dutch companies must report taxable income in the national currency, i.e., the euro. They may also report taxable income in another currency, such as the US dollar, if certain requirements are met, in order to avoid exchange gains and losses due to currency fluctuations. The main requirement is simply for the company to prepare its financial statements in the desired currency.

In the Netherlands, headquarters can charge affiliates certain typical shareholders' activities on a full-cost basis instead of applying a mark-up. A list of qualifying shareholders' activities has been published. For other typical support services, such as distribution and administration, a profit mark-up on costs is usually sufficient.

The Dutch corporate income tax ("CIT") rate is 25 percent. However, profits of up to EUR200,000 are subject to a reduced 20 percent rate.

3.2 Tax ruling

Foreign investment is very important for an open economy such as the Netherlands, and the tax authorities are generally willing to confirm the tax consequences for foreign investors in advance and on relatively short notice. The Dutch ruling team of the Revenue Service in Rotterdam is easily accessible and is open to concluding Advance Pricing Agreements ("APAs") and Advance Tax Rulings ("ATRs"). An APA is an agreement on transfer-pricing methods, arm's-length results and, in general, for operating in conformity with the OECD Transfer Pricing Guidelines. An ATR confirms the tax aspects of certain fact patterns, such as the absence of a permanent establishment. APAs and ATRs are issued as "determination agreements" governed by Title 15 of Book 7 of the Dutch Civil Code ("DCC"). The Netherlands' ruling practice has not remained immune from recent allegations of State Aid, although considered unfounded by the Dutch government and therefore appealed. As a matter of fact, the EU Commission itself confirmed in June 2014, that the Dutch tax ruling practice is robust, based on thorough assessments of comprehensive information that the taxpayer

is required to provide within the scope of a tax ruling application. As such, an APA or ATR remains a valuable instrument from a tax risk management perspective.

Among other provisions, all rulings contain a provision on the exchange of information, allowing the Dutch tax authorities to share information with EU member states and/or treaty partners. The Dutch government is committed to initiatives on the automatic exchange of information on rulings by the European Commission and the OECD. APAs and ATRs are granted for periods of four to five years, unless the facts of a specific case require a deviating term (for instance, for the substantial "Greenfield" investments, 10-year rulings are common). In order to obtain an APA, it is possible to arrange a pre-filing meeting with the Dutch tax authorities. A pre-filing meeting is generally recommended in order to determine whether an APA request would be considered and on what conditions.

The Dutch State Secretary of Finance has, on various occasions, emphasized the APA and ATR practice having the office's full attention, taking into account these practices' importance in safeguarding the Netherlands as a preferred place of business for multinationals. The following typical examples can be given on tax rulings granted to foreign investors in the Netherlands:

- Ruling on the application of the participation exemption to income from shares (see also Section 3.3, Holding of shares)
- Headquarter companies are usually granted a cost-plus ruling on management services, providing for a fixed profit mark-up on management costs that are charged to affiliates. Headquarter activities are often combined with a shared services center. Separate mark-up rates can be agreed on for the various services rendered, although a blended rate can also be possible and appropriate, depending on the circumstances.
- Distribution centers are usually granted a cost-plus ruling on supporting activities (warehousing, distribution) conducted for the benefit of affiliates (see also Chapter 7, Sales Support, Distribution and Production and Chapter 20, International Distribution Centers/ Customs Facilities).

- Principal (i.e., base) company rulings – A Dutch company acts as principal for sales activities through a network of affiliated sales entities, earning an arm's-length distribution margin based on sales volume. IP and other intangibles are licensed to the Dutch principal company against a royalty.
- Ruling for group financing and group licensing structures (see also Section 3.4, Group financing and group licensing) – It is also possible to reach an agreement with the Dutch tax authorities in regard to a favorable tax treatment of central invoicing, leasing and foreign exchange clearing, and cash management and treasury activities performed within the group.

3.3 Holding of shares

Holding companies have no special tax status under the laws of the Netherlands. Tax benefits are available to all companies holding shares in Dutch or foreign subsidiaries. The Dutch tax authorities are willing to issue ATRs on the applicability of participation exemption for intermediate holding companies in international situations and for ultimate holding companies. For an ATR, the group must have a certain nexus with the Netherlands and the holding company must meet the minimum substance requirements as defined for financial services companies or FSCs (see 3.4.a.).

Dividends received by a Dutch company from nonresident subsidiaries are fully exempt from Dutch income tax under certain conditions (see application participation exemption as described in Chapter 18, Corporate Income Tax). The exemption also applies to capital gains upon the disposal of shares in subsidiaries. With respect to capital losses and costs related to the subsidiary, reference is made to Chapter 18, Sections 184.2 and 18.4.3.

Certain limitations on interest deduction may apply in the Netherlands (reference is made to Chapter 18). Tax treaties concluded by the Netherlands generally provide that withholding tax on dividends distributed to a Dutch company holding at least 25 percent of the shares in the distributing company is reduced to a substantially lower percentage, often to nil. Appendix II contains a chart displaying the reduction of foreign dividend withholding tax rates under the tax treaties concluded by the Netherlands.

Based on the tax treaties concluded, the Netherlands has also committed to reducing its statutory dividend withholding tax rate on dividends. Based on the EU Parent-Subsidiary Directive, dividend distributions made in an EU context are exempt from withholding tax if certain conditions are met. This includes dividend distributions made by a qualifying EU subsidiary to a qualifying Dutch company and vice versa (see Chapter 18, Corporate Income Tax).

3.4 Group financing and group licensing

The Netherlands may also be attractive for group financing activities. The tax treaties concluded by the Netherlands generally reduce the foreign withholding tax on interest paid to a Dutch company to substantially lower percentages, even to nil. Appendix II contains a chart showing the applicable reductions. Moreover, the Netherlands does not impose any withholding tax on interest or stamp duty.

Dutch companies engaged in licensing (i.e., as a licensee of patents, trademarks or technology with the right to sublicense those intangibles) may obtain certainty on their Dutch transfer-pricing position by applying for an APA. An APA would typically confirm an arm's-length remuneration for the Dutch company's functions and activities (usually a percentage of the royalties received). Moreover, the tax treaties entered into by the Netherlands provide for a reduction of foreign withholding tax on royalties to a substantially lower percentage, oftentimes to zero. Appendix II contains an overview of the available reductions. The Netherlands does not levy withholding tax on outbound royalties.

Based on the EU Interest and Royalties Directive, interest and royalty payments made in an EU context are exempt from withholding tax if the relevant conditions are met. This includes interest and royalty payments made by a qualifying EU company to a qualifying Dutch recipient company and vice versa.

Since interest and royalties may flow through a Dutch company at nominal tax cost, there are many multinationals that use Dutch companies for intra-group financing and licensing.

In practice, these FSCs only report an arm's-length spread as income for CIT purposes. For FSCs, special rules apply regarding: (i) the substance they must have and (ii) the minimum risk profile.

A) Substance

A Dutch FSC must have a minimum level of substance in the Netherlands. The tax authorities have developed the following minimum requirements:

1. At least 50 percent of all authorized directors must be tax residents of the Netherlands.
2. The directors residing in the Netherlands must have the relevant professional knowledge and skills to execute their obligations as directors.
3. The main directorial decisions must be taken in the Netherlands.
4. The FSC's main bank account must be maintained in the Netherlands.
5. The FSC's books and accounts must be kept in the Netherlands.
6. The FSC must be a tax resident of the Netherlands and must not be deemed a resident of any other country.
7. The FSC should have equity sufficient to perform the activities that it is engaged in.
8. The FSC must have observed all applicable tax filing requirements (such as, for instance, CIT, VAT, wage tax, etc.).

As from 1 January 2014, all FSCs (either with or without APA) must declare in their tax return that these substance requirements are fulfilled. A lack of substance may cause spontaneous exchange of information to foreign tax authorities and disallowance of tax treaty benefits. The adoption in October 2015, of the final action reports of the Base Erosion and Profit Shifting Project ('BEPS reports') may also limit the use of tax treaties by FSCs lacking appropriate substance.

B) Minimum risk profile

FSCs must be subject to a minimum level of risk in respect of borrowing and lending within the group. This is the case if their equity is at least equal to the lower of 1 percent of the total outstanding loans or EUR2 million. For licensing, the lower of 50 percent of the net royalties received

per annum or EUR2 million as minimum equity is generally assumed sufficient. As mentioned, this equity must be at risk of a debtor defaulting. This risk should not be assumed by other parties or entities to the effect that the Dutch entity is *de facto* not (sufficiently) exposed to risks.

If the substance and minimum risk requirements are adequately fulfilled, an APA can be concluded to confirm that the compensation for the FSC is at arm's-length. An APA is not compulsory to act as an FSC and the activities of an FSC can be easily combined with holding or operating activities in one Dutch company.

Dutch entities that do not incur sufficient risk (as outlined above) may not credit any foreign withholding taxes related to interest or royalty income. Moreover, interest and royalties received and paid by such entity are disregarded for income tax purposes in the Netherlands, which may cause a spontaneous exchange of information with foreign tax authorities and the disallowance of tax treaty benefits. It should be noted that even if interest and/or royalty income is excluded from the Dutch taxable income, the Dutch entity must still report arm's-length remuneration with regard to services relating to the loan or royalty transaction.

4

The Subsidiary

4.1 Incorporation of N.V. and B.V.

An N.V. and a B.V. are incorporated by one or more incorporators, pursuant to the execution of a notarial deed of incorporation, which includes the company's articles of association.

The notarial deed of incorporation must be executed in the Dutch language before a Dutch civil law notary in the Netherlands. In the event of an incorporation of an N.V., a bank or an auditor's statement must be obtained prior to incorporation.

The bank statement should be issued by a bank registered as a credit institution pursuant to the Dutch Financial Supervision Act (*Wet op het financieel toezicht* or "Wft"). It must confirm that the incorporation capital has been transferred to a bank account in the name of the N.V. upon incorporation. After the issuance of such bank statement, the N.V. can be incorporated by means of the execution of a notarial deed. It is not necessary to obtain a bank statement in the event of incorporation of a B.V.

If upon incorporation it is agreed that a non-cash contribution shall be made on shares, the management board must prepare a description of the non-cash contribution. In the event of an N.V., a Dutch qualified auditor must issue a statement in respect of the contributed assets. The statement must confirm that the value of the contribution to be made, established by means of generally acceptable valuation methods, is at least equal to the amount payable of the incorporation capital. The aforementioned statement is not required in the event of a non-cash contribution on B.V. shares.

The name of the company is followed by "N.V." or "B.V.," and in the event an "N.V." or a "B.V." is in the process of formation, the abbreviation "i.o." (*in oprichting* or in the process of being incorporated) is annexed to the name. An N.V. or a B.V. is allowed to conduct business during the pre-incorporation period and the N.V. i.o. or the B.V. i.o. may be registered with the Trade Register of the Chamber of Commerce. The persons acting on behalf of the N.V. i.o. or the B.V. i.o., or the N.V. or B.V. are personally liable until the N.V. or the B.V. is duly registered in the Trade Register of the Chamber of Commerce, and has ratified the actions performed on its behalf during the pre-incorporation period.

Because of the simplification of the incorporation procedure for B.V.s, the registration of B.V.s "in formation" has, since 2012, become less common.

4.2 Incorporation of a cooperative

A cooperative is incorporated by the execution of a notarial deed in the Dutch language by a Dutch civil law notary in the Netherlands. Unlike the N.V. and similar to the B.V., no bank statement or auditor's statement is required for the incorporation of a cooperative. Dutch law requires that a cooperative be incorporated by at least two incorporators. Unless the deed of incorporation explicitly states otherwise, the incorporators automatically become members of the cooperative upon incorporation.

The word "*coöperatief*" must be included in the official name of the cooperative as well as one of the following abbreviations: (i) WA for *wettelijke aansprakelijkheid* (full statutory liability); (ii) BA for *beperkte aansprakelijkheid* (limited liability) or (iii) UA for *uitsluiting van aansprakelijkheid* (exclusion of liability), which indicates the level of liability of its members. Upon incorporation, the cooperative is registered with the Trade Register of the Chamber of Commerce.

4.3 Capitalization

N.V./SE

An N.V. and an SE must have an authorized and issued capital, divided into a number of shares with a par value expressed in euro. Shares without a par value are not permitted. Upon formation, at least 20 percent of the authorized capital must be issued and at least 25 percent of the par value of each share issued must be paid in. The minimum issued share capital is EUR120,000 for an SE and EUR45,000 for an N.V.

B.V.

The minimum capital requirements for B.V.s have been abolished in Dutch law. Instead, the incorporator(s) may determine the amount of capital to be paid. It is possible to choose for an authorized capital in the articles of association of a B.V., but it is no longer required by law. The nominal value of shares may be denominated in currencies other than euros.

Cooperative

There is no statutory requirement for a cooperative to maintain a minimum amount of capital. The articles of association or the separate members' agreement may oblige a member to contribute funds or assets to acquire a membership interest in the cooperative.

4.4 Transfer of shares and membership interest

An N.V. and an SE's authorized capital may be divided into transferable – bearer or registered – shares, while a B.V.'s capital may be divided into registered shares. Bearer shares are freely transferable upon delivery of the related share certificates, either electronically or physically. Registered shares may be ordinary, preferred or priority shares. Registered shares issued by an N.V. or a B.V. may be freely transferred, subject to any restrictions contained in the company's articles of association.

The transfer of registered shares in an SE, N.V. and B.V. requires a notarial

deed of transfer to be executed before a Dutch civil law notary in the Netherlands. The transfer of shares is recorded in the shareholders' register. The registration with the Trade Register of the Chamber of Commerce is updated accordingly in the case of a sole shareholder.

Membership interests in the cooperative may be held by private individuals, legal entities and partnerships, either foreign or Dutch. Membership interests are, in general, freely transferable, but certain restrictions can be included in the articles of association of a cooperative. A transfer of membership interest can be made subject to certain restrictions, such as prior consent of the board of managing directors, general meeting of members or meeting of holders of a certain class of membership interests.

After each transfer, admission or termination, the members' register is to be updated accordingly.

4.5 Shareholders' register and members' register

The board of managing directors of an SE, N.V. and B.V. with registered shares must keep a shareholders' register at the registered office of the company. The register must contain the company name, corporate seat, (authorized and) issued share capital, the number of all registered shares, the names and (electronic) addresses of the shareholders, pledgors and usufructuaries, the extent to which the par value of the shares has been paid up, as well as the particulars of the incorporation, any amendment to the articles of association, and issuance, transfer, pledge, attachment or usufruct on the shares.

A similar register is to be kept as well for cooperatives and must contain information with respect to the name, corporate seat, member's interest, contributions, members, pledgors, usufructuaries, and any amendment to the articles of association, as well as transfer, pledge and usufruct on interest.

Each shareholder, member, pledgor or usufructuary of shares or interest has the right to inspect the register and receive a certified excerpt. Any amendment or adjustments in the registers require the signature of one of the managing directors.

4.6 Issuance of new shares

Upon the issuance of registered N.V. shares, at least 25 percent of the par value of the shares must be paid up. This requirement does not apply to the issuance of B.V. shares. With bearer shares, payment must be made in full upon issuance. Shares may also be paid in kind, in which case a management board description of the contribution is required. For an N.V., an additional auditor's statement is to be obtained, confirming that the value of the contribution in-kind is equal to or exceeds the total par value of the issued shares. The amount exceeding the total par value is considered non-stipulated share premium.

The issuance of registered shares requires a notarial deed executed before a Dutch civil law notary in the Netherlands and must be recorded in the shareholders' register. The registration with the Trade Register of the Chambers of Commerce is updated accordingly.

4.7 Board of managing directors

N.V.s, SEs, B.V.s and cooperatives are managed by a board of managing directors consisting of one or more managing directors appointed by the general meeting of shareholders or members, who also have the authority to dismiss them. A managing director may be a private individual or a legal entity, either foreign or Dutch. From a Dutch corporate law point of view, none of the managing directors need to be a Dutch resident. However, a Dutch tax adviser can advise otherwise to create substance.

The articles of association state the number of managing directors and whether a managing director is solely or jointly authorized to fully represent and bind the company. A provision to this effect may be invoked against third parties.

The articles of association may provide that a number of specified acts of the board of managing directors require prior approval of the shareholders, members and the board of supervisory directors or another corporate body. These may not be invoked against third parties unless they are aware of this provision and have not acted in good faith.

As of 1 January 2013, a one-tier board of management directors composed of executive and non-executive directors can be installed, which creates a legal framework for improving the supervision of directors who are charged with the management of an N.V. or a B.V.

4.8 Board of supervisory directors

An N.V., a B.V. and a cooperative may institute a supervisory board to advise and supervise the managing directors, but this supervisory board is not allowed to participate in management affairs. Only a private individual may be appointed as a supervisory director. Supervisory directors are appointed and dismissed from their positions through the general meeting of shareholders or members. No person may serve as managing director and supervisory director in the same entity at the same time.

4.9 Proxy holders

Dutch law does not recognize the concept of officers. The board of managing directors may appoint proxy holders and grant them limited or unlimited power of attorney. The title and scope of the authority are determined by the management board. The determination may be subject to the prior approval of the board of supervisory directors or the meeting of shareholders or members. At all times, the persons appointed must act under the responsibility of the board of managing directors. The proxy holders are known to third parties due to the registration with the Trade Register of the Chamber of Commerce.

4.10 Large companies regime

An N.V., a B.V. or a cooperative is subject to the Large Companies Regime if the company meets for three consecutive years the following criteria:

- The issued capital of the company, together with reserves as reflected in the balance sheet, amounts to at least EUR16 million.
- The company and/or an affiliated company (i.e., an enterprise in which the company owns at least 50 percent of the shares) has installed a Works Council.
- Together, the company and its affiliate(s) employ an average of at least 100 employees in the Netherlands.

As a consequence hereof, the N.V., B.V. or cooperative should install a board of supervisory directors, or alternatively, install a board consisting of executive and non-executive members. A company may voluntarily apply to be subject to the Large Companies Regime. Provided that certain conditions are met, a mitigated Large Companies Regime is available to the N.V. or B.V. In the event the mitigated regime applies, the executive members of the board of managing directors will be appointed by the general meeting of shareholders instead of the supervisory board or the non-executive directors.

An international holding company that restricts its activity exclusively or almost exclusively to the management and financing of group companies and of its and their participations in other legal persons may be exempted from the Large Companies Regime if majority of their employees, which are employed by the company and by group companies, work outside the Netherlands.

The Large Companies Regime does not apply to SEs.

4.11 Developments

One-tier board

On 1 January 2013, the one-tier board system is introduced in Dutch law, thereby facilitating the installment of one single board of directors for a Dutch N.V. or a B.V., which comprises both executive and non-executive directors. As opposed to Anglo-American jurisdictions, the Netherlands (as many other civil law countries in Europe) used to only provide for a two-tier board system – a management board consisting of executive directors and a supervisory board consisting of non-executives. Over the past few years, the "formal" differences between the one-tier board and the two-tier board have become less significant, due particularly to international discussions on a more active role for supervisors or non-executives and on corporate governance in general. By introducing a legal basis for the one-tier board system in Dutch limited liability companies, the Dutch legislator facilitates foreign companies investing in the Netherlands that are familiar with the Anglo-American tradition of the one-tier board.

In the "new" one-tier board system, the general course of affairs becomes the responsibility of the board of directors as a whole (both executives and non-executives), resulting in a more timely and direct involvement of the non-executives. The executives will be charged with the day-to-day business of the company. However, the one-tier board system will be an addition to, and not a replacement for, the two-tier board system.

Conflict of interest

As part of the implementation of the one-tier board system, the Dutch statutory provision on conflict of interest between a director and the company was also changed for N.V.s and B.V.s. As of 1 January 2013, a director having a conflict of interest may no longer participate in the decision-making process on such matter. If the director does so anyway, the basic principle is that the company will nevertheless be bound. If there is no other director in office, the decision will be taken by the supervisory board. If there is no supervisory board installed, the decision will be made by the general meeting of shareholders, unless the articles of association

determine otherwise. The new conflict of interest provision is mandatory and supersedes any other provision on the matter as determined in the current articles of association of a Dutch limited liability company.

Limitations on number of supervisory positions

As of 1 January 2013, a person may not be a managing director (or an executive director in a one-tier board) of a “large” N.V. or B.V. under the existence of any of the following conditions:

- He or she already holds more than two supervisory positions (i.e., supervisory director, non-executive director in a one-tier board) in other “large” companies.
- He or she acts as chairman of the supervisory board or, in the case of a one-tier board, the management board of another “large” company.

A person may not be a supervisory director (or non-executive director in a one-tier board) of a “large” company if he or she already holds five or more supervisory positions with other “large” companies. Acting as chairman of the supervisory board or of the management board in the case of a one-tier board will count twice.

An N.V. or a B.V. qualifies as “large” if it meets at least two of the following criteria:
- Value of the assets is more than EUR20 million.
- Net turnover is more than EUR40 million.
- Average number of employees is 250 or more.

Supervisory positions in “large” companies that are part of the same group will be counted as one position.

Gender diversity

Since 1 January 2013, "large" companies had to ensure that at least 30 percent of positions in the management and supervisory boards were held by men and at least 30 percent by women, insofar as these positions were allocated to natural persons, and noncompliance to this gender diversity policy was to be explained then in the annual report. Nonetheless, this gender diversity requirement has been abolished from Dutch law by operation of law, effective as of 1 January 2016.

5

Reporting, Auditing and Publication Requirements

5.1 Financial statements

The annual accounts of a Dutch N.V., B.V., SE or cooperative consist of: (i) the balance sheet; (ii) the profit and loss account and explanatory notes, and (iii) the consolidated annual accounts, if applicable. Cooperatives must substitute the profit and loss account for a statement of operating income and expenses.

Each year, within five months after the end of the financial year of the N.V., SE or B.V., and within six months after the end of the financial year of the cooperative, annual accounts must be prepared by the board of managing directors. The annual accounts must be signed by all managing directors and supervisory directors (if any). If one or more of their signatures are missing, this must be stated, giving the reason therefor. The annual accounts are submitted to the general meeting of shareholders or members for adoption. For B.V.s, in the event all shareholders are managing directors as well, it is also possible to adopt the annual accounts by way of signing of the annual accounts by the managing directors (and the supervisory directors, if any). In special circumstances, the general meeting of shareholders or members may provide for an extension of four months for the cooperative and five months for the N.V., SE and B.V. (new law, effective as of 1 November 2015, and applies to financial years starting 1 January 2016 and later). The adoption should take place within one month for cooperatives or two months for N.V.s, SEs and B.V.s after the preparation. In the event the company is subject to the Large Companies Regime, the annual accounts are also to be submitted to the company's Works Council. Depending on the size of the business, the annual accounts must be accompanied by a director's report and an auditor's report.

The board of managing directors must file the adopted annual accounts with the Trade Register of the Chamber of Commerce within eight days after the adoption by the general meeting of shareholders or members. In the event that the annual accounts are not adopted within one month for cooperatives or two months for N.V.s, SEs and B.V.s after the period permitted by law, the board of managing directors should file forthwith the draft annual accounts with the Trade Register of the Chamber of Commerce with a reference to their draft status.

If a cooperative has not installed a supervisory board and no auditor's report is submitted to the general meeting of members, an audit committee consisting of at least two persons (none of whom can be a managing director) has to be appointed annually by the general meeting of members, and this committee will report on the annual financial documents provided by the board of managing directors.

5.2 Director's report

The board of managing directors must draw up the director's report. Micro companies and small companies (as defined in 5.7) are exempt from this obligation. The report must give a true and fair view of the position on the balance sheet date and of the course of the business during the financial year.

The director's report contains information on expected future business, particularly on investments, financing, personnel, the development of turnover and profitability, as well as information about research and development ("R&D") activities, unless this conflicts with legitimate interests.

Pursuant to the Dutch Corporate Governance Code, listed N.V.s and SEs are expected to devote a chapter in the annual report to: (i) the broad outline of their corporate governance structure; (ii) the compliance with the corporate governance code and (iii) the non-application of any best practice provisions.

The effect on the projections of unusual events, which need not be reflected in the annual accounts, must be disclosed. The director's report should not conflict with the annual accounts.

5.3 Accounting principles

The annual accounts, prepared in accordance with generally accepted accounting principles, must provide a view that would enable a sound judgment to be formed on the assets and liabilities and results of the company and, insofar as the nature of annual accounts permits, of its solvency and liquidity. If so justified by the international structure of its group, the annual accounts may be prepared in accordance with generally accepted accounting principles in one of the member states of the European Communities ("EC"). If the company makes use of the aforementioned possibility, it must make a statement in the explanatory notes of its annual accounts.

Micro companies and small companies, (as defined in 5.7) are allowed to use the valuation principles, which are used in their corporate tax filings when preparing their statutory annual accounts (*commerciële jaarrekening*). This is to prevent the preparation of two different sets of annual accounts.

5.4 Other information

The annual accounts prepared by the board of managing directors may include: (i) an auditor's report or information as to the reason for its absence; (ii) proposed allocation of profits, including the determination of amounts available for dividends or the treatment of losses for the financial year; (iii) a summary of profit-sharing certificates or similar rights; (iv) important events after the balance sheet date that have material financial consequences; and (v) a list of branches and the countries where those branches are located.

Furthermore, Dutch law contains detailed requirements for: (i) the composition of the balance sheet; (ii) the profit and loss statement; (iii) the explanatory notes; (iv) the valuation principles and (v) the determination of the results.

5.5 Language

The annual accounts and the director's report must be written in Dutch, unless the general meeting has resolved to use another language. The annual accounts and director's report must be translated into Dutch, French, German or English prior to its filing with the Trade Register of the Chamber of Commerce.

5.6 Currency

The sums quoted in the annual accounts must be expressed in euro. However, if justified by the activity of the company or the international structure of its group, its annual accounts may be prepared in another foreign currency.

5.7 Classification

The minimum reporting, auditing and publication requirements depend on the size of the company. It may suffice for small and medium-sized companies to publish an abridged balance sheet, profit and loss accounts and explanatory notes. A micro company will only have to file a balance sheet and does not need to publish its profit and loss accounts, explanatory notes and other information. Similarly, small companies do not need to publish their profit and loss accounts, whereas medium-sized companies must publish an abridged version of their profit and loss account. Micro, small, medium-sized and group companies whose accounts are included in the consolidated accounts of another company are subject to less stringent reporting, auditing and publication requirements. A company qualifies as micro, small, medium-sized or large if it meets certain criteria.

Financial information on subsidiaries is used to determine the size of a company as if the company were required to consolidate, unless it is exempt from group consolidation requirements. A company will not be reclassified unless and until it meets two or three of the criteria of another category for two consecutive years. The criteria are as follows:

	Micro	Small	Medium	Large
Total value of assets	≤ €350,000	≤ €6 million	≤ €20 million	> €20 million
Net turnover	≤ €700,000	≤ €12 million	≤ €40 million	> €40 million
Number of employees	< 10	< 50	< 250	≥ 250

5.8 Exemption for group companies

Subject to strict requirements, a group company may be exempt from meeting its reporting, auditing and publication requirements. The exempt group company has the right to prepare an abridged version, consisting solely of its individual annual accounts; it does not need to prepare a director's report, nor does it have to comply with certain auditing and publication requirements. In order to make use of the exemption, the following requirements must be fulfilled:

- The exempt company's financial information has been consolidated by another company whose accounts have been drawn up in accordance with the Seventh EC Directive.
- The consolidating company has declared in writing that it assumes joint and several liability for any obligations arising from legal acts by the exempted company.
- The shareholders or members have declared in writing their agreement to derogate from the statutory requirements after the commencement of the financial year and before the adoption of the annual accounts.
- The consolidated accounts, the director's report and the auditor's report have been drawn up in or translated into Dutch, French, German or English.
- The declarations and documents have been filed for deposit with the Trade Register of the Chamber of Commerce.

5.9 Consolidated accounts

The company that solely or jointly with another company heads its group must include consolidated annual accounts in the notes to its annual accounts, showing its own financial information and of its subsidiaries in the group and other group companies.

The obligation to consolidate does not apply to information concerning the following:

- Combined significance of group companies that is not material to the whole
- Required information of group companies that can only be obtained or estimated at disproportionate expense or with great delay
- Interest in group companies that is only held for disposal

Consolidation may be omitted under the following circumstances:

- If on consolidation, the company qualifies as a small company
- No company to be involved in the consolidation has securities in issue officially listed on an exchange
- The company has not been notified in writing by at least one-tenth of its members or by holders of at least one-tenth of its issued capital of an objection thereto within six months from the commencement of its financial year.

A part of a group may be excluded from the consolidation as long as the following conditions are met:

- The company has not been notified in writing by at least one-tenth of its members or by holders of at least one-tenth of its issued capital of an objection thereto within six months from the commencement of its financial year.
- The financial information that the company should consolidate has been included in the consolidated annual accounts of a larger entity.
- The consolidated accounts and the director's report are prepared in accordance with the Seventh EC Directive or similar principles.

- The consolidated accounts, the director's report and the auditor's reports are drawn up in or translated into Dutch, French, German or English and submitted to the Trade Register of the Chamber of Commerce.

5.10 Auditing requirements

Medium-sized and large companies are required to have their annual accounts audited. Annual accounts of group companies that do not need to be drawn up in accordance with the legal requirements due to group exemptions or consolidation do not need to be audited. The external auditor must examine whether the annual accounts provide the requisite legal disclosures and whether the annual accounts, the director's report and other information comply with the statutory requirements. It should also be verified that the director's report does not conflict with the annual accounts. The auditor must be a Dutch certified public accountant or a foreign auditor licensed to practice in the Netherlands and must be appointed by the general meeting of members or shareholders. If the shareholders or members fail to do so, the board of supervisory directors or managing directors may be authorized to appoint the auditor.

6

Corporate Governance Code

The Dutch Corporate Governance Code (referred to in this section as the "Code") applies to Dutch N.V.s with shares (or depositary receipts of shares) that are admitted to trading on a regulated market in the EU or a comparable system outside the EU. Furthermore, the Code applies to Dutch public companies with a balance sheet value of more than EUR500 million and whose shares (or depositary receipts of shares) are admitted to trading on a multilateral trading facility in the EU or a comparable system outside the EU.

The Code is merely designed as a code of conduct. However, the Dutch legislator has designated the Code as the code of conduct to which Dutch listed companies should refer in their annual report. In 2013, the "one-tier board structure" was formally implemented in the DCC, including provisions on the management and supervision by this board structure. In a one-tier structure, the board consists of members having responsibility for the day-to-day operations of the company (i.e., the executive directors) and members having the primary responsibility to supervise the duties of such executive directors (i.e., the non-executive directors). Since the Code is mostly based on the so-called two-tier board structure, it contains limited provisions pertaining to the "one-tier board structure." However, according to the announcement from the Code Committee, the provisions for the management board and supervisory board members apply *mutatis mutandis* to the executive and non-executive directors to the extent possible.

6.1 Principles and best practice provisions

The Code sets forth general principles, each followed by specific best practice provisions. Listed companies are obliged to comply with each principle and provision of the Code or, alternatively, these listed companies must explain in a separate chapter of their annual report, the extent to which they did not comply with the principles and best practice provisions during the relevant financial year (the so-called "comply or explain principle").

- The Code is divided into several chapters containing best practice provisions in relation to the following:
- Compliance with and enforcement of the Code
- The management board
- The supervisory board and its committees
- The shareholders and the general meeting of shareholders
- The audit of the financial reporting and the position of the internal auditor function and of the external auditor

Below are the most important best practice provisions of each chapter. The full text and additional information (which unfortunately is limited in English) may be found on the Code committee's website: www.commissiecorporategovernance.nl/information-in-english.

6.2 Compliance and enforcement of the code

Both the management board and the supervisory board (or in case of a "one tier structure," the board) are responsible for the company's corporate governance and compliance with the Code. Upon applicability of the Code, any deviation from the principles and best practice provisions should be specifically disclosed in the annual accounts and explained during the general meeting of shareholders. Subsequently, any deviation in complying with the Code in the years thereafter should again be disclosed in the annual accounts and explained to the general meeting of shareholders following the year in which the relevant deviation originated. The Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten* or "AFM") will verify whether the company has: (i) included this corporate governance code chapter in the annual report; (ii) attached this chapter

to the annual report; and/or (iii) published this chapter on the company's website.

6.3 Management board

- A management board member can be appointed and reappointed for a maximum term of four years.

- The management board is responsible for managing the company's business risks and for drafting a risk control policy.

- The management board reports annually on the functioning of the internal risk management and control systems, including significant changes and planned improvements in that respect. The management board must declare in the annual report, among other things, that the internal risk management and control systems are working adequately and do not contain material inaccuracies.

- The management board must ensure that there is a way for employees to report alleged company irregularities of a general, operational and financial nature to its chairperson or to a designated official (the so-called "whistleblower protection").

- A management board member may not have more than two supervisory board directorships in listed companies and may not serve as chairman of the management board of another listed company. Membership in the supervisory board of other companies within the group to which the company belongs does not fall under this restriction.

- In the event of an intended takeover bid on the shares in the capital of the company, the management board and the supervisory board must consider all interests involved. The supervisory board must be timely and closely involved in this takeover process.

- In the event that options are granted to management board members, these options must not be exercised for three years from the time they have been granted.

- Shares granted to management board members without consideration must be retained by these members for a period of at least five years or until the termination of their employment with the company.

- Compensation upon dismissal or resignation of management board members may not exceed their yearly salary (based on the "fixed"-remuneration component), unless this excess over their yearly salary is reasonable.

- The most important elements of the remuneration package, including the level of pre-arranged compensation upon dismissal ("golden parachutes" and severance packages) and change of control clauses, must be disclosed.

6.4 Supervisory board

- Each supervisory board member must be capable of assessing the company's general policy and must have the specific expertise required to fulfill tasks that form part of the role assigned to him or her within the framework of the supervisory board profile. The supervisory board must aim to have a diverse composition (in terms of age and gender).

- The annual report must state if the composition of the supervisory board deviates from the supervisory board profile.

- Upon their appointment, supervisory board members must participate in an introduction program dealing with general financial and legal affairs, specific aspects that are unique to the company in question and their responsibilities. The supervisory board must conduct an annual review to identify aspects in which its members require further training or education during their period of appointment.

- At least one member of the supervisory board must be a financial expert, which means that he or she has relevant knowledge of and experience in financial administration and accounting relating to listed companies or large companies.

- No supervisory board member may simultaneously serve in more than five supervisory boards of listed companies (being chairman of a supervisory board counts double), notwithstanding the fact that proper performance of his or her duties in each company should be guaranteed at all time.

- A supervisory board member may be appointed and reappointed for a maximum period of three successive four-year terms.

- The supervisory board must prepare an annual remuneration report containing extensive information on the management board remuneration policy. This report is submitted for approval to the general meeting of shareholders.

- Prior to preparing the annual remuneration policy and adopting the remuneration of individual managing directors, the supervisory board must analyze the possible outcomes of variable remuneration components as well as their consequences. Variable compensation must be based on long-term objectives and should be in line with the risk profile of the company. The supervisory board has the authority to change the value of the variable remuneration components afterward. In the event variable remuneration has been paid on the basis of incorrect (financial) information, the supervisory board may claim repayment thereof.

- Each supervisory board with more than four members must have: (i) an audit committee; (ii) a remuneration committee and (iii) a selection and appointment committee, each with specific detailed responsibilities.

- In the event of suspected accounting irregularities, the audit committee must be the external auditor's primary contact.

- The chairmanship of the audit committee may not be fulfilled by the chairman of the supervisory board or by a former member of the management board.

- The same applies to the remuneration committee, with the additional exclusion of any supervisory board member who is a management board member of another listed company.

- The supervisory board is assisted by the company secretary. The management board has the authority to appoint and dismiss the company secretary following approval from the supervisory board.

- The Code contains detailed provisions regarding the activities of the various supervisory board committees.

- The company must adopt a set of regulations governing the ownership of and transactions in securities by management board and supervisory board members, other than securities issued by their "own" company.

- In case of a one-tier board structure, the composition and function of the management board must ensure the proper and independent supervision by the non-executive members.

6.5 Shareholders and general meeting of shareholders

- A proposal on the agenda of the general meeting of shareholders, which is subject to shareholders' approval or authorization, requires a written explanation from the management board. This explanation will be published on the company's website.

- Material changes to the articles of association of the company and proposals for the appointment of management board and supervisory board members must be presented separately in the general meeting of shareholders.

- The company must offer its shareholders, as well as other persons who are entitled to vote, the opportunity to deposit their proxy to vote with an independent third party prior to the general meeting of shareholders.

- The company must formulate a policy on the outlines of bilateral contracts with shareholders and publish this policy on its website.

- The profit retention/dividend policy will be placed on the agenda of the annual meeting, and changes to this policy will be submitted thereto.

- Annually, institutional investors must publish on their website their policy on the exercise of voting rights on the shares held in listed companies.

- Shareholders may exercise their right to place items on the agenda only after having consulted the management board. The management board must respond within a reasonable period of time. For certain agenda items (e.g., a proposal to dismiss the entire management board), the Code provides for a longer period for the management board to respond, where a period of 180 days after the date on which the proposal to place items on the agenda has been submitted is generally deemed to be sufficient.

6.6 Financial reporting

- Considerable attention is given to the companies' financial reporting. The audit committee, composed of individual supervisory board members, will play an active role in supervising the functioning of the internal accounting department, and the risk management and control systems in general.

- The external auditor must attend meetings of the supervisory board and the audit committee at which the annual accounts will be approved or adopted. Detailed recommendations will be given in relation to the content of the auditor's report, and the external auditor has the direct obligation to answer the questions that may be posed by either the supervisory board members or the shareholders at the general meeting.

- The management board is responsible for the quality and completeness of publicly disclosed financial reports and press releases.

- The supervisory board must supervise the monitoring of the internal procedures for the preparation and publication of all important financial information by the management board.

- The external auditor may be asked questions at the general meeting of shareholders in relation to his or her statement on the fairness of the annual accounts.

- The external auditor must attend the meetings of the audit committee and the supervisory board, in which decisions will be made on the periodic external financial reporting.

7

Sales Support, Distribution and Production

A foreign company that considers establishing production and/or sales operations in the Netherlands or in Europe is likely to carry out the project in phases.

7.1 Liaison office

In the initial phase, without establishing a new legal entity, a liaison office may be opened in order to explore the market and to establish contacts with prospective customers. The office may provide information about the company's products and maintain a supply of goods or merchandise for display. Activities may include delivery, advertising and collection of information for the benefit of the foreign headquarters. In more general terms, the office may also carry out preparatory or supporting activities exclusively for the benefit of the foreign headquarters. These activities are generally not subject to Dutch corporate income tax under Dutch tax treaties if conducted in a manner in which the office will not be deemed as a "permanent establishment" for tax purposes.

7.2 Sales support

If the start-up phase proves to be successful, the company may decide to establish a new legal entity or to expand the activities of the liaison office to include sales support and distribution activities, such as processing, packing or repacking, central distribution, shipping, invoicing, repair, marketing and promotion. If no legal entity is set up, these activities will likely lead to a permanent establishment, which will be taxable in the Netherlands. In both cases, the taxable income should be at arm's-length and supported by transfer pricing documentation. One can request the

Dutch tax authorities to enter into an APA in which the company and the tax authorities agree upon an arm's-length remuneration for the services to be rendered by the Dutch legal entity or permanent establishment. Companies are required to submit an indication of an arm's-length return on services rendered on the basis of a transfer pricing study that is in line with the OECD Transfer Pricing Guidelines. As long as the legal entity or permanent establishment performs routine functions only and bears little risk, the arm's-length remuneration may be moderate.

7.3 Production

If the company enters into a third and final stage by organizing a full-fledged production and sales operation (with the customary business risks for bad debts, etc.), it will be required to report an increased arm's-length remuneration in respect of its increased activities and the increased risks to which it is exposed. However, the company may then also make use of the tax benefits available to Dutch companies, such as an investment allowance for business assets, accelerated depreciation of certain assets and generous loss compensation facilities. These facilities are described in Chapter 18, Corporate Income Tax.

8

Commercial Contracts

8.1 General Dutch contract law

Dutch contract law is rather liberal and allows for substantial freedom of contract. For the majority, the rules of the DCC are default rules that apply if and to the extent that the parties have not arranged for a specific topic in their contract. However, for some types of contracts, such as consumer contracts (see Section 8.3, Consumer protection/Consumer sales), commercial agency contracts (see Section 8.5, Agency agreements), lease contracts, insurance contracts and transport-related contracts, (partly) mandatory legislation applies (i.e., those that cannot be deviated from by contract).

Furthermore, it is important to note that the principles of reasonableness and fairness (*redelijkheid en billijkheid*) underlie Dutch contract law. The principles of reasonableness and fairness are based on the generally accepted principles of law, current juridical views in the Netherlands, and the societal and private interests involved in the case. These principles may be invoked to either supplement a contract agreed on by the parties or, in exceptional circumstances, prevent a party from relying on a contractual clause (see, with regard to limitations of liability, Chapter 23, Liability).

Besides these principles of reasonableness and fairness, the other distinctive features of Dutch law are as follows:

- Rescission – In the event of a breach, the non-breaching party is allowed to rescind the contract, unless the breach does not justify the rescission and its consequences. This also applies in the event of *force majeure*. The rescission releases the parties from their obligations under the contract. To the extent that these obligations have already been performed, an obligation arises to reverse the performance of the obligations that they have already received.

- Specific performance – In the event of breach of contract, the non-breaching party may also claim specific performance, which right cannot be deviated from in contract.

- Penalties – Parties are free to agree on a penalty. The amount of penalty does not have to be equal to the expected damages, although a court is entitled to reduce the amount of the penalty. Unless agreed on otherwise, the penalty replaces the right to claim specific performance and damages.

The Netherlands is a party to the UN Convention on the International Sale of Goods 1980 ("CISG").

8.2 General terms and conditions

In order to be effective, general terms must be accepted by the other party, and the other party must be properly informed of such terms. The DCC grants protection from a user of general terms and conditions. More specifically, a provision of general terms and conditions is voidable if: (i) a clause is "unreasonably onerous" (*onredelijk bezwarend*) vis-à-vis the other party or (ii) the user of the general terms and conditions has not given the other party reasonable opportunity to take knowledge of the general terms and conditions. The latter normally entails that the user of general terms and conditions provide the other party with a hard copy of the general terms and conditions.

However, with respect to business-to-business ("B2B") relationships, this protective legislation will only apply if both parties are established in the Netherlands. In addition, this legislation cannot be invoked by: (a) legal entities that have recently published their annual accounts at the time of conclusion of the contract; nor by (b) parties that employ 50 or more persons, according to an excerpt from the Trade Register at the time of conclusion of the contract. In other words, consumers and small businesses will mostly benefit from this protective legislation.

In case the contract relates to an international B2B sale, lower Dutch courts decided that the CISG will determine the applicability of the general terms - in accordance with Opinion No. 13 of the CISG Advisory Counsel. As such, general terms in this relation will be included, if the other party had a reasonable opportunity to take notice of these terms.

8.3 Consumer protection/Consumer sales

The DCC provides for the specific protection of consumers. This involves, most importantly, legislation with respect to consumer sales. A consumer sale is a sales agreement with respect to movables, including electricity, concluded by and between a seller that acts in the course of a profession or a business and a buyer being a natural person that does not act within the course of a profession or a business. The principal rule with respect to consumer sales is that a good delivered must conform to the agreement. If not, the DCC grants the consumer statutory remedies such as repair, replacement or refund of the purchase price.

This legislation is mostly mandatory in nature, which means that it cannot be deviated from to the detriment of the consumer. Provisions that deviate from such mandatory legislation are voidable. If the consumer were to subsequently declare such provision void, the seller would not be able to enforce such provision toward the consumer as a result.

The Directive on Protection of Consumer Rights 2011/83/EC was implemented on 13 June 2014. As such, for distant selling contracts (e.g., those concluded via the Internet), the manufacturer incurs extensive information obligations, such as those with regard to its identity, the characteristics of the goods/services, price, address, delivery, etc. Not providing such information will be qualified as an unfair trade practice. Agreements that result from unfair trade practices may be voided by the consumer. Furthermore, a consumer can cancel a distant selling contract for any reason within 14 days, which can be extended up to 12 months if not all required information was provided. In case the consumer makes use of its Right of Withdrawal, the trader must reimburse all payments received from the consumer within 14 days of the withdrawal.

8.4 Consumer authority

The Dutch Authority for Consumer and Market (*Autoriteit Consument en Markt* or "ACM") is the supervisory body with respect to consumer law and fair trade in the Netherlands. Its main objective is, *inter alia*, the promotion of fair trade between companies and consumers. In this respect, the Authority for Consumer and Market has civil and administrative enforcement remedies at its disposal for enforcing consumer laws, including imposing administrative fines. Depending on the violation, the administrative fine may range up to EUR400,000. In addition, the Consumer Authority may publish any measures it has taken against companies within the context of its supervisory role, causing a certain extent of negative publicity for the companies involved ("naming and shaming").

If an act or omission of a non-Dutch entity that is established in the EU violates consumer protective legislation in the Netherlands, the Authority for Consumer and Market may engage the enforcement authorities of the relevant EU country. In such events, the Consumer Authority can request the authorities in that other member state to: (i) provide all information relevant to assess whether a violation of consumer protective legislation has taken place or whether a reasonable presumption exists that such violation could take place; and (ii) take action to stop or prohibit the violating act or omission.

8.5 Agency agreements

A commercial agent is a person or a company that in consideration for a fee acts as an intermediary with respect to the conclusion of contracts and, possibly, concludes those contracts in the name and for the account of the principal.

Dutch agency law is based on EC Directive 86/653/EC and is substantially mandatory in nature, particularly those provisions aimed at protecting the agent. For example, mandatory minimum notice periods apply and an agent is, in principle, entitled to receive goodwill compensation upon the termination of the agency agreement.

The termination of an agency agreement may be subject to prior approval of the Dutch Employee Insurance Agency (*UWV WERKbedrijf*) if a so-called “small” agent is involved (i.e., an individual who acts as an agent for not more than two principals and who does not employ more than two assistants).

Parties are free to determine the governing law of their agreement. However, a choice for foreign law will not set aside the so-called Dutch “overriding mandatory rules.” To date, the rules regarding goodwill compensation and the special termination protection applying to “small” agents have been considered as such overriding mandatory rules.

Finally, EU and Dutch competition rules may also have an impact on agency agreements. Please refer to Chapter 10.

8.6 Distribution agreements

A distribution agreement differs from an agency agreement in that in a distribution agreement, the distributor purchases products or services from the supplier and resells them to third parties in its own name and for its own account.

Dutch law does not provide for specific legislation on distribution agreements. Consequently, distribution agreements are, by default, governed by the rules of Dutch contract law. As noted above, Dutch contract law is rather liberal and allows for substantial freedom for the contracting parties. The parties are thus, in principle, bound by their agreement, including the termination provisions thereof. A Dutch court may, however, set aside a contractual provision (such as a termination provision) if invoking such a provision, considering all circumstances of the case, is deemed unacceptable in view of the principles of reasonableness and fairness, as referred to above.

When a distribution agreement is silent on termination, such agreement may, in principle, be terminated upon a reasonable notice period or upon an offer to pay damages. All relevant factual circumstances need to be taken into account in order to determine the length of that notice period (e.g., the duration of the relationship, the dependence of the distributor, investments recently made, etc.). Depending on the circumstances, notice periods may typically vary from three months to two years (or even longer).

As a general rule, a distributor is not entitled to compensation if a reasonable notice period has been granted. However, the principles of reasonableness and fairness may bring about that under specific circumstances and despite the fact that a reasonable notice period has been granted, the distributor is entitled to some form of compensation. This may be the case, for example, if the supplier has given the impression that the contract would be continued and the distributor has made investments that cannot be recouped.

Finally, it should be noted that EU and Dutch competition rules have a significant effect on distribution agreements. This subject is further discussed in Chapter 10.

8.7 Franchise agreements

Contrary to some other European jurisdictions, the Netherlands has not adopted any specific legislation on franchise agreements. In the absence of any specific rules, franchise agreements, like distribution agreements, are regulated by default by the general rules of Dutch contract law.

Franchise agreements are not defined under Dutch law. Typically, however, a franchise agreement relates to, among others, the right of the franchisee to use a franchisor's common brand name and business formula, as well as know-how developed by the franchisor.

A common legal issue with regard to franchise agreements is whether the franchisor is subject to a (general) pre-contractual disclosure obligation, according to which he or she should inform the franchisee of the risks and opportunities (i.e., estimated revenues) of the franchise venture prior to concluding the agreement. The Dutch Supreme Court has held that such a general disclosure obligation, in principle, does not exist under Dutch law. However, there may be instances in which specific circumstances call for protection of the (potential) franchisee and a pre-contractual duty to inform comes from the general principles of reasonableness and fairness. Other legal issues that may be of specific relevance with respect to franchise agreements relate to lease and labor laws.

EU and Dutch competition rules also have a significant impact on franchise agreements. Please see Chapter 10, Competition Rules and Free Movement of Goods.

9

Real Estate

9.1 Ownership

The transfer of title of real estate generally requires a prior agreement, such as a sale and purchase agreement as well as an execution of a notarial deed of transfer, which must be entered in the land register in order for the transfer to take legal effect. The same applies to the establishment and transfer of *in rem* rights, including security rights (e.g., a right of mortgage).

The owner can use the property at his or her own discretion, since ownership is the most complete right to a property. The only exception is if there are restrictions attached to ownership based on statutory provisions or (unwritten) law.

In general, the transfer of commercial real estate is subject to the payment of (currently) 6 percent real estate transfer tax (2 percent in the case of residential property) or 21 percent turnover tax in case it concerns "newly developed" real estate or building land within the meaning of the Turnover Tax Act 1968.

The fees charged by the land registry for registration of transfer deeds are relatively low.

9.2 Land register

Rights over property are registered in the land register, which is publicly accessible. The information recorded includes ownership, mortgages, easements and other rights *in rem*. Also, some other administrative restrictions in the use of real estate are registered (such as designations as a protected

monumental building, municipal preemption rights and decrees pursuant to the Soil Protection Act). The lease of a property is not recorded in the land registers unless it concerns a ground lease (*erfpacht*), which is a right *in rem*.

Sale and purchase agreements can be made without specific formalities if these concern commercial properties and can also be made orally. However, this does not apply to residential transactions when the buyer is a private individual. In such cases, sale and purchase contracts must be in writing. The buyer (who is a private individual) of a residence has the option of dissolving the purchase and sale contract within three working days without specifying a reason by informing the seller thereof.

It is important to realize that as a result of the expectations that may have been created by the parties during the negotiations, agreements for commercial property do not require a specific written form and that parties can already be bound before a contract is signed. Therefore, as long as there is no final agreement, it is important for parties to state clearly in writing any conditions (such as obtaining board approval, irrevocable permits, financing or a satisfactory outcome of a due diligence audit) to the agreement that may exist. This is an important aspect that is relevant even at the stage of negotiating a letter of intent.

9.3 Other rights and obligations

In addition to formally executing the notarial deed, which the buyer of immovable property must file with the land register, the buyer should investigate all legal aspects of the property by consulting the land register as well. It is also sensible for the buyer to investigate whether the existing zoning plan allows the use of the property and to ask the seller whether he or she is aware of any (upcoming) changes to the existing zoning plan.

In the Netherlands, the seller is, by virtue of the law and in principle, obliged to transfer real estate without any restrictions or burdens unless the buyer expressly accepts these restrictions and burdens. This imposes on the seller the additional obligation to disclose all information in relation to the asset. The seller must inform the buyer of all rights vested in the real estate (i.e., the rights that are known to him or her). Case law demands that the buyer also conduct reasonable investigations.

Restricted rights in relation to real property can be divided into rights attached to a certain capacity and servitudes. Rights attached to a certain capacity are those arising from an agreement and relate to immovable property; for instance, an agreement with a neighbor to refrain from felling a tree. An example of servitude is the obligation to tolerate rainwater falling from the neighbor's roof on one's own yard. If the seller has not informed the buyer of such rights, the buyer – under certain circumstances – can order the seller (and cause the seller to be ordered by a court of law) to have those rights cancelled or to pay the buyer a lump sum.

9.4 Construction and renovation

The Netherlands is a small but densely populated country. Consequently, the use of space for residential and business purposes is tightly regulated. The zoning plan sets out specifically how land is to be used and developed. The competent authority in this respect is the relevant municipality.

The zoning plan contains regulations on a detailed scale for every plot of land in a municipality. These regulations may concern the use of the plot (i.e., agricultural, industrial, residential, etc.) as well as the dimensions (building height, volume, number of stories) of the buildings allowed and even the exact location of a new building on a plot of land. The zoning plan is the decisive instrument for granting or denying a general environmental permit (*omgevingsvergunning*) by the municipality. On the requirements that the buildings and the renovation of buildings have to meet, the Dutch Housing Act (*Woningwet*) applies. Under the Dutch Housing Act, municipalities are obliged to adopt a building ordinance (*bouwverordening*) containing building and renovation regulations. A building ordinance does not include technical building regulations, but it contains regulations

prohibiting the building of structures on polluted soil, regulations regarding building demolition and requirements regarding the external appearance of buildings. The technical regulations are included in the Building Decree 2012 (*Bouwbesluit 2012*). According to the General Provisions for the Environment Act (*Wet algemene bepalingen omgevingsrecht*), any application for a general environmental permit (*omgevingsvergunning*) will be assessed against several criteria, which, among others, include: (i) compliance with building and usage regulations in the zoning plan; (ii) compliance with municipal building regulations; (iii) compliance with the Building Decree 2012; (iv) requirements pursuant to the Monuments Act (*Monumentenwet*) and (v) requirements regarding the external appearance of buildings (*welstandsvereisten*).

Zoning law, in particular as it relates to the zoning plan and the general environmental permit, is enforced by the authorities, which have a wide range of instruments at their disposal to ensure the observance of the conditions in any zoning plan and of any permit.

9.5 Environmental aspects and soil pollution

Both in asset and share transactions, it is of utmost importance to give sufficient attention to the possible presence of soil pollution, as well as to requirements regarding the environmental aspects mentioned in the Dutch Environmental Management Act (*Wet milieubeheer*) concerning the general environmental permit (*omgevingsvergunning*). This aspect of the permit is an important regulatory instrument linked to the setup, change and operations of an establishment.

The Dutch Soil Protection Act (*Wet bodembescherming*) makes a difference between the concepts of “new” and “historic” pollution. In short, with regard to new pollution, all companies bear a general liability.

Practice has shown that these and other environmental issues can be dealt with satisfactorily by means of timely due diligence combined with clear contract language and, where appropriate, negotiations with the relevant authorities.

9.6 Leases

Leases are subject to various statutory provisions and administrative regulations. Three main lease regimes can be identified, which are as follows: (1) residential; (2) retail and (3) office and other commercial space. For residential and retail leases, specific statutory provisions of mandatory law apply, whereas the statutory framework for offices is limited in scope.

With respect to office space, a semi-mandatory system applies, which allows parties – to a great extent – to freely negotiate the rent and other terms of their agreement on the basis of prevailing market conditions. The rental price is often indexed on the basis of a locally published consumer price index. Upon termination of a lease, other than following notice given by the tenant, the tenant is by way of law granted a suspension of its obligation to evict the premises (which, in principle, arises at the end of a lease). On the basis of a request filed by the tenant, the district court can grant additional protection from eviction to a tenant up to a year, which may be extended twice (each time for a maximum of one year) following a repeated request by the tenant, for a maximum period of three years. In assessing the request for extension of the suspension of the eviction obligation, the district court will weigh the interests of both parties openly. One cannot appeal the district court's decision.

With respect to retail business space, a more complicated and more regulated semi-mandatory system applies, allowing the tenant to initially rent for a fixed five-year term. This term is extended for another five years if the tenant does not give notice of termination towards the end of the initial lease term, notwithstanding a court decision that terminates the lease after five years, following court proceedings that the lessor is required to initiate. The lessor can only do so when notice of termination has been served, stating either of two exhaustive termination grounds under mandatory law. The district court will test the grounds for termination. Toward the end of the second five-year term, the list of termination grounds is somewhat longer. Also, a review of the rent (other than yearly indexation) is regulated.

This statutory framework for retail space, which favors the tenant's position, implies a strong limitation of the freedom to contract, but allows for less-regulated contracts (i.e., without termination protection) if they are entered into for a period of two years or less. Also, with prior consent of the district court, parties may be allowed to discard the mandatory framework in part.

Although at present the residential market is looking up in terms of investment opportunities, the statutory framework for residential leases is an even more regulated area of Dutch law. Considerable mandatory law should be taken into account for the protection of the tenant, the most significant rules of which relate to rights of tenure and the rental price.

For all three types of leases, an industry standard contract is used, which circumvents most provisions of statutory law to the extent allowed and which still leaves room for alterations and negotiations on the terms and conditions for a specific lease.

9.7 Public housing

The Dutch government aims to ensure that there is sufficient housing for various social population groups in order to promote a suitable living environment. To this end, the Dutch government has implemented the Housing Act (*Woningwet*), which stipulates the obligations and powers of the different housing authorities and regulates the government's housing policy. The Dutch government is focusing on regulating the social housing agencies of late, which has resulted in a strong increase of social housing portfolio disposals.

10

Competition Rules and Free Movement of Goods

10.1 EU competition rules

The EU competition rules provided in Articles 101 and 102 of the Treaty on the Functioning of the EU ("Treaty") have direct effect in the Netherlands. Therefore, individuals can invoke these articles before the Dutch courts and the courts are obliged to apply them.

10.1.1 Restrictive agreements/Concerted practices between undertakings

Article 101(1) of the Treaty prohibits agreements and concerted practices between undertakings, which have as their object or effect to appreciably prevent, restrict or distort competition in the EU and which may have an effect on trade between EU member states.

Agreements and practices caught by the prohibition of Article 101(1) will nevertheless be lawful, if they meet the conditions of Article 101(3) of the Treaty. These conditions are met if the agreement or practice improves the production or distribution of goods or services or promotes technical or economic progress, while allowing consumers a fair share of the resulting benefit. Furthermore, the agreement may neither impose restrictions that are not indispensable to the attainment of these goals nor afford the parties the opportunity to eliminate competition in respect of a substantial part of the products or services in question.

Whether a certain agreement or practice satisfies these conditions for exemption has to be determined by means of self-assessment. To facilitate this self-assessment, the European Commission provides guidance through a set of notices.

In addition, the European Commission has adopted the so-called Block Exemption Regulations that automatically exempt certain categories of agreements. EU Block Exemption Regulations currently exist in relation to, *inter alia*, technology transfer agreements, specialization agreements, R&D agreements as well as other agreements in specific sectors, such as the insurance sector and the motor vehicle sector. All regulations have direct effect and are directly applicable in the Netherlands. By virtue of the Dutch Competition Act (*Mededingingswet*), they even apply in situations in which an effect on trade between EU member states is absent.

The EU Block Exemption Regulation on vertical agreements is among the most important EU Block Exemption Regulations. In principle, this regulation automatically exempts vertical agreements for the purchase or sale of goods and services from Article 101(1) of the Treaty, as long as the supplier's and buyer's respective market shares do not exceed 30 percent and the agreement concerned does not contain any "hardcore restrictions." Typical hardcore restrictions are fixed and minimum (re)sale prices, absolute territorial restrictions and absolute customer restrictions.

Agreements exceeding the 30 percent market share threshold are not eligible for automatic exemption, but may still be exempted on the basis of Article 101(3) of the Treaty following an individual self-assessment. Non-competition restrictions imposed on a purchaser in a vertical agreement are generally required not to exceed five years.

10.1.2 Abuse of a dominant position

Article 102 of the Treaty provides that any abuse of a dominant position by one or more undertakings within the EU (or a substantial part of it) is prohibited, if there is a potential effect on trade between EU member states. Abusive behavior may include exploitative practices (e.g., excessively high pricing) and exclusionary practices (e.g., predatory pricing and fidelity rebates).

10.1.3 Merger control

The EU Merger Regulation, which gives the European Commission jurisdiction over mergers, acquisitions and certain types of joint ventures with an EU dimension, is also directly applicable in the Netherlands. If certain turnover thresholds are met by the undertakings concerned, a transaction is considered to have an EU dimension. Therefore, prior notification as well as clearance of such transaction from the EU Commission is mandatory in the EU.

Transactions that fail to meet the turnover thresholds of the EU Merger Regulation may still be caught by the national merger control regimes of EU member states.

10.1.4 Fines

Upon infringement of the prohibitions laid down in Article 101 and Article 102 of the Treaty, the European Commission has the power to impose fines of up to 10 percent of the aggregate worldwide group turnover of the undertaking concerned. In addition, the European Commission may impose fines of up to 10 percent of the aggregate worldwide group turnover if an acquiring undertaking fails to notify a concentration, or up to 1 percent for providing incorrect or misleading information to the European Commission.

10.2 Dutch Competition Act

The Dutch Competition Act took effect on 1 January 1998. Articles 6 and 24 of the Dutch Competition Act contain prohibitions that are virtually identical to Articles 101 and 102 of the Treaty.

10.2.1 Restrictive agreements/Concerted practices between undertakings

Article 6(1) of the Dutch Competition Act contains a general prohibition on restrictive agreements or practices, both of a horizontal and a vertical nature. Article 6(1) is not applicable if the turnover and/or market shares of the parties concerned stay below certain *de minimis* thresholds. Agreements or practices that violate the prohibition are void.

Similar to Article 101 of the Treaty, agreements or practices prohibited under Article 6(1) of the Dutch Competition Act may, under certain conditions, be exempt. Whether a certain agreement or practice satisfies the conditions for exemption has to be determined by means of self-assessment. As previously stated in Section 10.1, the European Commission has provided guidance for this self-assessment through a set of notices. The Dutch Competition Authority (*Autoriteit Consument & Markt*, "ACM") has similarly provided guidance in this respect.

Under the Dutch Competition Act, present and future EU Block Exemption Regulations directly apply in the Netherlands. Any agreement benefiting from an exemption under an EU Block Exemption Regulation is therefore automatically exempt. Present and future EU Block Exemption Regulations also apply to purely Dutch restrictive agreements. As a practical result of which, the EU Block Exemption Regulations are the most relevant documents through which commercial agreements may be scrutinized.

In addition, there are specific Dutch block exemptions for certain agreements offering temporary protection from competition to undertakings in new shopping centers and certain cooperation agreements in retail trade.

10.2.2 Abuse of a dominant position

Article 24 of the Dutch Competition Act prohibits abuse of a dominant position by one or more undertakings. Generally, this principle also applies to undertakings or governmental bodies entrusted with the operation of services of a general economic interest, as is similarly outlined in Article 102 of the Treaty. In addition, detailed behavioral rules apply to Dutch governmental bodies that engage in economic activities in the Netherlands.

10.2.3 Merger control

The Dutch Competition Act also provides for a system of prior merger control. In order to fall within the scope of the Dutch merger control provisions, the proposed concentration (i.e., a merger, joint venture or acquisition) must meet the following thresholds: the undertakings concerned must have generated a total combined worldwide turnover of at least EUR150 million in the previous calendar year, of which at least EUR30 million must have been generated in the Netherlands in the previous calendar year by each of at least two of the undertakings concerned. The turnover of undertakings in the banking and insurance sectors is calculated according to specific rules for assessing whether these thresholds are met. Significantly lower turnover thresholds apply to certain types of healthcare institutions.

However, the ACM does not have to be notified of a concentration if the EU Merger Regulation thresholds are met. The EU Merger Regulation enables undertakings that are involved in a concentration over which the European Commission has automatic jurisdiction to benefit from the so-called "one-stop shopping." In addition, if the transaction has to be notified in three or more EU member states, it is possible for the parties involved to request that only the European Commission (not the individual national competition authorities) reviews the transaction.

The parties to the concentration are free to decide when to submit a merger notification (as long as its structure is sufficiently clear), but the proposed merger may not be implemented until four weeks after the formal notification (Phase 1). Within this four-week period (which can be extended if the ACM asks formal questions), the ACM will inform the notifying parties as to whether a license is required. If the ACM fails to notify the parties within this period, the proposed concentration is deemed to be approved. In case the ACM decides within the four-week period that no license is required, the parties will be free to implement the transaction.

The ACM may decide that a license is required if it has reason to believe that the concentration will significantly restrict effective competition in the Dutch market or a part thereof, especially as a result of the creation or

strengthening of a dominant position. Without such license, the concentration may not be realized and the parties will need to file a separate notification (Phase 2). Within 13 weeks and upon closer examination, the ACM will either grant or refuse the license. The license will not be granted if the ACM concludes that concentration significantly restricts effective competition in the Dutch market or a part thereof, especially as a result of the creation or strengthening of a dominant position.

If approached by the notifying parties, the Dutch Minister of Economic Affairs has the power to ultimately decide whether to approve a concentration as yet, thereby overruling the ACM's refusal, if it is believed that overriding social interests would demand an approval of the concentration.

10.2.4 Fines

For infringements of the prohibition on restrictive agreements, concerted practices or abuse of a dominant position, the ACM has the power to impose fines of up to EUR450,000 or 10 percent of the worldwide group turnover of the undertaking concerned (whichever is higher).

In addition, the ACM has the power to impose fines of up to EUR450,000 or 10 percent of the acquirer's worldwide group turnover (whichever is higher) if the acquirer fails to notify a concentration. The fines for withholding information or providing inaccurate or misleading information to the authorities will amount to a maximum of EUR450,000 or 1 percent of the company's worldwide group turnover (whichever is higher). The ACM also has the power to impose a fine on natural persons for giving instructions or exercising de facto leadership with regard to an infringement of the Dutch Competition Act. The maximum fine that can be imposed on a natural person is EUR450,000.

10.3 Public procurement rules

10.3.1 Sources of law

Dutch public procurement law currently consists of legislation implementing the EU Public Procurement Directives (2004/17/EC, 2004/18/EC) and several purely national regulations that contracting authorities are either allowed or obliged to apply.

The Dutch Public Procurement Act 2012 incorporates (*inter alia*) the European procurement legislation into a single framework. This framework consists of the following:

- The Dutch Public Procurement Act 2012, which implements the EU Directives (2004/17/EC, 2004/18/EC and 2007/66/EC)
- The Decree on Public Procurement, which regulates the implementation of certain topics from the Procurement Act and designates the applicability of certain guidelines
- Guidelines (including the Proportionality Guide and the Works Procurement Regulations 2012, "ARW 2012")

The Proportionality Guide provides guidance to contracting authorities with regard to the imposition of onerous terms for public contracts. In addition, there is a separate Procurement Act for works, supply and service contracts in the fields of defense and security, which implements Directive 2009/81/EC.

In order to modernize European procurement legislation, three new directives were adopted by the European Council on 11 February 2014. These directives should be transposed into national law by April 2016, (September 2018, for e-procurement). Directives 2014/24/EU and 2014/25/EU will replace Directives 2004/18/EC and 2004/17/EC respectively, while the newly introduced Directive 2014/23/EU regulates the award of concession contracts. At the time of writing, the legislative proposal to implement these directives in the Netherlands was still subject to parliamentary discussions.

10.3.2 Main principles

Dutch public procurement law is based on the following four main principles:

- Adequate advertising by contracting authorities when procuring public contracts exceeding certain threshold values
- Banning the use of technical specifications favoring or eliminating certain undertakings
- Applying objective criteria for the participation in - and the award of - public contracts
- General principles of good administration

These principles are based on the general principles of European procurement law, such as non-discrimination, objectivity and transparency. Contracting authorities should honor these principles with every contract, even those which do not have to be publicly procured. Moreover, contracting authorities should abide by the principles of good administration, including the principle of proportionality. The principle of proportionality requires that the requirements, terms and conditions in any tender procedure be in a reasonable proportion to its subject.

10.3.3 Contracting authorities

The public procurement rules apply to "contracting authorities." These include the state, regional or local authorities, bodies governed by public law or associations formed by one or several of such authorities (jointly referred to as "public authorities"). The definition of "state" is given a functional interpretation rather than a formal approach. More than 1,000 entities in the Netherlands qualify as public authorities, and these entities have to adhere to the Dutch Public Procurement Act. As far as the utilities sector is concerned, contracting authorities are defined as public authorities or public undertakings involved in certain activities in the utilities sector. Private companies operating on the basis of special or exclusive rights may also be covered by the Dutch Public Procurement Act.

Furthermore, in recent case law, it was held that private entities could be subject to general principles of procurement law if: (i) they apply a method of competitive procurement that resembles public procurement and (ii) the applicability of these principles was not excluded in the tender process.

10.3.4 Award procedures

Contracting authorities must use a regulated award procedure in order to award public contracts if the value of the respective contract exceeds certain threshold values.

The following procedures may be used in the procurement of public contracts:

- Open procedure
- Restricted procedure
- Negotiated procedure (with or without prior notice)
- Competitive dialogue

In the open procedure, all interested contractors, suppliers or service providers may submit tenders. If the restricted procedure is applied, only those contractors, suppliers or service providers that have been invited may submit tenders. When applying the negotiated procedure (which can be done only in a limited number of specified circumstances), contracting authorities may consult contractors, suppliers or service providers of their choice and negotiate the terms of contract with one or more of them. Finally, the EU Directives have introduced the competitive dialogue procedure, which was accordingly implemented in the Dutch legal procurement system.

10.3.5 Selection criteria

Qualitative selection criteria relate to the tenderer rather than to the contract. Such qualitative criteria relate to the company’s financial and economic standing on the one hand and to the tenderer’s technical knowledge or abilities on the other.

10.3.6 Award criteria

Public contracts may be awarded to either the tender with the lowest price or the tender that is the most economically advantageous. When the contract is awarded to the economically most advantageous tender, various criteria can be taken into account, including price, running costs and technical merits. European case law emphasizes that award criteria must be objective and unambiguous, so that parties can independently confirm the decision of the contracting authority.

10.3.7 Advertising

The Dutch government promotes electronic procurement (for instance through the Internet). As such, advertising rules oblige contracting authorities to send notices via TenderNed (http://www.tenderned.nl). If applicable, the notice is automatically forwarded to the Office for Official Publications of the EU in Luxembourg. The content of notices may differ and there are various publication requirements. Notices can (or must) take the form of indicative notices (when the budgetary year begins), calls for tenders, design contest notices, notices on the existence of a qualification system or notices on the contracts awarded.

According to the Dutch Public Procurement Act, contracts that fall below the EU thresholds are nonetheless to a certain extent subject to the general principles of procurement law, including the obligation to apply a sufficient means of transparency. Notices are also commonly published in the Government Gazette (*Staatscourant*) and *Cobouw*, a journal for the construction industry.

10.3.8 Time limits

Time limits for the receipt of requests or tenders may be fixed by the contracting authorities, but may not be more restrictive than those indicated in the EU Directives. Time limits may be reduced, if urgency renders the time limit impracticable.

10.3.9 Standstill period

The procurement process is not finished when the contracting authority takes a decision. The contracting authority must observe a 20-calendar-day standstill period in which it may not conclude the contract. This period starts as soon as the contracting authority has notified all participating market parties of the decision and the underlying reasons. Other market parties may then challenge the decision and try to obtain an injunction against the conclusion of the agreement.

10.4 Import and export: free movement of goods

Trade to and from the Netherlands (like trade to and from any other EU member state) is subject to the rules on the free movement of goods. Articles 34 to 37 of the Treaty provide that all measures that tend to restrict imports from or exports to other EU member states are prohibited. Such restrictions can only be justified in exceptional cases, such as for reasons of public security, the protection of the health and lives of human beings, animals or plants or the protection of industrial and commercial property.

The general rule is that any product that has been legally manufactured and marketed in another EU member state may be lawfully marketed in any other EU member state. Articles 34 to 37 of the Treaty have direct effect in the Netherlands and can be invoked before Dutch courts. All customs duties have been abolished with regard to trade between the Netherlands and other EU member states.

The common EU customs tariff rate applies to trade between the Netherlands and non-EU countries. In addition, the European Commission's import and export regulations for trade with non-EU countries must be observed. Depending on the country of origin or the destination of a product or the type of goods (e.g., dual-use or strategic goods), import or export licenses may be required. Additional control mechanisms exist for certain goods, such as livestock or chemicals.

10.5 The European Economic Area

The EEA currently consists of 28 EU member states plus Iceland, Norway and Liechtenstein. The EEA Agreement, which took effect on 1 January 1994, provides for a set of competition rules that is virtually identical to the EU competition rules. In addition, the abovementioned "free movement of goods" rules also apply to goods of EEA origin.

10.6 Standardization

One of the objectives of the EU is to eliminate barriers to trade and to promote the use of European standards. In the furtherance of this aim, a considerable number of EU directives and regulations have been enacted to harmonize technical and quality requirements. This legislation relates to the lawful marketability of a variety of products, such as machinery, toys and medical devices. Products that have been manufactured in conformity with European standards are presumed to be in conformity with the essential requirements of applicable EU legislation. Products that comply with such legislation are required to carry the CE mark and can be freely marketed throughout the EU.

11

Intellectual Property

11.1 Copyright

The Dutch Copyright Act ("DCA"; in Dutch: *Auteurswet*) was adopted in 1912, the year the Netherlands adhered to the Berne Convention. It is one of the oldest copyright laws in the world. Although the DCA has been amended numerous times, it has never been completely revised. And yet, due to its flexible wording, it is still up-to-date in the digital era.

The DCA is especially flexible in its definition of rights granted under copyright. Right holders enjoy two rights of exploitation, which are defined and interpreted in a very broad manner: (i) a right of reproduction (*verveelvoudigen*) and (ii) a right of communication to the public (*openbaarmaken*).

The right of reproduction comprises the right of reproduction *strictu sensu*, as well as a right of translation and adaptation. The right of communication to the public covers all acts of making a work available to the public, including acts of publishing and distribution, performing, exhibiting, reciting, broadcasting and cable (re)transmission, among other acts.

The threshold for a work to enjoy protection as copyrighted work is low – as long as a particular object has its own original character and bears the author's "personal stamp," it is a copyrighted work. This criterion is in line with the "own intellectual creation" criterion in the doctrine of the European Court of Justice under the Copyright Directive.

In accordance with the Berne Convention, the DCA does not contain any formal requirements that must be met to obtain copyright protection. Copyright is obtained by the mere creation of a work that is "original and has the personal imprint of the author." Furthermore, copyrightable works

made in other countries party to the Berne Convention or the Universal Copyright Convention are also protected under the DCA (principle of assimilation). Copyright protection continues for 70 years after the death of the author or, in some cases, after the publication of the work.

Ownership

The copyrights to a work are owned by the "author." This can be the individual that created the work, but it can also be the employer of this individual if the work was created by the employee in the course of his employment.

Moreover, when a work is first published in the name or on behalf of a legal entity, that entity is considered to be the copyright owner, unless proven otherwise.

Copyrights can be assigned by means of a "deed" (*akte*), a document which is destined to serve as evidence of the transfer and which is executed by a "wet ink" or electronic signature of the original copyright owner (the assignor).

Beginning 1 July 2015, some changes to the DCA entered into force to strengthen the position of authors when transferring or licensing their rights. One of these changes is that when granting an exclusive license, a deed is required. Furthermore, authors have: (i) a statutory right to receive equitable remuneration when granting exploitation rights and (ii) the right to receive additional remuneration in certain circumstances (e.g., the bestseller clause). Also, a *non-usus* rule is added, which means that if someone to whom the exploitation rights were granted does not sufficiently exploit the copyrighted work, the agreement in which the rights were granted can be rescinded.

11.2 Neighboring rights

Performing artists, producers of sound recordings and broadcasting/film/record companies can claim neighboring rights. Neighboring rights are related to copyrights under the Dutch Neighboring Rights Act ("DNRA"; in Dutch: *Wet op de naburige rechten*), which implements the Conventions of Rome and Geneva. The DNRA entitles the neighboring right holders to decide whether: (a) a performance may be recorded; (b) a recording may be reproduced and put on the market; (c) a recording may be broadcast, shown or played and put on the market and (d) a recording may be broadcast, shown or played. It is not necessary to register neighboring rights. Neighboring rights may be exercised for a period of 50 years after 1 January of the year following the year of the initial performance.

11.3 Protection of databases

The Dutch Database Act ("DDA"; in Dutch: *Databankenwet*) was adopted in 1999, to implement the European Directive 96/9 of 11 March 1996 on the legal protection of databases. It created *sui generis* protection for databases that cannot be protected under copyright law because they do not meet the originality threshold.

Under the DDA, the producer of a database is granted exclusive rights to prevent the unauthorized extraction and/or reutilization of the contents of the database. The protection covers any unauthorized act of appropriation and distribution to the public of the whole or a substantial part of the contents of a database.

The protection runs from the date of completion of the database and will expire 15 years from 1 January of the year following the date of completion of the database. In order to enjoy database rights, the producer must have substantially invested in the obtaining, verification and/or presentation of the contents, rather than in the creation of the content itself. This investment will have to be evaluated both quantitatively and qualitatively, and must be assessed in relation to the total volume of the contents of a database.

11.4 Trademarks

Belgium, the Netherlands and Luxembourg, together forming the Benelux region, have had a uniform trademark protection law since 1971. On 1 September 2006, the Benelux Trademarks Act and the Benelux Designs and Models Act were merged into the Benelux Treaty for Intellectual Property ("BTIP"; in Dutch: *Beneluxverdrag inzake Intellectuele Eigendom*).

To acquire trademark protection under the BTIP, a trademark must be registered with the Benelux Office for Intellectual Property in The Hague. Words, symbols, colors, three-dimensional shapes (of a product or packaging) and sounds that distinguish goods or services can be registered as trademarks. The Benelux Office for Intellectual Property may refuse signs that are not distinctive, are misleading or are in violation of public order.

Unregistered trademarks are, in principle, not protected.

A trademark registration is valid for 10 years and can be renewed for another 10 years. It is also possible to register collective trademarks. These trademarks distinguish certain collective characteristics of goods and services (e.g., seals of approval or logos for the environment), rather than the goods and services themselves.

The owner of a Benelux trademark has the right to prohibit others from using a younger sign: (i) which is identical for identical products or services in commerce; (ii) which is identical or similar for identical or similar products or services if this may cause confusion; (iii) which is identical or similar for other products or services if the trademark has a reputation in the Benelux and the use of that sign, without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or reputation of the trademark; and (iv) for other purposes than to distinguish a product or service if this use, without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or the reputation of the trademark.

Under the BTIP, trademark owners may oppose an application for a registration of a conflicting sign before the Benelux Office for Intellectual Property. The goal of these administrative opposition proceedings is to establish, at an early stage, whether a trademark can be registered or not. Furthermore, these rules are meant to encourage parties to reach an amicable settlement. Oppositions may be lodged against new trademarks filed for goods and services in all classes.

In addition, a European Community Trademark registration that covers all the 27 member states of the EU can be applied for. Trademark attorneys can file such applications from any EU country at the Office for Harmonization in the Internal Market ("OHIM"). Owners of older national trademark rights in one of the member states can file an opposition against an allegedly conflicting European Community Trademark.

The Netherlands is party to the Madrid Convention and the Madrid Protocol ("the Madrid System"), which enables: (i) persons or legal entities with a real and effective industrial or commercial establishment in a country that is a party to the Madrid System or (ii) persons or legal entities with domicile or a registered seat in an EU member state, to extend a Benelux trademark registration to another member state and vice versa.

In general, the main advantage of an international registration is that it is more cost effective than filing individual national applications for registration in each country of interest. The disadvantage of this type of registration is that it automatically lapses or is cancelled in all member states if the national application/registration on which the international registration is based on lapses or is cancelled within five years after the international registration. Opting for an international registration may also have strategic advantages, which differ per case.

Countries that are party to the Madrid System and/or the Paris Treaty can claim priority rights within six months after the application date of the first application of the identical trademark.

With our trademark database, Global IP Manager ("GIPM"), Baker & McKenzie can provide web-based worldwide trademark portfolio management services. GIPM enables our clients to instantly review online all IP matters being handled by Baker & McKenzie. Organized by country and legal action, or structured according to brand categories, GIPM replaces the need for in-house lawyers to trace information on the status of pending applications or current contentious matters.

11.5 Designs and models

The provisions of the BTIP also protect registered designs and models for functional products (i.e., features of shape, ornaments or patterns). Applications for registration are filed with the Benelux Office for Intellectual Property, or with the International Bureau for the Protection of Industrial Property in the case of international applications.

Novelty and having a "distinctive character" are conditions for protection, but originality of a design is not required. Nevertheless, a design is still considered new if it has been made public for the first time within 12 months before the filing. Pursuant to EC Directive 98/71 of 13 October 1998 (European Directive on the Legal Protection of Designs), the Benelux Designs and Models Act was amended and took effect on 1 December 2003. As a result, the possibilities of taking action against design infringements on the basis of unfair competition (tort) have been broadened. The Benelux Designs and Models Act was merged with the Benelux Treaty for Intellectual Property on 1 September 2006. The term of protection (five years) can be extended four times, to a maximum of 25 years.

As a result of EC Council Regulation 6/2002 of 12 December 2001 on Community Designs, a new and separate system has been created for the protection of designs in the European Community. This system also incorporates the Unregistered Community Design right, which provides protection for three years from the day the product incorporating the design is made available to the public in the EU. This design right, granted by law without formalities and free of charge, has been available since 6 March 2002. It only allows the owner to oppose the use of identical designs, whereas the Registered Community Design right entitles the

owner to also oppose the use of designs that produce a similar impression. The latter right provides protection for a five-year period, which can be renewed four times (a total of 25 years of protection). Applications for this right are to be filed with the OHIM of the EU. The OHIM began accepting applications on 1 January 2003.

The Netherlands is a party to The Hague Agreement for the International Registration of Designs and Models. This agreement makes it possible to apply for "international registration" in all member states. Registration is effected with the World Intellectual Property Organization in Geneva. Countries that are a party to the Paris Treaty can claim priority rights, within six months, to acquire a priority date, as of which the owner of the design or model can object to all identical and similar design or model applications and registrations.

11.6 Trade names

The Dutch Trade Name Act (*Handelsnaamwet*) prohibits the use of names that are identical or similar to those already being used by another company, if such use creates the risk of confusion with the public, taking into account the nature and location of the businesses.

A company cannot acquire the right to a trade name merely by registering it with the Trade Register; it must also use it as a business name.

Trade names can be transferred, but only as part of the business it is associated with.

11.7 Patents

A patent is an exclusive right to a technical or chemical invention. A Dutch patent right holder has the exclusive right to prohibit a third party from using the invention for commercial purposes in the Netherlands. The lifetime of the patent is 20 years from the date of filing the application.

In order to obtain a Dutch patent, the invention must meet three material requirements. It should: (i) be novel, which means that the proposed patented product/process should not have been disclosed to the public prior to the filing of the patent application; (ii) include an "inventive step," which means that the invention should not be too obvious and (iii) relate to a "technical" product or production process, which excludes, for example, scientific theories from patent protection. After filing the patent application, the applicant should file a "search report" containing an investigation into the existing "state of the art" within 13 months of the filing date of the application.

Applications for Dutch patents must be submitted to NL Octrooicentrum (www.octrooicentrum.nl) in Rijswijk, the Netherlands. Although the description of the patent application may be filed in English, the patent claims in the application must be submitted in Dutch.

European patent applications can be filed with the European Patent Office in Munich, Germany, or with its subdivision in Rijswijk, the Netherlands.

If a prohibited act with respect to a patented invention is commissioned without permission from the patent holder, this will constitute a patent infringement. Furthermore, the "use," which can be prohibited by the Dutch patent holder, is very broad and includes manufacturing, using, putting on the market, selling, lending, supplying, offering, importing and having in-stock infringing products.

The test for patent infringement boils down to the question whether the infringing act (product/process) falls within the scope of the invoked Dutch patent. This means that the patent claims and specifications will need to be analyzed against the infringing act. Furthermore, Dutch courts also tend to apply the "equivalence test," which means that there will also be an infringement of a Dutch patent even if the infringing product or process does not fall within the literal scope of the patent claim(s), but can be considered "equivalent" to the claimed invention.

Dutch patent law acknowledges the distinction between “direct” and “indirect” infringement. Direct infringers commit acts that fall within the scope of the patent – for example, by manufacturing a product for which the patent claims protection. Indirect infringement includes the supply of goods that “direct infringers” use to utilize the patented invention – for example, the supply of raw materials. In order to be held liable for patent infringement, the “indirect infringer” should be aware or should have been aware that the goods supplied were intended to be used in the infringing products/process.

Under Dutch patent law, any person or entity engaging in an infringing act can be held liable for patent infringement. Potential defendants may include producers/manufacturers, suppliers, distributors, importers, exporters and retailers, to purchasers and end users. Furthermore, Dutch patent owners may claim the cease and desist of services that infringe the patents which intermediaries provide to third parties.

In the Netherlands, civil action is the most important remedy for patent infringement. There are various types of civil proceedings available under Dutch (patent) law. These include: (i) preliminary (*ex parte*) injunction proceedings; (ii) proceedings on the merits and (iii) accelerated proceedings on the merits. The District Court of The Hague has exclusive jurisdiction in patent infringement and validity cases in the Netherlands. As a consequence, the Hague Court of Appeal has exclusive jurisdiction in patent (preliminary) appeal proceedings.

In both the preliminary proceedings and proceedings on the merits, the losing party may, in addition to the damages, be ordered to pay for the reasonable and proportional legal costs that the prevailing party incurred, including lawyer’s and patent agent’s fees.

Although Dutch Patent Law sets forth that intentional patent infringement is subject to criminal proceedings, Dutch Prosecuting Authorities rarely prosecute patent infringers.

Apart from opposition proceedings before the Dutch Patent Authority, there are no administrative actions applicable to patent infringement.

Furthermore, the patent right holder may grant licenses to third parties for the use of its patent at its own discretion. However, if it is considered necessary for the public interest, or if the patent is not adequately used in the Netherlands within three years after the patent right is granted, the patent right holder may be compelled to grant a license. Compulsory licensing can also be enforced if there is a certain level of dependency between an existing patent and the application for which the license has been requested, and if it involves an important new technology.

11.8 IP Enforcement

IP laws in the Netherlands provide for all enforcement procedures that are common in the Netherlands. They include infringement cease orders, procedures for the preservation of evidence and the protection thereof, and provisional measures such as *ex parte* injunctions and seizure.

Remedies available to intellectual property right holders include the destruction, recall or permanent removal from the market of illegal goods, as well as financial compensation, injunctions and damages.

IP owners may also request that the court order certain persons to reveal the names and addresses of those involved in distributing infringing goods or services, along with details of the quantities and prices involved.

Since the European Directive on the Enforcement of Intellectual Property Rights (2004/48) was implemented in the Netherlands in 2007, parties in intellectual property enforcement proceedings can be ordered to pay the actual legal fees of the prevailing party. The courts have issued guidance in respect of the amounts that are considered “standard,” but can still award the amount of legal fees on a case-by-case basis. This provision for the compensation of legal fees only applies to IP matters and Dutch courts tend to award higher legal fee compensation amounts than courts in surrounding countries.

11.9 Anti-counterfeit measures

As a member of the EU, the Netherlands has implemented measures to harmonize customs controls with respect to IP rights. Council Regulation 608/2013 lays down the measures concerning the importation into the European Community of counterfeit goods. These measures provide an effective tool in protecting most IP rights against counterfeit trade.

Under the Council Regulation, customs can seize goods and notify the IP rights holder, provided that an appropriate notice was filed with customs. Filing a customs notice is relatively simple and straightforward. Customs charges no administrative costs on processing the filing of such notice. Once customs has detained goods, there is a customs procedure available for rights holders to: (i) have the goods (voluntarily) surrendered by the importer, either by explicit or implied consent, after which the counterfeit goods can be destroyed or(ii) commence civil or criminal proceedings against the importer(s). Practice shows that the goods are usually voluntarily surrendered for destruction to avoid legal proceedings.

Baker & McKenzie offers various global web-enabled tools to fight, in a cost-effective way, counterfeiting at the customs level on a global basis, such as pre-litigation enforcement services on a fixed-fee basis, which includes customs recordation of intellectual property rights, preparing cease-and-desist letters and dealing with initial responses from the adverse parties to reach a settlement.

11.10 IP protection of software and (IT) hardware

11.10.1 Computer software, protection and reverse engineering

Computer software may be protected under the DCA, provided it satisfies the originality requirement. The courts in the Netherlands directly apply the doctrine of the European Court of Justice in respect of copyrights to software products. Similar to all other works of literature, science and art, no formalities are required to obtain copyright protection for computer software and its graphical user interface. The first is protected under the Software Directive (2009/24/EC), while the second is protected under common copyright law.

A developer of computer software may have, and be able, to enforce its copyrights if (parts of) the source code and/or particular behavior of the software qualify as one's "own intellectual creation," as set forth in the *Infopaq* decision of the European Court of Justice on 16 July 2009.

First sale doctrine/limitations

On 27 April 2012, the Dutch Supreme Court confirmed the Court of Appeal's decision that the provisions on "Sale" of Book 7 of the Dutch Civil Code apply to software licenses if the licenses are sold for a set amount and are not limited in time in the *Beeldbrigade case*.

On a European level, it was ruled that the licensing of standard software against a one-off license fee for use for an unlimited period of time is considered a sale, regardless whether the software was provided in a physical medium or downloaded by the licensee. To such a "sale," the *first sale* doctrine applies, meaning that the licensee can sell its rights and the original licensor cannot enforce its right against the purchaser of secondhand software. Moreover, the European Court of Justice held that contractual prohibition to transfer a license is void because it is in conflict with the first sale rule. In this decision (European Court of Justice, 3 July 2012, *Oracle/UsedSoft*), the court in fact abandoned the "licensed, not sold" legal theory.

Reverse engineering/reengineering

The developer/owner of a software product cannot prohibit legitimate users (licensees) from decompiling and reverse-engineering the software if the original source code is not used for this reengineering process. This follows from the *SAS/World Programming* decision of the European Court of Justice on 2 May 2012, whose doctrine was applied by courts in the Netherlands in various decisions.

Ownership

Software that is being developed by employees will be owned by the company that employs them by virtue of law (see under 11.1). However, if software development activities are commissioned to independent contractors or other auxiliary persons, the copyrights to such software will not automatically be owned by the company that is hiring these resources. Generally, the "work for hire" doctrine has no equivalent in the Netherlands. Unless otherwise agreed on in a written and signed agreement, the programmer (or its employer) will be considered the owner of the copyrights of the software code produced by him or her.

Patent protection

The possibility of protecting software by means of a patent is still under discussion, even at the European level. There is little case law in the Netherlands on patent protection for computer software. Although software "as such" is not eligible for patenting, patents have been granted for inventions that comprise software that is implemented in hardware. Foreign companies should at least verify whether their computer software qualifies for patent protection in the Netherlands (see Chapter 22, Financial Regulations).

11.10.2 Topographies of semiconductors

Computer chips and their topography may be protected against unlawful exploitation by third parties, pursuant to the Dutch Original Topographies of Semiconductor Products Legal Protection Act (*Wet houdende regelen inzake de bescherming van oorspronkelijke topografieën van halfgeleiderprodukten*). Registration with the Netherlands Patent Office, a department of the Netherlands Enterprise Agency, is required. A registration will expire after the earlier of: (i) 10 years, calculated after the filing or initial exploitation or (ii) 15 years following the creation of the topography if the application has not yet been filed or exploited.

11.11 Advertising

Misleading advertising is primarily addressed under tort law. The Dutch Civil Code declares it a tort to misrepresent the nature, composition, quantity, quality, characteristics, user possibilities, origin or price of a product.

Comparative advertising is permitted under Dutch law, provided it gives an objective comparison of one or more material, relevant, verifiable and representative features or qualities of the products or services being compared. Other trademarks may be used in such comparisons, provided that the advertisement does not harm the reputation of the other trademark.

In the case of misleading or unlawful advertising, an injunction, a rectification or compensation for damages can be sought before the Dutch courts based on the relevant provisions of the Dutch Civil Code.

Furthermore, advertising standards are regulated by separate laws for specific industries and by the industry itself. The Dutch Advertising Code (*Nederlandse Reclame Code*) is an example of such self-regulation and provides that advertising must be in accordance with the law, the facts and good taste, and that it may not be contrary to the public interest, public order or common decency. Advertising that misleads the public (e.g., with regard to the price or origin of a certain product) is prohibited. Specific regulations apply to, *inter alia*, advertising directed at children and to that of alcoholic beverages, pharmaceuticals and financial products.

Both consumers and competitors are entitled to file complaints with the Advertising Code Committee and its Board of Appeal. Although the decisions of either group are not legally binding, negative decisions are normally respected by the affiliated media (which is almost all media in the Netherlands), which will refrain from publishing the advertisement in question. The Advertising Code Committee and its Board of Appeal can render an “individual recommendation,” which is communicated only to the plaintiff and the offender in question, or it can render a “public recommendation” that is published in various media.

The advertisement of tobacco products has been banned in the Netherlands. The Dutch Tobacco Act also restricts the use of tobacco trademarks and distinguishing signs for non-tobacco products.

The advertising of pharmaceuticals is regulated by the Pharmaceuticals Act (*Geneesmiddelenwet*). It is further regulated by self-regulatory codes, such as the Code of Conduct for the Advertising of Pharmaceuticals of the *Stichting Code Geneesmiddelenreclame* and the Code for the Advertising of Medicinal Products to the General Public of the *Stichting Keuringsraad Openlijke Aanprijzing Geneesmiddelen* ("KOAG").

The advertising of pharmaceuticals (including the grant of incentives to health professionals) is strictly regulated. Public advertising of non-prescription pharmaceuticals is allowed under certain conditions, but public advertising of prescription pharmaceuticals is prohibited. Advertising to health professionals is allowed, provided that certain requirements are complied with. Strict rules apply to comparative advertising for pharmaceuticals.

Complaints on violation of the Code of Conduct for the Advertising of Pharmaceuticals can be filed with the Code Committee of the *Stichting Code Geneesmiddelenreclame*. Complaints on the violation of the Code for the Advertising of Medicinal Products to the General Public can be filed with the Code Committee of the *Stichting* KOAG. Appeals against the Code Committees' decisions can be filed with the respective Boards of Appeal. It is also possible to initiate court proceedings against competitors based on unfair competition.

Advertising through (promotional) games of chance is strictly regulated by the Betting and Gaming Act (*Wet op de kansspelen*) and the Code of Conduct on Promotional Games of Chance (*Gedragscode promotionele kansspelen*). A violation of these regulations is an economic offense. Under the Code of Conduct on Promotional Games of Chance, a maximum of one promotional game of chance per product, service or organization per year is allowed. No costs other than the costs of communication may be charged for participation in a prize draw. Furthermore, such costs of communication may not exceed EUR0.45 per entry and must be clearly

communicated before entry. The original price of the product or service may not be increased merely because of the prize draw. The total amount of any winnings must not exceed EUR100,000. In addition, there must be no more than 20 prize draws in one promotional game of chance.

The organizer of a promotional game of chance must use general terms and conditions that include certain information, such as the name and address of the organizer, the period during which the prize draw is open, the number, nature and value of the prizes, the communication costs, the date of the prize draw, the way that the tax on games of chance will be paid and the like.

For "small promotional games of chance" where the total value of the prizes is less than EUR4,500, the regulations are less strict.

11.12 Advertising and freedom of expression

Article 7 of the Dutch Constitution regarding the freedom of expression does not apply to commercial advertising. However, the corresponding Article 10 of the European Convention on Human Rights ("ECHR"), which supersedes the national constitutions within the EU, does not exclude commercial advertising. This implies that, according to European law, commercial advertising can fall under the scope of the right to freedom of expression.

In practice, the scope of protection of Article 10 of the ECHR for commercial advertising seems limited. It does not provide advertisers an unrestricted right to advertise for their own benefit and at their competitors' expense. In Dutch and European case law, it has been established that in the case of a conflict between commercial advertising and, for instance, the intellectual property rights of a competitor, the court will weigh the interests involved. Generally, the commercial interest of advertising will not prevail over the interest of protection of intellectual property rights.

11.13 Unfair competition

Under certain conditions, recourse may be claimed against passing off or unfair competition under Dutch tort law. To base a claim against unlawful reproduction or copying of goods on unfair competition, it will generally have to be demonstrated that the unlawful acts led to (a danger of) public confusion that could have been avoided without hampering the reliability and usefulness of the goods concerned. Furthermore, it will have to be demonstrated that the unlawful acts in question have caused damages to the plaintiff.

Other unlawful acts, such as unfairly competing with one's former employer, theft of trade secrets or misleading (comparative) advertising claims can also be redressed on the basis of unfair competition under Dutch tort law.

11.14 Trade secrets

Trade secrets are generally protected by contract rather than by law. However, they may also be protected by tort law under certain circumstances (see 11.12, Unfair competition).

11.15 Assignment, licensing and pledge

Further to the specific provisions under Dutch intellectual property law, the assignment, licensing and pledge of certain intellectual property rights are subject to the general provisions of Dutch property and contract law, and to European and Dutch competition law. No government approval is required. However, in order for certain assignments, licenses and pledges (such as patents, trademarks, design and models, topographies, or plant breeders' rights) to be effective against third parties, they must be registered with the applicable registration offices.

11.16 Treaties and general European legislation

In addition to the treaties previously mentioned, the Netherlands is also a party to, *inter alia*, the TRIPs agreement (effective since 1 January 1996) and the Paris Convention establishing the World Intellectual Property Organization.

12

ICT and e-commerce

12.1 General

The Netherlands takes a pragmatic approach to ICT legal issues. The regulatory body provides a basis for IT companies seeking IP protection for their products and services. Regulatory requirements in respect of ICT products and services are concentrated around consumer protection rules and e-commerce laws. Other regulatory requirements are based on telecommunication laws (see Chapter 12) and data protection laws (see Chapter 13).

Apart from these areas, much is left to the agreement between the parties. The principle of freedom to contract go hand in hand with a system of non-mandatory rules in the DCC, which provides default rules for situations of default, nonconformity, liability and late payment, etc.

This chapter addresses a number of contractual and topical issues in the field of ICT and e-commerce.

12.2 Technology transfer

The 2002 EU Technology Transfer Regulation has direct effect in the Netherlands. It is concerned mainly with the competition law aspects of technology transfer. Furthermore, in 2014, the European Commission issued the additional specific Regulation No 316/2014, containing certain categories of technology transfer agreements that are valid from a competition law perspective, provided certain requirements are met.

12.3 ICT agreements and standard terms

As in many jurisdictions, suppliers and distributors of ICT products use a plethora of agreements to, for instance, restrict warranties and liability. Both suppliers of computer products/services and end users draft standard terms that are freely available and are sometimes used, although their use is by no means mandatory. A number of standard terms are mentioned below.

12.3.1 FENIT Conditions – Nederland ICT Conditions

In 2014, Nederland ICT, the industry organization for suppliers of computer products and services, published its latest version of its set of standard conditions for activities such as the sale of hardware, the development and licensing of software and the provision of maintenance and computer services. Generally, the conditions are considered one-sided and to the advantage of the supplier.

Nederland ICT and its predecessors, ICT~Office, FENIT and COSSO, have regularly published new versions of their recommended standard conditions. Earlier versions, in particular the ICT~Office terms of 2009 and the FENIT terms of 2003, are still available and commonly used.

12.3.2 Purchase conditions

The Dutch Ministry of Home Affairs has published general terms and conditions covering a range of topics, from the purchase or lease of hardware to complex turnkey projects. These standard conditions, which used to be known as “BiZa” contracts, were replaced by the “ARBIT *voorwaarden*” in 2010. The ARBIT *voorwaarden* were updated in 2014, after a consultation organized by the Dutch ministry of internal affairs. Both the 2010 and 2014 versions are regarded as favorable to end users.

12.4 Sector-specific alternative dispute resolution ("ADR")

In addition to recourse to the courts and arbitration in accordance with the rules of the Netherlands Arbitration Institute ("NAI"), a special dispute resolution forum for the settlement of IT disputes operates in the Netherlands: the Association for the Settlement of Automation Disputes (*Stichting Geschillenoplossing Automatisering* or "SGOA"). SGOA has become a relevant market player due to the fact that the FENIT and ICT standard terms and conditions contain an arbitration clause that appoints it as arbitral tribunal.

12.5 Shrink-wrap license agreements

Many large (mostly US) software manufacturers use shrink-wrap or click-wrap licensing terms in the Netherlands. The legislation implementing the E-Commerce Directive EC/2000/31 contains several requirements regarding the use and/or applicability of electronic general terms and conditions. There is not much in case law in the Netherlands that governs the use or applicability of shrink-wrap or click-wrap licensing terms. The applicability of such terms will depend mainly on the manner in which they have been brought to the attention of the licensee. In order to rely on a shrink wrap of a click-wrap agreement, the supplier must able to demonstrate that: (i) its customer was actually given a reasonable opportunity to become acquainted with these general terms prior to its purchase decision and (ii) opening the wrap or clicking through a screen can be considered an affirmative action of the customer in respect of the applicability of these terms.

12.6 Source code escrow

Conventional software escrow constructions are aimed to ensure that a licensee will get access to the source code of the licensed software, solely in the case of specific triggering events, such as bankruptcy of the licensor. In order to provide for that, source codes are made available when the licensor is no longer able to maintain the software, and at the same time, to prevent the licensee from having access to these files in all other situations, an independent escrow agent is placed in the middle. Both active and passive

escrow agents make use of tripartite agreements with the licensor and the licensee.

Such software source code escrow is fairly common in the Netherlands, but has grown decreasingly popular for a couple of reasons.

First, the question of whether the liquidator of a bankrupt software supplier must honor already granted licenses is subject to an ongoing legal debate in the Netherlands. Since the Supreme Court's decision in the *Nebula* case (2007), various authors claim that a liquidator is entitled to ignore the licensee's rights in the case of the supplier's bankruptcy and consequently, sell the software license-free and/or demand that existing licensees enter into a new license agreement (and effectively pay for their right to use the same software twice). In 2014, the Supreme Court gave judgment in the *Berzona* case, in which it seems to have abandoned this doctrine.

Second, the commercial relevance of source code escrow is viewed differently nowadays. Due to advancing programming technologies, the costs of rewriting and reengineering software have gone down considerably. Therefore, it is often more rational to have a new supplier develop and maintain a new software product than to commission a supplier to maintain the source code of an existing product.

Third, as the supply of software in SaaS and Cloud models increases, source code dependency is overshadowed by more acute business continuity threats, which require other kind of mitigating arrangements. Such arrangements include “SaaS” escrow solutions, which claim to not only preserve a copy of the source codes, but also keep in escrow a copy of the run-time environment, including all user and configuration data required to deploy an identical software platform in the event of bankruptcy of the SaaS/Cloud provider.

12.7 The Internet and e-business

Although general contracting principles apply irrespective of whether business is conducted online or offline, online activities are also subject to specific regimes.

Some of the e-commerce regimes are not a mere civil law matter, but are also subject to enforcement by the Authority Consumers and Markets ACM, the Dutch consumer rights authority. Consumers or businesses can file a complaint with the ACM in the case of alleged noncompliance with consumer protection regulations. The ACM has the authority to initiate an investigation, impose a fine and publish its fining decision, if any.

12.7.1 E-Commerce

The E-Commerce Directive is implemented in the Dutch Civil Code and arranges for a variety of matters concerning e-business, such as information requirements for service providers and exemptions from liability of providers of Internet access, as well as hosting and information society services.

12.7.2 Consumer rights

The Consumer Rights Directive is implemented in the DCC and arranges specific consumer rights and business requirements if products or services are offered to consumers online (and offline outside the "normal" shops). Many of these requirements fall within the category of "information requirements" that are put in place in order to enable the consumer to identify and address its contracting partner. A significant consumer right that is arranged for is the consumer's right to withdraw the agreement for convenience and at no cost. The withdrawal term is set at 14 days under normal circumstances, but can be extended up to one year if certain information requirements are not met.

12.7.3 Electronic signatures

The Electronic Signatures Directive (also implemented in the DCC) provides for a special electronic signatures regime. So-called "advanced electronic signatures" are subject to the statutory presumption that they are "sufficiently reliable" if certain conditions are met. Whether this is the case is to be assessed on a case-by-case basis. If all requirements are satisfied, the electronic signature will generally have the same legal status as "wet ink" signatures.

Electronic signatures with an even higher level of security are called "qualified certificates." Such qualified certificates can only be issued by certification service providers, which may act as trusted third parties to certify that the identity of the signatory was verified on the basis of an actual meeting with the signatory and an inspection of the signatory's photo ID. In order to become a certification service provider, a registration process with the ACM must be completed.

12.8 Encryption

Although in the past, the Dutch government had expressed its intention to introduce a bill dealing with the use and availability of encrypted software (a draft of such a bill was circulated in 1994, was heavily criticized and was never made into a bill), still, no such bill has been introduced. It does not seem likely that legislative initiatives will ensue in this context in the near future.

12.9 Computer crime

The 1993 Dutch Act on Computer Crime (*Wet computercriminaliteit*) contains criminal provisions related to computers. Deletion of data and the addition of worms or viruses that lead to damage may constitute a criminal offense (although the definition of a virus is somewhat unclear). The Act on Computer Crime is incorporated in the Dutch Criminal Code and the Dutch Code of Criminal Procedure.

At the end of 1996, the Dutch Supreme Court issued a judgment holding that computer data are not "goods" within the meaning of the Criminal Code. In 2006, the long-debated Act on Computer Crime II (*Wet computercriminaliteit II*) entered into force, expanding the scope of certain computer crimes and granting investigative powers to the enforcement agencies. In October 2012, the Minister of Justice informed the Parliament about his proposal to introduce new investigative powers in order to detect and close down on cybercrime.

In the 2009 *Runescape* case, the Dutch Supreme Court held that virtual goods can be stolen as they have an intrinsic value, since time and energy need to be invested in order to obtain them.

12.10 Online gambling

In principle, offering games of chance over the Internet in the Netherlands requires a government permit. In 2006, the Ministry of Justice successfully took down a number of illegal gambling sites. Most illegal gambling sites in the Netherlands have since shut down. Beginning 2015, the market for online games of chance will have slightly opened, as a new bill is pending that will introduce additional permits for the offering of online games of chance, under strict conditions. Permit holders in the Netherlands will be obligated to pay: (i) 20 percent tax on the amounts paid out; (ii) a 0.5 percent contribution of the gross profits to a national fund for gaming addicts and (iii) 1.5 percent contribution to the National Authority on the supervision of Games of Chance.

13

Data Protection

13.1 General

The European Data Protection Directive (95/46/EC) is implemented in the Personal Data Protection Act ("PDPA"; in Dutch: *Wet bescherming persoonsgegevens*). The PDPA is applicable to any type of personal data use. Personal data is defined as any information that relates to a directly or indirectly identifiable natural person. This means, *inter alia*, that the PDPA is applicable to a person's business data as well.

The obligations of the PDPA are mainly about the legitimacy of data processing and transparency. In most situations, a notification must be filed with the Dutch Data Protection Authority ("DPA"; in Dutch: *Autoriteit Persoonsgegevens* [per 1 January 2016]). Unlike in other countries, in the Netherlands, notifications must be filed per data processing operation and not per entity that is processing data. In addition, specific requirements apply to any transfer of personal data outside the EEA. Such transfer ("data export") includes situations where the data is made accessible to recipients/viewers from outside the EEA. Data export is only permitted on limited grounds, which include explicit consent of the data subject, the use of EC-approved, standard contractual clauses and approved binding corporate rules. Per the European Court of Justice's decision in the *Schrems* case, data transfer to the US can no longer be based on the so-called Safe Harbor program.

Beginning 1 January 2016, a general data breach notification obligation applies in the Netherlands. Data controllers must report data security incidents to the DPA if the incident is likely to have serious adverse effects on data protection. Under the new rule, data subjects must also be notified if the data breach at hand is likely to have an adverse effect on their privacy.

In addition, the maximum penalties for violations of the PDPA were increased. The DPA can impose administrative fines of up to EUR810,000 or 10 percent of the national annual turnover for failure to comply with the rules of the PDPA. The increased maximum penalty will also apply to the new data breach notification obligations.

In 2012, the European Commission proposed a major reform of the EU legal framework on the protection of personal data, which included a proposal for a General Data Protection Regulation. Amendments have been proposed by both the European Parliament and the Council of Ministers. However, the legislative procedure is still pending and, therefore, there is some uncertainty if the regulation will finally be adopted and what its contents will exactly be.

The General Data Protection Regulation is intended to replace the Data Protection Directive (95/46/EC), and, if adopted, will replace the PDPA (and basically all European data protection laws). The regulation provides for similar rules as the Data Protection Directive, but introduces a much more severe enforcement scheme (with fines of up to 4 percent of the annual worldwide turnover of organizations). In addition, the regulation intends to widen the applicability of the European data protection rules to organizations that are not located in the EU, but do direct their products or services at EU citizens.

13.2 Data retention

The European Data Retention Directive (2006/24/EC) is implemented in the Dutch Telecommunications Act (TW). The rules impose an obligation on the providers of publicly available electronic networks or services to retain location and traffic data for a period of 12 months, and six months for Internet service providers. In 2014, the Court of Justice of the EU declared the Data Retention Directive invalid. Following this, the court of The Hague invalidated the Dutch data retention act in March 2015. The Dutch government has not appealed this decision. Instead, an amended act is being considered, but no significant progress seems to have been made between the court's decision and the closure of this chapter (December 2015).

14

Internet, Technology and Telecommunications

14.1 Registration requirement for providers of public networks and telecommunications services

In order to install or operate public electronic communications networks and provide public electronic communications services and conditional access systems (e.g., set-top box with decryption key), a party is required to register with the Dutch Telecommunications Authority or "ACM."

Registration is intended primarily to give the ACM an overview of market players in order to ensure effective supervision. It is not conditional on meeting any material qualifications other than demonstrating to the ACM that the service or network is indeed offered to the general public. The ACM charges an annual "supervision" fee, which is tied to the annual net turnover for telecom providers with a net turnover that exceeds EUR20 million. Providers that fall under that limit, but have a net turnover of more than EUR2 million, pay an annual flat fee of EUR7,590. When a provider can demonstrate that its net turnover is under EUR2 million, the annual fee is nil.

14.2 Numbers

The designated use of numbers is indicated in a number plan. Number plans have been drawn up for, *inter alia*: (1) mobile and fixed telephony and integrated services digital network ("ISDN") services; (2) telex services; (3) packet and circuit-switched data services; (4) international signaling point codes; (5) transit network signaling point codes and (6) International Mobile Subscriber Identity ("IMSI") numbers.

The ACM is charged with the tasks of granting and reserving numbers, as well as with supervising the use of such numbers. Numbers may be obtained or reserved by means of standard forms, which are available for: (i) information numbers for free services (0800) and paid services (0900 and 0906); (ii) number blocks; (iii) individual numbers; (iv) carrier (pre) select numbers (a prefix of "16xx"); (v) international signaling point codes and (vi) transit network signaling point codes.

Numbers with an exceptional economic value (i.e., short numbers) will be allocated by auction. Numbers allocated by auction will be assigned for an indefinite period, unless the number plan specifies the duration of the assignment.

Numbers may not be traded as a business activity, but the holder of numbers may allow third parties to use its numbers, provided this is done in a nondiscriminatory and transparent manner and on the basis of objective criteria.

Furthermore, the Telecommunications Act ("TA") states that the right of number portability applies to a change of provider as well as to a change in contract with the same provider. To enable number portability, providers in the Netherlands need to participate in a private association that is called the *Vereniging Coin*.

14.3 Service numbers

Specific requirements apply to so-called information numbers (i.e., numbers in the 0800, 0900 and 0960 ranges). The information that must be provided to consumers and the maximum fees that may be charged are set forth in a decree that is based on the TA. This is the regulation on universal services and end-user interests (in Dutch: "*Regeling universele dienstverlening en eindgebruikersbelangen*"). When a number in the 0900 range is being used for service line purposes, the costs for the call to the number in question may not exceed EUR1 per call, if the usage of the information service is charged per call. If the usage is charged on a per time unit basis, then the standard telephone charges are the only costs that may be charged to the caller.

Moreover, a user of a 0900 service line number is obligated to provide its platform operator with a prerecorded message that provides information regarding the (maximum) cost that the end user incurs for using the service number. The platform operator is, in turn, obligated to forward that notification to interconnecting telecom service providers, so that the message will be available to all end users calling the number in question.

Users of a 0800 service numbers may not be charged costs at all.

14.4 Net neutrality

In June 2012, the principle of "net neutrality" was passed into law in the Netherlands, making it the first European country with a net neutrality law in the books. Providers of public electronic communication networks that deliver Internet access services are prohibited from hindering or slowing traffic generated by specific applications or services on the Internet. The relevant article in the TA contains a carve-out for actions geared toward minimizing the effects of congestion or where the provider must comply with a law or judicial order. In 2014, the ACM exempted the National Railway Company from the ban on blocking services that consume a large amount of data capacity, as this filtering was considered proportionate and necessary to offer the public transport travelers (free) Wi-Fi Internet access.

14.5 Legal interception

The TA lays down specific privacy rules with respect to providers of public electronic communications networks and services. The TA explicitly states, however, that all provisions of the Data Privacy Act apply to providers of public electronic telecommunications services as well. In general, providers must take the appropriate organizational and technical measures to protect the privacy of their subscribers, the subscribers' personal data and the users of their network or services, taking into account the level of technology and the costs involved.

14.6 Data retention

The European Data Retention Directive (2006/24/EC) is implemented in the Dutch TA. The rules: (i) impose an obligation on the providers of publicly available electronic networks or services to retain location and traffic data for a period of 12 months and (ii) requires Internet service providers to do so for six months. In 2014, the Court of Justice of the EU declared the Data Retention Directive invalid. In March 2015, the court of The Hague invalidated the Dutch Data Retention Act. The Dutch government has not appealed this decision. Instead, an amended act is being considered, but no significant progress seems to have been made between the court's decision and the closure of this chapter (December 2015).

14.7 Unsolicited communications (spam)

The TA contains an opt-in regime for spam (i.e., unsolicited electronic commercial communications), which includes email, SMS and social media spam. This regime applies to spam sent to natural persons as well as businesses. The opt-in regime does not apply to unsolicited emails sent regarding products or services similar to those already purchased by a customer, provided that the customer is given the opportunity to object to such use of electronic contact details when they are collected and on the occasion of each message, if the customer has not initially refused such use. The ACM has a proactive approach with regard to combating spam and can impose severe penalties to spam legislation infringements.

The TA contains specific obligations regarding the processing of location data (which is data processed in an electronic communications network, indicating the geographic position of the terminal equipment of a user). Location data may be processed only when: (i) rendered anonymous to the extent necessary to provide the services or (ii) with the consent of the end user. All providers of public electronic communications networks and/or services are also obliged to enable the legal interception of their network or services at their own cost.

Providers of public telecommunications networks and services are obligated to store certain location and traffic data for a certain retention period.

In the case of mobile and fixed telephones, the retention time is 12 months. In July 2011, the retention period for Internet traffic data was reduced to six months.

14.8 Cookies

Cookies are small files that can be stored on the computer of an end user by the operator of a website. They can be used to track users across different websites. In the Netherlands, depending on the cookies used, cookies may only be placed after obtaining permission from the end user. Also, whoever uses cookies must provide sufficient information regarding the purposes of the cookies.

A strict regime applies to tracking cookies, that is, cookies that are intended to be used to collect, combine or analyze data about the use of different services of the information society by the user or subscriber for commercial, charitable or ideological purposes. Under the new legislation, the tracking of users in such a manner will presumptively be considered an act of processing, as defined in the Dutch Data Protection Act and is, therefore, subject to the rules in that act.

An amendment to the Dutch cookie law entered into effect in February 2015. Under the amended cookie law, analytics cookies and other analytics measures are no longer subject to the prior consent requirement, provided that they have "no or minimal consequences for the privacy" of the user of the relevant website.

The Dutch cookie regulations are enforced by the ACM. Since the 2015 law amendment, the ACM has become much more aggressive; it is proactively checking websites that generate much traffic and orders them to explain which cookies they use and how they ensure that consent is sought prior to dropping the cookies. In addition, the Data Protection Authority can enforce data protection rules if personal data is processed when using cookies. If data collected with cookies is used to collect, combine or analyze data for profiling purposes, a legal presumption applies that this constitutes processing of personal data.

14.9 Data breach notification

The 2009 European reform package for telecommunications law also introduced data breach notification provisions.

The breach notification obligation requires a provider of a public electronic communication service to notify the ACM in the event a breach of its security measures adversely affects the protection of personal data. In addition, these providers must also notify any relevant individuals whose personal data may be involved and that the breach is likely to have adverse consequences for their private life.

15

Labor Law

15.1 Term

An employment contract may be concluded either verbally or in writing. A written contract may take the form of an agreement or a letter signed by both parties. In either case, the employer is obligated to inform the employee in writing of the conditions applicable to his or her employment. The information to be provided by the employer is based on statutory law and must include, among others, the following:

- The parties' identities and places of residence
- The place of work
- The position of the employee or the nature of his work
- The length of the employee's normal working day or week
- The initial base salary and any other pay components, holidays and the applicable notice period
- The pension arrangement in place, if applicable

An employment contract may be concluded for: (i) an indefinite term; (ii) a specified term ("a fixed-term contract") or (iii) a specific task or project. If no term or specific task or project is specified, the contract will be considered concluded for an indefinite term.

15.1.1 Probationary period

Parties to an employment contract may agree on an initial probationary period in writing only. The statutory maximum probationary period for an indefinite-term employment contract is two months. As of 1 January 2015, it is no longer possible to agree on a probationary period in fixed-term contracts that do not exceed six months. For a fixed-term employment contract exceeding a period of six months and less than two years, a one-month probationary period is allowed. A two-month probationary period is allowed if the fixed-term employment contract is entered into for a period of two years or more. Deviation to the detriment of the employee is possible only pursuant to a collective labor agreement or by an order of an administrative body.

During the probationary period, either party may terminate the employment contract at any time without observing a notice period and without any liability for severance pay, unless the termination is, for instance, based on discriminatory reasons. At the employee's request, the employer must provide the reasons for the termination of the employment contract during the probationary period.

The employer will not be able to apply probationary dismissal if parties agreed to a probationary period exceeding the maximum statutory period (barring other provisions provided by an applicable collective labor agreement). In that case, the agreed probationary period will be void.

15.2 Noncompetition clause

Noncompetition clauses, applicable to a certain scope of activities in certain geographical areas and for a certain number of years, are common in the Netherlands. In order to validly restrict an employee from accepting competing employment after the termination of the employment contract, the noncompetition clause must be agreed upon in writing and signed by both parties. (Note, however, that the employee must be at least 18 years of age at the time of signing.)

Mere reference to a noncompetition clause in a collective labor agreement and/or internal rules and regulations will, in principle, not suffice to bind the employee. The employee should expressly agree to the contents of a noncompetition clause such as by signing an employment contract that includes the noncompetition clause.

A request by the employer for the enforcement of a noncompetition clause may be restricted or denied by the court. The court may deny the request if an employee will, for example, become too restricted by the noncompetition clause in finding a new position.

Furthermore, a noncompetition clause may become invalid if the responsibilities ensuing from the employee's position are substantially amended in the course of employment.

As of 1 January 2015, it is - in principle - no longer possible to agree on a noncompetition clause in fixed-term contracts, irrespective of their duration, unless the employer can substantiate that it has a weighty business or service interest that necessitate a noncompetition clause.

15.3 Termination

As of 1 July 2015, the procedural rules on the termination of employment contracts changed. Before, employers had the choice to terminate an employee through the UWV procedure or a court procedure. The court could award severance compensation to the employee, but the UWV could not, forcing employees to initiate a court procedure to claim compensation for obviously unreasonable dismissal. As such, employees in the same situation were not always treated equally, as the compensation in the different procedural routes were calculated differently and, consequently, had a different outcome.

Employment for an indefinite period

As of 1 July 2015, the UWV procedure is the compulsory route in case the employment contract will be terminated for economic reasons or in case of incapacity for work due to illness longer than two years. The court procedure is the compulsory route in case the employment contract is terminated for performance-related or other personal reasons. In both situations, parties are allowed to appeal (and appeal in cassation) the decision of the UWV / court with the competent higher court and claim reinstatement.

Termination by the UWV

As said, an employer must obtain prior written approval from UWV in case the employment contract will be terminated for economic reasons or in case of incapacity for work due to illness longer than two years before it can give a notice of termination of the employment contract. As an exception to this general rule, the employer does not have to obtain written approval to give notice of termination of an employment contract to a managing director.

The starting point is that an application for dismissal is, in principle, handled within a period of four weeks as of the date that the UWV deems the request for approval complete. Should the UWV give permission for the termination, the notice periods will be reduced by the duration of the UWV procedure, subject to a minimum notice threshold of one month. Obtained permission from the UWV is valid for four weeks.

After obtaining approval from the UWV, the employer may terminate the employment contract with due observance of the statutory or agreed-upon notice period minus the duration of the UWV procedure while granting a transition payment, assuming the employer acted in line with the rules for termination. If not, the sub-district court can - at the request of the employee - nullify the termination of the employment contract by the employer or grant the employee fair compensation instead.

Termination by the court

Either the employer or the employee may file a request with the Cantonal Division of the competent court to dissolve the employment contract in case the employment contract is terminated for performance-related or other personal reasons. The latter includes: (i) inadequate performance; (ii) imputable acts or omissions of the employee and (iii) a damaged working relationship.

The Cantonal Division of the competent court will dissolve the employment contract only if: (i) it has a reasonable ground for doing so and (ii) the relocation of the employee within a reasonable time, whether or not with the aid of training, in a different suitable job within the same company is not possible.

The employer must file a petition with the competent court to dissolve the employment contract. The employee may file a statement of defense, and a court hearing will take place after approximately four weeks. Two to three weeks after the court hearing, the court will give its decision. Depending on the validity (and substantiation) of the reasons, the court may either dissolve the employment contract or not, while granting the transition payment and taking into account the notice period. The notice period will be reduced by the duration of the court procedure, subject to a minimum notice threshold of one month, unless the termination of the employment contract is caused by severe culpable conduct or negligence of the employer.

Dissolution may be requested regardless of whether the contract is for a fixed term or entered into for an indefinite period. In principle, dissolving the employment contract during a statutory prohibition against termination is possible in specific circumstances if the employer is able to prove that the request for dissolution is not in any way related to the statutory ban on termination (i.e., pregnancy, parental leave, etc.). Failure to meet this requirement can result in the court denying the request for dissolution.

As of 1 July 2015, the Cantonal Court Formula is abolished and the transition budget is introduced. Where an employment contract has lasted for at least two years, the employer must pay a transition budget to the employee if the employee's termination is involuntary or if a temporary contract will not be extended. Transition budgets serve as compensation for termination of an employment contract and help an employee in his or her transition to alternative employment.

The transition budget is calculated as follows:

i) For the first 10 years of the employment contract one-sixth of the monthly gross salary of the employee for every six-month period
ii) After the first 10 years of the employment contract one-fourth monthly gross salary for every six-month period of the employment contract
iii) Transition scheme for older employees If the employee is 50 years or older at the termination date and the employment contract lasted for at least 10 years, the transition budget will be – after reaching the age of 50 years –one-half monthly gross salary for every six-month period the employee was in service of the employer.

A transition budget cannot exceed EUR75,000 gross or an amount equal to the employee's annual salary, if this is higher than EUR75,000 gross (as from 1 July 2016, the transition budget cannot exceed EUR76,000 gross or an amount equal to the employee's annual salary). Rules are expected to be laid down by order in council concerning what costs – particularly those related to facilitating a transition to alternative employment (e.g., education or outplacement) – may be deducted from the transition budget. The latter does not affect contractual arrangements in individual employment contracts that entitle the employee to severance compensation (i.e., "golden parachutes"). If a company employs less than 25 employees, an alternative, cheaper transition budget will apply.

Moreover, as of 1 July 2015, if an employee is of the opinion that the termination of his employment contract is caused by severe culpable conduct or negligence of the employer, the employee can request the court to award reasonable compensation (in Dutch: '*billijke vergoeding*'). This could, for example, apply in case of termination of the employment contract

after long-term disability or in a situation where the employee is wrongly dismissed for business economic reasons, but where, in the meantime, the relationship with the employer is irreparably disturbed.

Fixed-term employment

As of 1 January 2015, the employer will be obliged to inform the employee (including a managing director) at least one month before a fixed-term contract of six months or more ends of: (i) whether the contract will be continued and (ii) what conditions will apply to the continued employment.

Penalties for noncompliance are as follows:

- Failure to inform the employee of whether the employment contract will be continued may result in obligation to pay one month's gross salary.
- Late information may result in obligation to pay one day's gross wages for each day the employer has been late.
- If the employment contract is continued but the employer has not fully complied with this information obligation, the employment contract will be continued on the same conditions and duration as the previous contract. This time, however, the duration will be maximized to one year, if parties tacitly continue the employment relationship without making further arrangements.

Please note that, in principle, an employee - even if the employment contract is continued - can still claim compensation for late information or general failure to inform within two months.

This information obligation is applicable to fixed-term contracts that terminate by operation of law as from 1 February 2015.

Notwithstanding summary dismissal, the early termination of a fixed-term employment contract by giving notice is, in principle, not possible, unless the parties have agreed to a premature notice period.

If an employer enters into consecutive fixed-term employment contracts with the same employee, the last employment contract entered into will terminate by operation of law, without the need for a notice of termination upon obtaining approval from the UWV, as set out above. However, the total number of employment contracts entered into must not exceed three, and the total duration of these fixed-term employment contracts must not exceed two years. If more than three fixed-term employment contracts are concluded between the same parties at intervals not exceeding six months, or if the total duration of consecutive employment contracts at intervals not exceeding six months is two years or more, the last employment contract will qualify as an employment contract for an indefinite period. In the latter scenario, the employer will consequently have to: (i) obtain prior approval from the UWV in order to give notice of termination of employment or (ii) request the court to dissolve the employment contract (depending on the reason for termination).

The rule of the succession of fixed term employment contracts also applies *mutatis mutandis* to successive employment contracts between an employee and different employers, who should reasonably be considered one another's successors in relation to the work performed.

In deviation from the aforementioned general rules on the renewal of fixed-term employment contracts, a single fixed-term employment contract cannot qualify as an employment contract for an indefinite period, regardless of its duration. Furthermore, a fixed-term employment contract of two years or longer may be extended once for a fixed period of not more than three months immediately after the initial fixed-term contract expires, without resulting in an employment contract for an indefinite period and, therefore, would not require the obligation to give notice of termination.

15.3.1 Manifestly unreasonable dismissal

As of 1 July 2015, it will, in principle, no longer be possible for an employee to start manifestly unreasonable dismissal proceedings. An employee, as from that date, is entitled to the transition budget and could try to invoke an additional reasonable compensation (*billijke vergoeding*).

If an employee is of the opinion that the termination of his or her employment contract was caused by severe culpable conduct or negligence of the employer, the employee can request the court to award reasonable compensation. For example, this could apply in the event of termination of the employment contract after a long-term disability or in a situation where the employee is wrongly dismissed supposedly for business economic reasons, but is due, in fact, to having his relationship with the employer being irreparably disturbed.

15.3.2 Termination by mutual consent

All employment contracts may be terminated at any time by mutual consent between the employer and the employee, with or without observance of the statutory or agreed-upon notice period and with or without payment of compensation to the employee. It is important for the employer to ensure that the employee's consent to the agreement is explicit and unambiguous. Therefore, it is recommended that the employer enables the employee to seek legal advice in this respect, before accepting any offer for a termination of the employment contract.

As of 1 July 2015, a mandatory two-week reflection period has been introduced. In the event that parties have agreed to terminate the employment contract by mutual consent (or in the event that the employee has agreed to the notice rendered by the employer), a mandatory reflection period of two weeks, which also serves as a revoking period, applies. This means that within two weeks, an employee has the right to revoke his or her consent or dissolve the settlement agreement without the necessity of court proceedings and without having to give reasons. Moreover, the employer has an obligation to inform the employee of this right. Failure to inform the employee will extend the reflection period to three weeks. The mandatory reflection period does not apply to managing directors.

If the employee provides his or her written consent to the amicable termination within six months after his or her earlier revocation, parties are not obliged to observe a new reflection period.

15.3.3 Immediate termination for urgent cause

Either party to an employment contract (i.e., employer or employee) may face circumstances in which one cannot be reasonably expected to continue the employment relationship any longer. If the employee's conduct raises a so-called "urgent cause," the employer can, under circumstances, terminate the employment contract effective immediately (i.e., summarily dismiss the employee).

The employee has a similar right if the employer's conduct raises an "urgent cause."

Dutch law sets forth a number of examples of "urgent causes," such as gross negligence in the performance of duties, disclosure of trade or professional secrets, theft, fraud, embezzlement or crimes involving breach of trust. However, ultimately, only the competent court can assess whether the circumstances of a case at hand actually constitute an urgent cause, justifying an immediate termination.

The employee can contest a summary dismissal by submitting a request to the court. The employee can choose to claim either the nullification of the termination (in Dutch: '*vernietiging van de opzegging*') or a reasonable compensation (in Dutch: '*billijke vergoeding*'). The employee must file a petition in this perspective within two months after the summary dismissal. It is no longer possible to interrupt (in Dutch: '*stuiten*') the limitation period of two months. This is a final limitation period.

Managing director

The termination of the employment contract of a managing director (*statutair directeur*) that is appointed pursuant to the Articles of Incorporation of a legal entity differs from the termination of an employment contract of a regular employee. The reason is that a managing director has a twofold relationship with the company: (i) a corporate relationship and (ii) an employment relationship.[1]

1 As from January 2013, the managing director of a publicly traded company no longer has an employment relationship with the company.

Depending on the company's Articles of Incorporation, the shareholders will, in principle, be authorized to dismiss a managing director from his or her corporate position during a shareholders' meeting.

To convene a shareholders' meeting, invitations and letters, including an overview of the items on the agenda (i.e., the intended dismissal) should be sent in a timely manner to all shareholders, managing directors and members of the supervisory board (if any).

The managing director must be given the opportunity to defend himself/herself during the shareholders' meeting. Subsequently, all managing directors (i.e., including other managing directors of the company, if any) and members of the supervisory board (if any) should be offered the opportunity to render their advisory vote during the shareholders' meeting before the ultimate decision to dismiss the managing director is made.

In principle, the employment contract of the managing director will also end as a result of his or her dismissal during the shareholders' meeting (i.e., the corporate and employment relationship end simultaneously). Consequently, the employer of the managing director does not need to apply for prior approval from the UWV to give notice of termination to the managing director. Nonetheless, parties should still observe the notice period in full. As an alternative, the employer can pay, in lieu of the notice period, (at least) the equivalent of the remuneration the managing director would have been entitled to during the notice period.

As of 1 July 2015, the managing director can only claim reasonable compensation (*billijke vergoeding*) if: (i) there's severe culpable conduct or negligence of the employer;(ii) the dismissal lacks reasonable grounds and/or (iii) the managing director could have been reassigned to another alternative position within the organization of the employer. If the managing director falls sick before he or she receives the invitation to the shareholders' meeting, his or her dismissal during the shareholders' meeting will only result in the termination of the corporate position. During sickness, the managing director, just as every other employee, is protected by a statutory prohibition to give notice. Consequently, the employment relationship does not end simultaneously with the termina-

tion of the corporate relationship. In cases where the managing director has been unable to work due to illness, the compulsory route as of 1 July 2015 will be the UWV.

A managing director is entitled to the transition budget as well, if: (i) the employment contract has lasted for at least two years; (ii) the managing director's termination is involuntary or (iii) a temporary contract will not be extended.

In the event that the company has established a Works Council and the managing director is the consultation partner of the Works Council (*bestuurder,* within the meaning of the Dutch Works Councils Act), the prior advice of the Works Council on the intended dismissal of the managing director must be requested before the decision to dismiss him or her is adopted and implemented.

15.4 Works council

Under the Dutch Works Councils Act, companies with 50 or more employees must establish a Works Council. Part-time employees and those who are hired in (or out) should also be counted when determining the number of employees of the company.

The members of the Works Council are chosen by the employees from their own ranks. The number of members varies from three to 25, depending on the total number of employees of the company. One of the members is appointed as chairperson. A managing director may not be a member of the Works Council.

The management of the company and the Works Council must meet at least twice a year to discuss general subjects concerning the company.

The management is obliged to provide the Works Council with relevant company data and documentation such as the financial results and the legal structure of the company. Furthermore, the management must inform the Works Council about the results and the prospects of the company. The Works Council is also entitled to receive information on the scope and content of the terms and conditions of employment with respect

to different groups of employees within the company, including the general development of their remuneration.

Prior to the adoption of intended decisions that, for example, relate to the transfer of control of the company, the termination of or a major change in the company's activities, major investments, significant reorganizations, mergers, takeovers, changes in location or major workforce layoffs and dismissals, the Works Council must be requested to render its written advice.

In addition, the Works Council must first grant its approval before the adoption of intended decisions that directly affect employment conditions, such as pension plans and all kinds of in-house regulations, including regulations relating to working hours or holidays, working conditions, and policy on appointments, dismissals or promotions.

Failure to comply with the obligation to timely request the Works Council to grant its advice or approval often results in substantial delays, unwanted media exposure, unrest among employees and (where applicable) trade unions, and in a worst-case scenario, court proceedings resulting in the obligation to reverse the adopted decision, including all implementation measures.

The general aim of the Dutch Works Councils Act is to promote consultation between management and employees, especially with regard to intended changes in business and/or policies that can affect personnel (i.e., employment conditions, terms of employment, etc.). As a general rule to abide by, intended decisions that could impact employees will likely trigger an obligation to request the Works Council for its advice or, depending on the circumstances and extent of the intended decision, its approval.

Members of the Works Council must observe confidentiality in relation to all business and industrial secrets that may come to their knowledge, as well as all matters with respect to which the company or the Works Council has imposed an obligation of confidentiality.

Dutch statute holds a statutory prohibition to give notice of termination to employees due to their membership in the Works Council, which means that if parties fail to reach an amicable settlement, the employer will have to: (i) start substantive dissolution proceedings to terminate the employment contract of a member of the Works Council or (ii) obtain prior written approval from UWV in case the employment contract will be terminated for business economic reasons. The statutory prohibition to give notice of termination to employees due to their membership in the Works Council lapses in case the employment contract will be terminated for business economic reasons.

15.4.1 Small companies

The Dutch Works Councils Act contains employee participation/consultation obligations for companies that do not have a Works Council. For example, companies with at least 10 but less than 50 employees are, in the absence of a Works Council, required to set up a three-member "employee representative body" if the majority of the employees so request.

The management must consult with the staff representation committee on a number of subjects, including intended decisions that may result in job losses or major changes in the working conditions of at least 25 percent of the employees working in the company.

Small companies with less than 10 employees also have to set up a three-member employee representative body, if the majority of the employees so request. In comparison with the powers of an employee representative body of a company with 10 to 50 employees, the powers of an employee representative body of a company with less than 10 employees are far more limited and only relate to intended decisions that require prior approval.

In the absence of a Works Council and an employee representative body, a company with at least 10 but less than 50 employees is obliged to give its employees the opportunity to meet with the management twice every calendar year during a personnel meeting. Furthermore, the employees in such a company should be given the opportunity to render their advice on any proposed decision that may lead to a loss of jobs or to major changes in

the terms of employment or working conditions of at least 25 percent of the persons working in the company.

The Dutch Works Councils Act provides the personnel meeting with the same advisory powers as an employee representative body in a company with at least 10 but less than 50 employees.

An employee representative body and/or personnel meeting have limited powers in comparison with the powers of a Works Council. As opposed to a Works Council, an employee representative body and/or personnel meeting will not be able to engage in legal proceedings if the company does not abide by their written advice.

16

Social Securities and Pensions

16.1 The social security system

With respect to the social security system in the Netherlands, a distinction can be made among the following:

- National insurance
- Welfare provisions
- Employee insurance

16.2 National insurance

The types of insurance in the national insurance system apply in general to all residents of the Netherlands, irrespective of their nationality and whether they are working. However, there are some exceptions to this general rule such as for assigned employees and employees who are [also] working abroad. The following acts fall under the national insurance category:

a) General Old Age Pensions Act

The General Old Age Pension Act (*Algemene Ouderdomswet* or "AOW") provides for a basic old-age pension for all residents of the Netherlands. The national pension benefit is accrued between the ages of 15 and 65 with 2 percent for every insured year and differs for: (i) singles; (ii) single parents with children up to age 18 and (iii) married couples or registered partners. Until 2012, the standard pension age for the AOW was 65. As of 1 January 2013, the standard pension age for the AOW was set to be increased as follows:

Year	2013	2014	2015	2016	2017	2018
AOW pension age (in years + months)	65+1	65+2	65+3	65+6	65+9	66

Year	2019	2020	2021	2022
AOW pension age (in years + months)	66 +4	66+8	67	Linked to increased life expectancy

At the same time, the age on which the AOW benefit will be accrued, which is currently at the age of 15, will increase accordingly. A bridging scheme will be introduced for low earners who are in an early retirement scheme and who were unable to make provisions for this increase.

b) General Surviving Relatives Act

Under specific conditions, the General Surviving Relatives Act (*Algemene nabestaandenwet* or "Anw") provides benefits for the partner of the deceased and his or her (half-) orphans. These conditions involve taking care of a child under age 18 who does not belong to another family or those who are at least 45 percent disabled. Furthermore, the partner of the deceased should be younger than the standard pension age for AOW.

c) General Child Benefit Act

The General Child Benefit Act (*Algemene Kinderbijslag Wet* or "AKW") provides benefits with regard to children, stepchildren and foster children up to age 18. The amount of the benefit depends on the age of the child and whether the child lives at home.

d) Long-term Care Act

The Long-term Care Act (*Wet Langdurige Zorg* or "WLZ," previously known as *Algemene Wet bijzondere ziektekosten* or "AWBZ") insures all residents in the Netherlands against risks for exceptional expenses, which are not covered by the Health Insurance Act (see item e, Health Insurance Act and the Act on the Health Insurance Allowance).

e) Health Insurance Act and the Act on the Health Insurance Allowance

The Health Insurance Act (*Zorgverzekeringswet* or "Zvw") obliges all residents of the Netherlands, and all individuals who work in the Netherlands and pay tax on wages, to take out at least a standard insurance for medical expenses. Under certain conditions, the Health Insurance Allowance (*Wet op de zorgtoeslag* or "Wzt") provides an additional health insurance allowance (*zorgtoeslag*). The employee has to pay the nominal premium to the health insurance company. If the employer would like to reimburse this premium, the reimbursement is taxable as employment income.

The employer or the social security authorities will have to pay a mandatory income-related contribution of 6.75 percent (in 2016) of the annual salary maximized to an annual salary of EUR52,763 (in 2016) to the Dutch health insurance institution.

16.3 Premiums

In general, all premiums paid within the national insurance system are levied with and are part of the personal income tax rates.

The premiums are, in general, levied up to an income of EUR33,715 (2016). As of 1 January 2016, 17.9 percent is levied for the AOW premiums, while 9.65 percent is levied for the AWBZ and 0.60 percent for the Anw premiums. The AKW premium is 0 percent because it is funded by the government.

16.4 Welfare provisions

The welfare provisions fill the gap of insufficient (family) income to a social minimum with regard to a specific life situation, or provide for specific provisions or compensation with regard to a life situation. The following acts fall under this category:

a) Social Securities Supplements Act (*Toeslagenwet*)
b) Invalidity Insurance (Young Disabled Persons) Act (*Wet arbeidsongeschiktheidsvoorziening jonggehandicapten* or "Wajong")
c) Regulations Governing Contributions toward the Upkeep of Multiple and Severely Physically Disabled Children Living at Home (*Tegemoetkoming onderhoudskosten thuiswonende gehandicapte kinderen* or "TOG")
d) Older and Partially Disabled Unemployed Workers Income Scheme Act (*Wet inkomensvoorziening oudere en gedeeltelijk arbeidsongeschikte werkloze werknemers* or "IOAW")
e) Older Unemployed Workers Income Scheme Act (*Wet inkomensvoorziening oudere werkloze werknemers* or "IOW") (The IOW expires on 1 July 2016.)
f) Older and Partially Disabled Former Self-Employed Persons Income Scheme Act (*Wet inkomensvoorziening oudere en gedeeltelijk arbeidsongeschikte gewezen zelfstandigen* or "IOAZ")
g) Work and Social Assistance Act (*Wet werk en bijstand* or "Wwb")
h) Artists' Work and Income Act (*Wet werk en inkomen kunstenaars* or "WWIK")
i) Act providing pregnancy and childbirth benefits to the self-employed (*Wet Zwangerschaps- en bevallingsuitkering zelfstandigen* or "ZEZ")
j) Social Support Act (*Wet maatschappelijke ondersteuning* or "Wmo")

The Wajong, the ZEZ and the *Toeslagenwet* are executed by the Authority for Employee Insurance (*Uitvoeringsinstituut Werknemersverzekeringen* or "UWV"). The other acts are executed by either the local authorities (*gemeenten*) or the National Insurance Institute (*Sociale verzekeringsbank* or "SVB"). All these acts are funded by the Dutch government.

Over the past few years, the Dutch government has severely tightened the conditions for qualifying for the welfare provisions and the national insurance allowances. It has been agreed upon between the government and social partners that the IOAW will expire for employees born after 1965 and the IOW will continue to exist until 2020. During 2015 until 2020, the IOW will be phased out.

16.5 Employees' insurance

Performing employment activities in the Netherlands generally leads to compulsory insurance in compliance with the following acts.

16.5.1 Sickness Benefits Act (Ziektewet)

Under the DCC, an employer is, in principle, obliged to pay 70 percent of the last salary (maximized until 70 percent of the maximum daily wage) of the employee during the first 104 weeks of disability or up to the date of termination of the employment contract if that date is earlier. During the first 52 weeks, the salary should at least be equal to the minimum wage. The maximum daily wage amounts to EUR199.95 per workday as of July 2015.

16.5.2 Disablement Insurance Act and Work According to the Labor Capacity Act

The *Wet op de arbeidsongeschiktheidsverzekering* or "WAO" and *Wet Werk en Inkomen naar Arbeidsvermogen* or "WIA" both insure employees for a wage replacement benefit after 104 weeks of full or partial disability. The WIA has replaced the WAO and creates more incentives for rehabilitation and reintegration of employees into the workforce. The WAO is still applicable to employees who became disabled before 1 January 2004.

16.5.3 IVA and WGA/WhK

The WIA divides disability into the following two plans: (i) for individuals who are incapable of working due to full permanent disability ("IVA") and (ii) for individuals who are deemed able to work and, therefore, can earn some income ("WGA/WhK"). Based upon the IVA, as of 1 January 2007,

full and permanently disabled employees are entitled to 75 percent of their last salary, maximized to the maximum daily wage. Based upon the WGA/WhK, partially disabled employees who meet the requirements are entitled to a wage-related benefit maximized to the maximum daily wage. In the first two months, the benefit amounts to 75 percent of the monthly wages minus the current income. After these two months, the benefit amounts to 70 percent of the monthly wages minus the current income. The duration of this benefit can be three to 38 months depending on one's employment history.

After the wage-related benefit, employees could be entitled to benefits that are supplementing their salary (*loonaanvulling*) or that are a percentage of the minimum wage (*vervolguitkering*).

Individuals who are less than 35 percent disabled (but who earn more than 65 percent of the maximum hourly wage) (*maatman inkomen per uur*) are not eligible for WGA/WhK benefits or IVA benefits.

The basic WGA/WhK and IVA contributions, together with the basic contribution of the WAO and WIA (which also includes a contribution for childcare) are paid by the employer and is equal for all employers (in 2016, 6.38 percent of the annual salary maximized to an annual salary of EUR52,763).

The percentage of the differentiated WhK contribution depends on the disability risk of the company and whether the employers decided to either self-fund this disability benefit and/or insure this risk with private insurers or pay contributions to a government agency (UWV).

16.5.4 Unemployment Insurance Act

The Unemployment Insurance Act (*Werkloosheidswet* or "WW") insures employees and civil servants under certain conditions against the financial consequences of unemployment. The WW benefit for the first two months is 75 percent of the most recent salary (maximized by the maximum day wage) and 70 percent from then on. The duration of the benefit will depend on the labor history of the employee and whether the employee meets certain conditions (e.g., not receiving other benefits, like IVA or WGA/WhK benefits).

On 10 June 2014, the Upper House passed the Work and Social Security Act (*Wet werk en zekerheid*). This act substantially changed the laws governing unemployment benefits for newly unemployed individuals:

- Since 1 January 2016, the maximum unemployment benefits period of 38 months has been reduced by one month every quarter. By 2019, the maximum unemployment benefits period will be a maximum of two years.
- Since 1 January 2016, the accrual of time for unemployment benefits has been reduced: during the first 10 years of employment, one month of unemployment benefits will be accrued during each year of service. In subsequent years, 0.5 months of unemployment benefits will be accrued during each year of service.
- Since 1 July 2015, the obligation to take on any work generally accepted as suitable has taken effect after six months of unemployment (under current legislation one year). Furthermore, the calculation method of the daily wage has been changed.

16.5.5 The New National Assistance Act

The New National Assistance Act (*Nieuwe Algemene Bijstandswet* or "NABW") helps people provide basic living standards for themselves when they are not entitled to any other benefit.

Temporarily, certain reductions to the social insurance contributions may apply for employers who will hire special employees (e.g., disabled or older

[i.e., above the age of 50] employees) or who employ employees aged 62 or older. To this end, detailed requirements apply.

16.6 The Dutch Pension System

The pension system in the Netherlands is based on a three-tier system:

a) The first tier of the Dutch pension system is the national pension insurance known as the AOW, a national insurance on which the premiums are levied with and part of personal income tax rates. There is no relation between the amount of the AOW benefits and the amount of contributions paid. All residents of the Netherlands are entitled to AOW as of the date they indeed have reached the standard pension age for the AOW (65 and six months in 2016). Prior to 1 January 2013, the entitlement to AOW existed as of the actual date that the standard pension age (65) for the AOW would be reached.

   On 1 January 2013, the standard pension age for the AOW was set to increase to 66 in 2018 and 67 in 2021. By 2022, the standard pension age for the AOW will be linked to life expectancy.

b) The second tier of the pension system consists of old-age pension benefits, which is supplementary to the AOW. This is either agreed upon by or mandatorily applicable to the employer and employee. Sometimes, the second-tier pension includes disability pension, supplementary to WIA benefits, or more often, a surviving relative pension supplementary to ANW benefits. (See AOW, WIA and ANW benefits under 15.2 National insurance.) The second-tier pensions are financed by contributions paid by the employer to the pension provider. These contributions may be shared between the employer and the employee. There are many ways in which second-tier pension benefits can be arranged (see Sections 15.6.1 up to 15.6.8).

Due to the raising of the standard pension age for the AOW (See above under a), the tax framework for second-tier pension has also been changed. In this light, as of 1 January 2014, the pension target age for tax legislation has been increased from 65 to 67. After 2014, the pension target age will be linked to increased life expectancy. Furthermore, the maximum tax-facilitated pension accrual rates have been decreased since 1 January 2014 to as follows: (i) for a final pay system, from 2 percent to 1.9 percent, and (ii) for an average pay system from 2.25 percent to 2.15 percent. New maximum age scales have also been published for the defined contribution ("DC") system.

As per 1 January 2015, the tax framework for second-tier pension has been changed again to as follows:

- The maximum tax-facilitated pension accrual rates have been decreased further to: (i) for a final pay system from 1.9 percent to 1.657 percent, and (ii) for an average pay system from 2.15 percent to 1.875 percent. The age scales for the DC system have also been decreased accordingly.
- The accruals for partner and orphan pensions have also been decreased. Due to the lower accrual rates, most employees face lower insured partner's pension from 2015 and onwards.
- The minimum offset has been amended.
- The pensionable salary that could be taken into account for tax-facilitated pension accrual has been maximized to a gross of EUR101,519 (2016). It is expected that this cap will further decrease in the future.
- A net pension facility has been introduced for employees earning a salary with a gross of EUR101,519 (2016) or more in order to build up a net retirement provision via a DC plan. The contribution will be paid from the net salary. As a consequence, there will be no tax relief for the premiums, but the annuity payments at retirement date will be untaxed. A tax-friendly aspect is that the accrued value will not be subject to the deemed investment yield tax in Box III (i.e., the personal income tax due on income from savings and investments). Detailed conditions apply with respect to the net pension.

c) The third tier of the Dutch pension system consists of private insurance for the employee's salary that is in excess of second-tier benefits.

   Subject to detailed tax legislation, second-tier and third-tier pension contributions are not classified as taxable wages and, in principle, can be paid to the pension provider (e.g., pension fund or insurance company) free of payroll taxes. However, the payments to be received by the employee upon retirement will be taxable for personal income tax purposes. An exception applies for the net pension in the second tier and tax-excessive pension accrual.

16.6.1 Second tier

In January 2007, the Dutch Pension Act came into force and replaced the former Dutch Pension and Savings Fund Act. These acts described conditions for the second-tier pension. The Pension Act, however, offers more clarity about responsibilities and liabilities between the employer, the employee and the pension provider.

In principle, employers are not obliged to provide for pension, unless contractually agreed upon or a government initiative so requires. The latter applies if the employer falls within the scope of a mandatory Industry Wide Pension Fund (*Verplichtgesteld Bedrijfstakpensioenfonds* or "BPF"), which applies to an entire branch (industry). Please be informed that based upon the Dutch Pension Act, an employee who forms part of a group of employees that has been offered a pension plan of the employer will be considered to have been offered the same pension plan, unless explicitly agreed on otherwise with the employer.

Furthermore, various forms of legislation on equal treatment (e.g., based on age, gender, full-time/part-time work, temporary/indefinite labor contracts), existing collective labor agreements or some specific merger and acquisition situations might also lead to pension obligations for the employer.

16.6.2 Administering second-tier pensions

In the event that the employer has offered a pension promise to its employees, the employer is legally obliged to administer that pension promise with a pension provider within the meaning of the Pension Act. In this light, second-tier pensions could be administered by the following pension providers:

- An industrywide pension fund (this might be mandatory)
- A company pension fund (i.e., a self-administered fund)
- An insurance company that is licensed by the Dutch Supervisory Authorities
- A licensed pension institution registered in another EU member state
- A Premium Pension Institution (*Premiepensioeninstelling*, PPI). (See 15.7.2, New pension providers.)

Pension providers are supervised by the Dutch National Bank ("DNB") and the AFM.

Since 1 January 2007, employees are no longer entitled to set up an individual pension plan with an insurer themselves (the so-called c-policy). Only the employer is entitled to set up a pension plan with a pension provider and to become the policyholder. An exception exists for existing c-policies – Individual pension plans that were effective prior to 1 January 2007, can be continued as long as the employee is employed by the same employer.

16.6.3 Ways to finance second-tier pension benefits

There are several ways in which pension benefits can be financed. These are as follows:

- A defined benefit ("DB") system that can be formed as a final pay system or as an average pay system
- A DC system, either individual or collective

16.6.4 Final pay system

Under the Final Pay System, the pension accrued is a fixed percentage of the pensionable base (pensionable salary minus franchise), applicable in the initial year as of the commencement date of service or the commencement date of the pension plan. With regard to future increases of the pensionable salary, pension claims are allocated to previous years of service from the commencement date of employment or of the plan (past services). Therefore, the amount of the old-age pension depends on: (i) the employee's last salary prior to the pension date; (ii) the years of participation in the pension plan and (iii) the franchise.

16.6.5 Moderate final pay system

To prevent a situation in which salary increases at a later age will lead to major pension cost increases, the final pay system often includes provisions to limit the costs. A frequent provision stipulates that the pensionable salary after a certain age (55 or 60 years) will be taken into account only with respect to future years of service.

Alternatively, it may be determined that promotions after the employee reaches a certain age (55 or 60 years) no longer count for pension increases, but only the usual periodic salary increases. However, employers have to be aware that these kinds of stipulations might be in conflict with Dutch equal treatment law.

16.6.6 Average pay system

In this system, the pension accrual is a fixed percentage of the pensionable base in the first year as of the commencement date of employment or the commencement date of the plan. Upon each consecutive increase of the pensionable base, a pension is accrued only for years of service yet to come. In this way, the pension to be distributed on the pension date is calculated on the average of all pensionable bases over the entire period of participation in the plan.

16.6.7 The DC system

Under a DC system, it is not the final pension that is the standard, but the offered premium that forms the basis of the pension commitment. Thus, rather than a pension commitment, a premium commitment is involved. In this system, the pension benefit depends on: (i) the contribution paid; (ii) the interest percentage and (iii) the return on investment.

16.6.8 The Collective DC ("CDC") System

As of 2005, the International Financial Reporting Standards ("IFRS") for companies quoted on the stock exchange led companies to reconsider their existing DB pension plans. The Project Unit Credit ("PUC") method based on IFRS used leads to high-pension liabilities in the company books due to the fact that this method takes into account discount rates, salary increases, periods of service, inflation and other actuarial factors.

Although most of the companies affected by IFRS do not wish to be confronted with high liabilities in the company books, most of them do wish to keep the advantages of the DB System.

The combination of the two leads to the so-called CDC system. A CDC pension plan, based on a DB system, might show the following aspects:

- The employer pays on a yearly basis (within a few years) a pre-fixed pension premium.
- Extra risk insurance is already included in the pension premium.
- The pension fund will use the DB system to divide the pension accrual, making the yearly pension accrual flexible.
- The basic assumption will be that the premium should provide for the expected pension. However, if there is a mismatch in expectations and in the final result, the employees will collectively carry the actuarial/ investment risks and benefits.
- Indexation might be paid by extra interest profits.

The DNB, however, is very critical of the so-called CDC pension plans and interprets some of these plans as DB plans. The interpretation of the DNB has a direct effect on the way the pension plan has to comply with specific pension provisions. For IFRS purposes, the pension plan system will be interpreted by a specific accountant. If the CDC pension plan will not be interpreted as a DC plan, this may imply a considerable risk for the employer.

16.7 Pension developments in the Netherlands

16.7.1 The Dutch Pension System

In early 2010, several commissions (established by the Dutch Cabinet) published their view on whether the Dutch pension system is sustainable enough to take into account future developments. The commissions made several recommendations in order to make the Dutch pension system more sustainable in the future while trying to maintain the fundamental principles of the current Dutch pension system as much as possible (collectively, solidarity and compulsory membership). The Dutch Cabinet has indicated that it follows most of the conclusions and recommendations of the commissions.

During the previous years, social partners have concluded several pension agreements, which confirmed the aforementioned conclusions. Furthermore, several consultation rounds took place with respect to the future financial framework for pension funds.

As per 1 January 2015, the New Financial Assessment Framework Act (*Nieuw Financieel Toetsingskader* or “FTK,” an updated version, in Dutch) became effective. This act includes changes to the previous applicable financial framework for pension funds. A number of sections of the act have been implemented later.

Changes resulting from the new FTK include the following:

- Discount rates have been based on the new UFR approach for periods after 1 January 2015, and have resulted in lower discount rates compared to the previous UFR approach.
- Higher solvency buffers have been required in order to realize the legally required degree of actuarial certainty (97.5 percent).
- It is still possible to smooth discount rates over a (maximum) period of 10 years to determine the required contributions. It is also still possible to use the expected return on assets (as a discount rate) to determine the required contributions under certain conditions, including financing and future conditional indexations (instead of the solvency buffer).
- A 12-month moving average funding ratio has been introduced, replacing the previous point-estimate funding ratio. This is relevant for decisions related to indexation, benefit reductions and recovery plans.
- Stricter funding rules now apply for indexation, while benefit reductions, if necessary, are spread over time. The mechanism for this is as follows:

    - Indexation is not allowed at funding ratios below 110 percent.
    - Full indexation is allowed only at funding ratios higher than 130 percent (plan-specific and depending, in particular, on the maturity of the membership).
    - Current recovery plans no longer apply and is replaced by rolling 10-year recovery plans when funding ratios are below the full funding level.
    - Benefit reductions is now required when recovery to full funding within 10 years is not expected. Reductions amount to one-tenth of the deficit.
    - Further benefit reductions apply when funding ratios are below 105 percent on six consecutive annual measurement dates.

In general, these changes that increased the size of funding targets result to an overall increase in the costs associated with providing DB pensions in the Netherlands.

16.7.2 Framework memorandum on pension

The Dutch government published a framework memorandum on pension on 6 July 2015, in which it presented some pillars for the future pension landscape. The most important pillars include the aim of: (i) providing for a sufficient pension for both young and older employees, creating more transparency for employees on their pension accrual (e.g., with respect to solidarity, collective risk sharing and clear agreements) and (ii) phasing out the flat-rate system of pension contributions for young and older employees. Come autumn of 2016, the government will provide the steps to elaborate the presented pillars in more detail.

16.7.3 New pension fund governance

On 7 August 2013, part of the *Strengthening Pension Fund Board Act* (*Wet versterking bestuur pensioenfondsen*) came into force. The remaining part of this act has become effective on 1 July 2014. This act regulates the governance and participation in decision-making within the pension fund board. The most important aspect of the act is that on 1 July 2014, six variants of board models have been made possible. These variants are: (i) a board consisting of an employer, an employee and pensioner representatives; (ii) a joint board with (up to two) external experts; (iii) an independent model (solely external experts); and (iv) a joint mixed model (both the executive and [a maximum of three] supervisory board members represents the board); (v) an independent joint model (at least three supervisory and at least two executive board [not being direct representatives of the employer, employees or pensioners] members) and (vi) an upside-down joint model (at least two executives [not being direct representatives of the employer, employees or pensioners] and three supervisory board members). Depending on the opted-for board model, specific rules apply with respect to internal supervision.

Furthermore, on 1 January 2014, the Pension Fund Code became effective. This code has been compiled by the Federation of the Dutch Pension Funds and the Labour Foundation, which had, in so doing, set standards for "good pension fund governance." As far as the pension funds are concerned, the code replaces the Principles of Good Pension Fund Governance, which the Labour Foundation published in 2005.

16.7.4 New pension providers

The European Pension Directive (IORP Directive), which took effect at the end of 2005, is an initial step toward a European internal market for pension schemes by allowing pension institutions to operate across borders. Based on the IORP Directive, the Dutch Cabinet announced that they would introduce a new type of pension provider: the General Pension Institution (*Algemene Pensioeninstelling* or "API"). The main objective of introducing the API is to contribute to the attractiveness of the Netherlands as a country of residence for pension institutions.

The Dutch Cabinet has split the legislative process in the following phases:

- Introduction of a PPI
- Introduction of a Multi-Pension Fund
- Introduction of API (not completed yet)

The PPI is a new pension administrator (alongside pension funds and pension insurers) with limited costs and cross-border opportunities; its "business" opportunities are, however, limited. This is because the PPI could only operate as a pension provider for DC agreements and only in the accrual phase (i.e., it could not pay pension benefits to pensioners). The legislative proposal for the introduction of a PPI has been approved in December 2010.

By means of a Multi-Pension Fund, (company) pension funds could co-operate. This is especially important for smaller pension funds, which were thus enabled to achieve cost savings and economies of scale, to strengthen their negotiating position *vis-à-vis* operators, such as asset managers and administrators, and, finally, to make joint progress in

meeting pension fund governance requirements. The legislative proposal for the introduction of a Multi-Pension Fund was approved in May 2010.

Instead of introducing the API, the Lower House approved a legislative proposal to introduce the General Pension Fund (*Algemeen Pensioenfonds*) or APF, which would also be a new pension administrator. The APF is designed to serve as an alternative for pension funds considering liquidation. The APF offers pension funds with various arrangements and has the ability to operate under a single, independent board, while keeping their assets ring-fenced. The effective date was intended on 1 January 2016, but the legislative proposal is still subject to Upper House approval.

16.7.5 New Act regarding pension communication

Effective since 1 July 2015, the act regarding pension communication came into force. The aim of this act is to make it easier for people to learn about their pension and give them a better idea of its current position. Furthermore, it includes improvements to pension communication by responding more fully to participants' needs and communicating more clearly on aspects that people are unsure about.

17

Visas, Residence Permits and Work Permits for Non-EU Nationals

17.1 Executive summary

Under Dutch immigration laws, there are various procedures available in order to obtain the required work and residence permits for foreign non-EU/EEA nationals. These procedures range from temporary business visas to permanent residence permits. Often, more than one procedure is worthy of consideration. Requirements and processing time vary by procedure.

17.2 Key government agencies

The Ministry of Foreign Affairs issues visas through Dutch embassies and consulates around the world.

The Immigration and Naturalization Service (*Immigratie- en Naturalisatiedienst* or "IND") is part of the Ministry of Justice and, in general, is responsible for the decision in the visa and residence permit applications.

The Public Employment Service (*UWV WERKbedrijf*) handles work permit applications, while investigations and enforcement actions involving employers and foreign nationals are the particular focus of the Social affairs and Employment Inspectorate (*Inspectie SZW*).

17.3 Visit to the Netherlands not exceeding 90 days

Foreign nationals from most non-EU/EEA countries are generally required to have a tourist or a business visa for a temporary visit to the Netherlands. It is advisable to check with the Dutch embassy or consulate to confirm whether a visa is required.

The visa is issued for a maximum period of 90 days, and is not extendable. Furthermore, the holder of the visa may remain no longer than 90 days within 180 days within the Schengen Area, whose member states include: Austria; Belgium; Czech Republic; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Iceland; Italy; Latvia; Lithuania; Luxembourg; Malta; the Netherlands; Norway; Poland; Portugal; Spain; Slovakia; Slovenia; Sweden and Switzerland.

It is possible to apply for a multiple-entry visa allowing foreign nationals to leave and re-enter the Schengen Area during the visa period.

Visa Waiver

Passport holders of the following countries do not require a visa for a stay of 90 days or less:

1. Andorra	19. Brazil	39. Austria
2. Australia	20. Argentina	40. Cyprus
3. Bulgaria	21. Canada	41. El Salvador
4. Costa Rica	22. Croatia	42. France
5. Czech Republic	23. Denmark	43. Guatemala
6. Estonia	24. Finland	44. Iceland
7. Germany (Federal Republic)	25. Greece	45. Italy
8. Honduras	26. Hungary	46. Lithuania
9. Ireland	27. Israel	47. Mexico
10. Japan	28. Liechtenstein	48. Nicaragua
11. Malaysia	29. Malta	49. Paraguay
12. Monaco	30. New Zealand	50. Romania
13. Norway	31. Panama	51. Slovakia
14. Poland	32. Portugal	52. Spain
15. San Marino	33. Singapore	53. United Kingdom
16. Slovenia	34. South Korea	54. Vatican City
17. Sweden	35. Switzerland	55. Venezuela
18. United States of America	36. Uruguay	
	37. Brunei	
	38. Chile	

Business visit

If a temporary visit is intended for business reasons, foreign nationals must be cautious about assuming too readily that their activities in the Netherlands merely qualify as a business visit and do not require any further work authorization (i.e., a work permit). Whether they have a business visa is not relevant in this respect. The visa itself merely provides a right to reside in the Netherlands. It does not provide authorization to perform work activities. Consequently, in the absence of a work authorization exemption, a work permit may be required.

In general, an incidental visit in order to attend business meetings and/or participate in contract discussions will not require further work authorization, provided that the activities are limited in duration (the maximum is four weeks within a 13-week period).

Furthermore, a work permit is not required for a foreign employee who will be in the Netherlands to install, adapt to and/or provide instructions on the use of software that is produced and supplied by the employer established outside the Netherlands. These specific activities may be performed for a maximum of 12 consecutive weeks within a 36-week period.

Dutch law provides for additional - though very limited and strict - exemptions to the obligation to apply for work authorization. The majority of intended work activities in the Netherlands will not qualify for an exemption.

17.4 Visit to the Netherlands exceeding 90 days

A foreign national intending to stay in the Netherlands for more than 90 days (including the days spent in other Schengen member states) is required to have a Dutch residence permit (*verblijfsvergunning*). The conditions for obtaining a residence permit depend entirely on the purpose of stay in the Netherlands.

A foreign national intended to work and reside in the Netherlands must usually obtain three types of documents, which are as follows:

a) A provisional residence permit (*Machtiging tot Voorlopig Verblijf* or "MVV") This enables the holder to enter the Netherlands. Please note that an MVV is not required for citizens of the EEA, Switzerland, Vatican City State, Japan, Canada, Australia, Monaco, South Korea, the Unites States of America and New Zealand.
b) A residence permit This enables the holder to live in the Netherlands.
c) A work permit (which applies under certain conditions). This enables the holder to work in the Netherlands. Please note that the obligation to have a work permit is actually not an 'employee obligation.' If applicable, the employer must apply for (and obtain) a work permit to enable the deployment of the foreign national within its organization to the Netherlands. In the absence thereof, the employer can be penalized (not the employee). The next paragraph of this chapter provides further information regarding work permit requirements.

Provisional residence permit (MVV)

There are two application procedures that can be considered in order to obtain an MVV. These are as follows:

a) The foreign national can apply at the Dutch mission/embassy in the country where he or she lives.
b) The employer in the Netherlands or the person with whom the foreign national will be staying in the Netherlands (the "Sponsor") can apply on his or her behalf.

Depending on the purposes of stay, obtaining an MVV can take between two weeks and six months. The Sponsor in the Netherlands can follow a single procedure to start the application for both the MVV and a residence permit for the foreign national.

Residence permit

A residence permit is generally issued for a maximum of one year or - in case of residence for labor purposes - for the duration of employment in the Netherlands, up to a maximum of 5 years. If no changes of circumstances have occurred, the permit is extendible. After having been in the possession of a residence permit for five years, the foreign national may apply for a permanent residence permit. This permanent residence permit is renewable every five years.

A residence permit will not be granted if the foreign national was first required to obtain an MVV.

17.5 Work permit

An employer who wants to recruit an employee from outside the EU/EEA usually needs to apply for a work permit for that employee. Please note that the Netherlands has temporarily opted out for the full mobility of the workforce in respect of new EU member Croatia. This means that work permits for Croatian nationals may still be required depending on the intended work activities in the Netherlands.

There are various work permit categories and various application procedures. Under certain circumstances, a single procedure can be followed with the IND in order to apply for a 'combined residence and work permit' (*Gecombineerde Vergunning voor Verblijf en Arbeid* or "GVVA"). Otherwise, a separate work permit can be applied for with the *UWV WERKbedrijf*. The best approach must be determined on a case-by-case basis and depends entirely on the circumstances (e.g., the scope of intended work activities; whether intra-company assignment to the Netherlands is intended; the employee's salary level in the Netherlands; the position of the employee in the Netherlands).

Generally, the Dutch employer must prove that the Dutch/European labor market has been scanned for potential candidates before a non-EU/EEA employee can be considered (exceptions to this general rule may apply and should be verified on a case-by-case basis). The employer must first demon-

strate that a search for a suitable candidate in the Netherlands and Europe has been made within three months and that the search did not produce the right candidate, before a work permit for a non-EU/EEA employee can be applied for. In this respect, the employer must consider advertisements in Dutch newspapers and professional journals, use of Internet and the assistance of international recruitment offices. Furthermore, the employer must report the vacancy to the Dutch *UWV WERKbedrijf* for at least five weeks prior to the work permit application. If the employer appreciates assistance of the *UWV WERKbedrijf* to support a search throughout Europe, the vacancy must be reported at least six weeks in advance. The *UWV WERKbedrijf* will then involve the European Employment Services ("EURES"), a European network that consists of more than 700 employment intermediaries.

If a company is unsure whether it is subject to labor market scan/reporting obligations, the company is advised to consult our Immigration Desk in advance. In order to avoid unexpected permit refusal, companies should be cautious about assuming that they do not have to search for a Dutch/European candidate first and/or that there is no need to report a vacancy to the *UWV WERKbedrijf*. Our Immigration Desk can advise whether a permit category can be used, which would exempt the company from having to meet the foregoing obligations and/or t allow for permit application via an accelerated/prioritized procedure.

Permit application procedures require extensive preparation, which can easily take several weeks (notwithstanding the time it takes the authorities to process the application). This is necessary not only for the application as described above, but also with permit applications for: (i) foreign nationals who want to stay in the Netherlands as self-employed individuals or (ii) employees who are temporarily assigned to the Netherlands (i.e., an 'intra-company transfer').

17.6 Highly skilled migrants

As of 2004, skilled and highly educated foreign nationals do not require a separate work permit for employment in the Netherlands. Instead, a residence permit for a Highly Skilled Migrant will suffice. In order to define a "Highly Skilled Migrant," the choice has been made for one objective criterion, the salary. A Highly Skilled Migrant is a foreign non-EU/EEA national who will be employed in the Netherlands and who will receive a gross monthly salary of at least EUR4,189 (EUR4,524.12, including 8 percent holiday allowance) or at least EUR3,071 (EUR3,316.68, including holiday allowance) if age 30 years or younger. The foregoing salary levels reflect the thresholds applicable in 2015. As of 1 January 2016, and in accordance with market price movements, the salary thresholds will be raised.

Employers who want to hire Highly Skilled Migrants must hold so-called authorized sponsorship with the IND. Authorized sponsors benefit from the IND's assumption that they fulfill all relevant obligations under the Dutch Modern Migration Policy Act. As a result, the IND applies an expedited handling procedure and aims to decide on a permit application within a period of approximately two weeks. Unfortunately, the IND is hardly ever able to meet its two-week target term in practice. Generally, the procedure will take an additional two to four weeks. Employers who do not qualify as authorized sponsors yet should consider an additional two to three months in order to apply for authorized sponsorship first. Provided that the IND grants the request, authorized sponsorship will be granted for an indefinite period.

The residence permit for a Highly Skilled Migrant provides residence and work privileges in the Netherlands. As indicated above, an additional work permit is not required, unless: (i) the foreign national no longer qualifies as a Highly Skilled Migrant (for example, he no longer meets the salary threshold) or (ii) starts work activities for an employer who does not hold authorized sponsorship.

A Highly Skilled Migrant may receive a residence permit for up to five years, assuming that his employment in the Netherlands is intended to last

for at least five years. Should this not be the case, then the residence permit will be issued for the shortest validity period mentioned in the employment contract or assignment letter.

A Highly Skilled Migrant may start working in the Netherlands upon receipt of the residence permit. Dependents who accompany the Highly Skilled Migrant to the Netherlands will not require a work permit to perform work activities in the Netherlands. Upon receipt of their residence permits, they will obtain residence and work privileges similar to those granted to the Highly Skilled Migrant.

The European Blue Card

The Netherlands adopted the European Blue Card, a separate permit category alternative to the Highly Skilled Migrant procedure. The purpose of the European Blue Card is to make the EU more attractive to highly educated and skilled workers (and as such, strengthen the competitiveness and economic growth of the EU). This permit category makes it easier for a foreign national (and his or her family) to transfer from one EU member state to another.

In order to qualify for the EU Blue Card, the foreign national must have an employment contract for at least one year and must earn a gross minimum of EUR5,300.54 per month (2015 rate, including holiday allowance). On 1 January 2016, this salary threshold will be raised.

Furthermore, the foreign national must have a degree for the completion of higher education that lasted at least three years. The degree must be accredited and measured against the Dutch educational system (*Nuffic*).

18

Personal Income Tax

18.1 General

In the Netherlands, private individuals are subject to personal income tax. In general, every individual who lives in the Netherlands (i.e., a resident) is subject to taxation on his or her worldwide income. An individual who does not live in the Netherlands (i.e., a nonresident) is subject to taxation only on certain income derived from a Dutch source, as stipulated by law. Examples include income obtained from a Dutch business operated by a branch in the Netherlands, income obtained from Dutch real estate, directors' fees, income from employment in the Netherlands, and benefits from a substantial interest (*aanmerkelijk belang*) in a company located in the Netherlands.

However, a nonresident may opt to be treated as a resident taxpayer for personal income tax purposes, provided that the individual is a resident of the EU or of a country that has signed a double taxation treaty with the Netherlands containing a provision on the exchange of information. Please note that some articles are excluded by law for nonresidents who have obtained a resident status. Dutch tax authorities (*Belastingdienst*) may wish to tax recipients of Dutch-sourced income, but whether Dutch tax authorities may actually do so depends on the provisions set out in a tax treaty for the avoidance of double taxation in many cases. A tax treaty will be applicable only if the recipient of Dutch source income is a resident of one of the treaty countries.

18.2 2001 Personal Income Tax Act

The 2001 Personal Income Tax Act distinguishes three types of income that are subject to personal income tax and classifies them under "Box I," "Box II," and "Box III."

- Box I income includes profits, employment income, income from other activities and income deemed to have been generated from residential home ownership.
- Box II income includes income from shares in case of substantial interest of 5 percent or more.
- Box III income includes income from savings and investments.

Each box has its own rules for determining the tax base and its tax rate.

Income in Box I is taxed at a progressive rate with a maximum of 52 percent. Box II is taxed at a flat rate of 25 percent (2016) and income in Box III is taxed at a flat rate of 30 percent. Box III income is set at a fixed notional yield of 4 percent of the taxpayer's average equity. There are impermeable "walls" between the three boxes: losses that the taxpayer incurs in Box I may be set off (i.e., carried backward or forward, against Box I income only) and the same applies to losses in Box II. The taxable income in Box III is calculated at 4 percent of the fair market value of the taxpayer's property, minus the amount of the taxpayer's outstanding debts and a basic allowance of EUR24,437 (for 2016). In other words, the tax burden on savings and investments that fall within the scope of Box III, minus debts and basic allowance, is 1.2 percent (4 percent of income x 30 percent tax rate).

18.3 Business profits in income tax

In general, this is taxation on entrepreneurs who earn profits in one-man businesses or small companies without limited liability. The total profit minus the relevant entrepreneur's deductions and the tax deduction for small and medium-sized businesses or enterprises ("SMEs") is the basis of taxation. In the Netherlands, there has been a long tradition of government support for entrepreneurship. Therefore, certain tax reductions are available for entrepreneurs.

18.4 Income from employment

18.4.1 Managing and supervisory directors

In general, remuneration received by managing directors and supervisory directors of companies located in the Netherlands is subject to Dutch income tax even if they are nonresidents and they perform their activities outside the Netherlands. The company paying the remuneration must withhold wage tax and social security contributions, if any (as a pre-levy on income tax), from payments made to the directors.

18.4.2 Other employees

Employment income earned by Dutch resident employees is fully subject to personal income tax. Employees who are residents of a non-treaty country are subject to Dutch income tax on their employment income, to the extent that the employment is deemed being performed within the Netherlands. Those who are residents of a treaty country but work in the Netherlands are also subject to Dutch tax. In general, based on international tax treaties (if applicable), employment income is taxed in the country where the employment activities are performed.

However, employment income is taxable in the country of residence if:

- the employee spends less than 183 days per calendar year (or per any 12-month period, depending on the applicable tax treaty) in the working country;
- the remuneration is not paid by an employer in that working country; and
- the remuneration is not charged to a branch of the employer in that working country.

18.5 Income tax ruling

Upon the request of the employer and employee, the Dutch tax authorities may grant a special tax benefit called the 30 percent ruling to foreign employees who are hired from abroad by, or temporarily assigned to, a Dutch company or branch.

The employment contract does not necessarily have to be performed in the Netherlands; the 30 percent ruling also applies to income earned in relation to employment performed outside the Netherlands, provided that such income is taxable in the Netherlands on the basis of Dutch tax law or under a tax treaty. This may be particularly relevant to directors' fees.

Under the 30 percent ruling, 30 percent of the employee's salary may be paid out as tax-free compensation for costs. In practice, the 30 percent ruling reduces the effective (maximum) tax burden for expatriate employees from 52 percent to 36.4 percent. Furthermore, the employee may, at his or her request, benefit from treatment as a nonresident for tax purposes.

Consequently, the employee will not be taxed on passive income, such as interest. Please note that in general, either language in the employment contract or an addendum to the employment contract must be drafted, stipulating the application of the 30 percent ruling in respect of the agreed-on wages.

The main conditions attached to the 30 percent ruling pertain to:

- the employee's professional position (i.e., salary level);
- the employee's prior employment or stay in the Netherlands; and
- the status of the employer.

Cross-border employees that live within a 150-kilometer radius of the Dutch border are excluded from the 30 percent ruling. An employee is considered to be a cross-border employee if he or she has been living within the aforementioned radius for more than 8 months within a time frame of 24 months prior to the starting date of the employment agreement.

18.5.1 The employee's professional position (i.e., salary level)

The individual must have a specific expertise. This specific expertise is deemed to be present if the annual salary exceeds EUR52,699[2] (2016) (gross salary inclusive of the 30 percent ruling allowance).

Part-time workers should meet the same salary requirement. However, salary from other (foreign) employments may be taken into account as well (e.g., salary split scenario).

For individuals with a Master's degree (highly educated individuals) under the age of 30 and PhD graduates under the age of 30, a reduced salary requirement of EUR40,059[3] (2016) (gross salary inclusive of the 30 percent ruling allowance) is applicable. Researchers are excluded from the salary requirement.

In addition to the salary requirement, the specific expertise should be scarce or unavailable on the Dutch labor market. However, the Dutch tax authorities will only test this in specific cases.

The individual must meet the requirement of specific expertise in each year (i.e., the individual has to meet the salary requirement during the entire period the 30 percent ruling is granted). If at any moment the salary requirement is not met, the 30 percent ruling will lapse immediately and can no longer be applied to the salary income.

18.5.2 The employee's prior employment or stay in the Netherlands

The maximum duration period of the 30 percent ruling is eight years.

The eight-year period commences on the first day of employment or on prior arrival in the Netherlands. However, this period will be reduced

2,3 Please note that if the salary of the employee is below the salary requirement, the 30% ruling could still partially be applied provided that the annual salary is at least gross EUR 36,889 (2016) or EUR 28,041 (2016). Instead of a tax free compensation of 30% a lower percentage will then be applied.

by counting all periods of previous stays and/or work performed by the individual in the Netherlands in the last 25 years.

18.5.3 Status of the employer

In order to apply for the 30 percent ruling, the employer is obliged to withhold wage tax in the Netherlands. Moreover, the employer and employee should file a joint application request with the Dutch tax authorities. In principle, there is no time frame for the filing of the request, but the application would be retroactive to the date on which employment in the Netherlands commenced only if it is filed within four months after that commencement date. If that period has expired, the 30 percent ruling would take effect on the first day of the month, following the month in which the application form was filed. If the 30 percent ruling is not granted, it is possible to file an objection to the tax inspector's decision within six weeks.

18.6 Levy of taxes

Dutch personal income tax is levied by a personal income tax assessment based on a tax return submitted to Dutch tax authorities. Taxpayers usually receive a tax return automatically, which they must then file before 1 April of the following calendar year. An extension of this period may be obtained by request. Wage tax, Dutch dividend tax, or foreign withholding tax already paid on personal income for the taxable year will be set off against the personal income tax due.

On balance, this may result in a refund or payment of personal income tax. Nonresidents are not eligible for personal deductions (e.g., for alimony payments or losses incurred for venture capital investments). The only exception is the deduction for mortgage interest paid on a house located in the Netherlands insofar certain requirements are met. Labor costs are deductible by means of a "labor tax credit" for both resident and nonresident taxpayers.

18.7 Income tax rates

18.7.1 General tax credit

The general tax credit is not specifically related to one of the boxes and is set off against the combined amount of tax due in respect of Boxes I, II and III incomes. Some specific expenses that are not related to one of the boxes (e.g., some personal obligations or exceptional expenses) are deducted by means of a reduction on Boxes I, II, or III incomes. The maximum general tax credit is EUR2,242 (2016) for individuals up to the age of 65 plus six months.

18.7.2 Personal income tax rates

The following tax and national insurance rates will apply in 2016 for individuals up to the age of 65 plus six months who are also residing in the Netherlands.

The rate in the first bracket (36.55 percent) consists of 8.40 percent for income tax and 28.15 percent for national insurance contributions. The rate in the second bracket (40.40 percent) consists of 12.25 percent for income tax and 28.15 percent for national insurance contributions. The rates in the third and fourth brackets consist only of income tax.

Tax and premium rate	Taxable income
36.55%	up to EUR19,922
40.40%	EUR19,922 up to EUR33,715
40.40%	EUR33,715 up to EUR66,421
52%	in excess of EUR66,421

The following tax and national insurance rates will apply in 2016 for individuals born after 1 January 1946 and older than the age of 65 plus six months, and residing in the Netherlands. The rate in the first bracket (18.65 percent) consists of 8.40 percent for income tax and 10.25 percent for social security contributions. The rate in the second bracket (22.25 percent)

consists of 12.25 percent for income tax and 10.25 percent for social security contributions. The rates in the third and fourth brackets consist only of income tax.

Tax and premium rate	Taxable income
18.65%	up to EUR19,922
22.50%	EUR19,922 up to EUR33,715
40.40%	EUR33,715 up to EUR66,421
52%	in excess of EUR66,421

For individuals born before 1 January 1946, the same tax and national insurance rates apply, but other tax brackets are also applicable.

Tax and premium rate	Taxable income
18.65%	up to EUR19,922
22.50%	EUR19,922 up to EUR34,027
40.40%	EUR34,027 up to EUR66,421
52%	in excess of EUR66,421

18.7.3 Special rates

There are no special tax rates in the Personal Income Tax Act.

18.8 Substantial interest

Generally, an individual has a substantial interest if he or she, alone or together with his or her partner (spouse or registered partner), directly or indirectly:

- owns 5 percent or more of the nominal paid-in capital of a company;
- has the right to acquire 5 percent or more of the nominal paid-in capital of a company; and/or
- has a profit-sharing note entitling him or her, or them to 5 percent or more of the annual profits or liquidation revenue.

If an individual holds less than 5 percent of the subscribed capital of a company, he or she may nevertheless have a substantial interest if certain relatives also hold a substantial interest in that capital. If an individual holds a substantial interest, all of his or her other holdings in the company, including stock options, claims and other forms of profit participation, will qualify as substantial interest and will be taxed as such in Box II.

An individual who owns a substantial interest is taxed on all of the benefits derived from that holding, including periodic benefits, such as dividends and capital gains received upon the disposal of shares in the company, at a flat rate of 25 percent (2016). A capital gain or loss consists of the transfer price minus the acquisition price. A capital loss from a subscribed capital may be deducted only from income from substantial interests in Box II.

Notwithstanding the above, if the individual places an asset at a company's disposal while that individual has a substantial interest in that same company, the income from the asset will be subject to personal income tax at the progressive rates for Box I. Similarly, assets placed at a partnership's disposal will be subject to personal income tax at the progressive rates. The net income from option rights in the company in which the individual holds a substantial interest will also be taxed at the progressive rates for Box I.

18.8.1 Fictitious salary

An employee or a manager who works in a company in which he or she has a substantial interest has to take a fictitious salary into account, which will be taxed in Box I. The salary earned in a calendar year is, in principle, at least EUR44,000 (2016) per employment contract. As a result, an employee with a substantial interest has to earn at least the fixed amount of EUR44,000 (2016), which is treated as taxable income.

However, the fictitious salary may be higher or lower, depending on the specific circumstances of employment. The company has to pay wage tax over this fictitious salary. The wage tax is a deductible salary cost item for CIT purposes. As of 1 January 2010, no wage tax returns should be filed by the company if the manager will not receive a salary from the company and the fictitious salary is less than EUR5,000 per year (e.g., for passive companies).

19

Corporate Income Tax

The Dutch Corporate Income Tax Act (*Wet op de vennootschapsbelasting 1969* or "CITA 1969") distinguishes between resident and nonresident taxpayers. Dutch subsidiaries of foreign companies are regarded as resident taxpayers, while Dutch branches of foreign companies are regarded as nonresident taxpayers. From 2007 onward, the CITA 1969 has been amended more than once with respect to, *inter alia*, the CIT rate, the participation exemption regime, the rules on interest and cost deductions and the possibility to carry back and carry forward tax losses.

19.1 Subsidiaries

In general, Dutch subsidiaries are subject to Dutch CIT on their worldwide income.

19.1.1 Tax rates

Profits up to EUR200,000 are taxed at a CIT rate of 20 percent and profits exceeding EUR200,000 are taxed at a rate of 25 percent.

19.1.2 Residency

A company incorporated under the laws of the Netherlands is deemed a resident of the Netherlands for CIT purposes. If a company is incorporated in accordance with foreign law, the place of residence for Dutch CIT purposes will be determined on the basis of factual circumstances, whereby the place of the company's effective management is often regarded as a decisive factor.

19.1.3 Computation of taxable profits

The CITA 1969 does not prescribe a specific method for computing the annual taxable profits. It only requires that the annual profits be determined in accordance with sound business practice (*goed koopmansgebruik*) and in a consistent manner from year to year, regardless of the probable outcome. A modification of the method used is allowed only if it is justified on the basis of sound business practice.

Sound business practice is not defined by law. The Dutch Supreme Court has held that a method of computing annual taxable profits is in compliance with sound business practice if it is based on generally accepted accounting principles concerning the proper method of determining profits. A method of computing annual taxable profits is only deemed to be not in compliance with sound business practice if its application is found incompatible with explicit statutory provisions.

A Dutch taxpayer may, upon prior request and subject to certain conditions, calculate its taxable income using a functional currency. This allows Dutch taxpayers to eliminate currency exchange risks for tax purposes.

The CITA 1969 contains certain limitations on the annual depreciation of assets. A specific limitation of annual depreciation applies to real estate used for the taxpayer's own benefit, disallowing depreciation below (50 percent of) the *Waardering Onroerende Zaken* ("WOZ")-value, which is determined on the basis of the Valuation of Immovable Property Act (WOZ) by local tax authorities every other year for municipal real estate tax purposes and resembles an estimate of the fair market value. With respect to the valuation of inventory, there is considerable freedom in adopting a suitable system as long as it is in accordance with sound business practice.

Losses can be: (i) carried forward within nine years or (ii) carried back within one year. Reference is made to this chapter's Section 18.10 on Losses.

19.1.4 The arm's-length principle ("ALP")

The ALP is codified in Article 8b CITA 1969. This article requires taxpayers to disclose how the transfer prices between the associated enterprises have been determined. Given the legislative history of the Netherlands, tax authorities will provide the taxpayer with a reasonable term to prepare the required information and incorporate this in its administration. Please see Section 18.16, Transfer pricing regime, of this chapter for an overview of the Dutch transfer-pricing regime.

19.1.5 Innovation box and R&D deduction

Qualifying income that results from endeavors in the field of R&D is taxed at an effective tax rate of only 5 percent (the normal tax rate is 25 percent). Any income that is the immediate result of R&D activities undertaken for the account of the taxpayer will, in principle, benefit from this reduced rate. However, at least one of the following conditions must be met:

a) One or more patents have been granted to the taxpayer and these patents are of material significance for the exploitation of the invention.
b) The taxpayer benefited from the R&D Wage Tax Facility (*Wet Bevordering Speur-en Ontwikkelingswerk* or "WBSO") (further explained below) in connection with the R&D that was undertaken for the development of the invention.
c) The costs of R&D are immediately and fully deductible from the taxable profit and must be recovered first. The qualifying income is taxed at a 5 percent rate to the extent it exceeds the previously reported costs.

19.1.6 Dividend withholding tax

The Dutch domestic dividend withholding tax rate is 15 percent, which may be reduced by the application of tax treaties. Furthermore, no dividend withholding tax is levied on dividend distributions to companies residing in a member state of the EU that have a minimum shareholding of 5 percent in the nominal paid-up share capital of the Dutch entity, to the extent that the EU shareholder has one of the legal forms, as set forth in the appendix of the EU Parent-Subsidiary Directive.

In case a foreign company established in an EU member state is exempt from CIT (such as a pension fund) and that company would also be exempt from CIT in case it would have been established in the Netherlands, any Dutch dividend withholding tax that has been withheld upon a dividend distribution to that company will be refunded. This does not apply if the activities of the foreign company are similar to that of a Dutch investment company or an exempt investment fund (please refer to Sections 18.14, Fiscal investment institution; and 18.15, Exempt investment institution).

Cooperatives are generally not subject to dividend withholding tax. However, two specific anti-abuse provisions for cooperatives have been introduced. A cooperative becomes subject to dividend withholding tax in the following situations:

- A member of a cooperative becomes subject to dividend withholding tax if the cooperative is used in a structure as an intermediate holding company with the main purpose or one of the main purposes of avoiding Dutch dividend withholding tax or foreign tax. The cooperative will remain exempt from dividend withholding tax if it can be demonstrated that the use of the cooperative does not have as its main (or one of its main) purpose/s the avoidance of Dutch dividend withholding tax or foreign (withholding) tax. The cooperative should also remain exempt from dividend withholding tax if a member can demonstrate that its membership right in the cooperative can be allocated to a(n) (active) business enterprise conducted by that member. This test has to be applied to each member on a stand-alone basis.
  Within a group of companies, a member meets this criterion if it is the top holding company with substantial management involvement in the group activities. A member that is an intermediate holding company meets this criterion as well if it constitutes a 'link' between such a top holding company and the underlying operational companies.

- A change of law is proposed with effect as per 1 January 2016, pursuant to which intermediate holding companies are required to meet certain substance requirements in order to qualify as a linking company as described above. A cooperative will only remain exempt from dividend

withholding tax if its member(s) compl(y)(ies) with the required level of substance in their country of residence.

Profit distributions are subject to withholding tax in case a cooperative is implemented in a structure in order to reduce or avoid an existing Dutch dividend withholding tax claim. This implies that Dutch dividend withholding tax on retained earnings that were previously subject to Dutch dividend withholding tax cannot be avoided by interposing a cooperative. This anti-abuse provision will apply regardless of whether the membership right of a certain member can be allocated to a(n) (active) business enterprise conducted by that member.

19.1.7 Nonresident shareholder taxation

A nonresident entity that owns at least 5 percent of the issued share capital in a Dutch company (defined as a "substantial shareholding" in the CITA 1969) may be subject to a 25 percent Dutch CIT in relation to profit distributions, capital gains and interest from loans in connection with the substantial shareholding. This is an anti-abuse rule, which only applies in case the shareholder owns the share/s with the main purpose, or one of the main purposes, of avoiding Dutch personal income tax or Dutch dividend withholding tax.

Furthermore, the substantial shareholding tax does not apply if the shares can be attributed to a(n) (active) business enterprise conducted by the nonresident shareholder ("business enterprise relief").

A revision of the non-resident corporate income tax provision is proposed with effect as per 1 January 2016. If this new legislation is passed, a foreign shareholder with an interest of 5 percent or more in a Dutch company will be subject to Dutch corporate income tax derived from its investment under the following conditions:

i) If the foreign shareholder owns the interest with the main purpose, or one of the main purposes, of avoiding Dutch income tax or Dutch dividend withholding tax
ii) If the structure can be considered an artificial arrangement or part of a series of artificial arrangements

A structure will not be considered artificial if the interest in the Dutch company can be attributed to a business enterprise carried out by the shareholder itself. This criterion will be met if the shareholder is the top holding company with substantial management involvement in the group activities. The criterion will also be met if the shareholder has a 'linking' function between the top holding company and the underlying operational companies. In this way, group structures will not be burdened with this measure. However, under the new rules, a company is required to have a certain level of 'substance' in its country of residence in order to qualify as a linking company as described.

19.2 Branches

Dutch branches of nonresident companies are regarded as nonresident taxpayers for CIT purposes.

19.2.1 Domestic source income

Nonresident taxpayers are subject to CIT only with respect to their Dutch-sourced income. Dutch-sourced income mainly consists of the following:

- Profits derived from any business carried out in the Netherlands by means of a branch/permanent representative
- Income from a substantial shareholding in a resident company as defined in Chapter 4 of the Personal Income Tax Act 2001 -Wet Inkomstenbelasting 2001- (i.e., a shareholding of at least 5 percent), provided that the shares cannot be allocated to a(n) (active) business enterprise and are not held for tax avoidance (we refer to 18.1.7)
- Net income from immovable property located in the Netherlands

19.2.2 Branch profit remittances

Branch profit remittances are not subject to withholding tax. The nonresident company is regarded as the taxpayer, not the Dutch branch of the company.

19.2.3 Computation of taxable profits

The CITA 1969 does not contain any provisions on how taxable income should be attributed to a Dutch branch of a nonresident company. In practice, the following principles govern the attribution:

- The branch is considered an independent entity for CIT purposes.
- Intercompany transactions should be carried out on an arm's-length basis.

As the allocation of profits to a Dutch branch is cumbersome and can be subject to discussion, Dutch tax authorities are generally willing to enter into agreements with taxpayers on the determination of the taxable profits of the branch by agreeing on an APA (please refer to Section 18.16, Transfer pricing regime) based on an arm's-length allocation of income. These agreements are confirmed in writing in the form of APAs and are strictly observed by the Dutch tax authorities.

19.2.4 Method of taxation and tax rates

The determination of taxable income is basically the same for branches and subsidiaries. The branch is subject to CIT at the same rate as the subsidiary (i.e., 20 percent for profits up to EUR200,000 and 25 percent for profits exceeding EUR200,000).

19.2.5 Foreign branch profits

A base exemption for Dutch CIT applies to income realized through foreign branches of a Dutch resident company. As a result, foreign profits are considered as exempt income for Dutch corporate income tax purposes. This also means that foreign losses are, in principle, no longer deductible. Similar to liquidation losses of foreign participations, foreign losses that become permanent because of the fact that the foreign branch ceases its activities are deductible in the Netherlands. This will, in principle, not result in a higher tax burden, but in a timing difference of the taxation. In order to qualify for the exemption of branch income, the foreign branch must conduct a(n) (active) business enterprise or be subject to a tax of at

least 10 percent, according to Dutch tax standards. If the foreign branch does not qualify for the exemption of branch income, a credit system will be applicable to the foreign branch profits, unless a double tax treaty provides for an exemption.

Under the grandfathering rules, foreign losses that have been deducted prior to the introduction of the base exemption will not be subject to immediate recapture and will continue to be subjected to the old recapture rules.

19.3 Branch versus subsidiary

As indicated above, branches and subsidiaries are taxed virtually on the same basis, especially due to the foreign branch exemption.

The main differences are described below:

a) Most tax treaties provide that certain auxiliary activities carried out in the Netherlands do not constitute a branch for CIT purposes and, as a result, do not give rise to Dutch taxation. This exception does not apply to Dutch subsidiaries.
b) Profits from a Dutch branch may be transferred to its headquarters free from any withholding tax. Dividends paid by a subsidiary to a foreign parent company are, however, subject to Dutch dividend withholding tax at the ordinary rate of 15 percent (reduced to a lower percentage, or even to zero, by virtue of a tax treaty or EU law).
c) Interest paid by a subsidiary on loans and royalties is, in general, tax deductible if it is considered to be at arm's-length (nonetheless, see Section 18.6, Limitations on deductions of interest). Internal interest and royalty payments are not taken into account between a branch and its headquarters.

19.4 Dutch participation exemption

19.4.1 Basic rule

The Dutch participation exemption provides for a full exemption of all benefits (both dividends and capital gains) derived from a qualifying shareholding in a subsidiary. Historically, the participation exemption regime resulted in the establishment of thousands of holding companies in the Netherlands.

A shareholding in a subsidiary generally qualifies for the participation exemption if it represents 5 percent or more of the nominal paid-up share capital of the subsidiary, a so-called qualifying shareholding, unless the shareholding in the subsidiary is (deemed to be) held as a passive investment. Such shareholding is classified as a so-called "low-taxed passive investment participation."

A qualifying shareholding in a subsidiary is considered to be held as passive investment participation if it is the taxpayer's objective to obtain a return that may be expected from normal asset management. If the taxpayer has a mixed motive, the predominant motive will be decisive. A shareholding in a subsidiary is not held as passive investment participation if the parent company is involved in the management of the subsidiary and if the subsidiary in which the shareholding is held is engaged in the same line of business as the enterprise conducted by the taxpayer. These subjective criteria provide more room for Dutch tax inspectors to grant tax rulings with respect to the application of the participation exemption.

A shareholding in a subsidiary will be deemed to be held as a passive investment if more than half of the subsidiary's consolidated assets consist of shareholdings of less than 5 percent or if the predominant function of the subsidiary – together with the function of lower-tier subsidiaries – is group financing or the making available of assets (e.g., IP) to group companies. However, a shareholding in a subsidiary may still qualify for the application of the participation exemption if the subsidiary is subject to a "realistic levy of tax" by Dutch standards (the "Subject to tax test"), or the assets of the subsidiary consists of less than 50 percent of free portfolio investments (the "Asset test").

The Subject-to-tax test

If a subsidiary is not subject to a tax on its profits, resulting in a tax levy that is considered realistic according to Dutch standards (usually considered to be a rate of at least 10 percent), the subsidiary does not meet the Subject-to-tax test. Whether or not a subsidiary is subject to a realistic levy of tax on its profits has to be determined by comparing the effective tax rate to which the subsidiary is subject with the rate that would have been applied had the company been subject to tax in the Netherlands. In this respect, loss carry-forwards, double taxation or group relief should not be taken into account. Although this test requires a comparison of the foreign tax regime and the Dutch tax regime, which may be burdensome in practice, the test is more relaxed as compared to the test in the pre-2010 participation exemption regime, whereas a full recalculation to Dutch standards of the taxable profits of the participation is generally not required anymore under the current Subject-to-tax test.

The Asset test

If the assets of the subsidiary consist of more than 50 percent of free portfolio investments, the subsidiary does not meet the Asset test. Free portfolio investments can be regarded as assets that are not necessary for the business activities conducted by the subsidiary. Examples of free portfolio investments are shares in companies that are held as an investment, intra-group payables/receivables and excess cash.

If a subsidiary of a Dutch entity has a subsidiary (i.e., a sub-subsidiary) among its assets, the assets and liabilities of that sub-subsidiary should be attributed to the assets of the subsidiary on an aggregated basis when determining whether the participation meets the Asset test.

19.4.2 Expenses incurred in relation to qualifying shareholdings

Apart from certain provisions limiting the deduction of interest expenses (as indicated in Section 18.6, Limitations to deductions of interest), as a general rule, all expenses incurred in connection with a subsidiary qualifying for the participation exemption are deductible. Expenses related to

the acquisition of a subsidiary to which the participation exemption applies are added to the cost price of the subsidiary and are therefore not effectively tax-deductible. Expenses incurred in connection with the disposal of a qualifying subsidiary are, as of 1 January 2007, also no longer deductible. Currency losses realized on loans that are used to fund participations may be recognized as soon as they are incurred, whereas a currency gain will normally be taxable upon redemption of the loan. For companies that fund foreign participating interests with loans denominated in currencies other than the euro, it is particularly important to check whether it is possible to avoid exposure to currency exchange risks by a functional currency ruling that can be obtained by filing an ATR request with the Dutch tax authorities.

19.4.3 Capital losses under the participation exemption

As a general rule, capital losses and a decline in the value of the shares in a qualifying participating interest are not deductible. However, losses incurred on a completed liquidation of a subsidiary are deductible. Please note that this exception is subject to complex anti-abuse rules that will only be discussed here to a limited extent. In general, the deductible amount is equal to the difference between the funds invested and the liquidation proceeds. This amount will be reduced by dividend payments made in the previous five (or in specific cases, 10) years.

Liquidation losses may not be deducted if the activities of the liquidated subsidiary are continued elsewhere within the same group. Deduction of losses incurred during the liquidation of an intermediate holding company may be denied in certain situations. If a foreign branch is converted into a subsidiary, the participation exemption will, under certain circumstances, only apply once previous losses incurred by the branch have been recovered.

19.4.4 Conversion of loans

Under certain circumstances, a Dutch creditor realizes a gain upon the upward revaluation of a loan receivable on its subsidiary that was earlier converted into equity. This is the case if the loan was revaluated downward by the creditor in an earlier stage.

The essence of this provision is to tax a decrease and a later increase of the value of a loan that is converted into equity in the same way as an unconverted loan. If the downward revaluation was tax-deductible, a later upward revaluation, when the loan is converted into equity, is taxable.

19.4.5 Possible tax planning opportunities

The application of the Dutch participation exemption may provide for a number of interesting tax planning opportunities, depending on certain facts and circumstances.

19.4.6 Active companies located in "tax havens"

Active companies in tax haven jurisdictions used to be disqualified from the participation exemption due to the Subject-to-tax requirement. As this requirement was abolished for active companies in 2007, shareholdings of 5 percent or more in active operations that are completely exempt from local taxation are now eligible for the Dutch participation exemption. This makes the Netherlands more attractive than in the past for all sorts of active investments in jurisdictions that traditionally do not levy a profit tax or grant extensive tax holidays and that are currently referred to as "tax havens."

19.4.7 Mutual investment funds and private equity funds

In respect of mutual investment funds, the participation exemption regime used to be available to 5 percent quota holders in Dutch mutual investment funds only. At present, so long as the mutual investment fund qualifies for the participation exemption, a Dutch holding company may apply the participation exemption to such investments, regardless of the jurisdiction in which the fund is located. This makes the Netherlands an excellent jurisdiction for feeder companies holding large investments in certain mutual and private equity funds.

19.4.8 Hybrid instruments

Whether the participation exemption applies to proceeds from hybrid debt instruments in cross-border situations used to be contingent on the requirement that these proceeds were nondeductible at the level of the debtor. The rationale of this requirement was the prevention of double-dip structures resulting from mismatches in the classification of debt instruments in the jurisdictions involved. The abolishment of this condition and the extension of the participation exemption regime to hybrid instruments with certain characteristics might result in double-dip structures, allowing a Dutch parent company to derive exempt benefits from instruments, whereas the remuneration on the hybrid instrument is deductible in the country of issuance. As of 1 January 2016, the participation exemption regime has been adapted as a result of a change to the EU Parent-Subsidiary Directive. No tax exemption will be allowed anymore on proceeds from instruments that result in deductibility in a foreign country.

19.4.9 Real estate companies

Finally, the amendments in 2007 to the participation exemption regime with respect to real estate companies were particularly favorable. If more than 90 percent of the property of the subsidiary (on a consolidated basis) consists of real estate and that real estate is not directly or indirectly owned by a fiscal investment institution, the participation exemption would apply, provided that the parent company holds at least 5 percent of the nominal paid-up share capital in the subsidiary. This "90% test" must be considered on the basis of the subsidiary's consolidated balance sheet, with intercompany receivables and debts being set off against each other, which means that they will not have any effect on the minimum real estate percentage.

The value of the assets must be determined on the basis of their fair market value. For 2007-2009, it is then important to separate, as far as possible, real estate investments from business activities such as property management. If this is done properly, both the investment activities (real estate investment) and the business activities will qualify for the participation exemption.

However, as of 1 January 2010, the “90% test” has been abolished. The application of the participation exemption regime will be determined on the general criteria described above, whereby for the purpose of the asset test, real estate is not considered a free portfolio investment.

19.5 Capital gains

Capital gains are generally subject to CIT at the ordinary rate. However, under certain conditions, capital gains derived on the voluntary or involuntary disposition of tangible and certain intangible capital assets can be deferred by temporarily allocating the gain to a “reinvestment reserve.” Please note that there is a claw-back provision in case the reinvestment reserve is not used for the acquisition of a new asset within a three-year period after the creation of the reinvestment reserve (please also refer to Section 18.9.3, Provisions and tax-free reserves, of this chapter).

Capital gains earned when a capital asset is exchanged for another capital asset with a similar economic function in the business can also be deferred. Please note that, for assets with a maximum depreciation period of 10 years, it is required that the acquired asset has a similar economic function within the business as the replaced asset.

Capital gains may even be exempt under the following circumstances:

a) Capital gains on the alienation of a qualifying shareholding in resident or nonresident companies (as referred to in Section 18.4 regarding the participation exemption)
b) Capital gains on the transfer of assets (comprising a business or an independent part thereof) by one corporate taxpayer to another in exchange for shares (see Section 18.12, Mergers and demergers)

Capital losses need not be deducted from capital gains but may be deducted in full from business profits.

19.6 Limitations on deductions of interest

This section provides an overview of certain restrictions on the deduction of interest expenses, considering certain peculiarities of hybrid loans.

19.6.1 Article 10a, Dutch Corporate Income Tax Act

Interest payments, including related costs and currency exchange results, in relation to "tainted debt" are disallowed under Article 10a of the CITA 1969. Tainted debt is basically a debt incurred from an affiliated company or individual (e.g., the shareholder) in order to: (i) fund a profit distribution or repayment of paid-up share capital; (ii) make a capital contribution in a related entity (e.g., a participation of at least 33 percent); or (iii) acquire shares in another entity (which is or becomes a related entity as a result of the acquisition).

The interest expense in relation to this tainted debt is not deductible, except under the following conditions:

a) If it can be demonstrated that the contribution of debt instead of equity is largely based on sound business reasons (the business reasons criterion is used to exclude tax-driven schemes from eligibility for interest deduction; the saving of taxes will not qualify as a business reason)
b) If the interest payments are effectively taxed in the hands of the creditor at a rate that is considered to be reasonable according to Dutch standards (generally an effective rate of 10 percent), the so-called "compensatory tax exception" (please note that no existing loss carry-forwards may be utilized if this leads to an effective tax rate that is below the reasonable rate and that the compensatory tax exception will not apply if the tax inspector successfully argues that the payments will not be effectively taxed due to losses or claims arising in the current year or in the near future)

As of 2008, this "compensatory tax exception" no longer applies if the tax authorities can reasonably prove that the loan, or the transaction in connection with which the loan was given, has not predominantly been entered into for business reasons. This means that meeting the 10 percent

compensatory tax threshold at the level of the creditor does not necessarily entail the deductibility of interest at the level of the debtor, as the tax authorities still have the opportunity to challenge a deduction of interest on a loan if the loan came into existence without sufficient business reasons. As the law does not include a grandfathering rule for existing loans, the deductibility of interest on all related party loans that were defended until 1 January 2008, on the compensatory tax exception might potentially be challenged by the Dutch tax authorities.

19.6.2 Article 10, 1, d, Dutch Corporate Income Tax Act (Hybrid Loans)

A debt instrument is re-qualified into equity for tax purposes if the hybrid loan meets certain requirements. As a result, the interest paid on hybrid loans is re-qualified into dividend and therefore this interest will not be deductible for CIT purposes (or if received tax-exempt under the participation exemption, if applicable).

Debt is re-qualified into equity for tax purposes if the following conditions are fulfilled:

a) The remuneration on the loan depends (almost) entirely on the profit of the debtor.
b) The loan is subordinated to all creditors.
c) The loan has no fixed maturity date but may be reclaimed only in case of insolvency or liquidation of the debtor, or the loan has a term of more than 50 years.

Conversely, the participation exemption regime applies to income and gains received on hybrid loans, if the following conditions apply:

- The creditor of the hybrid loan also has a shareholding in the issuer that qualifies for the application of the participation exemption regime.
- A related company of the creditor of the hybrid loan has a shareholding in the issuer that qualifies for the application of the participation exemption regime.
- The issuer (debtor) is a related company of the creditor.

Finally, the (non)deductibility of the interest paid at the level of the debtor in another country is not relevant to the applicability of the participation exemption in the Netherlands at the level of the creditor. This may lead to an opportunity for tax-efficient, double-dip structures, although this aspect is subject to an international debate on Base Erosion and Profit Shifting, which has resulted in several OECD publications as well as draft legislation prepared by the EU. If adopted, structures with such hybrid instruments in place will have to be reviewed closely in order to avoid any adverse tax consequences.

19.6.3 Article 10b, Dutch Corporate Income Tax Act

The interest paid and capital losses realized on a loan are not deductible, provided that the following characteristics are present:

a) Debtor and creditor of the loan are affiliated companies.
b) The loan has: (i) no term or (ii) a term of more than 10 years.
c) The remuneration on the loan deviates considerably (i.e., by 30 percent or more) from an arm's-length interest rate.

If the redemption date of the loan is postponed, the term of the loan will be deemed extended accordingly as of the date of issuance of the loan.

19.6.4 Article 10d, Dutch Corporate Income Tax Act (thin capitalization rules)

The CITA 1969 includes restrictions on the deductibility of interest expenses in the case of companies that are largely financed with debt. In principle, the thin capitalization rules provide for a fixed maximum 3:1 debt-to-equity ("D/E") ratio, which means that interest (including expenses) will not be deductible if the total debt exceeds three times the total equity plus EUR500,000.

Whereas all debt is taken into account in establishing the D/E ratio, only interest paid to related parties may be disallowed and only if such interest exceeds interest received from related parties. Consequently, interest on third-party debt will remain fully deductible. Nevertheless, under certain

circumstances, third-party debt may be considered related-party debt if guaranteed by a related company.

The basic rules are reasonably clear: the D/E ratio is established on an annual basis by taking into account the non-weighted average equity at the beginning and at the end of the year. In addition, a *de minimis* rule is applicable, whereby interest on the first EUR500,000 of debt in excess of the ratio remains deductible. However, if other restrictions on interest deductions apply (e.g., Article 10a CITA 1969, see 18.6, Limitations on deductions of interest), the interest on the first EUR500,000 may still be nondeductible.

For the purpose of calculating this D/E ratio, "debt" is defined as the balance of all assets and liabilities, which (can) lead to taxable or deductible interest (e.g., for a company with 200 equity, 1,400 debt and 800 loans receivable and hence 600 net debt – all interest remains deductible), to the effect that the thin capitalization rules will not affect the mere borrowing and lending of funds within a group. Assets and liabilities, such as bank accounts or financial leases also have to be included in the calculation of the D/E ratio. If a debt falls within the scope of another article of the CITA 1969 that restricts interest deduction, such debt is not included in the calculation of the D/E ratio.

However, the interest relating to this debt is taken into account as nondeductible interest for the thin capitalization rules. Furthermore, "equity" is the company's equity for tax purposes, excluding fiscal reserves and with a deemed minimum of EUR1. As an alternative to applying the fixed D/E ratio, a company may, from year to year, decide to apply the average D/E ratio of the (international) group to which it belongs as its maximum D/E ratio. Unlike the fixed ratio for this purpose, the respective D/E ratios will be established on the basis of the respective statutory (consolidated) accounts, if possible, following the same accounting principles.

This alternative may serve, for instance, companies active in a business with relatively high debt financing or with a high D/E ratio due to losses.

This thin-cap rule has been abolished as of 1 January 2013, but might still be relevant with respect to fiscal years for which no final tax assessment has been issued yet by the Dutch tax authorities.

19.6.5 Interest deduction rules for acquisition holdings

It is common practice to use acquisition holdings to structure the acquisition of a Dutch target company. Such acquisition is commonly partially financed with debt at the level of the acquisition holding. Subsequently, the acquisition holding forms a fiscal unity with the Dutch target company, or (de)merges so that interest expenses can be set off against the operating profits.

The deduction of the interest is disallowed at the level of the Dutch target company if and to the extent the D/E ratio of the fiscal unity or (de)merged company exceeds 60 percent of the acquisition price of the target company. Debt on which the interest is not deductible on the basis of other provisions will not need to be taken into account when determining the debt level. The percentage of 60 percent is reduced to 55 percent in the second year, 50 percent in the third year, etc., until it reaches 25 percent of the acquisition price. Notwithstanding, this provision contains a *de minimis* rule in the sense that there is an allowance for the first EUR1 million interest expenses. The excessive interest expenses will only be deductible from the acquisition holding's own taxable profit and not from the target company's taxable profit. Interest charges that are nondeductible on the basis of the new rule can be carried forward to future years and may only be settled with profits of the acquisition holding company. Profits of a target company whose acquisition price is fully financed out of equity or is fully repaid will be regarded as profit of the acquisition holding company.

These new rules will apply to acquisitions whereby the target company is taken up in the fiscal unity, or the target company is (de)merged on or after 15 November 2011.

19.6.6 Interest deduction rules for excessive participation debt

This new rule limits the deductibility of excessive interest expenses and costs related to debt that is used for the acquisition of shares in, or capital contribution to the share capital of, subsidiaries that qualify for the Dutch participation exemption. Acquisitions of, or capital contributions to, a subsidiary that see to an expansion of the operational activities of the group to which the taxpayer belongs are not targeted by the new rule. Furthermore, the new rule contains an annual allowance for the first EUR750,000 of excessive interest expenses.

The new rule only applies to the extent that the annual average cost price of the subsidiaries exceeds the annual average fiscal equity. This excessive part is deemed to be financed out of debt (the “Participation Debt”). The Participation Debt is reduced with debts, of which the interest expenses are not deductible pursuant to other provisions in Dutch fiscal law. The potential limitation of the deduction of interest and costs related to the total debt outstanding is equivalent to the total interest expenses and costs multiplied by the factor Participation Debt divided by the total annual average debt outstanding. The total annual average debt outstanding includes both related party debt as well as third-party debt, and excludes loan payables, of which the interest expenses are not deductible pursuant to other provisions in Dutch tax law. Assets and liabilities attributable to a foreign branch are not taken into account when determining the nondeductible interest expenses under this (new) rule.

Acquisitions, expansions of or capital contributions to subsidiaries that relate to an expansion of the operational activities of the group are not targeted by the new rule, provided that the expansion of the activities commences within 12 months before or after the acquisition, expansion or capital contribution. This exception is, however, not applicable if: (i) the debt financing of the acquisition or contribution is structured in such a way that interest expenses can also be deducted in another country (a so-called “double dip”); (ii) the debt financing is used by the Dutch taxpayer to grant a hybrid loan, of which the interest expense is deductible abroad and not taxed in the hands of the Dutch taxpayer, and the interest expense due by the Dutch taxpayer is not subject to a reasonable taxation in the hands

of the lender or (iii) it is likely that the transaction would not have been executed by the Dutch taxpayer if no interest could have been deducted in the Netherlands.

During the parliamentary debate, two important amendments were made and these are as follows:

i) Dutch taxpayers that are actively involved in group financing activities are allowed to disregard debts - as well as the interest and costs relating to these debts - insofar as these debts are connected to group loans receivable.
ii) In determining the Participation Debt, the taxpayer has the option to disregard 90 percent of the fiscal cost price of subsidiaries that were acquired (or to which capital was contributed) in fiscal years that started on or before 1 January 2006.

A possible overlap of this new rule with the interest limitation rule regarding acquisition holdings (as described in Section 18.6.5) will be avoided through a regulation of the State Secretary of Finance.

19.7 Flow-through entities

Dutch entities that do not incur a genuine risk in respect of intra-group loans or royalty transactions are not permitted to credit the foreign withholding taxes related to such interest or royalty income. The flow-through entity is in fact treated as an intermediary company.

Technically, the denial of the credit is achieved by excluding the interest and royalties received and paid from the tax base in the Netherlands. The interest and royalties received and paid are excluded from the Dutch tax base under the following conditions:

- The Dutch entity receives and pays interest or royalties to and from a foreign entity within the same group.
- The interest and royalties received and paid relate directly or indirectly to a loan or a royalty transaction.
- The transactions are "closely connected."

- The flow-through company does not incur a genuine risk that may affect its equity.

A flow-through company is deemed to incur a genuine risk in respect of a loan if the equity is at least 1 percent of the outstanding loans or EUR2 million, and the taxpayer can prove that the equity capital will be affected if a risk arises. Even though the interest and royalty income and expenses are excluded from the taxable income, the flow-through entity should still report an arm's-length remuneration with regard to the services relating to the loan or royalty transaction.

During informal discussions in 2005, between tax advisors and the Dutch Revenue, representatives of the Dutch Revenue indicated that a flow-through company is deemed to incur a genuine risk in respect of the receipt and payment of royalties if its equity at risk is at least: (i) 50 percent of the expected gross royalty payments to be made by it, or (ii) EUR2 million and at least 50 percent of that amount has been paid in advance to the licensor.

19.8 Anti-dividend stripping

A refund, reduction, exemption or credit of Dutch dividend withholding tax on the basis of Dutch tax law or on the basis of a tax treaty between the Netherlands and another jurisdiction will be granted under the Dutch Dividend Tax Act of 1965 only if the dividends are paid to the beneficial owner of the dividends. Using so-called dividend stripping transactions, taxpayers subject to dividend withholding tax have sought to benefit from tax treaty and domestic law provisions to which they themselves were not entitled by transferring shares temporarily to another party that would benefit from a full exemption from dividend withholding tax.

The Dutch tax authorities took the position in court that the parties that temporarily acquired the shares were not the beneficial owners of the dividends. These attempts were, however, unsuccessful; after the Dutch tax authorities lost a number of cases in court, the legislator decided to introduce anti-dividend stripping rules basically for cases where a party could not be considered the beneficial owner of the dividends.

A natural person or a legal entity is not deemed the beneficial owner if, in relation to becoming entitled to the dividend distribution, that person or entity has paid a consideration (in the broadest sense) within the framework of a combination of transactions where the following may be assumed:

a) All or part of the dividend distributions has been made, directly or indirectly (for instance, due to the payment of the consideration), for the benefit of:

   - an individual or legal entity with respect to whom or which no exemption may be granted from the withholding obligation, whereas such exemption may be granted to the party paying the consideration; or
   - an individual or legal entity (again, usually the original shareholder) whose entitlement to a reduction or refund of dividend tax is lower than that of the party paying the consideration.

b) The individual or legal entity directly or indirectly retains or acquires a position in stock, profit-sharing certificates or profit-sharing bonds similar to its position in such stock, profit-sharing certificates or profit-sharing bonds before the commencement date of the combination of transactions referred to above.

Certain factors reduce the chance of a dividend stripping situation arising. Among these are: (i) the period between the moment of the transfer and the dividend distribution; (ii) the character of the dividend (i.e., regular, incidental or liquidation distribution) and (iii) the duration of the transfer.

The Dutch cooperative has proven a popular structuring tool in order to avoid withholding taxes. Therefore, as of 1 January 2012, the legislator introduced two specific anti-abuse provisions for cooperatives.

First, a profit distribution will be subject to dividend withholding tax if the cooperative is used in a structure as an intermediate holding company, where the main purpose, or one of the main purposes, of using the cooperative is the avoidance of Dutch dividend withholding tax or foreign tax.

The explanatory memorandum clearly states that this amendment is aimed against abusive situations only (e.g., artificial structures where the cooperative has no economic substance), and, therefore, the cooperative will remain exempt from dividend withholding tax under the following situations:

i) If it can be demonstrated that the use of the cooperative does not have as main (or one of the main) purposes the avoidance of dividend withholding tax or foreign (withholding) tax
ii) If a member, or the (indirect) parent company of the member, can demonstrate that its membership right in the cooperative can be allocated to an active business enterprise conducted by that member (this test has to be applied to each member separately)

Second, profit distributions will be subject to withholding tax in case a cooperative is interposed to reduce or avoid an existing Dutch withholding tax claim. This implies that the dividend withholding tax on retained earnings and hidden reserves that were previously subject to Dutch dividend withholding tax cannot be avoided by interposing the cooperative. This anti-abuse provision will apply regardless of whether the membership right of a certain member can be allocated to a business enterprise conducted by that member. The burden of proof lies with the Dutch tax authorities. In the event of a dividend-stripping transaction, the Dutch company has to withhold 15 percent withholding tax on the dividend distribution. If the conditions for dividend stripping have been established, no reduction of the 15 percent withholding tax will be provided, even if the deemed economic owner would have been entitled to a certain credit, reduction or refund (e.g., 10 percent instead of 15 percent).

19.9 Tax incentives

The following measures in this section provide tax relief to taxpayers.

19.9.1 Investment allowance

The investment allowance (*investeringsaftrek*) is limited to small investments (EUR2,300 to EUR309,693) and comprises a deduction of a percentage at a maximum of 28 percent.

Investment	Percentage
EUR0 - EUR2,300	0%
EUR2,301 - EUR55,745	28%
EUR55,746 - EUR103,231	EUR15,609
EUR103,232 - EUR 309,693	EUR15,609 less 7.56% of the amount that exceeds EUR103,231
EUR309,694 and more	0%

In addition, an investment allowance of 41.5 percent is available for energy-saving investments (up to EUR119 million). Furthermore, an investment allowance of 13.5 percent, 27 percent or 36 percent is available for certain qualified environment investments (but not if an energy investment has already been applied for).

If, within five years after the beginning of the calendar year in which the investment took place, more than EUR2,300 in assets for which an investment allowance was claimed is disposed of, a proportionate percentage will be added to the company's profit (divestment addition or *desinvesterings-bijtelling*). Withdrawal from an asset is deemed a disposal in this respect. Assets that are used for the operation of a business that is subject to a regulation to prevent international double taxation are excluded from the investment allowance. However, an exception could be made by the Dutch Minister of Financial Affairs.

19.9.2 Random depreciation

Random accelerated depreciation (e.g., in one year) may be claimed for certain environment-friendly assets that are on the list of assets and regions compiled by the Ministry of Environmental Affairs. In addition, other assets on the list compiled by the Ministry of Economic Affairs are eligible for random depreciation.

Furthermore, the motion picture industry may claim random depreciation or apply for an investment allowance.

The Dutch Counsel of Ministers agreed on 28 June 2013, to the proposal of the State Secretary of Finance and the Minister of Economic Affairs. This proposal aims to stimulate business investments in order to strengthen economic growth in the Netherlands. As of 1 July 2013, taxpayers can claim random accelerated depreciation up to a maximum of 50 percent with respect to investments in business assets made between 1 July 2013 and 31 December 2013. The main requirement for the application of the random accelerated depreciation is that business assets acquired in the second part of 2013 must be commissioned before 1 January 2016.

One can only apply for the random accelerated depreciation insofar as payments or production costs (*voortbrengingskosten*) have been made between 1 July 2013 and 31 December 2013. Most likely, the random accelerated depreciation will be applicable to most business assets, excluding, among others, buildings, infrastructure projects, immaterial fixed assets and assets to be leased to third parties.

As a result of the random accelerated depreciation possibilities, taxpayers are able to limit their taxable profit over fiscal year 2013. Normally, business assets (excluding goodwill and buildings) can be depreciated at a maximum rate of 20 percent of the acquisition costs and only after the business assets are commissioned.

19.9.3 Provisions and tax-free reserves

Provisions can be created for future expenses, the cause of which exists on the balance sheet date. An increase in such provision leads to a decrease in taxable income and vice versa. For example, provisions can be created for: (i) the payment of certain pensions; (ii) events that may occur in the future and (iii) bad debts.

A company alienating an asset, tangible or intangible, may create a reinvestment reserve if the asset's sales proceeds exceed its book value for tax purposes. The reinvestment must take place within a period of three years; otherwise, the reserve must be added to taxable profits. It is not required that the new asset has the same economic function, unless the alienated asset is not depreciated or is depreciated over a period of more than 10 years.

A tax-free allocation of profits to a reserve is also permitted for the purpose of spreading intermittently recurring costs ("equalization reserve").

19.10 Losses

A tax loss incurred during a fiscal year may be carried back to the preceding year or carried forward to nine subsequent years, subject to certain detailed anti-abuse provisions. This means, for example, that a tax loss in 2015 may be credited with the taxable profit of either 2014 or 2016 up to and including 2024.

As a temporary measure in 2009, 2010 and 2011, a taxpayer could opt to extend the carry-back period to three years, whereby the carry-forward of losses will be limited to six years instead of nine. Such extension of the carry-back period is limited to EUR10 million per (fiscal) year.

The amount of tax losses that may be carried back or forward has to be determined by the Dutch tax authorities after the taxpayer files its annual CIT return. Certain anti-abuse provisions restrict loss compensation if: (i) at least 30 percent of the ultimate ownership of a company changed as compared to the oldest year in which the losses were incurred and (ii) the

change of control occurred after the company terminated or largely reduced its former business activities.

As from January 2011, the abovementioned change-of-control provision, which aims to restrict the trade in so-called "loss-companies" and "profit-companies," has been amended. The current anti-abuse provision only disallows the carry-forward of losses that were realized in the years prior to the (financial) year in which the change of control occurred. Losses can, however, still be utilized – and, hence, the trade in loss companies is still beneficial – if such losses are suffered in the same year in which the change of control occurs. Similarly, a possibility exists in relation to "profit-companies," which are companies that realize a significant profit in a certain year because, for instance, they have sold all their business assets with hidden reserves. Such profit companies may, under the current legislation, be transferred to a party that is able to create and "inject" losses for tax purposes in the profit company within the same year in order to "sweep away" the realized profits.

The change-of-control provision has been amended so that the compensation of losses of loss companies and the offsetting of profits of profit companies are also disallowed in change-of-control situations within the same year in which the change of control takes place.

Losses incurred in years during which the taxpayer qualifies as a "holding company" (i.e., during 90 percent of the year, 90 percent or more of the company's activities consist of holding or group financing activities) may solely be set off against profits derived in years during which the taxpayer also qualifies as a holding company. This rule is intended to prevent pure holding companies from initiating active operations with the (exclusive) aim of setting off their (holding) losses against operating profits. A holding company may also not carry forward its losses if a holding company increases the balance of its intercompany loans and liabilities (compared to the balance in the year when the loss was incurred) in order to generate additional interest income, which is to be set off against previous losses.

The law provides for a safe harbor rule: companies with at least 25 full-time employees who are not engaged in the holding (management) of subsidiaries or the financing of affiliates are not deemed holding companies for loss compensation purposes.

19.11 Liquidation

Capital gains arising from the liquidation of a company are subject to CIT at normal rates, unless an exemption applies (e.g., participation exemption for a capital gain on a qualifying shareholding).

Liquidation distributions to shareholders are treated as follows:

- Repayment of paid-in capital, including share premiums and capitalized profits but excluding retained earnings, is tax-free (with certain exceptions).
- Any other payment is deemed to be a dividend and, therefore, subject to dividend withholding tax. Dividend withholding tax will not be levied if the recipient is any of the following:
  - A Dutch resident company that qualifies for the participation exemption
  - An EU resident company that qualifies for the EU Parent-Subsidiary Directive and, at the time of the liquidation, holds at least 5 percent of the nominal paid up share capital of the distributing company
  - A recipient that may benefit from an exemption based upon a tax treaty

19.12 Mergers and demergers

19.12.1 Business merger

Taxation of capital gains that are realized on the transfer of the assets and liabilities (comprising a business or an independent part thereof) of one company to another company (whether existing or newly incorporated) may be “rolled over” under the “merger exemption” if the business is transferred in exchange for shares in that other company. This exemption is subject to the following conditions:

a) The only compensation received by the transferring company consists of shares in the receiving company.
b) The future levying of CIT is assured. This condition implies that for tax purposes, the transferee company must apply the same basis in the assets and liabilities that the transferring company applied immediately prior to the transfer.
c) None of the companies suffered losses eligible to be carried forward prior to the merger.
d) Both companies are subject to the same tax regime. This will not be the case if, for instance, one company is a regular taxpayer while the other company qualifies as an investment institution and is therefore subject to a 0-percent CIT rate.
e) The shares acquired by the transferring company are not disposed of within three years.

Under Dutch tax law, mergers and demergers may be exempt from Dutch CIT, provided that certain requirements are met. In general, the legal merger and demerger exemption does not apply if the merger/demerger is predominantly pursued with the aim of avoiding or deferring taxation.

The Ministry of Finance issued several regulations in the form of "standard conditions" that must be met for the merger exemption to apply. This exemption has undergone only technical changes as a result of the implementation of the EC Merger Directive. For instance, the exemption is also applicable if a permanent establishment of a nonresident company is converted into a resident company. In principle, this exemption will apply only insofar as the transfer of assets leads to a full financial and economic integration of the business involved.

19.12.2 Merger by share-for-share exchange

As a result of the implementation of the EU Merger Directive, it is possible for a nonresident taxpayer (e.g., an individual) holding shares in a Dutch corporation to exchange those shares for shares in another EU corporation without triggering Dutch CIT. Once again, specific requirements must be fulfilled. One of the most relevant conditions is that both EU corporations involved in the merger must be qualified corporations. Furthermore, the

acquiring corporation must acquire more than 50 percent of the voting shares in the Dutch corporation.

19.12.3 Legal merger

CITA of 1969 also provides for the "legal merger" facility, whereby the assets and liabilities of the absorbed company are passed on to the absorbing company and the absorbed company itself ceases to exist. The shareholders in the absorbed company receive shares in the absorbing company. The two companies are basically amalgamated into one, without the need to liquidate the absorbed company. Alternatively, a new third company can absorb the assets and liabilities of the two former companies. One of the conditions for a legal merger is that the qualifying companies involved are tax residents in the Netherlands, the EU, Iceland or Norway. In practice, the tax treatment of a legal merger will be similar to that of a business merger.

19.12.4 Demerger

In general, the legal demerger of companies allows the transfer of all or part of the property, rights, interest and liabilities of one legal entity to one or more other legal entities by means of a universal transfer of title(i.e., without the separate transfer of all of the assets and liabilities). The main principle is that the shareholders of the legal entity being demerged all become shareholders of the transferee company (i.e., the acquiring company or companies). In general, two main types of demergers may be distinguished. These are as follows:

a) A full demerger, whereby the property, rights, interests and liabilities of a legal entity that ceases to exist on completion of the demerger are acquired by two or more other legal entities
b) A partial demerger involving a split whereby all or part of the property, rights, interests and liabilities of one legal entity are acquired by one or more other legal entities (the original legal entity does not cease to exist on completion of the demerger)

Demergers may be effected without incurring CIT under certain conditions, which is quite similar to the condition for the transfer of assets.

19.13 Fiscal unity

The CITA 1969 provides for a fiscal unity regime that, subject to certain conditions, permits companies that are members of a fiscal unity to file a consolidated tax return. Upon request, companies that are tax residents of the Netherlands (an N.V., B.V., a cooperative or a mutual guarantee association) may form a fiscal unity with subsidiaries in which a participation of at least 95 percent is held. The main advantages of the fiscal unity regime are that profits and losses may be freely set off among members of the fiscal unity and members can avoid the realization of income on transactions between them. After the formation of a fiscal unity, only the parent company is in fact recognized as a taxpayer for Dutch CIT purposes. Any income or expense at the level of the subsidiary company is automatically aggregated at the level of the parent company.

The most important characteristics of a fiscal unity are as follows:

a) To opt for fiscal unity, a parent company must (directly or indirectly) own at least 95 percent of the nominal paid-up share capital of a subsidiary, including statutory voting rights and profit entitlement.
b) Under certain conditions, qualifying subsidiaries may enter into a fiscal unity with the parent company during the fiscal year (e.g., as of the date of acquisition of the subsidiary).
c) Fiscal unities may be ended with respect to one or more consolidated subsidiaries during the course of the fiscal year (e.g., as of the date of disposal of the subsidiary).
d) A company leaving the fiscal unity may, under certain conditions, retain losses that have not yet been set off and that were incurred during the fiscal unity period, provided that these losses were attributable to that company.
e) Under certain conditions, Dutch permanent establishments of foreign companies may enter into fiscal unity with a Dutch (resident) company or another Dutch branch of a foreign company, provided there is a shareholding of at least 95 percent between the companies.

A fiscal unity may also be established between Dutch sister companies that have a common shareholder within the EU that owns at least 95 percent of the shares, voting rights and profit rights of these sister companies. The same applies for a Dutch parent company that holds a 95-percent interest in a Dutch subsidiary through a foreign company within the EU. On 16 October 2015, the State Secretary for Finance submitted a legislative proposal to incorporate this expansion of the fiscal unity regime into the CITA 1969. However, in anticipation of this new legislation, a fiscal unity can already be established in the abovementioned situations, based on the Decree of the State Secretary for Finance of 16 December 2014, no. BLKB2014/2137M, *Stcrt*. 2014, 38029.

19.14 Fiscal investment institution

A fiscal investment institution (*Fiscale Beleggingsinstelling* or "FBI") enjoys a beneficial tax regime, provided certain requirements are met. Based on this regime, profits are subject to CIT at a rate of 0 percent. Profit distributions by an FBI to its shareholders will give rise to Dutch dividend withholding tax at a rate of 15 percent, unless reduced by an applicable tax treaty or the Parent-Subsidiary Directive.

In order to qualify as an FBI, a company must meet the following cumulative requirements throughout the entire tax year:

a) The FBI must be set up as a Dutch public company (N.V.), a Dutch limited liability company (B.V.), an open-ended investment fund for joint account (*fonds voor gemene rekening* or "FGR") or a comparable foreign legal entity established under the laws of Bonaire, Sint Eustatius, Saba (the BES Islands), Aruba, Curacao, Sint Maarten, an EU member state or any other state in case a double tax treaty has been concluded with that other state that contains a nondiscrimination provision. Comparable foreign legal entities are not required to be residents of the Netherlands, but should be liable to Dutch CIT.
b) The FBI must restrict its activities to making portfolio investments (passive investments).

c) The FBI is subject to leverage restrictions. Debt is maximized at 60 percent of the tax book value of real property investments and 20 percent of the tax book value of other investments.
d) An FBI is required to distribute all of its profits to its shareholders within eight months after the end of its financial year. An FBI is allowed to exclude the net balance of capital gains and losses from its taxable profit and allocate this balance to a so-called reinvestment reserve. Distributions from the reinvestment reserve are not subject to Dutch dividend withholding tax under certain circumstances.
e) If an FBI is listed on a financial market within the meaning of the Financial Supervision Act (WFT) or if the FBI or its manager (*beheerder*) has a license under the Financial Supervision Act (or has been exempted from being licensed), the following must be met:

    i) Not more than 45 percent of the FBI may be held by an entity (or by two or more related entities, as defined by law) that is subject to a profit tax.
    ii) A single individual may not hold an interest of 25 percent or more.

f) If the FBI is not listed on a financial market or if the FBI or its manager does not have a license under the Financial Supervision Act (nor has been exempt from being licensed), the following must be met:

    i) A least 75 percent of the shares in the FBI must be held by individuals, corporate entities exempt from CIT or listed FBIs.
    ii) Individuals may not hold an interest of 5 percent or more.

g) 25 percent or more of the shares in an FBI may not be held by Dutch resident companies via nonresident corporate shareholders or mutual funds.

A director of an FBI or more than half of the members of the supervisory board of an FBI cannot also be a director, a member of the supervisory board or an employee of an entity that holds (alone or with related entities) an interest of 25 percent or more in the FBI, unless the latter entity is an FBI listed in a financial market within the meaning of the Financial Supervision Act.

The FBI must restrict its activities to passive real estate investments. It is not permitted to develop real estate itself. Real estate development activities are allowed under the following limitations:

a) The FBI is allowed to hold shares in a subsidiary that conducts real estate development activities. Such subsidiaries should be subject to tax at the general CIT rate. If the FBI wishes to develop its own real estate investments, the subsidiary may develop the real estate held by the FBI in exchange for an arm's-length remuneration.
b) The improvement and expansion of existing real estate by the FBI itself are allowed as long as the investments do not exceed 30 percent of the market value of the real estate, which is determined under the Valuation of Immovable Property Act (WOZ).

Under certain conditions, the FBI may credit foreign withholding tax on income received by the FBI against the Dutch dividend withholding tax to be paid by the FBI. If an FBI no longer meets one or more of the abovementioned requirements in a certain financial year, it loses its status as an FBI. As a result, the entity becomes a regular corporate taxpayer as from the beginning of that financial year.

19.15 Exempt investment institution

The Exempt investment institution (*vrijgestelde beleggingsinstelling* or "VBI") is fully tax-exempt. Upon request, a taxpayer in the Netherlands subject to CIT can benefit from the VBI regime, provided that the following requirements are met:

- The VBI is set up as an N.V., an FGR or a comparable foreign legal entity established under the laws of the BES Islands, Aruba, Curacao, Sint Maarten, an EU member state or any other state in case a double tax treaty has been concluded with that other state that contains a nondiscrimination provision.
- The VBI is set up as an open-end investment fund.
- The activities of the VBI consist of collective passive investments.

- The VBI is only allowed to invest in "financial instruments," as defined in the Markets in Financial Instruments Directive or MiFID (e.g., shares, bonds, options, futures, swaps). It is allowed to invest in Dutch and foreign real estate indirectly (i.e., via a non-transparent, Dutch or foreign entity or real estate fund.)

A VBI cannot credit withholding taxes incurred as it is not subject to tax. Since it is not subject to tax, the VBI is not eligible to tax treaty protection. Withholding tax levied on income received by the VBI will be an actual cost for the VBI.

The VBI has no specific shareholder requirements; both individuals, corporations, as well as institutional investors may invest via a VBI. In order to meet the requirement of collective investment, the VBI may not be used as a portfolio investment company that was primarily set up for one shareholder. The VBI should diversify its risks (it cannot invest in one asset only).

The VBI is not subject to any funding restrictions.

The VBI regime does not have any distribution obligations. Dutch (corporate and individual) investors have to revaluate their interest in the VBI to fair market value every year, as a result of which, the underlying (realized and unrealized) income will be taxable at the level of the Dutch shareholders.

The Dutch participation exemption does not apply to a shareholding in a VBI. Profit distributions by a VBI to its shareholders are not subject to Dutch dividend withholding tax.

19.16 Transfer pricing regime

The Dutch tax authorities adhere in general to the OECD Transfer Pricing Guidelines and apply the ALP. The ALP requires that all intra-group transactions should occur at the price that would have been agreed upon between unrelated parties. Therefore, if the transfer price differs from what unrelated parties would have agreed upon, the pricing would generally not be at arm's-length and the tax authorities may adjust the pricing accordingly.

19.16.1 Transfer Pricing Documentation

Under Dutch tax law, taxpayers are obliged to maintain documentation for transactions with related parties. Such documentation must demonstrate how the intercompany price was established.

As per 1 January 2016, additional transfer pricing documentation requirements apply to companies with revenue of EUR50 million or more. These additional transfer pricing documentation requirements follow the recommendations from the OECD as part of the BEPS project (see Action Item 13: Country-by-Country Reporting Implementation Package http://www.oecd.org/ctp/transfer-pricing/beps-action-13-country-by-country-reporting-implementation-package.pdf hereinafter references as "Action Item 13").

More specifically, entities located in the Netherlands that are part of a MNE with consolidated revenues of EUR750 million or more must prepare transfer pricing documentation that consists of a Master file and one or more Local files. In addition, a Country-by-Country Report (CbCR) must be filed with the Dutch tax authorities. Entities that are part of an MNE with consolidated revenues of EUR50 million or more but less than EUR750 million must prepare transfer pricing documentation that consists of a Master file and Local file. A CbCR filing is not required for entities that are part of a MNE with consolidated revenues of less than EUR50 million; only the pre-2016 transfer pricing documentation requirements are applicable. The reference year for determining whether one of the thresholds is met is the preceding fiscal year of the MNE. This means that the year that starts on or after 1 January 2015, is the relevant year to determine the applicable transfer pricing documentation requirement for 2016.

The Master file and the Local file must be included in the taxpayer's administration within the term for filing the corporate income tax return (i.e., in principle, within five months after the end of the fiscal year). The requirements related to the content of the Master file and Local file are generally in line with the recommendations from Action Item 13.

The CbCR must be filed with the Dutch tax authorities within 12 months after the end of the fiscal year. The ultimate parent entity of a group is required to file the CbCR with the Dutch tax authorities, if this entity is located in the Netherlands. However, in some occasions, a subsidiary of an MNE could also be required to file a CbCR in the Netherlands. In summary, the CbCR should contain aggregate tax jurisdiction-wide information on: (i) the global allocation of income; (ii) the taxes paid per country and (iii) the activities performed in these countries.

Failure to comply with the information and documentation obligations mentioned above can result in: (i) a reversal of the burden of proof from the tax authorities to the taxpayer or (ii) administrative penalties. Intentionally not meeting the aforementioned obligations or gross negligence may also result in criminal prosecution. The Dutch government has further announced that it is engaged in the development of a multilateral instrument that is proposed by the OECD on the automatic exchange of information, which should also cover the automatic exchange of the CbCR.

19.16.2 Dutch Transfer Pricing Decree

Extensive guidance has been issued by the Dutch Ministry of Finance in the form of decrees, which provides further guidance regarding the interpretation/application of the ALP and procedures for obtaining an APA or ATR in the Netherlands.[4] In 2013, the Dutch Ministry of Finance issued a transfer pricing decree, No. IFZ2013/184M or the “2013 transfer pricing decree,” which combines and replaces two previous transfer pricing decrees released in 2001 and 2004 (No. IFZ2001/295M and No. IFZ2004/689M, respectively). The OECD Transfer Pricing Guidelines are incorporated in domestic law by reference in the transfer pricing decree.

4 An APA is an agreement between a multinational enterprise and the Dutch Tax Authorities on the arm’s-length remuneration of cross-border transactions (goods and service) between related parties. An ATR is an agreement between a multinational enterprise and the Dutch tax authorities, which provides certainty on the tax consequences of a proposed transaction or a set of transactions for international issues mentioned in the ATR decrees.

The Netherlands transfer pricing regime can be characterized as pragmatic. All the OECD transfer pricing methods are accepted and so are Pan-European comparables. Transfer pricing documentation may be prepared in the English language. For years prior to fiscal year 2016, transfer pricing documentation that is in line with the EU Code of Conduct on transfer pricing documentation is generally accepted by the Dutch tax authorities. For fiscal year 2016 and onward, the transfer pricing documentation rules as set forth above apply.

The 2013 transfer pricing decree specifically addresses three possible areas of profit-shifting and the manner in which such profit-shifting may be addressed. The three areas include: (i) transactions involving intangibles; (ii) centralized procurement activities and (iii) the transfer pricing treatment of captive insurance companies. Additionally, the decree focuses specifically on intra-group financing transactions.

Furthermore, intercompany transactions involving intra-group charges, such as management fees and royalties, usually attract the tax inspector's interest. Additionally, multinational companies with group entities in low-tax jurisdictions can expect scrutiny, whereby outgoing payments are invariably reviewed during transfer pricing audits.

Recent developments, including the OECD's BEPS project and the additional transfer pricing documentation requirements indicate that transfer pricing is a major concern of governments and international organizations. These developments, together with the increased awareness of the Dutch tax authorities with respect to transfer pricing, will most likely result in more frequent transfer pricing audits. The Dutch government has indicated already that the Dutch Tax Authorities will use the CbCR as a risk-assessment tool to determine the focus of audits. As such, taxpayers should, more than ever, be able to substantiate that their supply chain structure and their intercompany transactions are in line with value creation.

19.16.3 Certainty in advance

APAs and ATRs are encouraged and the Dutch tax authorities aim to be the premier service providers in that they strive to provide for rapid advance certainty for a mutually agreed-on period of time. To illustrate, the number of APA requests that were received and assigned were: (i) 247 in 2012; (ii) 228 in 2013 and (iii) 203 in 2014. For ATRs, requests that were received and assigned were: (i) 468 in 2012; (ii) 441 in 2013 and 429 in 2014.[5]

Within five days after the receipt of an APA or ATR request, the Dutch Tax Authorities will grant a notification of receipt. ATR requests will, in principle, be finalized within eight weeks upon the receipt of the request. This period can be extended if additional information is required to assess the request properly.[6] For APA requests, there will be a joint "case-management-plan" drafted between the tax authorities and the taxpayer, in which the estimated handling period of the APA request will be determined.[7] The tax authorities aim to process and finalize all APA and ATR requests in the shortest possible period.

19.16.4 Automatic Exchange of Information

On 6 October 2015, the Council of EU Finance Ministers (ECOFIN) reached an agreement on the exchange of basic information on tax rulings within the EU starting from 1 January 2017. As a result of this agreement, the EU Directive on administrative cooperation between the member states will be amended to provide for the automatic exchange of information on tax rulings.

Based on this agreement, the tax authorities of the member states, including the Dutch tax authorities, will exchange information on tax rulings with other member states that are potentially affected by a ruling. The agreement covers both APAs and ATRs and, in principle, will be

5 "*Overzicht van afgegeven rulings en overzicht van uitgewisselde informatie met andere lidstaten*," issued by the Dutch government on 12 June 2016.
6 Organization and Competence regulation of the APA/ATR-team of the Dutch Tax Authorities, Decree DGB 2014/296M, 12 June 2014.
7 Handling procedure for APA requests, Decree DGB 2014/3098, 12 June 2014.

applied retroactively to 1 January 2012. However, there will be a certain transitional arrangement.

The information that will be exchanged includes, *inter alia*: (i) the identification of the taxpayer; (ii) a summary of the ATR or the APA; (iii) a description of the relevant business activities; (iv) the relevant dates; (v) the type of APA or ATR; (vi) the amount of the transactions covered by the agreement and (vii) information on the transfer pricing remuneration applied to the transactions included in the APA or ATR.

Considering the new instrument on the automatic exchange of information, taxpayers should consider whether an APA or ATR is preferred, or if there are other ways to obtain the required level of certainty in advance.

19.17 Competent authority/Arbitration convention

Although the Dutch transfer pricing regime can be characterized as pragmatic, a transfer pricing adjustment or another cross-border conflict may result in double taxation. In such cases, the competent authorities can resolve the double taxation resulting from the dispute by way of competent authority proceedings under a bilateral tax treaty, or under the Convention on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises (“the Arbitration Convention”), provided that both states involved are signatories to this Arbitration Convention. In a Decree of 29 September 2008, No. IFZ2008/ 248M, Stcrt. No. 188, the Dutch State Secretary of Finance has issued specific guidance regarding competent authority proceedings under a bilateral treaty or the Arbitration Convention.

The Dutch government actively promotes the effectiveness of both procedures. One of the more recent initiatives of the Dutch government includes the introduction of the Netherlands Accelerated Mutual Agreement Procedure. The main goals of this initiative are to: (i) improve transparency; (ii) reduce taxpayer costs and (iii) find a resolution within a target (short) timeframe.

A person residing in the Netherlands for tax treaty purposes who is subject to economical or juridical double taxation is allowed to invoke competent authority proceedings under an applicable bilateral tax treaty. All bilateral tax treaties for the avoidance of double taxation concluded by the Netherlands contain a provision similar to Article 25 of the OECD Model Convention. As of 1992, the Netherlands, as a general policy, has been in favor of including an arbitration clause in the competent authority article when concluding a bilateral tax treaty. This was long before the 30 January 2007 report adopted by the Committee on Fiscal Affairs regarding the inclusion of a new paragraph 5 to Article 25 of the OECD Model Convention with an option to send a case to arbitration upon the request of the taxpayers. Furthermore, the Netherlands favors the inclusion of the arbitration option in renewed treaties. The Netherlands has an arbitration clause included in treaties with various countries. As part of the BEPS project, the Netherlands, as well as a large portion of the other OECD countries, have also agreed to add an article to the bilateral tax treaties that provides for a mandatory arbitration procedure, in addition to the MAP, which is already present in many bilateral treaties.

Moreover, the 2013 transfer pricing decree introduces an early stage mechanism whereby, upon the anticipation of double taxation by the taxpayer and the taxpayer's request, the Dutch tax authority is willing to engage in an exchange of information or a coordinated audit with the other tax authority, in order to prevent double taxation at an early stage.

Separate and apart from the applicable treaties for the avoidance of double taxation, double taxation arising from transfer pricing adjustments within the EU may be resolved under the Arbitration Convention. This convention explicitly caters to handling transfer pricing issues. It has a significant advantage over regular treaties for the avoidance of double taxation in that it applies to situations such as permanent establishments of EU companies in other EU states as well.

The Arbitration Convention guarantees the removal of double taxation within a certain period. Under the Arbitration Convention, if the member states concerned are unable to agree with one another through mutual consultation after two years, a second (arbitration) phase ensures that a

solution is arrived at through the arbitration committee within six months. After the arbitration committee has given its advice, the competent authorities of the member states are obliged to resolve the double taxation issue within six months.

19.18 EEIG and SE

19.18.1 EEIG

Since July 1989, it has been possible to form an EEIG (*Europees Economisch Samenwerkingsverband* or EESV) in the Netherlands. An EEIG must be registered with the Trade Register of the Chamber of Commerce. An EEIG with an official address in the Netherlands is considered a legal entity under Dutch law. A regulation has been published with respect to the taxation of EEIGs.

The following general rules apply:

a) EEIGs are "tax-transparent" and therefore not subject to Dutch CIT. The profits resulting from the activities of an EEIG are taxable only in the hands of its members. Any distributions made are not subject to Dutch dividend withholding tax. Tax transparency does not apply to other taxes (e.g., wage tax).
b) Foreign members will be subject to tax in the Netherlands only if the business in the Netherlands is conducted via a permanent establishment or a permanent representative.
c) The EEIG itself does not have access to the Dutch tax treaty network as it does not qualify as a Dutch tax resident.

19.18.2 SE

As of 2004, it is possible to incorporate a European company or SE. The SE has legal personality and is, in many respects, comparable to a Dutch N.V. or a B.V. For Dutch tax purposes, an SE that has its registered office in the Netherlands is treated similarly to a Dutch N.V. (a public limited liability company). This means that an SE is subject to the same taxes as a Dutch N.V. and that an SE has access to the same tax facilities available to a Dutch

N.V., such as the fiscal unity facility and the participation exemption. An SE is also eligible for the benefits of the EU Parent-Subsidiary Directive, the EU Interest and Royalties Directive and the EU Merger Directive.

There are four ways to incorporate an SE and these are as follows:

a) Through a legal merger between two companies based in different EU member states
b) Through the incorporation of an SE as a holding company for two companies based in two different EU member states or with subsidiaries in two different EU member states
c) Through incorporation of an SE as a subsidiary of either of the following:

    i) Two companies based in two different EU member states
    ii) An SE

d) Through a change of corporation form from an eligible company (e.g., an N.V.) to an SE

Although there are rules restricting the way that an SE may be incorporated, anyone can become a shareholder. An SE is able to transfer its registered office from one EU member state to another. In addition, a group that has companies throughout the EU can now create a uniform management structure by forming an SE, since an SE may opt for a one-tier or a two-tier board system. Another relevant practical aspect is that the formation of an SE makes international legal mergers possible between companies incorporated under the laws of an EU member state.

19.19 EU Interest and Royalty Directive

The EU Interest and Royalty Directive took effect on 1 January 2004. Referring to the directive, companies that are directly related and are able to meet certain conditions are no longer subject to withholding tax on interest and royalty payments. Furthermore, EU member states have the option not to apply the directive if companies do not meet a direct shareholders' test for an uninterrupted period of two years. The directive is effective for EU

member states. Since the Netherlands does not levy a withholding tax on interest and royalty payments, the effects of the directive on Dutch legislation is limited.

19.20 EU Savings Directive

The EU Savings Directive took effect on 1 July 2005, with the aim of enabling the taxation of savings income in the form of interest payments. Payments made in one member state to beneficial owners who are individual residents for tax purposes in another member state fall within the scope of this directive. After the obligatory exchange of information between the member state where the payment originates and the member state of which the beneficiary is a resident, the income may be taxed in accordance with the laws of the latter member state. In principle, a zero withholding tax rate applies to payments between member states. However, a transitional period is observed for Austria.

19.21 EU Parent-Subsidiary Directive

This directive gives complete relief from double taxation in the EU on dividend income by abolishing dividend withholding tax on dividends flowing from a subsidiary to its parent company (or to a permanent establishment of the parent company) within the EU, provided that the companies have a qualifying parent-subsidiary relationship. The withholding tax exemption may be applied under the directive if all of the following criteria are complied with:

a) The parent company holds a minimum of 10 percent of the capital of the subsidiary.
b) Both parent and subsidiary have one of the legal forms listed in the Annex to this directive.
c) The parent and subsidiary are companies that, according to the tax laws of their respective countries, are considered resident of their respective countries for tax purposes and under the terms of a double taxation agreement concluded with a third country. Neither of them is considered a resident for tax purposes outside the EU.

d) The parent and subsidiary are companies that are subject to one of the taxes listed in this directive, without the possibility of being exempt or having an option to be exempt.

As of 1 January 2007, Dutch domestic law provides for an exemption from dividend withholding tax on distributions made to shareholders in the EU, with a stake of 5 percent or more of the nominal paid-up share capital. This means that the Dutch rules toward EU shareholders are more favorable than those required by the EU participation exemption.

19.22 EU Merger Directive

The EU Merger Directive is implemented in Dutch law and is described under Section 18.12, Mergers and demergers of this chapter.

19.23 Summary of the Netherlands' Bilateral Tax Treaties

The Netherlands has one of the most extensive tax treaty networks in the EU. The treaties generally provide for substantial reductions of withholding tax on dividends, interest and royalties. Below is a list of treaties currently in force and under negotiation as well as the treaty reductions for withholding taxes. Most tax treaties negotiated by the Netherlands relating to income and capital are based on the draft models published by the Organisation for Economic Cooperation and Development (OECD) in 1963, 1977 and 1992-2000.

Double taxation or taxation not in accordance with the convention for avoidance of double taxation is to be resolved under Decree of 29 September 2008, no. IFZ 2008/248M. Tax treaties are currently in force with the following countries:

Albania	Estonia	Malta	Suriname
Argentina	Finland	Mexico	Sweden
Armenia	France	Moldova	Switzerland
Aruba	Georgia	Morocco	Taiwan
Australia	Germany	New Zealand	Thailand
Austria	Ghana	Nigeria	Tunisia
Azerbaijan	Greece	Norway	Turkey
Bahrain	Hong Kong	Oman	Uganda
Bangladesh	Hungary	Pakistan	Ukraine
Barbados	Iceland	Panama	United Arab Emirates
Belarus	India	Philippines	United Kingdom
Belgium	Indonesia	Poland	United States
Bermuda	Ireland	Portugal	Uzbekistan
Brazil	Israel	Qatar	Venezuela
Bulgaria	Italy	Romania	Vietnam
Canada	Japan	Russia	Zambia
China (excluding Hong Kong and Macau)	Jordan	Saudi Arabia	Zimbabwe
Croatia	Kazakhstan	Singapore	
Curacao	Kuwait	Slovak Republic	
Czech Republic*	Latvia	Slovenia	
Denmark	Lithuania	South Africa	
Egypt	Luxembourg	South Korea	
	Macedonia (FYR)	Spain	
	Malaysia	Sri Lanka	

**The Netherlands continues to apply the Czechoslovak treaty to the Czech Republic and the Slovak Republic. The treaty has, however, been amended by protocols with both republics.*

Tax treaties are still in force with the following countries after split or separation from the (former) Soviet Union and Yugoslavia:

Bosnia and Herzegovina	Kyrgyzstan*	Serbia
Kosovo	Montenegro	Tajikistan*

**Treaty was unilaterally applied by the Netherlands. Kyrgyzstan has announced that they do not apply the treaty.*

The Netherlands has concluded new tax treaties that are not yet in force with the following countries:

Germany	Ethiopia	

Negotiations are underway or have been held already with the following countries:[8]

Algeria	Ghana*	Russia*
Angola	India*	Senegal
Australia*	Indonesia*	Singapore*
Bangladesh*	Iraq	South Africa*
Belgium*	Ireland*	Spain*
Brazil*	Kenya	Sri Lanka*
Bulgaria	Kyrgyzstan	Thailand*
Canada*	Moldova*	Uganda*
Chile	Mongolia	Ukraine*
Colombia	Morocco*	Uruguay
Costa Rica	Mozambique	Uzbekistan*
Cyprus	New Zealand*	Vietnam*
Egypt*	Nigeria*	Zimbabwe*
France*	Pakistan*	
Georgia*	Poland*	
Germany*	Philippines*	

**Negotiations for revision of the current treaty in force are underway.*

8 Overview published by the Dutch Ministry of Finance regarding (ongoing) tax treaty negotiations of the Netherlands, dated 30 September 2015.

Tax-sparing credits are granted in respect of the following less developed countries:

Brazil *(dividends/ interest/royalties)* China *(interest/royal- ties)* Pakistan *(interest/ royalties)*	Philippines *(interest/ royalties)* Sri Lanka *(dividends/ interest/royalties)*	Suriname *(dividends/ interest/royalties)* Zambia *(dividends)*

Tax treaties with regard to profits from air and/or sea shipping are currently in force in the following countries:

Albania *air*	Hong Kong *air/sea*	South Korea *sea*
Argentina *air/sea*	Hungary *air*	Qatar *air*
Armenia *air*	Isle of Man *air/sea*	Saudi Arabia *air*
Azerbaijan *air*	Latvia *air/sea*	Slovak Republic *air*
Bahrain *air*	Lithuania *air/sea*	Ukraine *air*
Barbados *air*	Macau *air*	United Arab Emirates *air*
Belarus *air*	Macedonia *air*	Uzbekistan *air*
Bermuda *air/sea*	Madagascar *air*	Venezuela *air/sea*
Brunei *air*	Maldives *air*	Vietnam *air*
Cuba *air*	Moldova *sea*	
Czech Republic *air*	Oman *air*	
Estonia *air/sea*	Panama *air/sea*	
Georgia *air*	Poland *sea*	

Furthermore, the Netherlands is a signatory to the EU Arbitration Convention of 23 July 1990.

20

Other Taxes

20.1 Value-added tax ("VAT")

20.1.1 Taxable persons

In general, taxable persons are all entities or individuals that provide taxable supplies of goods and services, or intra-community acquisitions in the course of a business in the Netherlands. If a (foreign) business supplies goods and/or services, it is considered a taxable person for Dutch VAT purposes.

VAT Grouping

In case persons (*e.g.*, entities, organizations and (non) taxable persons) are closely connected from a financial, economic and organizational perspective, these persons, together, form a so-called VAT group. For VAT purposes, the VAT group will be regarded as one single VAT taxable person as opposed to regarding the individual (taxable) persons as such. Transactions between the persons forming a VAT group are considered out of scope and, thus, are not taxable.

Non-taxable persons, in principle, can also be a part of a VAT group.

20.1.2 Taxable transactions

VAT is imposed on the following transactions:

a) The supply of goods or services by a taxable person in the course of a business
b) The intra-community acquisition of goods from other EU countries by a taxable person or a nontaxable legal person in excess of a certain threshold
c) The intra-community acquisition of a new means of transport by anyone
d) The importation of goods from outside the EU by anyone

Dutch VAT is due if these transactions are considered to take place in the Netherlands.

20.1.3 VAT rates

The general VAT rate in the Netherlands is 21 percent.

A reduced VAT rate of 6 percent applies to certain essential goods and services, for example food and drinks (excluding alcoholic drinks), gas, electricity, certain types of medical devices, medicines, certain pharmaceutical products, tickets to certain events, public transport (including taxi's) and certain labor intensive repair and maintenance activities.

A 0 percent VAT rate generally applies to: (i) supplies of goods not cleared through customs (either because they are merely passing through the Netherlands or because they are stored in the Netherlands); (ii) supplies of goods that are exported from EU countries and (iii) intra-community supplies and services connected to such supplies.

Furthermore, cross-border passenger transport by airplane and sea vessel (i.e., tickets) is also taxed at the 0 percent VAT rate.

20.1.4 Compliance

Periodical VAT return

In general, a VAT return should be submitted per quarter. If desired, you can request the Dutch tax authorities to submit the VAT return per month. Under certain conditions, an annual VAT return is allowed.

VAT returns must be submitted and the VAT due must be paid within one month after the filing period. Taxable persons must file their VAT returns electronically (i.e., online or using a designated software program).

EU Sales Listing

If a Dutch VAT-taxable person supplies goods and/or services to other EU member states, an EU Sales Listing should be filed, next to the periodical VAT return. In principle, an EU Sales Listing can be filed monthly, every two months, quarterly or yearly. However, as of 1 January 2016, VAT taxable persons should file monthly EU Sales Listings when the supplies within the EU exceed the threshold of EUR50,000 on a quarterly basis.

Intrastat

In order for the statistical agencies to receive their information regarding the trade between the EU member states, an Intrastat return should be filed if companies supply goods to customers within the EU or buy goods from suppliers within the EU. Companies that exceeded the threshold of EUR1.5 million of sales or purchases in 2015, must file the Intrastat return monthly. The threshold applies separately with regard to the supply to other EU member states and the purchase from suppliers within the EU.

Once the threshold is exceeded during 2016, the obligation to file an Intrastat return starts as of the month in which the exceeding takes place.

Record keeping

Based on Dutch administrative laws, records should, in principle, be kept for seven years, although certain exceptions exist. For instance, records with regard to real property (transactions) should be kept for at least 10 years. The records can be kept in hardcopy or in electronic format.

Invoicing

It is allowed to issue an invoice on paper or by means of electronic invoicing. In line with the EU VAT Directive, the Dutch VAT act provides the details that are required to mention on the invoice. The format of the invoice is (more or less) free, as long as the following are safeguarded: (i) authenticity of origin; (ii) the integrity of the content and (iii) the clarity of the invoice. There are no further rules regarding the (financial) system /software that is used to generate the invoice. *Self-billing and third party billing* are allowed provided certain conditions are met. Under certain conditions, a so-called *simplified VAT invoice* can be issued if the chargeable amount does not exceed EUR100 (including VAT).

The invoice should be issued ultimately before the 15th of the month following the month of the taxable supply.

Registration threshold

There is no VAT registration threshold in the Netherlands.

20.1.5 Place of supply

If goods or services are supplied, the rules of the place of supply determine in which country VAT is due.

20.1.6 Supply of Goods

In the case of supplies of goods, the place of supply (and liability to pay VAT) will be in the country where the goods are located at the time the right to dispose as owner of the goods has been transferred (regardless where the supplier or recipient is established). If the goods are transported in relation to the supply, VAT is due in the country of dispatch.

For cross-border supplies within the EU (further: "intra-community supplies") or supplies to recipients outside the EU, additional rules apply (see also Section 20.8.1). A taxable person who sells and supplies goods from the Netherlands to a taxable person (i.e., business-to-business, "B2B") located in another EU country will perform an intra-community supply in the Netherlands (EU country of dispatch of the goods). Such intra-community supply is, in principle, exempt from VAT (the Netherlands in general refers to a supply taxed at the 0-percent VAT rate). The same applies for export supplies from the Netherlands to non-EU countries.

When applying the 0-percent VAT rate on cross-border supplies of goods from the Netherlands, additional VAT requirements apply, including additional invoice requirements. Furthermore, it is recommended to keep relevant documents that can prove the supply and shipment of the goods at hand. In case of an intra-community supply, the receiving taxable person will perform a taxable intra-community acquisition in the EU member state of arrival of the goods. The recipient should report the VAT due over the acquisition in its own local VAT return.

Nontaxable legal entities are treated as taxable persons for their intra-community acquisitions if such acquisitions exceed an annual threshold (EUR10,000 in the Netherlands) in the current calendar year, or have exceeded this threshold in the previous calendar year.

For EU business-to-consumer (B2C) cross-border supplies of goods, the so-called *Distance Selling* rules apply. Based on these rules, these B2C supplies are taxable in the EU member state of dispatch unless the sales exceed a threshold. The threshold is determined per EU member state of the recipient.

For sales from other EU member states to recipients in the Netherlands, a threshold of EUR100,000 applies. Once this threshold is exceeded, the underlying supply of goods are in principle taxable in the Netherlands.

20.1.7 Supply of Services

The general rule for business-to-business ("B2B") supplies of services is that services are deemed to take place in the country where the VAT-taxable recipient of the service is established. In cross-border situations, the liability to pay VAT is shifted to the VAT-taxable recipient (please note that this includes VAT-exempt entities such as insurance companies, banks, hospitals).

As opposed to the above, certain types of services are taxable according to a different approach. For example, services related to real property and the transportation of persons is taxable in the EU member state where the real property is located or where the transport takes place.

According to the general rules for business-to-consumer ("B2C") services, such services are taxable in the country of the service provider. However, exceptions may apply for certain rules.

B2C broadcasting telecommunication and electronically supplied services are VAT-taxable in the member state of the customer. Service providers that render B2C broadcasting, telecommunication and electronically supplied services should, in principle, charge local VAT of the EU member state of their customer. This VAT should be reported and remitted through a local VAT return.

MOSS

In order to avoid an increase in administrative and compliance obligations, the so-called Mini-One-Stop-Shop (MOSS) makes it possible for businesses to register for VAT purposes in one single EU member state and file their VAT returns for each EU member state in which VAT should be reported through one single Pan-EU VAT return because of B2C broadcasting, telecommunication and electronically supplied services,. This so-called

MOSS VAT return can be filed in the EU member state where the service provider is established.

Even though the MOSS is used, a provider of any of the aforementioned services will charge the VAT rates applicable in the country where the customer resides or is established and remains liable for the local VAT in all of the EU member states of its customers.

Both EU-based and non-EU-based companies can participate in this scheme. Participation is not mandatory. If you do not make use of this scheme, you will however have to register for VAT purposes, file VAT returns and remit VAT in all member states where your customers are established.

20.1.8 Exempt activities

VAT exemptions, among other, include the following categories:

a) Certain supplies of real property – The Dutch VAT Act provides the possibility to opt for a VAT-taxable supply.
b) Lease of real property – Note that the lease of certain types of real property are excluded from the exemption. Furthermore, the Dutch VAT Act provides the possibility to opt for a VAT-taxable lease. When opting, certain conditions have to be fulfilled.
c) Provision of healthcare and closely related services and supplies
d) Provision of education and closely related services and supplies
e) Certain services related to youth care, child day care and social welfare
f) Certain services related to sports
g) Certain financial services and transactions
h) Games of chance

20.1.9 Charging VAT and Taxable Amount

VAT should be charged over the price received for the goods and/ or services. The remuneration can be paid in cash or in kind (barter).

Local reverse charge mechanism(s)

A special regime applies in the event that a foreign established business (without a fixed establishment in the Netherlands) supplies goods or services, which are taxable in the Netherlands, to a taxable person or a nontaxable entity established in the Netherlands.

In such case, a so called reverse charge mechanism applies. Pursuant to the reverse charge mechanism, the Dutch VAT due is levied from the taxable person or non-taxable entity receiving the goods or services. The supplier does not charge Dutch VAT. Instead, the recipient of the goods and/or services has to self-assess the Dutch VAT due.

Furthermore, a local reverse charge mechanism can apply to certain transactions with regard to real property, mobile phones, computers, laptops, tablets, emission rights and waste and old materials.

Margin scheme(s)

The VAT should be reported over the aggregated value of the goods and services sold during the VAT filing period. However, a special scheme exists for certain sales of used goods, works of art, antiques and collectors' items. Under this scheme, VAT can be calculated on the margin.

20.2 Real estate transfer tax

In principle, the acquisition of Dutch real property, including the acquisition of beneficial ownership, is subject to a real estate transfer tax (further "RETT") of 6 percent. The transfer tax is calculated on the purchase price or the market value, whichever is higher. Legally, transfer tax is to be paid by the purchaser, but it is not uncommon for the buyer and the seller to agree on who will effectively bear the tax.

The acquisition of residential property (or certain legal rights related to such real property) is taxable at a 2 percent RETT rate.

The acquisition of (the beneficial ownership of) rights to real estate, shares belonging to a substantial interest in a real estate company and certain certificates entitling the holder to a proportionate share of immovable property are, under certain conditions, also subject to a 6 percent transfer tax.

In case of an acquisition of real property within six months of a previous acquisition of the same real property by another person, the transfer tax due will be based on the transfer price minus the initial transfer price. Acquisitions by way of inheritance and gifts (except for gifts of shares in real estate companies) and acquisitions by a company within the scope of an internal reorganization qualify for an exemption of transfer tax under certain conditions.

Furthermore, under certain conditions, a RETT exemption may apply if the underlying supply of real property is subject to VAT.

20.3 Withholding tax on dividends

Dividends and other distributions of profits (including interest on loans that are considered to be equity and liquidation distributions in excess of the paid-in capital) paid by companies that are resident in the Netherlands are, in principle, subject to 15 percent dividend withholding tax.

However, an exemption from withholding tax on dividend may be available with respect to distributions to companies that own at least 5 percent of the shares in the distributing company and which are residents in the Netherlands or in another EU country. Furthermore, tax treaties may provide for a limitation or an exemption of the dividend withholding tax.

A dividend withholding tax return must be filed with the local tax inspector by the distributing company, and the dividend withholding tax must be paid to the tax collector within one month after the date on which the dividend becomes payable. The Tax Inspector may impose a penalty if a dividend tax return is filed late.

20.4 Interest and royalties

There is no Dutch withholding tax on interest and royalties paid by companies that reside in the Netherlands.

21

International Distribution Centers/ Customs Facilities

Upon the importation of goods into the free circulation of the EU, import duties and import VAT (and if applicable, excise duties), in principle, become due (see Section 20.1). Import duties are calculated based on the customs value of the goods, multiplied by the applicable tariff rate. The applicable tariff rate depends on the customs classification and the (preferential) origin of the goods.

Once paid, import duties are, in principle, nonrefundable and, thus, become a cost. This is also the case if the imported goods are subsequently re-exported out of the customs territory of the EU. Thus, it may be advantageous to postpone the levying of import duties until it becomes clear that the goods will be destined to remain in the EU. In order to do so, the goods entering the customs territory of the EU can be kept under customs bond, using customs procedures such as customs warehousing (see Section 20.2). Postponement of the levying of import duties using the applicable customs procedures may also present the possibility of a cash flow advantage. Therefore, it may be advantageous to either avoid or defer the levy of import duties for goods entering the Netherlands.

Once goods are brought into free circulation, they can be transferred to other EU member states, without import duties becoming due on arrival. However, such a transfer may give rise to VAT compliance requirements (see Section 19.1.6 and Section 20.8).

Beginning 1 May 2016, the current Community Customs Code (CCC) and the Community Customs Implementing Code will be replaced by the new Union Customs Code (UCC) and the implementing provisions contained in the Union Customs Delegated Act on the one hand and in the

Union Customs Implementing Act on the other. Under the new code, the current customs procedures are streamlined and simplified. Procedures that are distinct procedures in the CCC are integrated in the new UCC. For example, the new customs procedure "processing" will comprise of the current procedures "inward processing," "outward processing" and "processing under customs control." As a rule of thumb, it can be said that the procedures of the new UCC will offer the same facilities as the procedures of the CCC.

In the new UCC, compliance is key. Most simplifications, exemptions and authorizations are only accessible if the importer can guarantee a sufficient level of compliance. In certain cases, these simplifications can only be obtained in case the importer has obtained the status of trusted party, or "Authorized Economic Operator" (AEO; see Section 20.7). It is important to note that when assessing the compliance track record of an importer under the UCC, its compliance track record with regard to other taxes, such as corporate tax and VAT, will also be taken into consideration. It should also be noted that under the UCC, it pays to be in control: if an importer discovers a situation of non-compliance before the customs authorities do, the customs debt associated with this situation will, in principle, go extinct, if measures are taken to regularize the situation.

21.1 Bringing goods into free circulation

21.1.1 General procedure

If goods are brought into the customs territory of the EU, a declaration must be lodged with the customs authorities in the place of entry into the EU. If the goods are released for free circulation, the import duties and other levies and taxes (if applicable) will become due, unless an exemption applies. In principle, the declarant (i.e., the person in whose name the declaration is filed) is the customs debtor. Under certain conditions, it is possible to file a customs declaration in the name and/or on behalf of another person. For customs purposes, it is not required that the declarant or the represented person holds the title to the imported goods.

The importer of record for customs duty purposes (i.e., the declarant) must be established in the EU. If the designated declarant is not established in the EU, another person must act as declarant on its behalf. In the Netherlands, it is also possible to have an importer of record for VAT purposes that is not the importer of record for customs duty purposes. This makes it possible that the non-EU based entity, although represented for customs duty purposes, does account for VAT on importation (see further Section 20.8).

21.1.2 Customs value and applicable customs rate

Import duties are calculated based on the customs value of the goods multiplied by the applicable tariff rate. The applicable tariff rate depends on the customs classification and the (preferential) origin of the goods. For certain products, the levying of import duties is suspended. Also, a reduced or even a zero-percent duty rate may be applicable in case of specific processing of certain products (so-called 'end use').

In order to determine the customs value of goods imported into free circulation, several methods can be used, which have to be applied in sequential order. This means that one is allowed to use only a subsequent customs valuation method if the previous method cannot be applied. The first and most common valuation method is the transaction value of the goods. In this respect, the transaction value is defined as the price actually paid or payable for the goods when sold for export to the customs territory of the EU. It is noted that certain additions or deductions to the customs value used may have to be made depending on the circumstances of the case at hand. Although under the CCC, Dutch customs allows the use of the "first sale for export" as basis for the customs value, this will no longer be the case under the UCC. Under the "first sale for export," an earlier transaction in a chain of transactions can be used, usually resulting in a lower taxable base. Under the UCC, the last sale will have to be used. In order to facilitate the change to the UCC, the provisions of the latter regulation foresee in transitional measures, which make it possible to keep on using the "first sale for export" under certain strict conditions during a transitional period. In general, for valuation purposes, a ruling can be obtained from the Dutch customs authorities. This ruling is, however, valid only in the Netherlands.

The tariff classification number determines the customs duty rate assessed on the importation, whether the goods are eligible for special duty privileges and whether these are subject to import restrictions (e.g., quota, anti-dumping or countervailing duties, or specific licenses). Customs classification in the EU is based on the Combined Nomenclature, which, in turn, is based on the Harmonized System ("H-S"). The H-S has currently been applied by 207 countries and jurisdictions around the world. This means that the classification in these countries should be the same as in all these countries on a six-digit level. Since the applicable tariff duty rate depends on the customs classification, failure to correctly classify imported articles can result in post-clearance recovery of import duties and, in a worst-case scenario, in fines or penalties becoming due.

Binding Tariff Information ("BTI") can be obtained in order to obtain legal certainty regarding customs classification. Under the UCC, these BTIs will be valid in all EU member states for a period of up to three years. During this period, however, BTIs can be revoked. Nonetheless, this, in principle, will not affect prior and pending imports. BTIs issued by the customs authorities in different EU member states are an import tool to take into consideration when classifying products for customs classification purposes. A BTI by the authorities of any of the EU member states is collected in an EU database. This database can be accessed through this link: (http://ec.europa.eu/taxation_customs/dds2/ebti/ebti_consultation.jsp?Lang=en). Although this database is a useful tool to assess the customs classification of products, it should be noted that importers cannot as such rely on BTIs issued to other importers. BTIs present legal certainty with regard to the customs classification of the products described in the BTI only to the holder of that BTI.

Establishing the origin of the products is relevant because it determines whether goods are eligible for customs duty preferences ('preferential origin') and if they are subject to import restrictions such as embargoes, quotas, anti-dumping or countervailing duties, etc., ('non-preferential origin' or 'economic origin'). The country of origin may be defined as the country where the imported products were grown, manufactured or produced. While this may appear to be a simple concept, the rules related to country of origin are diverse and often complex. In order to obtain legal

certainty with respect to the (preferential) origin, it is possible to obtain Binding Origin Information ("BOI"). This information is comparable to BTIs. Unlike with BTIs, however, there is no database that the public could access to find BOIs issued by the authorities of different EU member states.

21.2 Use of customs procedures

In order to defer or prevent payment of import duties, goods brought into the customs territory of the EU can be kept under customs bond by placing them under a customs procedure. Depending on the procedure used, the goods can be stored (see Section 20.3), transferred (see Section 20.4), processed (see Section 20.5) or re-exported. For the use of certain procedures, a license may be required. In all situations, a guarantee must be put up for the full amount of the customs debt that can become due. In case the holder of the procedure is AEO certified (see Section 20.7), the amount of the guarantee may be reduced to 30 percent of the customs debt.

If goods are sold while placed under a customs procedure, this may trigger a VAT-taxable event. However, if such a transaction takes place in the Netherlands, this supply for VAT purposes will usually be subject to a 0-percent VAT rate.

21.3 Customs warehouses

One of these customs procedures is the storing of goods in a customs-bonded warehouse. Importers can use the customs warehouses of third-party logistical service providers, taking away the need to set-up such a facility individually. Using the customs transit procedure, it is possible to transfer goods under deferral of import duties between two places in the EU, including customs warehouses.

A customs warehouse is a designated location, such as a tank, building or silo, in which non-community goods (also called "T-1 goods") can be stored. Operating such a warehouse requires an inventory system authorized by and subject to the control of the customs authorities. Only upon the removal of the goods from the customs warehouse will the applicable import duties, VAT and, in as far as applicable, excise duties become due,

unless the goods are placed under a subsequent customs procedure.

It is noted that customs warehousing arrangements allow only the storage of goods. If approved by the customs authorities, certain usual activities are allowed with regard to the goods. These usual activities include actions to ensure the reasonable condition of the goods during storage and actions that prepare the goods for further distribution (e.g., repackaging). It is, however, not allowed to actively process or alter the goods while these are stored under customs warehouse arrangements. However, such processing is possible using the customs procedure processing (see Section 20.5).

21.4 Customs bonded transport

Goods under customs bond can be transported through the customs territory of the EU (so-called 'external Union transit' or 'T-1 transit'). As a result of the transport under customs bond, no customs duties and import VAT have to be paid when the goods physically cross a border (see also in this respect Section 19.1.4, regarding Intra-community acquisitions). It should, however, be proved that all goods transported under customs bond are also declared to customs authorities upon the arrival of goods. If not, customs duties may become due as a result of irregularities while these goods are in transit.

In certain situations and subject to restrictions set in the required license, the procedures foresee the possibility to 'transfer' goods to another location, without having to be placed under the procedure 'external Union transit.' For instance, this can be the case if goods are moved to another storage location of a customs warehouse.

The use of the procedure 'internal Union transit' (or 'T-2 transit') is reserved for the transportation of goods with the customs status of Union goods between two places in the customs territory, via the territory of a third country. An example of this is the transportation of goods in free circulation from Germany (EU), via Switzerland (non-EU), to Italy (EU). The procedure is also used to consign goods to the parts of the EU customs territory that do not belong to the VAT territory of (one of) the EU (member states). An example of this is the Channel Islands. These islands are part of the customs territory of the EU, but are not part of the VAT territory.

21.5 Processing

21.5.1 Inward Processing Relief (IPR)

Under the so-called IPR, goods like raw materials or semi-manufactured goods can be imported into the EU to be processed for re-export without import duties and VAT on the importation of the goods. Strict (administrative) requirements, including the so-called 'economic conditions,' have to be met in order for the relief to be granted.

Not only can the processed goods be re-exported without being subject to import duties in the EU, it is also possible to bring the goods into free circulation on the basis of the processed goods, rather than on the basis of the unprocessed goods that entered the customs territory. This regime, which under the CCC is referred to as 'processing under customs control' (PCC), can be advantageous in case the imported unprocessed goods are subject to a higher duty rate than the processed goods. For instance, this is the case with a number of pharmaceutical products, which, as a finished product, are subject to a 0 percent import duty rate, while the active pharmaceutical ingredient is usually classified as a chemical and, thus, is subject to a duty rate of up to 6.5 percent.

21.5.2 Outward Processing Relief (OPR)

Under this customs relief, goods that are already in free circulation of the EU can be exported for processing in a third country (i.e., outside the customs territory of the EU). Upon return of the processed goods to EU, a full or partial exemption for customs duties will then be granted. The advantage is that less import duties (or none at all) will have to be paid on the import of the treated goods. Again, several administrative requirements have to be met in order for OPR to be granted.

21.6 Specific use

21.6.1 Temporary admission

Subject to certain restrictions, goods can enter the customs territory of the EU temporarily, without import duties becoming due. The term of the admission, as well as the use of the goods that is authorized under the procedure of temporary admission, depends on the nature and the use of the goods involved. A similar exemption can be applied for VAT purposes. When the term for the use expires, the goods must be placed under a subsequent customs procedure, including re-exportation or bringing of the goods into free circulation.

21.6.2 End use

For products that are, for instance, in short supply in the EU, the applicable import duties are suspended for a definite of indefinite period of time. In certain cases, this suspension only relates to specific use of the goods. In that case, the importer can apply for a so-called 'End Use' license on the basis of which, the suspension can be claimed for products that are used for that specific use. It is possible to transfer the goods to another license holder.

21.7 Authorized economic operator ("AEO")

In order to facilitate international trade and enhance security, EU regulations now provide for the so-called 'Authorized economic operator' (AEO) concept. The AEO-certified operators benefit from more lenient administrative requirements in respect of the import and export of goods from the EU. In order to qualify as an AEO, a trader has to demonstrate compliance with solid security criteria and controls as set by the EU regulations. AEO-certified operators are listed in the EU commission database, which can be accessed through this link: (http://ec.europa.eu/taxation_customs/dds2/eos/eos_home.jsp?Lang=en).

AEO-certified operators may also benefit from simplifications in the customs procedures and from facilitation with regard to customs controls relating to safety and security. Secure AEO-certified operators may further be informed in advance that their consignment has been selected for controls and will get priority treatment for these controls. Other benefits to which AEO-certified operators are entitled include a reduction of the amounts of mandatory guarantees, being allowed to submit less data to customs authorities and being subject to fewer controls as they are considered secure partners by customs and as their compliance and reliability would have been thoroughly checked when the AEO Certificate is issued.

There is no legal obligation to become recognized as an AEO, although being recognized as such may constitute an added value for the operator, as the recognition demonstrates compliance with solid security criteria and controls. This will provide a competitive advantage to participating companies.

21.8 VAT and excises

On importation of goods, not only import duties are levied, but also VAT on importation and (if applicable) excises.

21.8.1 VAT on importation and on exportation

In principle, VAT on importation becomes due at the actual moment of importing the goods. If the levying of import duties is deferred by means of placing the goods under a customs procedure, the levying of VAT on importation is also deferred. When the goods are brought into free circulation, VAT on importation is calculated over the taxable base. This is the customs value (see Section 20.1.2) to which certain amounts are added. Provided that certain conditions are met, an import license can be obtained. As a result of which, the import VAT can be reported through the periodic VAT return, rather than actual payment upon the moment of physical importation. This license (the so-called “Article 23 deferment license”) can thus create a cash-flow advantage, since in the same VAT return in which the VAT on importation is declared, also the same amount can be deducted as input VAT, if the importer is entitled to a full deduction of input VAT.

In case the goods are placed under a customs procedure (see Section 20.2), the supply of such goods is considered a taxable event for VAT purposes. However, in case of such, a supply of goods in the Netherlands is subject to a zero-rate for VAT purposes.

If the goods, after being brought into free circulation, are relegated to a consignee in another EU member state, VAT compliance formalities must be taken into consideration. Although no import duties will become due in the EU member state of the consignee, a so-called Intra-Community Transaction (ICT) will take place. This consists of a VAT-taxable Intra-Community Supply (ICS) in the EU member state of dispatch subject to a 0-percent VAT rate, followed by a VAT-taxable Intra-Community Acquisition (ICA) in the EU member state of the arrival of the goods. The consignee then self-charges the ICA VAT. If the consignee is a VAT entrepreneur entitled to a full deduction of input VAT, it can deduct in the same VAT return. These formalities result in the goods leaving the EU member state of the consignor without being cleared of any VAT, but being subject to the levying of VAT in the EU member state of arrival (see also Section 19.1.6).

If goods are sold for export to consignees in non-EU countries, the 0 percent VAT rate for export can be applied to the supply of these goods. The application of this 0-percent VAT rate is subject to the requirement that the supplier must be able to prove that the goods supplied are exported out of the EU. The export declaration filed for these goods plays an important part in this respect.

21.8.2 Excise duties

Excises are levied with respect to the (deemed) consumption of alcoholic beverages, tobacco products and energy products (e.g., mineral oils). The deferral of import duties also results in the deferral of excise duties being levied. Under certain conditions, goods may be brought into free circulation for customs duty purposes, but at the same time, kept under deferment of VAT and/or excise duties.

On importation, excise goods can also be brought into free circulation for excise purposes. As a result of which, excise duties become due as well. However, under certain circumstances, the levying of excise goods can also be deferred. In that case, the excise goods remain under customs supervision using special excise-bonded arrangements.

In principle, levying of excises takes place in the EU member state where the goods are used or consumed. Excise goods that are not transferred using a deferral arrangement are, in principle, subject to Dutch excise upon importation in the Netherlands. However, in the event that the excise goods are shipped to another EU member state or exported out of the EU after importation, the Dutch excise duties paid earlier can be refunded after the excise duties have been paid in the member state upon arrival thereof (and after showing proof of that payment to Dutch authorities) or the excise goods have been exported out of the EU.

22

Investment Incentives

The Dutch government and the authorities of the EU grant incentives to encourage investment in new business activities, expansion of existing activities, R&D in respect of new technologies and investment in regions with weaker economic structure. The incentives may take the form of financing credits or subsidies. Incentive schemes, conditions for awarding subsidies and budgets are often amended, but professional guidance will help you discover the variety of funds and the beneficial opportunities offered by the EU organizations, state governments and local authorities.

The anthology of subsidies described below offers an impression of the variety of funds available. It is always worthwhile to verify subsidy opportunities before making investments and when exporting to foreign countries. Our office has up-to-date information and contacts with competent authorities and can offer you effective and sound advice.

22.1 Tax incentives

Several tax facilities are granted. First of all, tax relief is granted in the form of random depreciation for specific investments (*Willekeurige afschrijving milieu-bedrijfsmiddelen* or "VAMIL"). These investments must be innovative, not commonly used in the Netherlands and contribute to a better environment. Qualifying investments are determined by the Ministry of Infrastructure and the Environment.

Second, the Energy Investment Relief (*Energie-investeringsaftrek* or "EIA") grants a one-off tax deduction of 41.5 percent (2015) of the investment cost of an energy-efficient investment. Qualifying investments are determined by the Ministry of Economic Affairs, Agriculture and Innovation. In 2015, the budget amounted to EUR106 million.

Third, depending on the nature of the investment, the Environmental Investment Deduction (*Milieu-investeringsaftrek* or “MIA”) also grants a one-off tax deduction of 36 percent, 27 percent or 13.5 percent (2015) for investments in environment-friendly assets. Qualifying investments are determined by the Ministry of Infrastructure and the Environment.

In 2012, the R&D deduction (*Research and Development Aftrek*) was introduced for the Dutch income tax. Due to this new tax regime, the taxpayer is allowed an extra deduction of 60 percent (2015) of the R&D expenses, excluding wage costs. The right to this deduction will be determined by the Ministry of Economic Affairs, Agriculture and Innovation. The process of reaching a decision on the application will take the same form as the WBSO-declaration (see under 21.4.1).

To claim EIA or MIA, a request must be filed with the proper authorities in the year the investment is made. The EIA and MIA cannot coincide. However, it is possible that the VAMIL coincides with either the EIA or MIA, resulting in a maximum tax deduction of 141.5 percent of the original investment cost in one year.

22.2 (International) investment enhancing credits

If you intend to export goods or services, it is generally advisable to contact the Netherlands Enterprise Agency (*Rijksdienst voor Ondernemend Nederland*, or “RVO”) at the Ministry of Economic Affairs, Agriculture and Innovation for information on foreign markets and export in general.

The Dutch government has several special programs for the purpose of stimulating companies’ export activities. These programs provide financial support for export transactions. A selection of the export- enhancing credits available is given below.

22.2.1 Dutch Good Growth Fund ("DGGF")

Through the DGGF, the ministry of Foreign Affairs supports SMEs that are willing to invest in emerging markets and developing countries. Sixty-eight countries have been appointed as "qualifying DGGF countries." Dutch SMEs investing in these countries or local SMEs established in these countries may qualify for financing through the fund.

Since 1 July 2014, applications may be submitted for the following issues with regard to these DGGF countries:

- Direct financing of investments in Dutch SMEs
- Financing of local SMEs via intermediary funds
- Financing/insuring exports

Please note that the DGGF is not a subsidy, but a loan that must be repaid.

22.2.2 Export Credit Insurance

The aim of the Export Credit Insurance (*Export Kredietverzekering* or EKV) is to promote Dutch exports. The Ministry of Finance provides a reinsurance facility that covers the non-payment risk of commercial export credit. Atradius Dutch State Business N.V. ("Atradius") is the insurer. Atradius does not cover the risk of non-payment on export of capital goods to certain countries due to the high risk of, for instance, nationalization, war and default. For that reason, the Ministry of Economic Affairs, Agriculture and Innovation created a lease facility for reinsurance against the risk of non-payment associated with export to those countries. The Dutch government issues a list of "high-risk countries" and the coverage possibilities for the EKV.

22.2.3 Export Credit Guarantee Facility

In addition to the EKV, the Ministry of Finance introduced a guarantee facility (Exportkredietgarantieregeling) during the credit crisis. Originally, the program would run only until 31 December 2014, but the program has been extended. The aim of the program is to stimulate market parties that finance exportation (mainly banks) to finance Export Credits. The premium for this guarantee is added to the premium for the EKV.

22.3 Innovation box: reduced CIT rate

Qualifying income that results from endeavors in the field of R&D is taxed at an effective tax rate of only 5 percent (the normal tax rate is 25 percent). Any income that is the immediate result of R&D activities undertaken for the account of the taxpayer since 2007, and in the successive years will, in principle, benefit from this reduced rate. However, at least one of the following conditions must be met:

a) One or more patents have been granted to the taxpayer and these patents are of material significance for the exploitation of the invention.
b) The taxpayer benefited from WBSO, which is further explained below, in connection with the R&D that was undertaken for the development of the invention.

The costs of R&D are immediately and fully deductible from the taxable profit and must be recovered first. The qualifying income is taxed at a 5 percent rate to the extent it exceeds the previously reported costs.

22.4 R & D

The Dutch government provides incentives for R&D projects in, for example, information, biotechnologies and environmental technologies. However, it is also possible to benefit from general R&D grants.

22.4.1 Wage withholdings facility

The WBSO is an example of an R&D general grant. The WBSO is enacted to encourage investment in R&D activities in the Netherlands. The R&D facility provides for a reduction in wage withholdings (i.e., wage tax and certain social security contributions) withheld from the salary of experts engaged in R&D in the Netherlands. This results in a decrease in R&D labor costs, which benefits the employer. The reduction for a given year is 32 percent of the wage withholdings on R&D wages up to EUR350,000.

For companies that qualify as a start-up, the percentage amounts to 40 percent. The reduction for wages in excess of EUR350,000 is 16 percent of the wage withholdings. Self-employed persons may request a reduction of EUR12,484 (2014) from their taxable profit.

First-time, self-employed persons may request an additional reduction of EUR6,245 (2014). Qualifying R&D activities are awarded a so-called R&D declaration (S&O *verklaring*) by the Ministry of Economic Affairs, Agriculture and Innovation. Such intangible assets may also benefit from the Patent/Innovation Box facility as described above.

This 2016, the WBSO budget will amount to EUR1.151 billion.

22.4.2 Innovation credit

This program was set up by the Ministry of Economic Affairs, Agriculture and Innovation in order to offer support to innovative companies in the SME sectors.

It entails an interest-bearing loan for up to 45 percent of the costs of technical development of a new product, with a maximum of EUR10 million. In the event the project fails or is aborted for commercial reasons, the loan may be released. If the project succeeds, the loan, plus interest, must be repaid within six years.

22.4.3 Integration of Research & Development benefits

On 15 September 2015, the Dutch government released its Budget 2016, containing the Tax Plan 2016, which includes an integration of the Research & Development deduction ("RDA") and the R&D Wage withholding tax deduction ("WBSO").

The background of this integration is that the RDA only results in an immediate benefit if the R&D product or service becomes profitable.

As such, the RDA will be abolished and, in addition to the R&D wage costs, R&D costs and expenditure will now also qualify for the WBSO regime, resulting in lower wage withholding taxes. The brackets of the WBSO has also been amended since 1 January 2016. The first bracket is increased from EUR250,000 to EUR350,000 and the tax benefit of this bracket will be decreased from 35 percent (2015) to 32 percent. Costs exceeding EUR350,000 will result in a tax benefit of 16 percent (2015: 14 percent).

Furthermore, two specific activities have now been excluded from the WBSO qualification beginning 1 January 2016 (i.e., (i) technical feasibility analysis of own R&D work and (ii) technical research on substantial amendments of production methods or modelling of processes).

23

Lending and Taking Security

23.1 Lending in the Netherlands

23.1.1 Current state of the Dutch lending market

Last year, the Dutch economy has shown growth after years of crisis and stagnation. The Dutch economy is expected to grow even more this 2016, with - logically - exports being the number one growth driver. Despite this positive forecast, 2016's challenges for the global economy, such as currency depreciation and downward pressure on energy prices, will remain and may affect the Dutch market.

For 2016, we expect to see a continuation of borrowers turning to alternative funding options. Investors are looking at new ways to get solid returns on investments. For instance, this is shown in the growth of funds originating from mortgage loans on behalf of institutional investors.

By diversifying the sources of funding, economic recovery should be supported. The intense competition between alternative lenders and banks has resulted in various financial products being offered to borrowers, including senior-only structures, mezzanine, unitranche and several combinations of these products. Dutch borrowers expect their use of funding sourced from insurance companies, pension funds and other non-banks to increase over the next years. Banks will play a significant role as intermediaries assisting with the arrangement of alternative credit funding.

23.1.2 Trends

Unitranche financing

In 2016, an increase in deal activity in the acquisition finance sector is expected. The strong competition between banks and alternative lenders has led to product differentiation. Although the concept of unitranche financing is well-known and often applied in foreign countries, such as UK, US and France, this relatively 'new' type of financing has not been used that often by Dutch investors and corporates. Yet, we expect this way of financing to gain popularity over the next few years in the Netherlands. It may particularly be interesting for private equity funds and in mid-market deals.

Unitranche is a combination of senior and subordinated debt made available by the several lenders on the basis of one contract applying one interest rate. It offers more flexibility to borrowers compared to the 'common' way of financing by means of a senior and a mezzanine debt. Contrary to the common way of financing, unitranche offers advantages, such as allowance of higher leverage, covenant-lite structures, no need for syndication and no or much lower amortization (allowing more retained cash for growth and investment).

Supply chain finance

Corporations are always searching for more efficient financing terms. An alternative way of financing the corporations' liquidity (which is seen more and more in the Dutch market) is the so-called supply chain financing or supplier financing. Buyers and suppliers join forces in obtaining preferred financing terms for both: (i) lower financing costs that improve the working capital of the supplier and (ii) longer payment terms improving the liquidity of the buyer. As a general rule, buyers want to pay their invoices as late as possible, whereas (international) suppliers want to collect payment as soon as possible. This often results in an imbalance between, for instance, a large buyer and a small supplier, where a large buyer may impose its preferred terms (such as late payment terms) on the small supplier. However, this may result in (and has often resulted in) the heaviest burden

being borne by the weakest supply chain party. Consequently, strong buyers were confronted with defaulting and bankrupt suppliers, as those suppliers could no longer bear their financing costs while satisfying their clients' demands.

Various Dutch banks have established a supply chain finance program under which: (i) the buyer can get a postponed payment term maturity date and (ii) the supplier can get paid in advance with a (relatively small) discount. The program is initiated by the buyer (in many cases, the stronger party). On the basis of the buyer's risk profile, the bank determines the discount per day that it will charge for prepaying the invoiced amount to the supplier. As a result, the financing terms borne by the weaker supplier are based on the profile and creditworthiness of the stronger buyer. The bank acts as a (reverse) factor or as a (pre)payment agent, depending on the mechanics of the program, and receives a fee for its services.

Real estate finance

Last year, we have seen an increase in the number and size of many real estate financing transactions and we expect a further increase in the coming years, particularly in the residential, hotel, logistics and student accommodation sector, where office refurbishment and relocation still offer many opportunities. The current favorable financing market for real estate is especially enhanced by the low interest rate that is offered by German banks and alternative investors such as pension funds and insurance companies.

Sanctions in loan documentation

As a result of the increased sanctions legalization, specific sanctions provisions are more frequently included in the loan agreements. Recommended form documentation, such as LMA, already contains certain standard undertakings and representations on compliance with rules and regulations. However, these standard provisions are generally not considered to be sufficient, since: (i) these relate only to laws that the borrowers are "subject to" while many sanctions regimes do not apply to such borrower and (ii) these contain materiality thresholds - while such materiality threshold is not appropriate in respect of a breach of sanction legislation.

Nonetheless, there remains no market standard for the relevant sanction provisions to be included in loan documentation, and provisions will need to be specifically negotiated in each deal. Key points for discussions are the scope and the extent of the sanctions provisions to be included.

Another point for discussions is whether or not a breach of any sanctions provisions would constitute an event of default. While obligors argue that it should only trigger the mandatory prepayment of the loan to avoid any cross-defaults, lenders consider such breach as very serious and damaging and, therefore, will consider such breach as an event of default.

Recalibration of Dutch insolvency laws

The Dutch Bankruptcy Code ("Bankruptcy Code") is being renewed by improving the reorganizational abilities of enterprises. This change is not expected to adversely affect the position of (secured) lenders, but it may be of interest to lenders in the Dutch market where it relates to two topics: (i) pre-pack and (ii) compulsory settlement.

As part of the recalibration, the Bankruptcy Code is to provide a legal basis for a so-called pre-pack. Pre-pack refers to a preparatory construction whereby the relevant court - at the debtor's request - informally appoints the envisaged receiver (*curator*) and supervisory judge (*rechter-commissaris*) prior to any formal insolvency to enable the debtor to make preparations for its bankruptcy under the supervision of such receiver and supervisory judge at relative ease. Over the last few years, the Dutch market has seen several restructurings whereby a pre-pack was applied in restructuring and the sale of assets prior to insolvency, in order to enable a sale immediately following a formal insolvency. Providing a legal basis in the form of a framework for pre-pack settlements enhances legal certainty, while leaving sufficient flexibility for the market to apply the pre-pack practically.

The compulsory settlement that is going to be part of the Bankruptcy Code relates to pre-insolvency restructurings and provides for creditors or shareholders who are unreasonably hindering a restructuring of debts that is supported by the majority of the creditors or shareholders of the debtor, forcing them to cooperate with such a restructuring if a bankruptcy could

thus be prevented. To this end, creditors are to be divided into different classes. Each class can then be provided with a separate proposal for settlement. If the majority of the creditors of that class approve the proposal, it would be declared binding for all creditors in that class. As it diminishes the risk of a creditor frustrating a settlement, the introduction of the compulsory settlement improves the chances of a successful restructuring and prevents the debtor - acting under pressure - from either requesting its formal bankruptcy itself or satisfying the relevant creditor's claim(s) for payment.

23.1.3 Legal risks for lenders

Fraudulent acts (actio pauliana)

In an insolvency scenario, a receiver can nullify - by an extrajudicial statement - any legal act performed by a Dutch entity (such as the granting of (quasi-)security) under the following circumstances:

a) If the act was performed without a legal obligation to do so
b) If the act is detrimental to other creditors of the company
c) If both the debtor and the beneficiary of the act knew, or should have known, that such detriment would occur (which knowledge is rebuttable, assumed in case of certain legal acts and in the case of all legal acts performed without consideration, in each case when performed within one year prior to bankruptcy)

If no consideration is received by the debtor for the legal act performed, the beneficiary of the act is not affected by the nullification if it did not know and shouldn't have known that such detriment would occur and proves that no benefit was received by it as a result of the legal act at the time of bankruptcy.

Similarly, such legal acts may also be annulled at the request of the creditors outside insolvency, but this right is rarely invoked.

The act of satisfaction of a due claim may also be nullified, but only if it is established that: (i) the beneficiary of the payment knew that a file for bankruptcy of the debtor had already been made by the time of payment or (ii) the payment was made as a result of a consultation between the debtor and the creditor with an aim to put the creditor in a better position *vis-à-vis* other creditors.

Financial assistance

Unlike in the United Kingdom, there is no whitewash procedure available under Dutch law. A Dutch public limited liability company (*naamloze vennootschap*, "N.V.") cannot grant security, give a price guarantee or otherwise bind itself (jointly and severally or otherwise) for the purpose of an acquisition (by itself or others) of shares in its share capital. Furthermore, an N.V. cannot (for the same purpose) grant loans, unless the board of directors of the company has resolved to do so and the following other conditions exist:

a) The loan (and interest received by and any security granted to the N.V.) is made on reasonable market conform terms.
b) The equity capital (*eigen vermogen*) of the N.V. minus the amount of the loan is not less than the amount of the paid-up and called capital (*gestorte en opgevraagde deel van het kapitaal*) and any statutory reserves.
c) The creditworthiness of the N.V.'s counterparties has been carefully assessed.
d) If the loan is made for a subscription of shares in connection with an increase in the share capital for the acquisition of shares held by the N.V. in its own capital, the purchase price for the shares is reasonable.

The board resolution to grant the loan is subject to shareholder approval, which requires a qualified majority (or a 95 percent majority if [depositary receipts of] the shares are listed).

These prohibitions extend to all subsidiaries of the N.V., whether they are foreign companies or Dutch incorporated ones (including private companies with limited liability [*besloten vennootschappen*, "B.V.'s"] even though the financial assistance restrictions for transactions where a B.V. is the subject of the acquisition of shares were removed from the Dutch Civil Code in October 2012).

Corporate benefit

If a legal act is not within a company's corporate objects (*ultra vires*), the act may be nullified (by the company or its receiver in bankruptcy), if the recipient of the act knew or should have known (without investigating) that such legal act was not in the entity's corporate interest.

To determine whether a specific legal act should be regarded ultra vires, the relevant court must take all relevant circumstances into consideration (including its group relations). The courts will assess the following:

a) Whether the objects clause in the articles of association of the company allows the transaction
b) Whether the transaction is in the corporate interest of the company
c) Whether the transaction jeopardizes the continuing existence of the company

23.2 Dutch law security

23.2.1 Forms of in rem security

In the Netherlands, security is usually granted as *in rem* security in the form of: (i) a right of mortgage or (ii) a right of pledge. The appropriate form depends on the type of asset that is to be encumbered. The only other form of security under Dutch law is the financial collateral agreement, which in fact is a right of pledge when constituting a security financial collateral agreement.

Mortgage

A right of mortgage (*hypotheekrecht*) is the appropriate form of security to encumber registered goods (*registergoederen*), such as real estate and rights in relation thereto (such as rights of superficies and long leases), but also vessels and aircrafts that are registered with the Dutch public registry (*Kadaster*). A right of mortgage is granted pursuant to a notarial deed executed by a Dutch civil law notary and registration thereof at the relevant Dutch public registry. The deed is statutorily required to include (among other things): (i) a description of the encumbered asset (with registration number); (ii) a description of the secured claim(s) or facts based on which the secured claim(s) can be determined and (iii) the maximum amount for which the security is granted.

Pledge

A right of pledge (*pandrecht*) is the appropriate form of security to be used in respect of non-registered tangible assets - such as inventory, stock in trade and equipment, but also of title documents, claims to order and claims to bearer and receivables. A pledge can either be possessory or non-possessory (in the case of tangibles) and disclosed or undisclosed (in the case of receivables).

Non-possessory pledge. This is the most common type of pledge and is created by a written deed of pledge, which is either: (i) executed in the form of a notarial deed or (ii) executed as a non-notarial deed, which is more commonly used, and registered with the Dutch tax authorities (being date stamping, no actual records are being maintained). Such registration with the Dutch tax authorities is free of charge and could be completed within two weeks.

Possessory pledge. This form of pledge is created by bringing the asset in the physical possession of the pledgee or a third party as agreed between the pledgor and the pledgee. No deed is required, but claims to bearer should be endorsed. Whenever the pledgor regains control over the pledged asset, the pledge automatically terminates. This form of pledge is rarely used in practice, except for pledges over title documents in certain trade finance transactions.

Disclosed right of pledge. This form of security is created by a written (non-notarial) deed and notice of the right of pledge to the debtor. Receivables against a bank in relation to a bank account (including in respect of cash deposits administered to the bank account) are to be encumbered with a disclosed right of pledge.

Undisclosed right of pledge. An undisclosed right of pledge is to be created by a written deed of pledge, which is either: (i) executed in the form of a notarial deed or (ii) registered with the Dutch tax authorities, similarly to the non-possessory right of pledge. A claim or receivable "to order" can also be encumbered by means of an undisclosed pledge.

Financial collateral agreements. As defined as such in Directive 2002/47/EC on financial collateral arrangements (*financiëlezekerheidsovereenkomst*) (Financial Collateral Arrangements Directive), security over financial collateral (is created by way of a financial collateral agreement (*financiële-zekerheidsovereenkomst*). The Dutch regime relating to financial collateral agreements is based on the Financial Collateral Arrangements Directive. A financial collateral agreement can only be created if: (i) none of the parties is a private person (not acting in the conduct of his or her business or profession) and (ii) at least one of the parties is a regulated financial institution (such as a bank), a governmental authority, central bank or a supranational financial institution.

A financial collateral agreement can create a security interest by way of pledge or security transfer. Contrary to a "regular" right of pledge, a financial collateral agreement can provide that the security beneficiary can enforce the security by: (i) appropriating the encumbered asset(s) or (ii) setting off the value of those assets against the secured claim. When a financial collateral agreement relates to securities that are transferable by Giro transfer (see below), security should be granted in accordance with the laws of the jurisdiction where the account in which the securities are held is maintained.

Special assets

Securities that are transferable through book-entries under the Act on the Securities Giro System (*Wet giraal effectenverkeer*), such as shares, depositary receipts of shares or registered bonds, can be pledged by a book-entry in the name of the pledgee by the custodian bank. If the pledgee is also the custodian bank, then a pledge is established by an agreement between the pledgor and the custodian bank. If the securities are transferable by book-entry but not governed by the Act on the Securities Giro System, they can be pledged by a deed of pledge and notice of the pledge to the bank that maintains the bank account in the Netherlands in which the securities are held. Under Dutch law, a security interest must be granted over these securities in accordance with the law of the jurisdiction where the securities account is maintained.

Registered shares. A right of pledge over registered shares in a B.V. or an N.V. (as well as the depositary receipts of such shares) must be created by way of a notarial deed and notification thereof to the company in the capital of which the shares are being pledged.

Membership interests and partnership interests. A right of pledge over membership interests in a cooperative (*coöperatie*) or a right of pledge of partnership interests in a limited partnership (*commanditaire vennootschap*) can be created either by way of a notarial deed or a non-notarial deed, depending on the terms and conditions of the constitutional documents of the relevant entity and what is agreed between the members or the partners.

Intellectual property rights. The form of security that can be granted over intellectual property rights (i.e., registered and unregistered patents, trademarks, copyright, domain names, designs, databases) is a right of pledge, provided that such intellectual property rights have a legal basis and are capable of being transferred. A right of pledge over intellectual property rights is created by way of a non-notarial deed. In order for the right of pledge to be enforceable against third parties, the right of pledge should be registered with the same registries as the relevant intellectual property rights, those for the Netherlands being the Dutch Patent Office

(*Octrooiencentrum Nederland*) and the Benelux Office for Intellectual Property (*Benelux Bureau voor de Intellectuele Eigendom*). To the extent the intellectual property right comprises a receivable, notification of the right of pledge should be made to third parties against whom the intellectual property right is to be enforced.

No security can be granted over trade names or intellectual property rights that are "personal" (for instance, certain copyrights).

Future assets. In general, security in the form of a right of pledge can be granted over all present and future tangible movable property, financial instruments, receivables and intellectual property rights. No valid right of mortgage can be created over future registered property. The security right becomes effective if and when the pledgor becomes authorized to dispose of the (to-be) encumbered asset.

Fungible assets. Security rights can be granted over fungible assets, as long as their description makes them sufficiently identifiable. This concept may be broadly interpreted and, as such, it is common practice to use a description of an entire type of assets stored at a particular location. One should, however, be aware of the risk of commingling the encumbered assets with identical assets owned by a third party.

Assets with transfer restrictions and personal rights. No security right can be granted over contractual rights that have a (contractual) restriction with proprietary effect on transfers or establishment of security interest, or over personal rights that, by their nature, cannot be transferred, such as certain rights under limited partnership agreements and certain intellectual property rights as aforementioned.

23.2.2 Enforcement of in rem security

Outside bankruptcy

Rights of pledge and mortgage are generally either enforced by way of: (i) public sale or (ii) an alternative procedure. Security that has been created pursuant to a security financial collateral agreement can be enforced by: (i) selling the collateral (securities) on the capital markets and applying the proceeds toward the satisfaction of its secured claims; (ii) appropriating the collateral and setting off its secured claims against the value of the collateral and (iii) setting off the collateral (cash) against its secured claims. Parties can agree otherwise in the relevant financial collateral agreement.

Public sale

The Dutch Civil Code provides for various options for the security beneficiary to sell the encumbered assets. The general rule is that the assets are sold in a public auction according to local customs and applicable standard terms and conditions, which are as follows:

a) For a right of mortgage, the public sale must take place before a civil law notary.
b) For pledged assets that can be traded on a market or an exchange, the sale can take place on: (i) the market through a broker or (ii) an exchange through a qualified intermediary, according to the rules and usages applicable to an ordinary sale on that market or exchange.
c) For assets consisting of receivables, the secured creditor can enforce the right of pledge by collecting the receivables. If the receivables are not yet due and payable but can be declared due and payable by termination, the secured creditor has the right to do so.

Alternative procedure

An alternative enforcement procedure (such as a private sale to a third party or to the security beneficiary or, for pledges only, any other solution) requires the prior approval of the Dutch preliminary relief judge (*voorzieningenrechter*). This approval is discretionary, but is usually granted if the

proceeds of the private sale are anticipated to be higher than the proceeds that would have been received if the collateral were to be sold at a public auction.

With regard to a right of pledge, the pledgor and pledgee can agree on an alternative method of sale without involving the preliminary relief judge, provided such agreement is reached after the right of pledge has become enforceable. If the pledged assets are encumbered with a limited right (*beperkt recht*) or an attachment (*beslag*), the cooperation of the holder of the limited right or attachment would also be required.

When enforcing a right of pledge over shares in a private or public company with limited liability incorporated under Dutch law, the following must be observed: (i) any share transfer restrictions set out in the articles of association of the company in the capital of which the shares have been pledged will have to be observed by the enforcing pledgee and (ii) the offering of shares in the context of enforcement could be prohibited without an approved prospectus being published and may also involve the rendering of regulated investment services.

In bankruptcy

In general, there are two formal standard insolvency proceedings under Dutch law with regard to companies (not being financial institutions): (i) bankruptcy and (ii) suspension of payments. Security beneficiaries have a strong position in Dutch insolvency proceedings and can enforce their rights as if no insolvency proceedings have commenced, as the encumbered assets may be deemed as being separate from the other assets in the estate of the insolvent company.

When enforcing without involving the receiver, security beneficiaries do not contribute to the general costs and expenses of the insolvency proceeding and the proceeds of enforcement fall outside the bankruptcy. Bankruptcy proceeding with regard to assets that are part of the estate (or, with regard to pledged/mortgaged assets, proceeds realized with the involvement of the receiver) applies the following order of priority:

a) General costs and expenses of the bankruptcy proceedings themselves, including the receiver's fees (boedelschulden)
b) Secured creditors in respect of proceeds of encumbered assets, where they have not themselves taken enforcement measures – Of these, the mortgagee and pledgee rank highest.
c) Creditors with a specific privilege, particularly creditors with priority with respect to the distribution of the proceeds of a particular asset such as creditors who have incurred costs to preserve the assets
d) Creditors with a general privilege such as wages and pensions
e) General, unsecured/unprivileged/unsubordinated creditors
f) Subordinated creditors
g) Shareholders

There are a number of exceptions to this general order of distribution, as a specific privilege may rank above a pledge on a certain asset, and the Dutch tax authorities rank above the creditors with a privilege and above the holder of a non-possessory pledge over movable inventory on the debtors' premises (*fiscaal bodemvoorrecht*).

In addition to the prohibition as to fraudulent acts, as described more elaborately above, secured lenders should be aware of the following:

a) A receiver can set a "reasonable" time frame in which the mortgagee or pledgee must enforce its security, failing which the receiver may sell the encumbered assets. With regard to an undisclosed right of pledge, the Supreme Court has determined that if the pledgee has not notified the relevant debtors within 14 days of the start of the bankruptcy, the receiver can collect the relevant debts. The pledgee and mortgagee will have preferential rights with regard to the proceeds of sale, but they would have to share in the bankruptcy costs and wait for the receipt of payment until a distribution list has been made up by the receiver. The bankruptcy costs (or any share therein) may be as high as the actual sales proceeds.

b) Same as the terms in a) above, if receivables that are encumbered with an undisclosed right of pledge are paid by the debtor to the pledgor in bankruptcy proceedings, the pledgee has a preferred claim on these payments, but must share in the bankruptcy costs and wait for payment until the distribution list has been made up and payments are made by the receiver. In order to avoid this, debtors of pledged receivables should be notified of the right of pledge in time for the right of pledge to become a disclosed right of pledge. It should also be noted that, as a rule of thumb, a receiver may not, within 14 days following his or her appointment, actively seek to collect receivables that are subject to an undisclosed right of pledge in favor of a bank. As a result, a bank pledgee is advised to provide notification of any pledges within that 14 day-period to the relevant debtors or to at least notify the receiver in that period it intends to notify the relevant debtors (which would not prevent the relevant debtors from paying the bankrupt pledgor).

c) A receiver may cause the release of an encumbered assets against payment of the relevant secured obligations and any enforcement expenses of the security beneficiary.

d) The supervisory judge can declare a cooling-off period of not more than two months (which can be extended once, with an additional period of a maximum of two months), during which creditors, including secured creditors, are prevented from claiming movables that are subject to a non-possessory right of pledge from the receiver ,and no (other) enforcement action on secured assets belonging to the estate can be taken. This includes movables that are subject to a possessory right of pledge. This period allows the supervisory judge and receiver to assess the scope of the insolvent company's estate with relative ease. The supervisory judge may also apply the cooling-off period only to certain parties and, thereby, exempt pledged assets already in the possession of the pledgee. The pledgee of an undisclosed right of pledge can give notice to the relevant debtors and collect such receivables, even during the cooling-off period. The cooling-off period does not affect the secured creditor's rights under a security financial collateral agreement.

e) Legal acts performed by the insolvent company on the date of it being declared bankrupt or granted a suspension of payments lose their effect, as the declaration of bankruptcy/suspension of payments has a retroactive effect and, as such, the company has lost the authority to bind its assets as per the beginning of that day (the so-called "00.00 hours-rule"). This is especially relevant where a right of pledge is granted over future assets as mentioned above. The 00.00 hours-rule do not affect a right of pledge created pursuant to a security financial collateral agreement.

23.2.3 Release of in rem *security*

Dutch security rights are accessory rights and are therefore terminated by operation of law whenever the secured claims are satisfied or discharged. Additionally, security rights can be terminated (*opzeggen*) by written statement from the secured creditor if the security document so provides (which is usually the case), without any further formalities. Alternatively, security rights can be waived (*afstand doen van*) by an agreement between the security provider and the security beneficiary, without any further formalities other than those applicable to the creation of the security right (such as execution in the form of a notarial deed).

A mortgage release must be registered in the Dutch public land register. The release should also be notified to third parties that have been notified of the security, intellectual property registers and companies in whose capital shares are pledged.

23.2.4 Quasi-security

Quasi-security can be obtained either by the granting of personal security (*persoonlijke zekerheden*), such as guarantees, or by the implementation of structures that give a similar benefit as a security right but would not (necessarily) be characterized as such. Examples of the latter are sale and lease-back constructions and (reverse)factoring and hire purchase constructions. Title retention arrangements and set-off rights as well as certain liens, may also be considered quasi-security.

Guarantees

(Corporate) Guarantees are commonly used in the Netherlands in the form of an abstract guarantee as opposed to suretyship (*borgtocht*), and joint and several debtorship (*hoofdelijkheid*). Such an abstract or independent guarantee is a contractual undertaking of the guarantor and, as such, is brought about by freedom of contract and, thus, is enforceable in accordance with its terms. No formalities apply, but it is advisable to make explicit that the guarantee is an independent guarantee and not a suretyship or a joint and several debtorship and that if it would nonetheless be characterized as such, certain Dutch law provisions should be waived (to the extent permitted by law).

Sale and leaseback

In a typical sale and leaseback, the user/lessee of an asset sells it to a buyer/lessor, who then leases it back to the user/lessee. In a finance lease, the lease period would be equivalent to (or at least 75 percent of) the useful life of the asset and the lease installments are equal to (or at least 90 percent of) the fair value of the asset. At the end of the lease term, title to the asset transfers to the lessee or the lessee can purchase the asset at an advantageous price. In an operating lease, the term is shorter, the sum of the lease installments is lower, and there is no purchase option.

(Reverse) Factoring

In a factoring transaction, a creditor sells all or certain of its receivables to a factor at a discount, either with or without recourse to the creditor. If the receivable is satisfied by the debtor, the factor may either: (i) hold the entire amount as received or (ii) withhold an amount covering its costs and fees, and transfer the remainder to the creditor, depending on the factoring arrangements. If the receivable is not satisfied by the debtor (for instance, due to insolvency), this either remains for the account of the factor (non-recourse) or the creditor has to reimburse the factor for monies lost (with recourse). In regular factoring, one creditor sells all or certain of its receivables against (usually) a multitude of debtors to a factor. In the case of reverse factoring, a multitude of creditors sell all or certain of their

receivables against one and the same debtor to a factor. Depending on its terms, (reverse) factoring may commercially be similar to a loan secured by a pledge over the receivables.

Hire purchase

A hire purchase transaction comprises a lease with an option to purchase the asset for a nominal amount at the end of the lease term. If the lessee becomes insolvent before exercising the purchase option, the lessor remains the owner of the asset. From a commercial perspective, this is equivalent to a loan to finance the purchase price of the asset, the repayment of which is secured by a right of pledge over the asset. For hire purchase transactions with consumers, regulatory limitations apply.

Retention of title

The seller of an asset may stipulate that, although the asset is transferred to the buyer (or someone acting on behalf of the buyer), title to the asset will not transit unless and until the purchase price has been paid in full. This is commercially similar to a loan secured by a right of pledge over the asset.

Set-off

A debtor may set off its (due and payable) debts toward a counterparty against its claims toward the same, if certain conditions are met. Parties can agree to widen or restrict the scope of set-off and certain conditions are not applicable in a bankruptcy. If the debtor is a bank, the commercial outcome of exercising the right of set-off is the same as the enforcement of a financial collateral security arrangement (with monies or bank accounts as collateral) or a right of pledge over accounts held with it by the counterparty.

23.3 Structuring the priority of debts

In general, creditors are entitled to the net proceeds of the liquidation of a debtor's estate in proportion to their claims. However, a creditor and a debtor can agree that a creditor's claim will have a lower ranking in respect

of all or certain other creditors. Such a subordination of claims is common in certain types of larger finance transactions and is typically achieved by: (i) a subordination or intercreditor agreement between the various creditors and the debtor or (ii) by incorporating subordination provisions in the loan agreement. It would also be possible to have a subordination agreement between a junior creditor and a debtor with only a third-party stipulation in favor of a senior creditor, but such a stipulation may be revoked until it is accepted by the senior creditor. In addition to the actual subordination, the contractual arrangements in the subordination or intercreditor agreement may include: (i) an obligation to turn over amounts received; (ii) a restriction on enforcing claims and (iii) a power of attorney granted to the senior creditor to release the junior debt.

Instead of a contractual subordination, one may also implement a structural subordination by lending on different levels in the group structure and/or by contractually agreeing to limit recourse (to certain assets of certain group entities).

23.4 Agent and trust concepts

Recognition

Dutch law does not have a concept or doctrine identical to the concept of a trust. However, the Netherlands have ratified The Hague Convention on the Law Applicable to Trusts and on their Recognition 1985 ("**Hague Trust Convention**") and as such, any trust validly created under its governing law will be recognized by the Dutch courts, according to, and subject to the limitations of, the Act on the law applicable to trusts (*Wet conflictenrecht trusts*) ("**Trust Act**"), which implements Hague Trust Convention. However, the agency concept is recognized in the Netherlands as a contractual arrangement only. Although in theory, Dutch law will recognize certain trust relations created under other laws, the extent of this is unclear and parties do not tend to rely on a trust.

Enforcement

A foreign security trustee can enforce its rights in Dutch courts. Section 4 of the Trust Act stipulates that rules of Dutch law regarding transfer of property, security interests or protection of creditors on insolvency do not prevent recognition of the trust under Section 11 of the Hague Trust Convention.

Alternative: parallel debt

Dutch security is commonly granted to secure a security agent's claims under a mechanism by which the obligors undertake to pay to the security agent, at intervals, an amount equal to the total amounts outstanding toward the finance parties (excluding the payment obligations so undertaken toward the security agent). This security is called parallel debt, which is commonly granted due to the uncertainty under Dutch law and the discussions in Dutch legal literature whether security can be validly created in favor of a person who is not the creditor of the secured claim. By way of the parallel debt mechanism, the obligors' parallel debt corresponds with the total debt, and security is held by the security agent for its own claims, which correspond with the finance parties' claims. There is no statutory law or case law available on parallel debts and the security provided for such debts, but the mechanism is commonly accepted and applied in the Dutch market.

23.5 Debt trading and transfer mechanism

Both unsecured and secured debts are traded in the Netherlands. The transfer of a claim under Dutch law can be achieved by executing a simple transfer certificate, which must comply with the requirements for transferring claims (*cessie*) or (if obligations are to be transferred as well) for transfer of contract (*contractsoverneming*).

If all rights under a bilateral loan agreement are transferred, the security accessory to the transferred rights (as a Dutch law security will typically be) follows the transferee by operation of law.

If a participation under a syndicated loan agreement is transferred and the participation is secured by Dutch law security, buyers of the debt obtain the benefit of the related security by relying on the parallel debt structure (please see above).

24

Financial Regulations

24.1 Exchange control regulations

Pursuant to the 2003 Reporting Provisions, the so-called Special Finance Institutions (*Bijzondere Financiële Instellingen* or “SFIs”) that are incorporated or established in the Netherlands are obliged to register with the Dutch Central Bank (*De Nederlandsche Bank* or “DCB”). SFIs are resident enterprises or institutions, irrespective of their legal form, in which nonresidents hold a direct or indirect participating interest through a shareholding or otherwise, and whose objective is - or whose business consists, to a major extent, of – receiving funds from nonresidents and channeling them to nonresidents. Examples of SFIs are the following:

- Holding companies of (mainly) foreign companies
- Finance companies that typically extend loans to foreign group companies and are themselves financed mainly from abroad
- Royalty companies, film and music rights companies that receive royalties mainly from abroad
- Re-invoicing companies that are mainly invoiced by foreign entities and invoice other foreign entities
- Operational lease companies that typically lease durables to foreign customers
- Special Purpose Vehicles (“SPVs”) created by foreign originators whose balance sheets almost exclusively contain foreign assets and foreign liabilities

An SFI must notify the DCB within three weeks after its incorporation in order for the DCB to assess whether monthly and yearly or bi-yearly reporting obligation should be imposed. Such reporting obligation is set out in the 1994 Foreign Financial Relations Act (*Wet financiële betrek-*

kingen buitenland 1994) and the 2003 Reporting Provisions (*Rapportage-voorschriften betalingsbalansrapportages 2003*).

If a reporting obligation is imposed, the company has to file reports with the DCB for the benefit of the DCB's composition of the balance of payments for the Netherlands. The imposition of a reporting obligation by the DCB is based on certain criteria (e.g., international payment volume and amount of foreign assets and liabilities).

The DCB has established certain specific institution profiles such as pension funds, central securities depositaries and undertakings for collective investment. The nature of the foreign payment information to be provided to the DCB by a resident designated as a reporting entity depends on the category of institution to which such resident belongs.

24.2 Regulated financial activities

The Act on Financial Supervision (Wft or the "AFS") - including related lower regulations and decrees - and European directives and regulations encompass practically all the rules and conditions that apply to: (i) Dutch financial undertakings; (ii) financial undertakings that provide financial services in the Netherlands through a Dutch branch office and (iii) financial undertakings that provide financial services in the Netherlands on a cross-border basis.

Under the AFS, a distinction is made between: (i) prudential supervision, which is conducted by the DCB, and (ii) conduct of business supervision, which is done by the Dutch Authority for the Financial Markets (AFM). We set out in this section a high-level overview of the main activities regulated under the AFS. Please note that this description is non-exhaustive and we'd be happy to provide you with more specific information at your request.

24.2.1 Banking activities

The AFS prohibits the use of the word "bank" in a company or trade name, unless such company is a licensed bank under the AFS or in another member state of the EEA.

The AFS prohibits anyone from attracting, obtaining or having at its disposal repayable funds in the Netherlands in the pursuit of a business from the public. Please note that until a European definition of "the public" will be given, the Dutch legislator will interpret this as beyond a restricted circle (*besloten kring*) from parties other than the so-called professional market parties (*professionele marktpartijen*).

Any party undertaking this activity, combined with the granting of loans for its own account in the Netherlands, qualifies as a "bank" and must obtain a banking license with the European Central Bank ("ECB") or, if such bank has its statutory seat outside of Europe, with DCB, except where a general exemption applies. Either ECB or DCB may also grant an individual dispensation in exceptional cases.

Attracting, obtaining or having at its disposal repayable funds

As set out above, it is prohibited for anyone to attract, obtain or have at its disposal repayable funds beyond a restricted circle (besloten kring) in the Netherlands in the pursuit of a business from other parties other than the so-called professional market parties (professionele marktpartijen).

Under the AFS, any funds that must be repaid, for whatever legal reason, qualify as "repayable funds," provided that it is clear beforehand what the nominal repayable amount is and in what manner any applicable compensation, such as interest, is to be calculated.[9] The definition of "repayable funds" could entail more than just the borrowing of funds. For instance, it is possible that monetary obligations created in the context of complex financing structures (which do not necessarily entail an obligation to repay borrowed money) may nevertheless be considered to qualify as obtaining "repayable funds" within the meaning of the AFS. Similarly, taking into account the wide scope of the term "bank" under the AFS, certain finance companies may also qualify as "banks" within the meaning of the AFS.

As mentioned above, the prohibition does not apply if the activity takes

9 Note that shares must not be regarded as "repayable funds," as there is no upfront obligation to repay the nominal amount.

place within a restricted circle. A restricted circle is defined in the AFS as a circle composed of persons or companies from which a person or company obtains the disposal of repayable funds and which meets the following criteria:

- It is accurately defined.
- The joining criteria of the circle have been defined in advance, are verifiable and do not facilitate entry for persons or companies that do not belong to the circle.
- The members of the circle already have a legal relationship with the person or company obtaining the repayable funds and at that time they can, in all reasonableness, be aware of its financial position.

In most instances, finance companies operating exclusively within a group of companies (i.e., obtaining repayable funds in the Netherlands within a “restricted circle” of legal persons or entities) do not qualify as “banks.” Therefore, they are likely to be exempt from the aforesaid requirements of the AFS if certain conditions are met. Such exemption may typically be available for an intragroup cash-pooling structure.

Pursuant to the AFS, “professional market parties” include, inter alia, licensed financial undertakings, (such as banks, investment firms and undertakings for collective investment), and certain large corporations.

The Banking Directive has introduced a scheme of mutual recognition of licenses granted to banks within the EEA. If a license is granted to a bank within the EEA, such license can be “passported” to the Netherlands or any other country within the EEA. To passport such license, the supervisory authority of the country in which the license was granted must notify the DCB. Subject to the fulfillment of the relevant notification requirements, such bank may provide services in the Netherlands either through branch offices in the Netherlands or on a cross-border basis. A bank that has successfully passported its license to the Netherlands is not under an obligation to apply for a Dutch banking license for the provision of banking activities in the Netherlands.

The ECB closely supervises the administration, liquidity and solvency of all banks established in the EEA.

Dutch banks are generally involved in a wide range of financial activities, including (but not limited to):

- Granting loans
- Effecting domestic and international money transfers
- Providing payment services
- Exchanging foreign currency
- Brokering publicly listed securities
- Acting as a listing agent and underwriter in the context of an application for admission to trading on NYSE Euronext Amsterdam N.V.

The AFS also regulates the activities of the so-called “financial institutions” (*financiële instellingen*) in the Netherlands, which particularly refer to companies whose main business is to perform one or more of the activities listed in Appendix I of the (Revised) Capital Requirements Directive 2013/36/EU[10] or that acquire or hold participating interests, but which do not qualify as a “bank” as they do not attract, obtain or have repayable funds at their disposal (as described above). Nonetheless, such companies may generally be under a different license obligation. The type of license may vary, depending on the characteristics of the activities.

EEA-based financial institutions that are granted a license by the super-

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10 These include the following activities: (i) lending; (ii) financial leasing; (iii) provision of payment services (e.g., services enabling cash to be placed on a payment account, services enabling cash to be withdrawn from a payment account, execution of payment transaction, money remittance and issuing payment instruments); (iv) issuing and administering means of payment (e.g., credit cards, travelers' checks and bank drafts); (v) guarantees and commitments; (vi) trading for own account or for account of customers in: (a) money market instruments (checks, bills of exchange, certificates of deposit and similar instruments); (b) foreign exchange; (c) financial futures and options; (d) exchange and interest-rate instruments and (e) transferable securities; (vii) participation in securities issues and the provision of services related to such issues; (viii) advice to undertakings on capital structure, industrial strategy and related questions and advice, as well as services relating to mergers and the purchase of undertakings; (ix) money broking; (x) portfolio management and advice; (xi) safekeeping and administration of securities and (xii) issuing electronic money.

visory authorities in their home state in respect of certain services may rely on such license for the provision of the same services in the Netherlands (either via a branch office or on a cross-border basis), subject to prior notification to the DCB.

24.2.2 Offering and admission to trading of securities

Pursuant to the AFS, it is prohibited to offer securities[11] to the public in the Netherlands or to have securities admitted to trading on a regulated market[12] situated or operating in the Netherlands, unless a prospectus is drafted in accordance with Prospectus Directive 2003/71/EC (*the Prospectus Directive*).

Prior to such offering of securities or admission to trading, a prospectus must be approved by the AFM or by the relevant competent EEA supervisory authority. If a prospectus has already been approved by the competent supervisory authority of an EEA country, a notification by the supervisory authority to the AFM is sufficient for the issuer to be allowed to offer the securities in the Netherlands.

The AFS and related regulations pursuant to the AFS contain exemptions from the prospectus requirement pertaining to, *inter alia*, the following:

- Offerings of securities within the EEA with a total consideration of less than EUR2.5 million, which amount must be calculated over a period of 12 months
- Offerings targeting exclusively "qualified investors" (*gekwalificeerde beleggers*);
- Offerings to less than 150 (legal) persons in the Netherlands who are not "qualified investors"
- Offerings of securities with a minimum consideration per investor/ minimum denomination per security of EUR100,000

11 Securities are: (i) negotiable shares or other negotiable securities or rights equivalent to negotiable shares; (ii) negotiable bonds or other forms of negotiable debt instrument or (iii) other negotiable securities issued by a legal person, company or institution through which securities meant under (i) or (ii) may be acquired by the performance of the rights pertaining thereto or by conversion or giving rise to money settlement.

12 Within the meaning of the Markets on Financial Instruments Directive 2004/39/EC.

A peculiarity under Dutch law is the inclusion of a prescribed warning sign in the event of certain exemptions to the prospectus obligation. Such warning sign is to be included in all commercial expressions and other documents relating to the offer of the securities. Specific apply to the location and sizing of the sign.

24.2.3 Public takeover offer

The public takeover offer process for an offer on the issued and outstanding securities of a public company, whose securities are admitted to trading on a regulated market in the Netherlands ("Public Company"), is subject to the statutory rules set out in the AFS and its subordinate regulations.

Announcement of a friendly public takeover offer

If a person or entity wishes to make a friendly offer on the securities of a Public Company, the public takeover offer process begins with the announcement of the intention of such person or entity to make such an offer. This will usually be in the form of a press release. Such press release would state that the parties (i.e., the offeror and the target company) have reached a 'conditional or unconditional agreement.' The announcement of the intention to make a public takeover offer will trigger, among other things, statutory rules relating to the timing of the offer.

Approval of offer document

Pursuant to the AFS, it is prohibited to make an offer for securities of a Public Company unless an offer document has been made publicly available by the offeror prior to launching such offer. This offer document must meet certain specific criteria and must be approved by the AFM or by the competent supervisory authority of another EEA country prior to the publication thereof. The AFM (or, if applicable, the competent supervisory authority of another EEA country) will assess whether the offer document contains all required information for a reasonably informed person to form a well-considered opinion on the offer. It usually takes one or two months for the AFM to approve an offer document.

The "put up or shut up" rule

The "put up or shut up" rule is legally enshrined in Dutch law. According to the "put up or shut up" rule, the target company can request the AFM to demand that the potential offeror clearly clarifies its intentions regarding a possible public takeover offer by publishing - within six weeks - either: (i) a "put up" statement, which is a public takeover offer announcement as described above, or (ii) a "shut up" statement, which is a public announcement stating that the potential offeror has no intention to launch a public takeover offer. This rule aims to prevent a potential takeover offer from negatively affecting a target company in a situation where it remains unclear whether a potential offeror will make a public takeover offer on a target company. In the event that the potential offeror has been requested by the AFM to announce that it has no intention to launch a public takeover offer, the offeror will not be permitted to announce or launch a public takeover offer for a period of six or nine months.

Mandatory takeover offer

Pursuant to Dutch law, the person or entity that acquires "predominant control" in a Dutch Public Company is obligated to launch a public takeover offer on all the issued and outstanding securities of such Public Company. "Predominant control" is deemed to occur when such acquiring person or entity is able to exercise 30 percent or more of the voting rights in the general meeting of shareholders of the Public Company. The obligation to launch a public takeover offer will also apply to persons or entities that acquire predominant control while acting in concert, together with other persons or entities.

Undertakings

In the event of a friendly takeover offer, the management board of the target company may require that the offeror agrees to a number of undertakings, such as a nondisclosure agreement/standstill provision and fairness opinion.

Nondisclosure agreement/standstill provision

It is common market practice that the target company will require that the offeror enter into a nondisclosure agreement containing a standstill provision ("NDA") prior to entering into the negotiations on the terms and conditions of the public takeover offer. This NDA will usually prohibit the offeror to launch the public takeover offer without the approval of the management board of the target company. Furthermore, the NDA will also prohibit the offeror from: (i) trading in shares of the target company; (ii) disclosing any (inside) information it has obtained from the target company to third parties and (iii) recommend third parties to trade in shares of the target company.

Fairness opinion

A fairness opinion is an opinion issued by a third party, usually an investment bank, on whether the terms of the public takeover offer are fair for the shareholders of the target company from a financial perspective. Although a fairness opinion is not required under Dutch law, it is common market practice that such opinion will be issued at the request of the target company.

24.2.4 Market abuse

The AFS contains various rules that aim to prevent market abuse, and such rules pertain to inside information and the disclosure thereof, as well as tipping and (other forms of) market manipulation. The provisions aim to promote the integrity of the financial markets and to create a level playing field on these markets.

Inside information

As a general rule, Dutch law prohibits any person from conducting or effecting a transaction in securities with the use of inside information. Inside information is "awareness of specific information that relates directly or indirectly to an issuer to which the securities pertain or to the trade in those securities that has not been publicly disclosed and which, if disclosed, could have a significant influence on the price of the securities or on the price of securities derived therefrom."

A typical example of inside information is the (not public) knowledge that a public bid will be launched.

We note that executing one's own intention (e.g., buying securities by an offeror prior to launching a public offer) is not considered prohibited use of inside information.

Disclosure of inside information and tipping

As a general rule, Dutch law prohibits any person to disclose to a third party data to which the inside information relates, other than in the course of its normal duties, profession or position. This prohibition is rather strict and the exemptions of communication in the course of normal duties, profession or position are very limited.

Furthermore, Dutch law prohibits recommending or inducing a third party to conduct or effect transactions in certain financial instruments (the so-called tipping prohibition).

Market manipulation

The prohibition of market manipulation applies to everyone. There are four categories of market manipulation and these are as follows:

a) Conducting or effecting a transaction or order to trade in financial instruments that gives, or is likely to give, a false or misleading signal as to the supply of, demand for, or price of financial instruments
b) Conducting or effecting a transaction or order to trade in financial instruments to secure the price of financial instruments at an abnormal or artificial level
c) Conducting or effecting a transaction or order to trade in financial instruments that employ deception or fraud
d) Dissemination of information that gives, or is likely to give, false or misleading signals as to the supply of, demand for, or the price of financial instruments, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading

The scope of the prohibition is very broadly formulated.

In addition, it is prohibited to: (i) provide or disseminate false or misleading information in relation to the calculation of a benchmark, where the person who provided or disseminated the information knew or reasonably ought to have known that it was false or misleading, or (ii) manipulate, or even to just attempt to manipulate, the calculation of a benchmark in any other way and attempt to provide or to disseminate such in false or misleading information.

If a party violates rules on the prevention of market abuse, administrative law or criminal law sanctions may be imposed. The AFM may impose an administrative penalty or it may refer the case to the Public Prosecution Service (*Openbaar Ministerie*). There is a wide variety of administrative sanctions that the AFM has at its disposal. Accordingly, the sanctions that will be imposed depend on the specific circumstances of violation of the law. A penalty for violation of insider trading rules may amount to EUR4 million per violation. In addition, sanctions imposed by the AFM will (almost always) be published.

24.2.5 Major holdings disclosure

The AFS contains reporting requirements in respect of major holdings in Dutch public companies (N.V.) or legal persons, which are incorporated under the law of a non-EEA country and whose shares are listed on an EEA-regulated market (*Issuing Institutions*).

These requirements include the following:

a) Reporting requirements applicable to Issuing Institutions themselves in respect of their issued share capital (e.g., reporting requirements for each change of 1 percent in issued share capital or more when compared with the issued share capital at the time of the previous notification)
b) Initial and ongoing reporting requirements for managing directors and supervisory directors of Dutch Issuing Institutions in respect of their voting rights and participating interest in both the Issuing Institution and the "related Issuing Institutions"

c) Ongoing reporting requirements for shareholders and other persons holding a right to vote at the shareholders' meeting of an Issuing Institution

Below is an overview of the reporting requirements covered under (c) above.

Pursuant to the AFS, any person or entity acquiring or losing control over shares in the issued capital of an Issuing Institution, or of voting rights in respect of an Issuing Institution, must report such change to the AFM if it leads to a transgression of one of the thresholds laid down in the AFS. The following thresholds are currently applicable: 3 percent, 5 percent, 10 percent, 15 percent, 20 percent, 25 percent, 30 percent, 40 percent, 50 percent, 60 percent, 75 percent and 95 percent. The reporting requirements are applicable to changes in both the participating interest held (i.e., shares) and the total number of votes a person is entitled to cast at the general meeting of shareholders of an Issuing Institution.

The AFS contains a detailed regime for determining what entity is obliged to report the relevant participating interests and/or total votes held, and how these must be calculated. For example, a parent company is deemed to hold both the participating interests and the voting rights held by its subsidiaries; a subsidiary is deemed not to hold any participating interests or voting rights. This rule may result in the parent company being obliged to aggregate and disclose different participating rights and/or votes held in the same Issuing Institution by different subsidiaries. Similarly, a person is deemed to indirectly hold the voting rights that a third party holds if such person has entered into a lasting voting agreement (i.e., for a period of time longer than one shareholders' meeting) with such third party (and vice versa). The obligation to report changes also applies to indirect control held through (security) interests (e.g., right of pledge, right of usufruct). The AFS also contains specific provisions with regard to participating interests and votes held by undertakings for collective investment and/or their management companies. In certain cases, (temporary) exemptions may apply.

The disclosure of major holdings in listed companies is supervised by the AFM.

Furthermore, Issuing Institutions are subject to transparency obligations prior to convening a general meeting of shareholders. In particular, Issuing Institutions are obliged under certain circumstances to publish on their website draft resolutions and proposals legally submitted by a shareholder that are subject to voting during a forthcoming general meeting.

24.2.6 Investment services and markets in financial instruments

In principle, investment firms (*beleggingsondernemingen*, e.g., brokers, dealers, "market makers," financial advisers and portfolio managers) are under an obligation to apply for a license/must hold a license, in order to provide their investment services in the Netherlands. To obtain such a license, investment firms must comply with certain financial, administrative and organizational requirements. The (day-to-day) policymakers and (if applicable) supervisory board members of investment firms must also pass certain integrity and suitability tests prior to their appointment. The requirements that investment firms must fulfill are quite elaborate. Investment firms are closely monitored by the AFM.

EEA-based investment firms with a license to offer their services in another EEA country may offer their services in the Netherlands after due notification to the AFM by the supervisory authority of that EEA country. If all notification requirements are met, such investment firms may offer their services either through a branch office in the Netherlands or on a cross-border basis. Please note that the majority of Dutch rules governing the investment firm's conduct of business in the Netherlands will still apply to branch offices located in the Netherlands. For a variety of such rules, dispensation can be requested, either with the AFM, which is bestowed with the conduct of business supervision, or the DCB, which is bestowed with prudential supervision.

Investment firms operating from a number of non-EEA countries (i.e., United States, Switzerland and Australia) are exempt from the obligation to apply for a license with the AFM, provided that certain requirements

are met. Again, the majority of Dutch rules with respect to the investment firm's conduct of business in the Netherlands will still be applicable. For a variety of such rules, dispensation can be requested, either with the AFM, which is bestowed with conduct of business supervision, or the DCB, which is bestowed with prudential supervision.

24.2.7 Investment funds

In the Netherlands, two types of collective investment funds are regulated: the so-called "alternative investment funds" and "undertakings for collective investment in transferable securities." An undertaking for collective investment in transferable securities is an undertaking with the sole object of collective investment in transferable securities or in other liquid financial assets of capital raised from the public and which operate on the principle of risk-spreading. An alternative investment fund is an investment fund that: (i) does not qualify as an undertaking for collective investments in transferable securities and (ii) raises capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors. Typical examples of alternative investment funds are hedge funds and private equity funds.

Pursuant to the AFS, participation rights in an investment fund, whether it be an undertaking for collective investment in transferable securities or an alternative investment fund, may be offered in the Netherlands only if the management company of such undertaking has been granted a license by the AFM. A license to operate as a management company of an investment fund in the Netherlands will be granted if certain financial, administrative, organizational, integrity and expertise criteria are met. A licensed fund manager must continuously meet a large number of requirements related to, for example, (minimum) capital, day-to-day management, remuneration, conflicts of interests, risk management, valuations, disclosure toward supervisors and investors (including a prospectus obligation), delegation, appointment of a depositary and use of leverage finance.

A "light" regime may be applicable to managers of alternative investment funds in instances where the cumulative funds under management fall below a threshold of EUR100 million (or EUR500 million if the fund is not

leveraged and has a minimum lock-in period of five years). This "*de minimis* exemption" only applies to Dutch fund managers. Pursuant to the AFS, a "Dutch fund manager" has been defined, to the extent relevant for the applicability of the *de minimis* exemption, as a management company that: (i) has its statutory seat in the Netherlands; (ii) has a Dutch license and its statutory seat in a jurisdiction other than an "appointed state" or (iii) has appointed the Netherlands as its "member state of reference." A *member state of reference* is an EEA member state where that manager intends to undertake, broadly speaking, most - if not all - of its European business. In essence, this appointed state becomes a fund manager's "European seat" for regulatory purposes. Please note that the provisions allowing a fund manager to appoint the Netherlands as its *member state of reference* have yet to enter into force. Furthermore, exempted managers still have to comply with certain AFS provisions such as on reporting to the DCB.

Non-EEA alternative investment fund managers may be exempted from the requirement to obtain a license if they only offer shares or units to "qualified investors" (*gekwalificeerde beleggers*). A fund manager wishing to benefit from this exemption must provide due notification to the AFM.

24.2.8 Other regulated activities

The AFS also regulates, among other things, the following activities and entities:

- Insurance and reinsurance activities (including [re)]insurance intermediation and advice on insurance products)
- Offering, advising and intermediation in respect of individual investment objects
- Offering, advising and intermediation in respect of financial products to consumers in the Netherlands
- Advertisement in respect of financial products in the Netherlands
- Recognition and operation of securities exchanges and certain types of trading platforms in the Netherlands
- Clearing institutions (i.e., entities whose business it is to conclude contracts regarding financial instruments with a central counterparty ["CCP"] that acts as an exclusive counterparty in respect of these

contracts [where the provision of these contracts indicating the essence of the performance correspond to the provisions forming part of the contracts concluded by third parties, or by the party itself in its capacity as a party to the contract, on a market in financial instruments and indicate the essence of the performance in the latter contracts)
- Payment services providers
- The provision of technical services relating to payment transactions (*afwikkeldiensten*)
- The issuance of e-money
- Acquisition of qualified holdings (i.e., 10 percent or more) in a clearing and settlement institution (*afwikkelonderneming*), a bank, a management company of an undertaking for collective investment in transferable securities, an investment firm, an entity for risk acceptance or an insurer established in the Netherlands

24.3 Money laundering

An important anti-money laundering act is the Money Laundering and Terrorist Financing Prevention Act (*Wet ter voorkoming van witwassen en financieren van terrorisme,* or the "Wwft").

The Wwft is principle-based and risk-based, rather than rule-based. Thus, it does not prescribe what specific anti-money laundering mechanisms an institution should have in place, or how it should carry out its obligations under the Wwft. Rather, the Wwft sets out certain objectives that must be achieved by the institution in its prevention of money laundering and terrorist financing. The Wwft covers the following two areas of anti-money laundering and terrorist financing prevention: (i) customer due diligence and (ii) reporting of unusual transactions.

Customer due diligence

The Wwft provides for various levels of customer due diligence, whereby the levels are dependent on the level of risk of money laundering or terrorist financing. It stipulates how the institutions to which the Wwft applies must identify and monitor their customers. Customer due diligence can be divided into three categories, which are: (i) ordinary; (ii) simplified

or (iii) enhanced in character. The institution must assess what customer due diligence category is applicable, following the assessment per particular transaction and/or client of the risk to money laundering and terrorist financing.

In certain circumstances, the application of customer due diligence measures may be delayed. The verification of the customer's identity may be carried out after a business relationship has been entered into (instead of prior to it) if there is a low risk of money laundering or terrorist financing, and if such a postponement is necessary in order to not disrupt the service(s) to be provided to the customer. In such a case, verification of the customer's identity must be carried out as soon as possible after the first contact with the customer.

Reporting of unusual transactions

Institutions are under an obligation to report unusual transactions to the *Financial Intelligence Unit Nederland* ("FIU-NL"). The assessment as to when transactions must be reported is left at the discretion of the institution. To provide for a framework as to when a particular transaction could be potentially unusual, the Wwft contains several indicators. In addition, various Dutch governmental bodies and international organizations have published guidelines pertaining to the assessment of whether a transaction could be potentially unusual.

Scope

Institutions to which the Wwft applies include the following:

- Financial enterprises, such as banks, payment service providers, money transfer offices, life insurers, investment firms, alternative investment funds and financial service providers
- Parties conducting certain other types of professions or businesses, such as tax advisors, accountants, trust offices, casinos, traders in high-value goods (all traders that accept cash payments of EUR15,000 or more), real estate brokers, lawyers and civil law notaries

The Wwft does not provide an exhaustive list of services to which it is applicable. Rather, it contains criteria that may give rise to obligations under the Wwft. The Wwft applies in the event of the following:

- When a business relationship is entered into with a customer
- When one or more (incidental) cash transactions with an aggregate value of EUR15,000 or more are carried out
- When there are indications that a customer is involved in money laundering or terrorist financing
- When there are doubts as to the reliability of information obtained from the customer
- When the risk of potential involvement of an existing customer on money laundering or terrorist-financing activities gives cause to do so
- When there is an enhanced risk of money laundering or terrorism financing based on the country in which the client has its residence, is established or has its statutory seat

In the event that an institution reports a suspicious transaction, such institution is prohibited to disclose to its customer that authorities are conducting (or intend to conduct) investigations into the transaction reported by that institution.

25

Liability

25.1 Liability

Introduction

Under the Dutch liability law, the basic principle is that every person bears his or her own damages. A person is only liable for part of another person's damages if there is a basis either in contract or in law for such liability.

Both types of liability – contractual liability and non-contractual liability – are regulated in the DCC (*Burgerlijk Wetboek*; referred to in this chapter as the "Code"). The basis for contractual liability is the nonperformance of a contractual obligation. The basis for non-contractual liability is committing a wrongful act.

The two types of liability may coincide, for instance , in a situation in which a party to a contract causes damage to the other party resulting in contractual liability, while the event also qualifies as a wrongful act toward a third party with whom there is no contractual relationship.

25.2 Contractual liability

25.2.1 Nonperformance

A specific section of the Code applies to all contractual liabilities, regardless of the type of contract. The main provision of that section is Article 6:74 of the Code, which stipulates as a basic rule that a party is liable for all the other party's damages resulting from the first party's nonperformance of any contractual obligation (breach of contract). Such a party may avoid liability if it can prove that the nonperformance is not attributable to it on

the basis of its factual or legal actions, the law or the generally prevailing public opinion (cf. the well-known concept of *force majeure*).

25.2.2 Other consequences of nonperformance

In addition to the right to claim damages in case of nonperformance incurred as a result of the breach, the creditor has two additional options, which are as follows: (i) claim specific performance (*nakoming*) or (ii) partly dissolve the contract (*ontbinding*). In all cases in which the debtor is still able to comply with its obligations, the creditor may claim specific performance. Alternatively, the creditor may partly dissolve the agreement. Upon dissolution of an agreement, the parties are no longer bound by the obligations arising from the agreement and each party must undo or repay any obligation that was already performed by the other party.

Furthermore, in a situation where both parties to a contract have obligations *vis-à-vis* one another, the nonperformance of one party may provide the other party with the right to suspend its own obligation under the contract.

Several types of contracts are governed by specific statutory provisions, which may provide for more specific obligations in case of nonperformance.

25.2.3 Limitation of liability

In principle, the parties to an agreement are free to contractually exclude or limit their potential liability for damage incurred by another party, thereby deviating from the liability provisions in the Code. However, there are some restrictions and exceptions, which are as follows:

1) In case of agreements with consumers, a limitation of liability in general terms and conditions can be declared void if the limitation is deemed to be unreasonably onerous to the consumer.
2) A limitation of liability drastically sacrificing the interests of one party to the other party's interests can be invalid because it is contrary to public morality (*strijd met goede zeden*) or can be declared void because

of abuse of circumstances (*misbruik van omstandigheden*). A limitation of liability is usually contrary to public morality if the damage is caused intentionally or by gross negligence.

3) A limitation of liability cannot be successfully invoked if invoking such clause would be contrary to the principles of reasonableness and fairness. Whether this is the case depends on the circumstances of the case, such as the extent to which the other party was aware of (the meaning of) the clause, the manner in which the clause was agreed on, the nature and further contents of the contract, the possible negligence of the other party, the nature and seriousness of the interests at stake, the relative bargaining strength of the parties and the mutual relationship between the parties.

25.2.4 Obligation to timely complain

In case of contractual obligations, Article 6:89 of the Code stipulates that if a creditor fails to timely complain about a shortcoming in the performance by a debtor, it loses all its rights in relation to the shortcoming.

A creditor has to complain within an appropriate time after he or she has discovered a shortcoming in the performance, or after he or she reasonably should have discovered it. Taking that into account, it is debatable what constitutes "appropriate time" and this heavily depends on the specific circumstances of the case. For that reason, there is a substantial case law on this topic.

25.3 Non-contractual liability

25.3.1 Wrongful act

The most applied basis for non-contractual liability is Article 6:162 of the Code. This article stipulates that any party committing a "wrongful act" (*onrechtmatige daad*) toward another party is liable for all damages incurred by the injured party, provided that the wrongful act is attributable to the party committing the wrongful act and that there is a causal connection between the damage and the wrongful act. There are three categories of a wrongful act and these are as follows: (i) infringement of a subjective right;

(ii) act or omission violating a statutory duty and (iii) conduct contrary to the general standard of conduct acceptable in society. Examples of wrongful acts for the respective categories are: for (i) violation of a party's rights to privacy by a physician who fails to keep medical records confidential; for (ii) building without a permit as required by law and for (iii) creating a dangerous and possibly injury-causing situation without undertaking reasonable precautions or preventive measures.

Nevertheless, liability is denied if the norm violated by the party committing the wrongful act is not intended to cover the injured party's interests that were damaged.

25.3.2 Strict liability

In principle, liability under Article 6:162 of the Code is liability based on fault. However, under Dutch law, several types of non-contractual liability are based on strict liability (*risicoaansprakelijkheid*). One of the main types of this kind of liability is the liability for defective products. Strict liability means a liability based on risk. The requirement of attributability and/or the applicability of one of the categories of wrongful acts mentioned above are less relevant to establish liability. The main components of a wrongful act based on strict liability are: (i) the existence of damage and (ii) the causal connection between such damage and the liable party's actions deemed to be a wrongful act.

25.3.3 Product liability

Product liability was incorporated in the Code in 1988 as a result of the EC Directive of 25 July 1985 on liability for defective products. This legislation provides for strict liability on which basis a consumer can hold a manufacturer liable if the latter has brought defective products on the market. The term "manufacturer" also includes the party importing products into the EEA, or the party that presents itself as the manufacturer by selling the product under its own brand name. Thus, in principle, the contractual party of the consumer (i.e., the seller) is not liable for damages for which the manufacturer would be liable.

According to the Code, a product is defective if it does not provide the safety that one is entitled to expect, taking all circumstances into consideration, in particular: (a) the presentation of the product; (b) the reasonably anticipated use of the product and (c) the moment the product is brought into circulation.

The manufacturer is liable for all damages resulting from physical injury or death caused by the defective product. The manufacturer is also liable for damage to other goods intended and applied for private use by consumers if such damage exceeds EUR500. It is not possible to contractually exclude product liability toward the injured party (i.e., the consumer). Such a clause in a contract can be declared void. However, companies, especially in a distribution chain, can limit their liability toward one another.

In order to establish liability, the consumer must demonstrate the damage he or she has suffered, the defect of the product and the causal connection between the defect and the damage suffered.

Dutch product liability legislation does not contain any provisions on product recalls. The EU Directive 2001/95/EC on General Product Safety was implemented in the Consumer Goods Act. Based on this act, rules may be imposed regarding product safety in the interest of public health, safety, fairness in trade or proper information about the goods. This act is aimed especially at protecting (further) distribution of unsafe goods. Any obligation to launch a product recall is based on the Consumer Goods Act.

25.3.4 Other strict liability

Other types of non-contractual liability based on strict liability are, *inter alia*, the liability for a wrongful act of one's employees, one's subcontractors and one's representatives. Another example of strict liability is that the owner of a moveable defective object is, under certain conditions, liable for the damage caused by that object. Liability for some forms of environmental damage is also based on strict liability.

25.4 Compensation

The sections of the Code that govern compensation apply to both contractual and non-contractual liabilities.

25.4.1 Types of damage

The Code provides that the following two types of damage may be compensated: (i) financial loss (*vermogensschade*) and (ii) other disadvantages (*ander nadeel*).

Financial loss includes both losses suffered and profits lost. Financial losses also include: (i) reasonable cost made in order to avoid or limit one's damages; (ii) reasonable cost made in order to establish the damages and the liability and (iii) reasonable cost made in order to collect one's damages out of court. By the term "other disadvantages," immaterial or emotional damage is meant. This damage will be compensated only in as far as the law provides for a legal basis for such compensation. A legal basis for compensation exists, for instance, in case of: (a) intentional damage or (b) personal injury or damage to the injured party's reputation.

Dutch law does not distinguish between direct damages and consequential damages. In principle, all damages suffered must be compensated, provided that there is sufficient connection between the damage and the event that has led to the liability of a party, which requires that the damage may reasonably be attributed to it as a consequence of that event, taking into account the nature of the liability and of the damage.

25.4.2 Evaluation and calculation of damages

Normally, damage will be compensated in money, but the injured party may demand compensation in other forms.

Although in principle, the injured party has a right to claim compensation for the exact damage it has suffered, the courts are free to evaluate the damage in a more abstract way if that corresponds better to the nature of the damages. The court may also reduce the obligation to compensate the

injured party for the damage if the court believes that full compensation would clearly lead to unacceptable results. Also, if the liable party has profited as a result of its breach of contract or a wrongful act, the court may (but not *ex officio*) calculate the damages at such profit or as part of such profit.

Dutch law does not provide for a system of "punitive damages"; only the suffered damages can be compensated.

25.4.3 Contributory damages

If the damages are also, to a certain extent, a consequence of a circumstance attributable to the injured party, the liable party's obligation to compensate (after the liability is established) is reduced proportionately.

25.4.4 Penalty clauses

Penalty clauses are allowed under Dutch law regardless of whether the penalties serve as compensation of damages or as an incentive to perform. The creditor cannot claim both the payment of the penalties and the specific performance at the same time. Unless otherwise agreed upon, the penalty is the only compensation that may be claimed, regardless of the amount of the penalty. A party that is obliged to pay a penalty may request the court to reduce the penalty amount if payment of the full penalty would clearly be unacceptable.

25.5 Period of limitation of action

The sections of the Code that govern the period of limitation of action apply to both contractual and non-contractual liabilities. Hereunder, only the discharge by prescription is discussed and not the acquisition by prescription.

25.5.1 Short term (usually five years)

The prescription term for claims for contractual penalties and for damages is usually five years. The term starts running on the day following the day

on which the injured party has become aware of both: (i) the damage or the fact that the contractual penalty has become due and payable and (ii) the identity of the liable party.

25.5.2 Long term (usually 20 years)

In any event, claims for contractual penalties and for damages will expire after 20 years from the day on which the event occurred that caused the damage or that triggered the contractual penalty to become due and payable.

25.5.3 Exceptions

The prescription periods mentioned in 24.5.1 and 24.5.2 above reflect what apply for most common cases. Special regimes apply for specific types of claims or damages, such as terms for pollution-related claims. Furthermore, exceptions to the general rules are accepted for extraordinary circumstances, such as claims related to the exposure to asbestos, for which the period of incubation may be longer than 20 years.

25.5.4 Contractual restrictions and interruption of the prescription period

Parties to a contract can agree to restrict the duration of prescription periods for claims arising out of the contract.

In summary, the running prescription period is interrupted if the injured party initiates litigation with regard to his claim. Furthermore, a written notice in which the injured party unequivocally states that he or she reserves its rights vis-à-vis the debtor will interrupt the prescription period. However, specific requirements to such notice apply. An acknowledgement by the debtor of the injured party's claims will also interrupt a running prescription period.

The consequence of a valid interruption will cause a new prescription period to start running, with the same duration as the original, yet no longer than five years.

26

Dispute Resolution

26.1 Jurisdiction

In the Netherlands, the civil and criminal judiciary comprises: (i) 11 district courts (with cantonal branches); (ii) four courts of appeal and (iii) the Supreme Court. The district courts have general jurisdiction in the first instance over civil law disputes, administrative disputes and criminal cases, which are all judged by separate branches of the district courts. In principle, judges are professional judges and appointed for life.

On 1 July 2011, the jurisdiction of the cantonal divisions was extended. The cantonal branches of the courts are now concerned with first-instance claims relating to civil and commercial cases amounting to up to EUR25,000, regardless of the cause of the claim (formerly: EUR5,000). The cantonal branches of the district courts also have jurisdiction over disputes regarding employment law, agency and lease, and, since 1 July 2011, consumer purchases and consumer credit as well.

The civil branches of the district courts essentially hear all other civil and commercial first-instance claims. The judgments given by both the civil branches and the cantonal branches of the district courts may be appealed before a court of appeal. The court of appeal fully reassesses the case, both factually and legally.

A judgment given by the court of appeal may, in principle, be submitted for review or cassation before the Supreme Court of the Netherlands on issues of law only. Therefore, the Supreme Court will not decide on any factual issues. A submission for cassation to the Supreme Court may be brought on grounds of: (i) noncompliance with formal requirements (for instance, if a court fails to give adequate reasons for its judgment) or (ii) breach of law,

but not a breach of any foreign law.

The Dutch Supreme Court and lower courts have no authority to examine statutes for compliance with the Dutch Constitution (*Grondwet*), neither with regard to the manner in which statutes are established nor as to their substance. However, statutes may be tested for compatibility with: (i) treaties to which the Netherlands is a party and (ii) European legislation.

There is a separate division of the Amsterdam Court of Appeal dealing with corporate law issues. The so-called Enterprise Chamber (*Ondernemingskamer*) decides on disputes in the first instance on, *inter alia*, the following: (i) annual accounts; (ii) mismanagement; (iii) buyouts of minority shareholders and (iv) the Dutch Works Councils Act. In addition, on appeal, the Enterprise Chamber deals with disputes on, *inter alia*, the following: (a) the mandated departure or ejection of shareholders; (b) the revocation of responsibility for a group company and (c) objections to a reduction of capital, legal merger or split.

26.2 Course of the court proceedings

The rules governing Dutch civil legal proceedings are laid down in the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*, referred to in this chapter as the "Code"). Most civil and commercial proceedings are initiated by the plaintiff issuing a writ of summons against the defendant and take place before the district court. The writ of summons must include the legal and factual grounds for the claim. In principle, cases will be heard by one judge, but, depending on the complexity or the scope of the case, it may be judged by a panel of three judges.

In the writ of summons, which is served on the defendant by a bailiff, the defendant is summoned to appear in court on a certain date. In civil branch district court proceedings, the defendant must appear in court through a lawyer. This first court date appearance is merely for administration and record purposes and does not take place physically. Unless the defendant makes no appearance, the court customarily grants the defendant a six-week extension within which to submit a written answer (the statement of defense).

After the statement of defense is submitted, additional briefs may subsequently be exchanged, or the court may order a hearing for the parties to appear in person. The purpose of such hearing usually is threefold and that is for the parties to: (i) supply information to the court; (ii) argue their case before the court and (iii) attempt to reach a settlement.

The parties' briefs are filed at a docket session, which is a district court session held specifically for the purpose of filing briefs and making formal procedural requests. After the briefs have been exchanged, a hearing for oral arguments before the court may be held if either of the parties so requires. If there has already been an opportunity for oral argument during the hearing mentioned above, the court may deny a request for oral argument.

Appeal proceedings are initiated by the service of a notice of appeal (within three months from the district court's judgment). In principle, only two briefs are exchanged. In the appellant's brief, the party filing the appeal explains why it disagrees with the judgment passed in first instance. The opponent may file an answer, which is often followed by a hearing for oral arguments. The appeal is heard by a three-judge panel.

The course of the proceedings, both in the first instance and on appeal, may be complicated by several motions on procedural issues (such as a motion on jurisdiction) and/or by ordering witnesses examinations or expert opinions.

26.3 Summary proceedings

In urgent cases, a judge of the district court may sit in summary proceedings to provide provisional relief. There are few restrictions on the type of dispute that may be heard. Summary proceedings are even used to obtain a payment order for essentially undisputed claims.

Summary proceedings are usually done with dispatch. At the plaintiff's request, the court will schedule a date for the summary hearing to take place within a few weeks. In very urgent cases, hearings can be scheduled even on the same day. The plaintiff initiates the summary proceedings

by serving a writ of summons on the defendant. The defendant may file a statement of defense, but this is rarely done. On the date of the summary hearing, the parties and their counsel appear before the court to explain their positions through oral arguments (although a defendant may appear without counsel).

The court has a great degree of latitude to decide on the procedure at a hearing. Although witnesses cannot be heard in the context of summary proceedings, the court may hear people as “informants” if they are present at the hearing. That way, although no sworn statements are taken, the court is still able to obtain information from the people involved before deciding on the issue.

The court generally hands down its decision in summary proceedings within 14 days from the hearing, but may do so earlier if the case is urgent. A summary judgment is immediately enforceable. The judgment can be sanctioned by a (substantial) penalty to be forfeited if the judgment is not complied with. The judgment may be appealed before the competent court of appeal (within four weeks after the judgment in first instance is rendered). It is also possible to lodge a summary appeal, so that the proceedings before the court of appeal are conducted more swiftly. In that case, there is no appellant’s brief, as the grounds for the appeal must be included in the notice of appeal. A decision by the court of appeal may be submitted for cassation to the Supreme Court (on issues of law).

After the summary proceedings, either of the parties may start principal proceedings in which the case is judged on its full merits (since summary proceedings are in principle merely a provisional remedy.) The court is in no way bound by a judgment given in summary proceedings. However, it is quite common for parties not to initiate principal proceedings after summary proceedings, but to decide to accept the judgment given in summary proceedings (whether or not on appeal).

26.4 Prejudgment attachment

To secure its claim, the plaintiff may levy one or more prejudgment attachments, before or during legal proceedings. The leave of the district court is required for a prejudgment attachment. Such leave is generally easy to obtain (often on the same day or the next) in *ex parte* proceedings. The plaintiff must file a petition with the court in which the claim is *prima facie* explained. The prejudgment attachment is levied by a bailiff. An attachment on movable property may be combined with judicial custody. This means that pending the legal proceedings, the bailiff turns over the attached property to a person appointed by the court to keep the property in his or her custody.

The party subject to a prejudgment attachment may object to the attachment in summary proceedings. The court will lift the attachment if it is demonstrated that: (i) specific formal attachment requirements were not complied with; (ii) the asserted claim is nonexistent or frivolous or (iii) the attachment is unnecessary. In case of a monetary claim, the court will also lift the attachment if the party subject to prejudgment attachment provides adequate security (which is generally a bank guarantee by a first-class Dutch bank).

If legal proceedings are not yet pending at the time of filing the petition for the court's leave to attach, the court will set a period within which such proceedings must be initiated. The standard period is 14 days, but can also be longer upon the petitioner's request. Also, this period may be extended (several times) at the request of the attaching party. If, eventually, the claim for which the attachment was made is dismissed, the attachment is then rendered wrongful. In that case, the attaching party is liable for damages caused by the attachment.

26.5 International enforcement

Judgments passed by the courts of EU member states can easily be enforced in the Netherlands. EU member states are subject to the Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (No. 44/2001).

This council regulation has replaced the Brussels Convention. With regard to Switzerland, Norway and Iceland, the (new) Lugano Convention applies.

Prior to the enforcement of a judgment handed down by a court in one of the states referred to above, the leave to do so must be obtained from the district court. The procedure to obtain leave generally takes no more than a number of weeks from filing the request. Similarly, Dutch judgments are easy to enforce in such states.

Judgments passed by courts in states with which the Netherlands has no enforcement convention cannot be recognized and/or enforced in the Netherlands. In order to obtain an enforceable title in the Netherlands, such cases must be retried by the Dutch courts. However, during such proceedings, the court may decide that the foreign judgment does meet the requirements for recognition of that judgment in the Netherlands as generally accepted in municipal law. In that case, the matter will not be assessed on the merits; the Dutch court will simply decide in accordance with the decision rendered in the foreign judgment.

The assessment of a case submitted to the Dutch court with a foreign judgment in place is usually done on a sliding scale: The more the foreign judgment is in line with the requirements for recognition, the less the court's assessment of the case on its merits will be.

26.6 European enforcement order for uncontested claims

The European Parliament and Council Regulation of 21 April 2004 creating a European enforcement order for uncontested claims (No. 805/2004) lays down minimum procedural standards to ensure that judgments, court settlements and authentic instruments on uncontested claims can be enforced easily in the EU member states. The regulation is applicable in civil and commercial matters. It does not cover revenue, customs or administrative matters. It is applicable in all EU member states, with the exception of Denmark.

The regulation provides that a judgment that has been certified as a European enforcement order in the EU member state of origin will be recognized and enforced in other member states without the need for a declaration of enforceability and without any possibility of opposing its recognition. A judgment on an uncontested claim can be certified as a European enforcement order if certain requirements are met, such as enforceability in the EU member state of origin. Certification is carried out by means of a standard form.

The regulation lays down minimum standards with regard to the service of documents, initiating the proceedings to protect the defendant's procedural position.

If a European enforcement order is given, the judgment can be enforced in any EU member state through a copy of the judgment and a copy of the European enforcement order certificate (sometimes with a translation).

26.7 European payment orders

The European Parliament and Council Regulation of 12 December 2006 creating a European order for payment procedure (No. 1896/2006) allows creditors to recover their uncontested civil and commercial claims before the courts of the EU member states (except Denmark) according to a uniform procedure that operates on the basis of standard forms. The existence of a procedure that is common to all member states reduces the need for creditors to familiarize themselves with foreign civil procedures.

The cost-efficient procedure does not require presence before the court. It can even be started and handled in a purely electronic way. The claimant only has to submit an application. It does not require any further formalities or intervention on the part of the claimant.

This is to ensure a swift and efficient handling of the claim, especially considering the length of traditional court proceedings.

The European payment order obtained as a result of this procedure can be enforced easily in other EU member states. The creditor will not have to take intermediate steps to enforce the decision abroad.

26.8 European small claims

The European Parliament and Council Regulation of 11 July 2007 establishing a European Small Claims Procedure (No. 861/2007) is intended to speed up litigation and reduce costs concerning small claims in cross-border disputes in all EU member states, except Denmark.

This procedure provides an alternative to other – more costly and complex – legal proceedings. It applies to civil and commercial matters, where the claim (excluding interest, expenses and disbursements) does not exceed EUR2,000. It does not extend to revenue, customs or administrative matters or state liability for acts and omissions in the exercise of the state's authority.

26.9 Collective action

Articles 3:305a and 305b of the DCC allow associations and foundations with full legal capacity as well as certain public law entities to initiate action with the aim of protecting "similar interests of other persons (natural or legal)." The articles of association should stipulate that the foundation or association serves these interests. Also, the association or foundation must actually engage in activities relevant to such interests. Before filing a claim, the foundation or association is obliged to make an effort to settle the dispute out of court.

The foundation or association files the claim in its own name. The interested parties will not be a party to the proceedings. An interested party retains the right to submit its own claim, provided that it has sufficient interest with such legal action. A judicial decision does not, in principle, affect a person whose interest the action aims to protect but opposes the decision's effect as regard himself.

The most important limitation of the collective action is that damages cannot be claimed. However, if a declaratory judgment decides that, for instance, tort was committed, such declaratory judgment could be used to reach a (binding) settlement between the perpetrator and the aggrieved persons (see 24.10, Collective settlement of mass damages).

26.10 Collective settlement of mass damages

The Dutch Act on the Collective Settlement of Mass Damages facilitates binding court-endorsed, collective out-of-court settlement agreements regarding mass damages between a representative organization and the party or parties responsible for the damages. The procedure in achieving a binding settlement agreement as described in the act is undertaken in three phases.

During the first phase, the representative organization and the responsible party or parties negotiate a possible settlement agreement. The articles of association of the representative organization should indicate that it serves the interests of the parties affected. The claims of the affected parties must, to a certain extent, be similar. In the settlement agreement, the amount of monetary compensation to each affected party, or a formula to calculate the monetary compensation on the basis of objective criteria, must be specified. The party responsible must provide sufficient security for its payment obligations under the settlement agreement.

In the second phase, the representative organization and the responsible party file a joint request with the Court of Appeal in Amsterdam to declare the settlement agreement binding for all parties affected or a group of affected parties. Pending the request with the Court of Appeal, all legal proceedings against the responsible party involved can be suspended. In principle, all affected parties known to the responsible party must be invited to the hearing of the Court of Appeal in order to give them the opportunity to file any objections against the settlement agreement and the declaration of it as binding.

After this hearing, the Court of Appeal must assess whether the settlement agreement meets the criteria as set out in the act, such as whether the

compensation is reasonable. The Court of Appeal may either declare the settlement agreement binding, deny the request or allow the parties to amend the settlement agreement before making its final decision.

The third phase concerns the execution of the settlement agreement. If the Court of Appeal declares the settlement agreement binding, the settlement must then be published in one or more Dutch newspapers and be sent to all known affected parties. The affected parties who do not want to be bound by the settlement agreement have the option to "opt out" within three months after the court decision. The affected parties not "opting out" may collect their compensation within the time frame specified in the settlement agreement. If the responsible party does not fulfill its payment obligations in a timely manner, the affected person may dissolve the settlement agreement in as far as it concerns the part of the settlement agreement relating to the compensation of that affected person.

26.11 Inspection or taking copies of certain identifiable documents instead of full discovery

Dutch law does not provide for full discovery of documents. The legislator and the courts are wary of "fishing expeditions." However, Article 843a of the Code does allow a party who is considered to have a justified interest to demand: (i) inspection; (ii) a copy or (iii) an extract of identifiable documents that relate to a legal relationship to which the claimant is a party. A contract or an alleged wrongful act constitutes such a legal relationship in any event. "Identifiable" means that the claimant must identify the documents or at least specify a category of documents. The party may demand this information from any party that has these documents at its disposal or in its possession.

If necessary, the court decides the manner in which inspection, copies or extracts are to be given.

In order to reinforce a court order pursuant to Article 843a of the Code, a penalty for noncompliance can be imposed or, in some cases, an attachment can be made on relevant documents.

However, there are restrictions to the application of Article 843a of the Code. First, a party that, because of its duties, profession or occupation, is bound by confidentiality (e.g., attorneys-at-law) cannot be forced to comply with the demand if the documents are solely at its disposal or in its possession on that account. Second, compliance with a demand is not required if the proper administration of justice is guaranteed even without providing the requested documents. Finally, the interest in not divulging information may outweigh the interest in obtaining it.

26.12 Preliminary witness hearing and expert opinion

As is the case during civil legal proceedings, the court may be requested to hold a preliminary hearing of witnesses before legal proceedings are commenced. The purpose is to preserve evidence and evaluate the chances in litigation or in settlement negotiations.

The court orders witnesses to appear in court and to testify. A witness who refuses to testify can be escorted to court by the police and/or taken into custody for a maximum of one year. An uncooperative witness can also be liable for damages caused by his or her refusal to testify.

The hearing is held before the court and the witnesses are heard under oath. A single judge will hear the witness. Counsels to the parties are also given the opportunity to question the witness. There are no sound recordings of witness hearings and no word-for-word transcript is made. The judge summarizes the witness' statements in the presence of the witness and the parties in an official record of the hearing (*proces-verbaal*). That record is signed by the witness at the end of the hearing.

26.13 Arbitration

Parties may also choose to settle their disputes by arbitration, rather than in court. The Dutch Arbitration Act provides that, if either party invokes an arbitration agreement, the Dutch court must decide that it has no jurisdiction over the case. Nonetheless, the district court may still be competent to grant provisional relief in summary proceeding, even if the parties concluded an agreement for arbitral summary proceedings, if the court

believes that the remedy provided in arbitration is inadequate or that the relief sought is too urgent.

The best-known Dutch arbitration institute is the NAI in Rotterdam, which has its own arbitration rules that parties can adopt in their arbitration agreement. The NAI may appoint the arbitrators, or the parties may do so themselves, depending on the arbitration agreement. The NAI has a list of qualified and experienced arbitrators who are often lawyers.

Dutch arbitral decisions can easily be enforced in the Netherlands. Like many European countries and the United States of America, the Netherlands is a signatory to the New York Convention on the recognition and enforcement of foreign arbitral awards. Thus, arbitral awards given in the territory of these states can, in principle, be enforced in the Netherlands and vice versa.

26.14 Mediation

Mediation as an instrument for dispute resolution is becoming somewhat more popular in the Netherlands. At the start, mediation was mainly used in family law cases. Today, though, mediation is being used with increasing frequency in other types of disputes. The Dutch courts have even developed an initiative promoting mediation during pending legal proceedings.

27

Energy Law

27.1 General market situation

27.1.1 Dutch energy markets

The Netherlands is a liberalized market economy and ranks among the leading countries in terms of market integration, investment and innovation. It has substantial investments in energy infrastructure facilities, ports, modern power plants, and efficient industrial processes. It is the second largest producer of natural gas in Europe and maintains competitive oil-refining and industrial processes. The Dutch energy sector contributes around 11 percent of GDP and annually generates around EUR15 billion in exports. The Netherlands is one of Europe's largest hubs in energy trade. On the basis of the agreement reached by the liberal and labor coalition government in 2012, under the guidance of the Social Economic Council, a nationwide Energy Accord was reached in 2013, to achieve objectives of affordable, sustainable and secure energy supply by target years 2020, 2023 and beyond ("Energy Accord").

27.1.2 Major developments

Major developments in the Dutch energy markets are, among other things, the following:

i) The comprehensive long-term policy to boost renewable power generation, notably through onshore and offshore wind generation and solar PV capacity
ii) The shift of the Netherlands from net exporter to net importer of natural gas that is expected from 2025 to 2030

The transition mentioned in ii) above will change the gas composition and requires investment in conversion and new appliances in industry and households. This affects the whole energy system and its use of fuels and technologies. The Netherlands is preparing for this transition by transforming itself into a: (i) "gas-hub for Europe" through large gas storages, networks, a liquefied natural gas ("LNG") terminal and the Dutch Title Transfer Facility ("TTF"), and (ii) "power hub" of Northwestern Europe. The Dutch electricity market dynamics are changing fast, with high volumes of low or zero short-run marginal cost, low carbon prices and the strong competitiveness of coal over gas. These dynamics have a major impact on the market position of the utility sector and can lead to power generation overcapacity.

27.2 EU legislation/unbundling/liberalization

27.2.1 EU legislation

The regulation of the Dutch energy markets is, to a large extent, influenced by the European liberalization drive that started with the first EU Electricity Directive in 1997, and the first Gas Directive in 1998. The objective of these directives was to address market imperfections, introduce unimpeded competition and reduce prices by creating a unified liberalized European energy market. By now, these directives have been significantly amended twice, most recently by the third EU Electricity Directive in 2009, and the third Gas Directive in the same year (collectively, the "EU Third Package"). These directives are implemented in Dutch law to ensure access to transportation infrastructure, a level playing field, market transparency and consumer protection in the Dutch energy markets. In view of worldwide efforts to combat climate change, the following were undertaken: (i) the European Trading Scheme was created; (ii) European targets for the reduction of greenhouse gasses were set and (iii) the use of renewable energy is promoted throughout the EU.

27.2.2 Ownership unbundling grids

The Dutch Network Unbundling Act requires full ownership unbundling of electricity and gas distribution grids from generation, supply and trade activities. It prohibits grid operators from being part of a vertically integrated group. Grid operators are not allowed to be privatized, be part of a group or be engaged in privatized or commercial, non-infrastructure activities. The Dutch Network Unbundling Act has been challenged by three incumbents. In 2013, the European Court of Justice ruled that the Dutch Unbundling Act is in line with EU requirements on free movement and referred the matter to the Dutch Supreme Court to decide on the proportionality of any ownership restrictions contained in the Act. On 26 June 2015, the Dutch Supreme Court stated that the prohibitions constitute an obstacle both to the free movement of capital and to the exercise of the right of establishment, but considered such justified for reasons of public interest. In December 2015, the Dutch Authority for Consumers and Markets (ACM) officially informed the relevant incumbents that they have to unbundle their companies at the latest in 2017.

27.2.3 Regulation grid services

Grid services performed by transmission or distribution grid operators are regulated. Owners of such grids must appoint an “independent grid operator” to operate the same. Operation takes place on the basis of regulated tariffs and conditions set by the ACM (see 26.3.1 (i) and 26.3.2). Grid operators have exclusive powers to: (i) construct, maintain, renew and operate their networks; (ii) provide for connections to their grids and (iii) provide metering services to small-scale users (they will also need to provide “smart” meters to small-scale users). There are various statutory provisions to ensure the financial and operational independence of the grid operators. Under the Gas Act, an operator must also be appointed for liquefied natural gas and gas storage facilities, but these fall under a lighter regulatory regime. Regulated third-party access is guaranteed by law, which obliges grid operators to provide third parties with a connection and transportation at regulated tariffs and conditions, except in case of lack of capacity or when the safety of the grid is at stake. Further legislation is anticipated on preferential transportation of renewable electricity in case of congestion and on congestion management.

27.2.4 Liberalization generation and supply

The supply of electricity and gas was liberalized in 2004. As such, customers have since been free to choose their supplier and to negotiate prices. As a form of consumer protection, a supply license from the ACM is required for supply to small-scale users. The license requires reasonable supply conditions and tariffs. There is no license requirement for generation of electricity or gas, but general permits from local and national government authorities (or both) may be required for various construction, operation or decommissioning activities. For large-scale investments, a coordination mechanism was put in place that shortens the duration of the permitting process. For exploration and production ("E&P") of oil and gas in the Netherlands (including the Dutch part of the continental shelf), a license from the Minister is required pursuant to the Mining Act. The license may be obtained if it can be established that production is economically feasible. Producers who supply their electricity or gas directly to end users through a "direct line" must register the same at the ACM. Trading of electricity or gas does not require a license from the Ministry or the ACM, but traders have to obtain certain licenses from TenneT or GTS, as the case may be.

27.3 Key institutions

The following are key Dutch governmental institutions:

i) Ministry of Economic Affairs. This institution has overall responsibility for Dutch energy policy, including renewable energy, energy transition and the state coordination of large infrastructure projects.
ii) Ministry of Infrastructure and Environment. This is the institution responsible for policies on climate, the environment, transport, water and public works;
iii) ACM. This institution supervises electricity and gas markets as well as district heating markets.
iv) Nuclear Safety Authority
v) Authority for Nuclear Safety and Radiation Protection

vi) State Supervision of the Mines. This institution is the supervising authority for mining activities, including oil and gas production and geothermal energy.
vii) Netherlands Enterprise Agency ("RvO"). This institution implements the R&D policy and funds sustainable and innovative programs.

27.3.2 Energy regulator

The energy regulator, the ACM, is established as an independent authority under the Ministry of Economic Affairs. It has a number of departments, including the Energy Department, and enforces the Dutch Competition Act. In its capacity as energy regulator, the ACM adopts tariffs and technical codes governing the transmission and distribution of electricity and gas. It sets the regulated tariffs for the distribution companies. The ACM has the power to impose administrative fines and issue binding orders and orders sanctioned by periodic penalty payments. It also handles complaints about distribution companies and monitors suppliers to small-scale users. The independence of the ACM is affirmed when it opposed the creation of a national power generation champion, as advocated by the Minister, as well as the concerted closure of coal-fired power plants, as foreseen in the Energy Accord.

27.4 Oil & gas

27.4.1 General/Gas E&P

In 1959, Europe's largest gas field was discovered in the northern part of the Netherlands (the Slochteren field). The country opened offshore production from small gas fields in the 1970s. The Netherlands is a significant gas producer and its gas system is linked to that of Belgium, the UK and Germany. Natural gas dominates the power supply, domestic heating and industrial feedstock.

In 1973, the Netherlands introduced the "small-fields policy," enabling gas-producing companies to enter the Dutch market. In 1995, the Netherlands opened up its licensing regime for exploration in the Dutch part of the continental shelf. All unlicensed acreage is available for competitive alloca-

tion and licenses are granted by the Ministry of Economic Affairs. Under a 1976 Royal Decree, the Dutch state takes 40 percent equity stakes in production and exploration licenses through its state-owned participation company, *Energie Beheer Nederland* ("EBN").

The Netherlands has a strategic position in the European oil supply chain, it being a leading importer and exporter of oil and refiner of crude, as well as a host of major oil storage capacity for the European region. The port of Rotterdam is the energy hub of Europe, with oil refineries and storages, an LNG terminal, large coal import facilities, major power plants and chemical industries. Oil reserves in the territory of the Netherlands are limited. Small amounts of oil are being extracted and produced by Dutch oil companies out of the Dutch continental shelf and the oil fields in the inlands of the Netherlands.

27.4.2 Main legislation and regulation

The Dutch legal framework is governed by the 2003 Mining Act, which sets out the basic terms and conditions for E&P activities and storage. Pursuant to the Mining Act, all minerals and gas at depth under the Dutch soil (including the Dutch part of the continental shelf) are owned by the state. Ownership in such minerals is transferred to the operating license holder of the relevant acreage at the moment of production. The Mining Act requires state participation of 40 percent through EBN. The Mining Act regulates the approval of E&P of minerals and terrestrial heat, as well as the storage and the exploration of carbon monoxide. Together with its subordinate regulations, which is contained in the Mining Decree and Regulation, the Mining Act sets out conditions on matters like supervision, financial and other requirements for operators, measurements and reporting, coordination in construction of wells, mines and pipelines, and use and disposal of oil and chemicals.

The 2012 Gas Act lays out the rules for the transport of gas and the functioning of the gas markets, such as the responsibilities of the transmission system operator ("TSO") and the distribution system operators ("DSO"), the regulator, the access regime in relation to the network, storage sites and liquid natural gas facilities. Gas Transport Services ("GTS") is designated

as the operator of the national high-pressure gas network. GTS is wholly owned by the Dutch state. The Ministry of Economic Affairs introduced a range of measures to improve the functioning of the gas market by: (i) amending the Gas Act with a view to integrate different gas qualities; (ii) simplifying the balancing regime for the gas transmission network;(iii) improving the use and capacity of the gas transmission network;(iv) merging many small delivery locations into one and (v) providing new allocation rules for cross-border transmission. In addition, several ministerial decisions govern the delivery of gas to small consumers.

The Gas Act and ministerial regulations on the quality aspects of network management, electricity and gas tariff structures, and conditions all guarantee the quality of gas supplies. The security of gas supply in the Netherlands is regulated in the Gas Act and specified in the Decision in Relation to Security of Supply. On the basis of the new EU regulation about the security of natural gas supply, a risk analysis of the Dutch natural gas sector was undertaken. The main conclusion was that the Dutch gas infrastructure is of high quality and capable of dealing with unforeseen disruptions in gas supply. In line with EU Regulations, the national gas TSO has been given additional tasks and responsibilities regarding the security of supply. Debates on a legislative proposal to effect a merge between the Gas Act and the Electricity Act are currently pending.

In 2013, the Netherlands implemented the EU Oil Stocks Directive and changed its stockpiling regime into a legal obligation of 100 days of net oil products imports, of which 75 percent to 80 percent is to be held by the central stockholding entity, and 20 percent to 25 percent by the refineries and the traders. The percentage changes every year, depending on the volumes released to the inland market.

27.4.3 Unconventional gas

Several international players showed interest in the exploration of unconventional gas in the Netherlands and acquired onshore acreages. Unproven wet shale gas of technically recoverable resources is estimated at 26 trillion cubic feet.

The Dutch government issued a total of three permits to date in connection with the exploration for shale gas in the territory of the Netherlands. However, commercial drillings for shale gas have been put on hold by the Dutch government since 2011, until more information regarding the consequences of shale gas extraction is gathered. Researches performed by order of the Ministry of Economic Affairs have shown that the extent of the impact of shale gas exploration and extraction on the environment and society (e.g., earthquakes and soil pollution) remains uncertain at this moment. Based on these outcomes, the Dutch government decided in July 2015, that commercial drillings, searches and extraction for shale gas may not take place for the next five years. Already issued permits will not be renewed and new applications for permits will be rejected in this period.

The Dutch government announced the publication of a Dutch Energy Report 2015. This report is published in December 2015 and outlines the current vision of the Dutch government on sustainable energy while promoting a balanced mix of energy resources (the so-called 'Energymix'). With the publication of the Energy Report 2015, the government will take a position on the desirability of shale gas as a resource for sustainable energy in the Netherlands. If so, this will be anchored and elaborated further in 2016, in a separate underground structural vision (*Structuurvisie Ondergrond - STRONG*). Non-commercial drillings for shale gas will then take place for scientific researches only and in 2018, at the earliest.

27.4.4 Carbon capture and storage

The Netherlands supports the use of carbon capture and storage ("CCS") as part of the transition toward a low-carbon economy by 2050. The government's stated intention is to promote CCS via large-scale demonstration projects. The Netherlands is one of a relatively small number of European countries that have developed substantial competences in CCS and the Dutch government is keen to maintain a leading position globally.

The joint venture between E.On Benelux and ENGIE Energie Nederland (formerly known as GDF Suez Energie Nederland) developed a CCS demonstration project the Rotterdam Capture and Storage Demonstration Project ("ROAD"). According to ROAD, the project is, in a worldwide

context, one of the first CCS projects to realize an integrated chain of carbon dioxide capture, transport and storage on a large scale and aimed to capture 1.1 million tonnes of carbon dioxide per year as of 2015. ROAD is co-financed by the European Commission within the framework of the European Energy Programme for Recovery, the Dutch government and the Global CCS Institute.

27.4.5 Trading/TTF

GTS offers the Title Transfer Facility ("TTF"), a virtual trade floor where market parties can transfer gas to another party. GTS registers the title transfers of gas via the TTF by means of an electronic message that list the volumes of gas transferred, the period, and the purchasing and the selling parties involved. Delivery for trades on the physical and future exchange, APX-ENDEX, also takes places on the TTF. The high-pressure gas transmission system is connected to Belgium, Germany and England (BBL). Programme-responsible parties arrange for the gas to be transported within the national gas transmission system by contracting transport capacity with the GTS on the basis of the GTS Transmission Service Conditions. GTS operates the market-based imbalance system.

27.4.6 Gas trading

Parties trading on the APX-ENDEX need to be members. Program-responsible parties for gas must meet the administrative requirements of GTS. To participate in the TTF, a party must apply with GTS for a TTF subscription.

Under the Regulation on Energy Market Integrity and Transparency ("REMIT"), parties active in the wholesale markets for gas are also subject to, among other things, information obligations aimed to increase transparency and prevent insider trading. Depending on the type of contract, the Markets in Financial Instruments Directive (MiFID) as implemented in the Dutch Act on Financial Supervision may apply, as derivatives may qualify as "financial instruments" and services could be construed as "investments services" under the MiFID and may require a license from the Dutch Financial Markets Authority.

The European Market Infrastructure Regulation ("EMIR"), which entered into force on 16 August 2012, is designed to increase the stability of the over-the-counter ("OTC") derivative markets. The EMIR requires standard derivative contracts to be cleared through CCPs and further establishes stringent organizational, business conduct and prudential requirements for such CCPs. It has also introduced an obligation to report derivative contracts to trade repositories.

27.5 Electricity

27.5.1 General/Liberalization and regulation

The 1998 Electricity Act anticipated the principles that were later enshrined in the EU Electricity Directives, including the creation of a national regulatory authority, the legal unbundling of networks from competitive generation and supply activities, third-party access to the networks and the gradual liberalization of the retail market. The Dutch retail market was opened in 2002, for industry and in 2004, for households. The Dutch electricity market is integrated in the northwest region and the EU internal electricity market. In 2014, market coupling increased with the NorNed interconnector of the Netherlands to the Nordic market area. The government supports further integration of the Netherlands into the wider regional and EU internal energy market.

27.5.2 Unbundling/Regulated transport and distribution assets

The Dutch electricity transportation and distribution system is operated by one TSO (i.e., TenneT) and several DSOs. TenneT operates the nation high-voltage grid, which comprises all grids with a voltage level at or over 110kV. The DSOs operate lower voltage grids and are mostly owned by the Dutch municipalities and provinces. The Dutch state holds the entire issued share capital of TenneT under the "TenneT holding structure," which also holds TenneT Germany, a TSO in Germany (TenneT Offshore GmbH) and holds shares in a number of energy exchanges in North-Western Europe, including APX-ENDEX. TenneT operates the balancing market for regulating power. The NorNed interconnector is co-owned and co-operated by TenneT and the Norwegian TSO Statnett. The BritNed interconnector is

jointly owned by TenneT B.V. and National Grid, but is operated independently on a merchant basis in Great Britain and the Netherlands.

Every two years, TenneT prepares a Quality and Capacity Plan, the most recent being for 2013-2016. TenneT's long-term grid development perspective, "Vision for 2030," suggests that the Dutch electricity grid will play a key role in the integration of the European power system. This applies especially in relation to renewable energies from future North Sea wind farms. It prioritizes cross-border (export) capacity and expansion of the Dutch electricity grid to accommodate new conventional and renewable generation, and suggests new investments in the intraregional network interconnection capacity to Germany, Denmark and Norway.

TenneT operates within the European Network of Transmission System Operators for Electricity ("ENTSO-E") on the development and implementation of the EU-wide Ten-Year Network Development Plan ("TYNDP"). The ENTSO-E Regional Group North Sea currently operates under the Regional Investment Plan for the North Sea Region 2012-2022.

27.5.3 Power trading

Electricity trading takes place in the following three markets: (i) the OTC market; (ii) the APX-ENDEX physical and futures exchange and (iii) the imbalance market. Currently, there are seven electricity interconnectors on the Dutch border. In addition to the roles of producers, traders or suppliers, a participant in the Dutch electricity market can also be a "programme-responsible party." In that capacity, a party must inform TenneT of all forecasts of energy to be taken from, or fed into, the grid on a day-ahead basis. Imbalances lead to imposition of imbalance tariffs by TenneT.

27.5.4 Main legislation and regulation

The Dutch legal framework is governed by the 1998 Electricity Act, which sets out the regulatory framework, supervision of the market and enforcement, as well as the basic terms and conditions for generation and transport of electricity, data collection and processing, and renewable power generation. Subordinate legislation and codes regulate the: (i) conditions for licenses

for supply of electricity to small electricity consumers; (ii) tariffs, conditions and measurement of supply of electricity; (iii) protection granted to small electricity consumers against disconnection; (iv) rules to assure the security of supply and (v) rules on the construction of electricity infrastructure. A legislative package called STROOM, which combines the Dutch Electricity Act and Gas Act, is pending in the Dutch Senate. STROOM is a major stepping stone to enact the renewable electricity objectives of the Dutch Energy Accord. It appoints TenneT, the Dutch TSO, as the grid operator for the Dutch offshore power grid. Entry into force of the STROOM legislation is expected at the beginning of 2016. The Dutch regulation of transmission networks aims to achieve cost reduction and efficiency of the TSO and DSOs, while providing moderate levels of return on investment. To this end, the Dutch government applies a revenue-cap (CPI-X) regulation across total operational and capital expenditure for a period of three years (2014 to 2016). Efficiency factors are determined by benchmarking productivity growth against a basket of foreign operators. There is a special subordinate set of rules of the financial management of grid operators.

Suppliers to small-scale users need a license from the ACM, while trading on the APX-ENDEX requires membership. Moreover, programme-responsible parties for electricity must meet the administrative requirements of TenneT. REMIT information obligations may apply, as well as MiFID and EMIR.

27.5.5 Renewable energy

The Netherlands adopted a legal framework for renewable energy within the context of the EU Renewable Energy Directive. The directive requires each EU member state to increase the share of renewable energy in its gross final consumption in order to achieve an EU-wide 20 percent share by 2020. Under the directive, the Netherlands needs to achieve a 14 percent share of renewable energies by 2020. The European Environment Agency notes that the Netherlands stood at a 4.3 percent share of renewable in 2011, and has not reached its interim targets of 5.1 percent under the Dutch National Renewable Energy Action Plan ("NREAP") and 4.7 percent as set out in the directive. The European Commission's progress report noted that the Netherlands also falls behind the indicative 2010 transport target of 5.75 percent.

In order to address this situation, the Dutch government reformed the feed-in tariff scheme, the *Stimulering duurzame energieproductie* ("SDE"), into a market-based, cost-effective premium scheme financed by a surcharge on the end consumer bill, and then renamed it SDE+. The SDE+ premium feed-in support scheme promotes renewable energy sources, including those for gas production, as well as for electricity and heating purposes in a technology-neutral manner. The variable feed-in premium encourages the most cost-effective technologies and promotes cost reductions. The SDE+ is reviewed annually.

In 2012, the liberal-labor government accord raised ambitions toward a renewable energy target of 16 percent by 2020. The nationwide Energy Accord of September 2013, however, remains with the EU commitment of 14 percent by 2020, and aims to achieve 16 percent by 2023. The Energy Accord confirms that the SDE+ scheme will remain the main support instrument for renewable energies. The Energy Accord prioritizes wind power generation by planning to install additional onshore wind power (6 GW by 2020 and 7 GW by 2023) and offshore wind power (2 GW by 2020 and 3.5 GW by 2023). It also supports decentralized renewable production through tax incentives for smaller photovoltaic ("PV") projects. The 2009 National Water Plan, the National Spatial Strategy and the Integrated North Sea Management Plan 2015 plot the deployment of around 6 GW wind power by 2020, and designate areas for wind parks.

27.5.6 Nuclear power generation

Nuclear plays a small part in the Dutch energy supply, constituting about 1.7 percent of total generating capacity. The only nuclear power plant in operation is located in the southwestern part of the country and has a net electrical capacity of 482 MW. In 2013, the plant's operating life was extended from 2014 to 2033.

The Dutch government considers nuclear power a transition technology to a sustainable low-carbon energy system, in combination with renewable energy, energy savings and CCS. Thus, nuclear energy is considered an option for electricity generation in the future, provided that health safety and environment ("HSE") conditions are met. Recent governments have

taken the necessary steps to facilitate the planning and the licensing procedure for new nuclear capacity and to update legislation.

Nuclear facilities operate under a license granted by the Directorate for Nuclear Installation and Safety under the Nuclear Energy Act. Licensees of nuclear installations perform a comprehensive safety review every 10 years. The Department for Nuclear Safety, Security, Safeguards and Radiation Protection is responsible for the supervision, inspection and assessment of nuclear facilities. A legislative proposal that will regulate the establishment of an Authority for Nuclear Safety and Radiation Protection as an independent administrative organization is pending in the Dutch Parliament.

27.6 Climate change

27.6.1 General

The Netherlands ratified the Kyoto Protocol in May 2003, and has committed to reduce GHG emissions on average by 6 percent within the 2008-2012 period compared to the 213 Mt CO2-eq in the base year. In 2012, the Netherlands reached its Kyoto target. Through a European Commission decision, the Dutch national Kyoto target for 2008-2012, was translated into an emissions level, which was then split between the European Union Emissions Trading Scheme ("EU-ETS") sector and the non-ETS sectors. On 24 June 2015, the Dutch Supreme Court has ruled that the Dutch state has to take more actions in reducing the GHG emissions in the Netherlands. The state has to ensure as well that the Dutch GHG emissions in 2020, will be at least 25 percent lower than those in 1990. Even when the Dutch government has decided to appeal, such climate change litigation ordering the Netherlands to step up its climate change actions was already publicized worldwide.

In the 2011 Climate Letter 2050, the previous government reaffirmed its commitment and set out the following four core elements to achieve a climate neutral economy by 2050:

i) CO2-free electricity supply
ii) Sustainable use of biomass
iii) Energy savings
iv) CCS

27.6.2 Main legislation and regulation

Since 2008, the Netherlands has been continuing to implement climate policies through a broad range of measures under the Clean & Efficient Programme ("CEP"), which remains largely in place even today. However, national energy and climate targets and the support scheme for renewable energies have changed considerably over time. The Environmental Management Act and the National Climate Policy Implementation Plan form the legal framework for Dutch climate and energy efficiency policies, which are in line with the Kyoto target and the objectives of the EU-ETS under the EU energy and climate package for 2020. The main instruments include: (i) the EU-ETS, energy taxation and green tax incentives (such as energy investment allowances); (ii) subsidies on renewable energy and (iii) a broad range of energy efficiency measures, including voluntary agreements with the industry.

On 12 December 2015, the Paris Agreement was adopted by 195 nations. The Paris Agreement is the outcome of the 21st conference of the parties (COP21) to the United Nations Framework Convention on Climate Change (UNFCCC) and aims to achieve the following:

i) Keep global temperature increase this century well below 2 degrees Celsius and drive efforts to limit temperature increase even further to below 1.5 degrees Celsius.
ii) Significantly reduce the emissions of greenhouse gases.
iii) Encourage developed countries to invest in developing countries to help them reach their reduction goals. This type of investment is to be financed by the developed countries through an annual reservation

of USD 100 billion (plus voluntary contributions by other countries) between 2020 and 2025, after which, new goals will be determined.

For the Paris Agreement to be legally binding, it will have to be ratified by at least 55 countries that account for at least 55 percent of global emissions. It will enter into force 30 days after such milestone had been reached. The agreement will be open for signature from 22 April 2016 to 21 April 2017.

27.7 Energy efficiency

27.7.1 European energy efficiency directive

The 2006 European energy efficiency directive was implemented in the Netherlands, and it deals with matters like energy-saving requirements for appliances and the distribution of smart energy meters. An action plan for energy savings was promulgated to increase awareness for the potential of energy savings in building. In addition, the Dutch government also entered into a “Green Deal,” which aims to: (i) encourage energy saving and the generation of local sustainable energy and (ii) indicate that “green” and “growth” can be combined.

27.7.2 Energy Accord

The Energy Accord sets out 10 pillars for boosting Dutch green growth and includes the following overall targets:

i) Reduction of the total final energy consumption by 100 petajoules (PJ) in 2020, and a saving of 1.5 percent per year in the final energy consumption
ii) Increase in the proportion of energy generated from renewable sources from the current 4.5 percent to 14 percent by 2020 in line with EU commitments and a further increase to 16 percent by 2023

The reduction of the total final energy consumption by 100 PJ in 2020, should enable the Netherlands to contribute to the EU-wide goal of saving energy consumption by 20 percent by to 2020 and the target of 1.5 percent savings per year at end-user level, as required under the EU Energy Efficiency Directive. As interim goals, the Netherlands aims to reach 35 percent of this reduction (100 PJ) by the end of 2016, and at least 65 percent by the end of 2018. The main focus of the Energy Accord in this regard is the implementation and enforcement of the Environmental Management Act and the Environmental Management of Non-Residential Buildings Act. The act sets out an obligation to implement energy-saving measures with a payback period of five years or less. A pilot Energy Performance Assessment will evaluate the implementation of energy efficiency measures in 2015.

Appendix I

Procedure for Incorporating a Dutch N.V., a B.V. or a Cooperative

This section details the procedure in incorporating a Dutch N.V. (*naamloze vennootschap met beperkte aansprakelijkheid* or a public limited liability company), a B.V. (*besloten vennootschap met beperkte aansprakelijkheid* or a private limited liability company) and a cooperative (*coöperatie*).

Procedure

1) Execute a power of attorney by the incorporator(s) to sign the notarial deed of incorporation.
2) Open a separate bank account in the name of the company in incorporation.*
3) Issue a bank statement to the notary confirming the payment of the incorporation capital, or issue an auditor's statement to the notary confirming that the value of the contribution is at least equal to the nominal value of the incorporation capital.*
4) Execute the notarial deed of incorporation, including the articles of association.
5) Register the company or cooperative, managing directors and sole shareholder (if applicable) with the Trade Register of the Chamber of Commerce within eight days after the execution of the notarial deed.

* Steps 2 and 3 are not applicable to the incorporation of a B.V. or cooperative.

Appendix II

Overview of Tax Rates for Inbound Income under Dutch Tax Treaties

1 Dividends column

The lower rate in the column generally applies if the recipient is a company that owns at least 25 percent of the capital to the voting power in the Dutch company, as the case may be. There may be special conditions or exceptions.

2 Interest column

Many treaties provide for an exemption for certain types of interest, such as interest paid to the state, local authorities, the central bank, export credit institutions, or in relation to sales on credit. Such exemptions are not considered in this column. The lower rates generally refer to interest paid by banks or to interest on government bonds.

3 Royalty column

Different rates in the columns generally refer to different types of withholding tax rates depending on the type of royalty, such as copyright payments, payments for the use of films and computer software, payments for the use of patents, trademarks and know-how.

Appendix	Dividends	Interest	Royalties	
Country	Reduced rate under tax treaty for qualifying participa-tions	Reduced rate under tax treaty for indi-viduals and companies	Reduced rate under tax treaty	Reduced rate under tax treaty
Albania	0%/5%	15%	0%/5%/ 10%	10%
Argentina	10%	15%	0%/12%	3%/5%/ 10%/15%
Armenia	0%/5%	15%	0%/5%	5%
Aruba	5%/7.5%/ 8.3%	15%	0%	0%
Australia	15%	15%	10%	10%
Austria	0%*/5%	15%	0%	0%/10%
Azerbaijan	5%	10%	0%/10%	5%/10%
Bahrain	0%	10%	0%	0%
Bangladesh	10%	15%	0%/7.5%/ 10%	10%
Barbados	0%	15%	5%	0%/5%
Belarus	0%/5%	15%	5%	3%/5%/ 10%
Belgium	0%/5%	15%	0%/10%	0%
Bosnia and Herzegovina	5%	15%	0%	10%
Brazil	15%	15%	10%/15%	15%/25%
Bulgaria	0%*/5%	15%	0%	0%/5%
Canada	5%	15%	0%/10%	0%/10%
China	10%	10%	10%	10%

Appendix	Dividends	Interest	Royalties	
Country	Reduced rate under tax treaty for qualifying participa-tions	Reduced rate under tax treaty for indi-viduals and companies	Reduced rate under tax treaty	Reduced rate under tax treaty
Croatia	0%	15%	0%	0%
Curaçao	5%/7.5%/ 8.3%	15%	0%	0%
Czech Rep.	0%	10%	0%	0%*/5%
Denmark	0%	15%	0%	0%
Egypt	0%	15%	0%/12%	12%
Estonia	0%*/5%	15%	0%/10%	0%*/5%/ 10%
Ethiopia (not in force)	5%	10%/15%	0%/5%	5%
Finland	0%	15%	0%	0%
France	0%*/5%	15%	0%/10%/ 12%	0%
Georgia	0%/5%	15%	0%	0%
Germany	0%*/10%[13]	15%	0%	0%
Ghana	5%	10%	0%/8%	8%
Greece	0%*/5%	15%	0%*/8%/ 10%	0%*/5%/ 7%
Hong Kong	0%	10%	0%	3%
Hungary	0%*/5%	15%	0%	0%

13 The new treaty for the avoidance of double taxation between the Netherlands and Germany entered into force on 1 January 2016. In the new treaty between the Netherlands and Germany, the dividend withholding tax rate for qualifying participations has been reduced from 10 percent to 5 percent. The other withholding tax rates remain unchanged.

Appendix	Dividends	Interest	Royalties	
Country	Reduced rate under tax treaty for qualifying participa-tions	Reduced rate under tax treaty for indi-viduals and companies	Reduced rate under tax treaty	Reduced rate under tax treaty
Iceland	0%	15%	0%	0%
India	10%	15%	10%/15%	20%
Indonesia	10%	10%	10%	10%
Ireland	0%	15%	0%	0%
Israel	5%	15%	10%/15%	5%/10%
Italy	0%*/5%/10%	15%	0%/10%	0%*/5%
Japan	0%/5%	10%	0%/10%	0%
Jordan	5%	15%	5%	10%
Kazakhstan	0%/5%	15%	0%/10%	10%
Korea	10%	15%	10%/15%	10%/15%
Kosovo	5%	15%	0%	10%
Kuwait	0%	10%	0%	5%
Latvia	0%*/5%	15%	0%*/10%	0%*/5%/10%
Lithuania	0%*/5%	15%	0%*/10%	0%*/5%/10%
Luxembourg	0%*/2.5%	15%	0%/2.5%/15%	0%
Macedonia	0%	15%	0%	0%
Malaysia	0%	15%	10%	0%/8%
Malta	0%/5%	15%	0%*/10%	0%/10%

Appendix	Dividends	Interest	Royalties	
Country	Reduced rate under tax treaty for qualifying participa-tions	Reduced rate under tax treaty for indi-viduals and companies	Reduced rate under tax treaty	Reduced rate under tax treaty
Mexico	5%	15%	0%/5%/ 10%	10%
Moldova	0%/5%	15%	0%/5%	2%
Montenegro	5%	15%	0%	10%
Morocco	10%	25%	10%/25%	10%
New Zealand	15%	15%	10%	10%
Nigeria	12.5%	15%	12.5%	12.5%
Norway	0%	15%	0%	0%
Oman	0%	10%	0%	8%
Pakistan	10%	20%	10%/15%/ 20%	5%/15%
Panama	0%	15%	0%/5%	5%
Philippines	10%	15%	0%/10%/ 15%	10%/15%
Poland	0%*/5%	15%	0%/5%	0%*/5%
Portugal	0%	10%	0%/10%	0%*/10%
Qatar	0%	10%	0%	5%
Romania	0%/5%	15%	0%/3%	0%/3%
Russia	5%	15%	0%	0%
Saudi Arabia	5%	10%	5%	7%
Serbia	5%	15%	0%	10%
Singapore	0%	15%	10%	0%

Appendix	Dividends	Interest	Royalties	
Country	Reduced rate under tax treaty for qualifying participa-tions	Reduced rate under tax treaty for indi-viduals and companies	Reduced rate under tax treaty	Reduced rate under tax treaty
Slovak Rep.	0%	10%	0%	0%*/5%
Slovenia	0%*/5%	15%	0%/5%	0%*/5%
South Africa	5%	10%	0%	0%
Spain	0%*/5%	15%	0%*/10%	0%*/6%
Sri Lanka	10%	15%	5%/10%	10%
Suriname	7.5%/15%	20%	0%/5%/10%	5%/10%
Sweden	0%	15%	0%	0%
Switzerland	0%	15%	0%	0%
Taiwan	10%	10%	0%/10%	10%
Tajikistan	15%	15%	0%	0%
Thailand	5%/10%	25%	10%/25%	5%/15%
Tunisia	0%	20%	0%/7.5%/10%	7.5%/11%
Turkey	5%/10%/15%	20%	10%/15%	10%
Uganda	0%	5%/15%	0%/10%	10%
Ukraine	0%/5%	15%	0%/2%/10%	0%/10%
United Arab Emirates	0%/5%	10%	0%	0%
United Kingdom	0%	15%/10%	0%	0%

Appendix	Dividends	Interest	Royalties	
Country	Reduced rate under tax treaty for qualifying participa-tions	Reduced rate under tax treaty for indi-viduals and companies	Reduced rate under tax treaty	Reduced rate under tax treaty
United States	0%/5%	15%	0%	0%
Uzbekistan	0%/5%	15%	0%/10%	0%/10%
Venezuela	0%	10%	0%/5%	5%/7%/10%
Vietnam	5%/7%/10%	15%	0%/7%/10%	5%/10%/15%
Zambia	5%	15%	10%	10%
Zimbabwe	10%	20%	10%	10%

* 0 percent-rate based on the EU Parent-Subsidiary Directive/EU Interest and Royalty Directive

Please see Section 18.23 for more details about current treaty negotiations.

Appendix III

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