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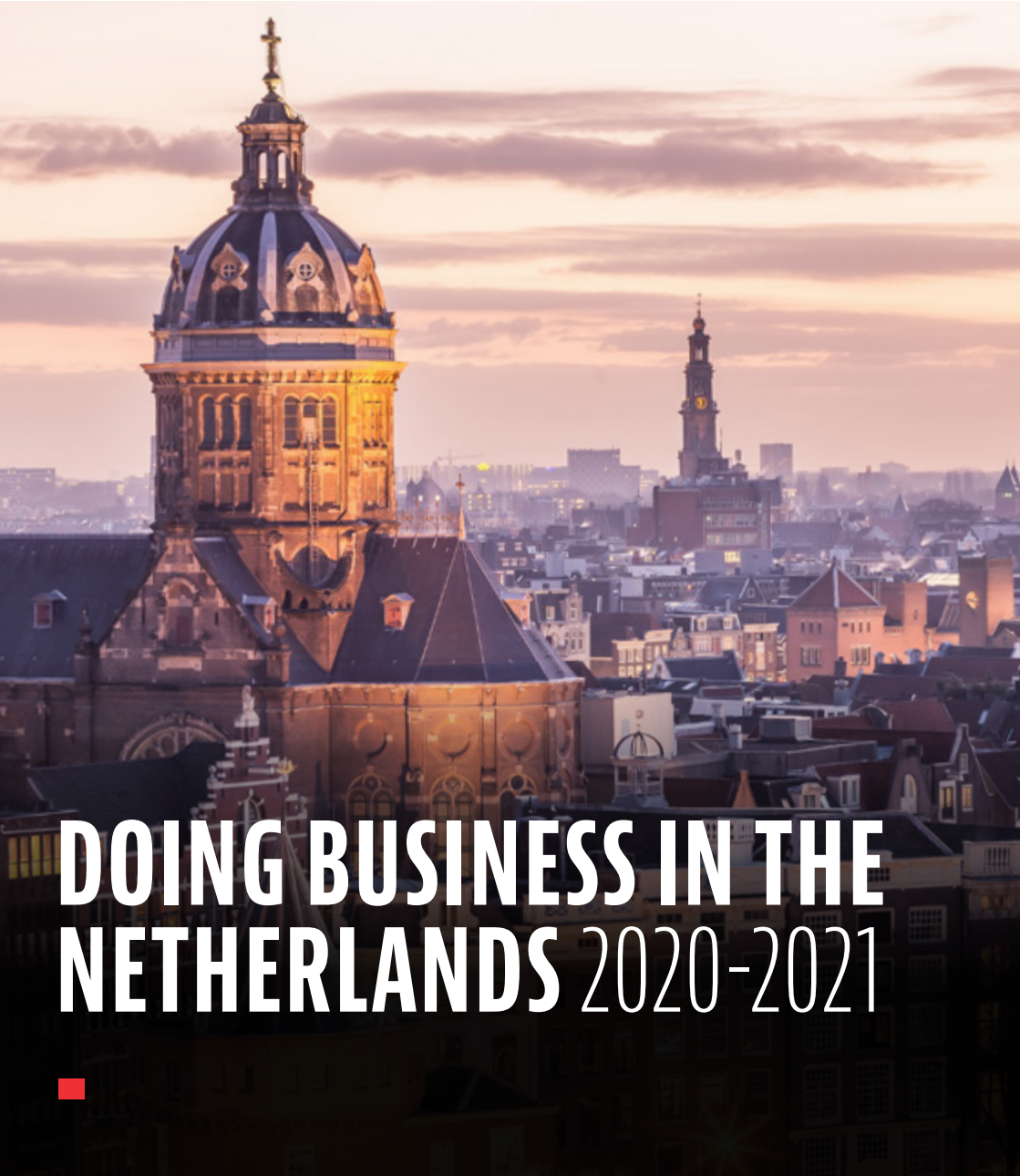

DOING BUSINESS IN THE NETHERLANDS 2020-2021

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Introduction

We are pleased to present to you the Doing Business in the Netherlands Guide 2020-2021.

This handbook is your personal guide to the Dutch legal and taxation system and beyond. It gives you an informative view of the key aspects of doing business and investing in the Netherlands and covers a wide array of topics, such as the main aspects of corporate law, employment law, tax law and ICT and e-commerce law, as well as many other legal aspects and regulations of relevance.

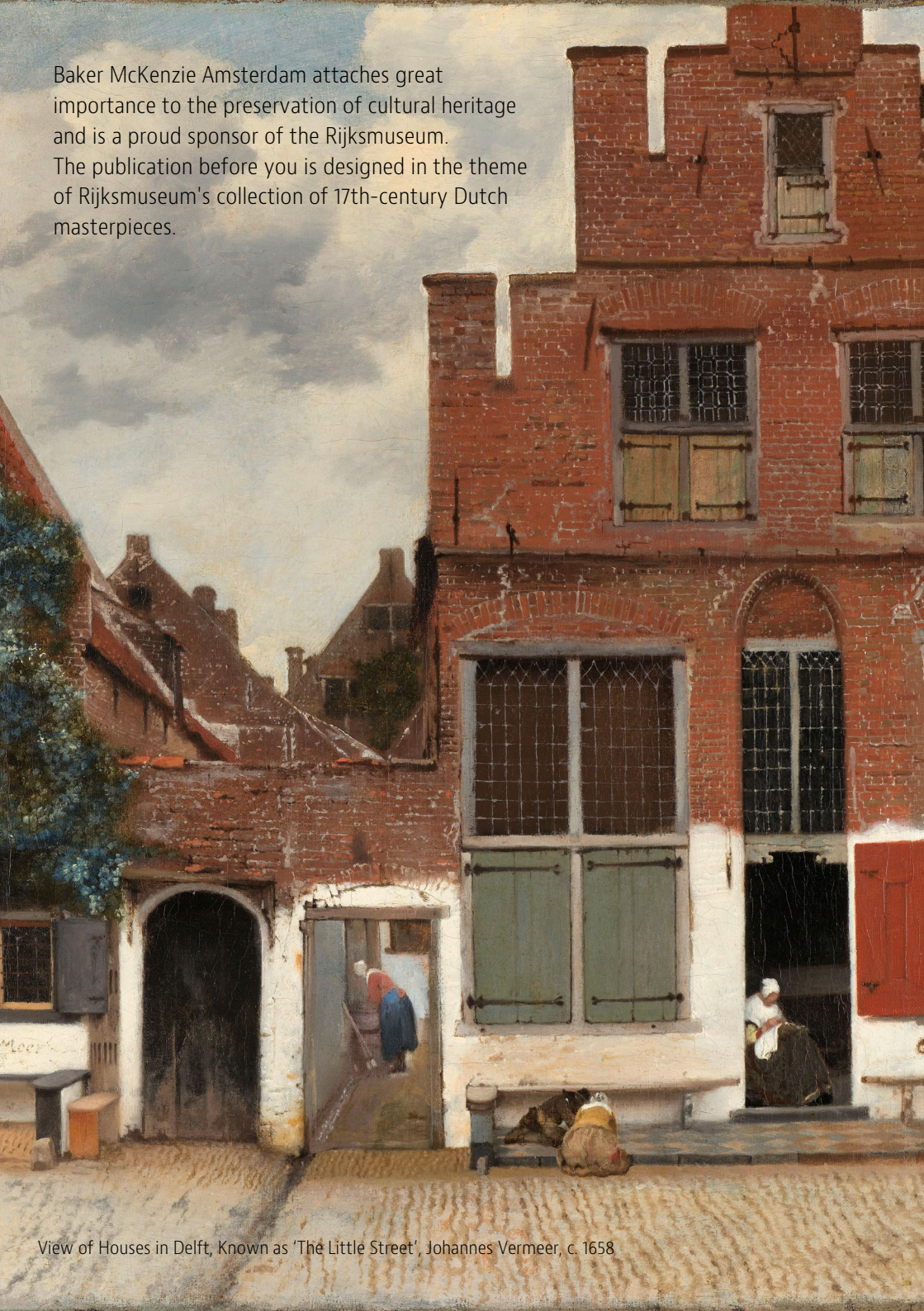
With its central geographical position and excellent infrastructure, the Netherlands is the ideal gateway to enter the EMEA market. In fact, 400 out of the 500 largest companies in the world have their offices in the country, and a growing number of multinationals are establishing their European head offices here as well.

Baker McKenzie - with our rich history dating back to 1949 - is strongly positioned in the Netherlands. We are legal and tax advisers to many of the world's leading corporations on the complex issues of today's integrated global market.

If you require more information about any of the topics covered in this guide, our attorneys and tax advisers will be happy to assist you. On behalf of Baker McKenzie Amsterdam, we hope that you find this guide useful and would like to wish you every success in the Netherlands.

Corinne Schot
Managing Partner
Baker & McKenzie Amsterdam N.V.

Baker McKenzie Amsterdam attaches great importance to the preservation of cultural heritage and is a proud sponsor of the Rijksmuseum.
The publication before you is designed in the theme of Rijksmuseum's collection of 17th-century Dutch masterpieces.



View of Houses in Delft, Known as 'The Little Street', Johannes Vermeer, c. 1658

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 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 will give you a glimpse of the excellent business environment that the Netherlands offers.

1.1 Country and cities

Land Information	
Population	17,282,163 (as of 24 September 2019)*
Total area	41,543 km²

Land Information	
Land	33,880 km²
Water	7,645 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: 854,047 inhabitants* The Hague: 539,154 inhabitants* Rotterdam: 646,859 inhabitants* Utrecht: 352,866inhabitants*

Kingdom of the Netherlands

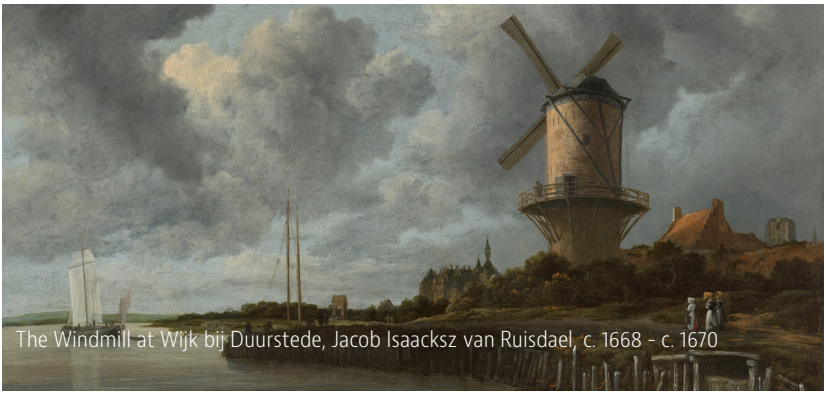
The Netherlands is a kingdom, officially known as the Kingdom of the Netherlands. It consists of the Netherlands itself and three islands in the Caribbean Sea, which are: (i) Aruba; (ii) Curacao; and (iii) Sint Maarten. After the dissolution of the Netherlands Antilles on 10 October 2010, the three Caribbean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

* Source: Statline

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.



The Windmill at Wijk bij Duurstede, Jacob Isaacksz van Ruisdael, c. 1668 - c. 1670

1.2 Infrastructure, traffic and transport

Traffic and Transport 2018	
Main airport	Amsterdam Airport Schiphol
Number of (air) passengers	71,1 million*
Passenger destinations	327*
Air freight capacity	1,72 million tons*
Main seaport	Port of Rotterdam
Annual throughput	469 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

Amsterdam Airport Schiphol is one of the four main European airports. It is close to the Port of Amsterdam and the Port of Rotterdam and is also supported by a wide transport network of rail and road, making it a true European gateway.

* Source: Schiphol
** Source: Port of Rotterdam

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 largest logistic and industrial hubs in Europe. With an annual throughput of 469 million tons of cargo, Rotterdam is by far the largest seaport of Europe. Rotterdam's position can be attributed to its excellent accessibility via the sea, its 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 hectares consist of industrial sites, including Maasvlakte 2). The length of the port area is over 40 kilometers.

Amsterdam Internet Exchange

The Amsterdam Internet Exchange (AMS-IX) is one of the largest internet hubs in Europe. After Frankfurt 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, 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, 2018	Value
Gross domestic product ("GDP")	EUR 774,039 billion*
GDP growth	2.6%
Inflation rate	1.6%*
Total workforce	9,125,000**
Unemployment rate	3.8%*

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), 2018	
Exports	EUR 496,000 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 articles
Imports	EUR 41,637 million*

* Source: Statline
** Source: CBS
*** Source: Globaledge

Trade (Import and Export), 2018	
Import country comparison to the world	9***
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 articles

The Netherlands' exports totaled EUR 496 million in 2018. 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. Around half of the exports are transit ones.

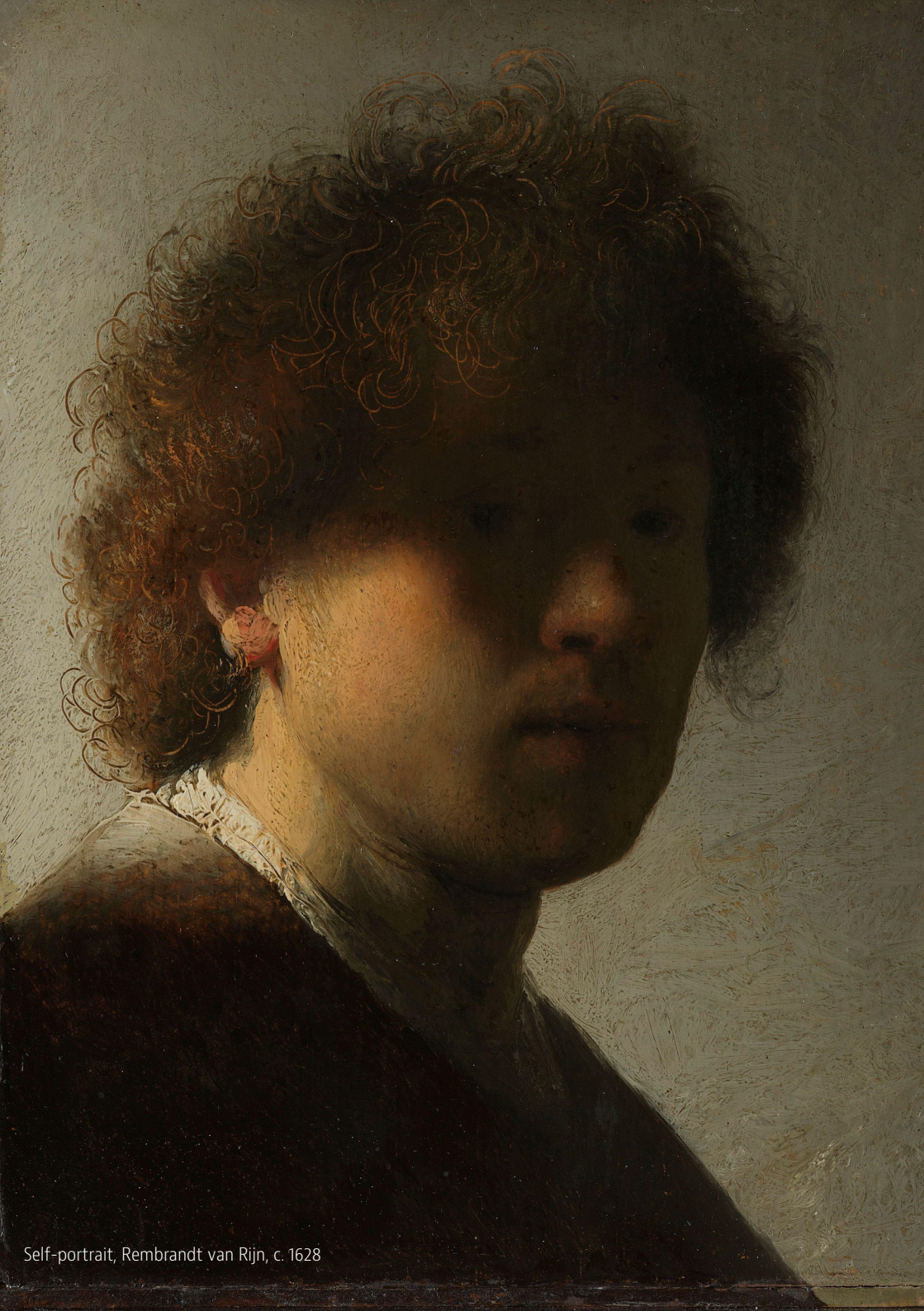
1.5 Dutch people and culture

The People	
Total population	17,282,163 (September 2019)
Languages	Dutch (official), Frisian (official)
Life expectancy	Men: 80.2 years; women: 83.3 years
Nationalities	200

1.5.1 People

The Dutch themselves are surprising people. They live, all 17 million of them, on 41,543 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 and to serve customers across the globe. Another distinctive fact is the attractive cultural climate. Dutch people are anti-authoritarian, innovative and open-minded.



Self-portrait, Rembrandt van Rijn, c. 1628

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 theatre.

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 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 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 approximately 1250 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 specifically to Amsterdam to work in a climate of artistic freedom, dialogue 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 helps maintain. The world's planners and architects flock here to learn about Dutch solutions for crowded countries.

Holidays

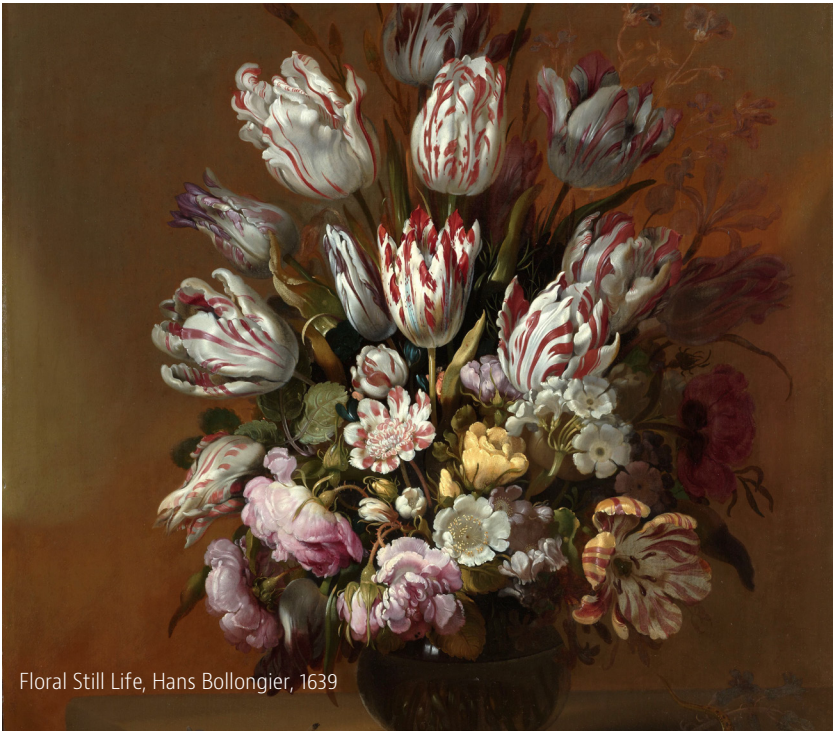
National holidays are important in Dutch culture. Several holidays have a rich history and have been celebrated for a very long time, with some having strong cultural ties to local regions. For instance, King's Day, which the Dutch celebrate in April, is an annual holiday in honor of King Willem-Alexander. On 5 May, 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 are held, for children and adults alike. Sinterklaas' arrival is in November and his birthday is celebrated on 5 December.

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 over 1000 old-fashioned working windmills?
- The International Court of Justice (at the Peace Palace) and the International Criminal Court are both situated in The Hague?



Floral Still Life, Hans Bollongier, 1639

- Holland has nearly 35,000 kilometers of cycle paths?
- Holland is the second biggest exporter of agricultural produce, preceded only by the US, even though just over 2% of the Dutch population work in the agriculture sector?
- The Dutch are among the tallest people in the world?
- Amsterdam was built entirely on piles?
- There are .23 million bicycles and over 8 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
- 6.76 meters 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 kilometers 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 1.55 million cows, which together produce 13.7 billion liters of milk?
- On average, the Dutch eat 14.3 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 a Dutch holding company, a subsidiary or 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 (non-resident) 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, principal place of business of the foreign company, a short description of the actual business activities, number of employees and full address of the branch. A (local equivalent of a) trade registry extract as well as the articles of association of the foreign company are to be submitted.
- For the directors of the foreign company — the full name, address, date and place of birth, nationality and authority to represent the foreign company, signature and certified copy of an identity card (passport or driver's license)
- For the branch manager (no residency requirement) — the full name, address, date and place of birth, nationality, extent of power and authority to represent the branch, signature and certified copy of an identity card (passport or driver's license)
- The annual accounts of the foreign company filed locally are 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: public companies (*naamloze vennootschap or N.V.*), and private companies with limited liability (*besloten vennootschap met beperkte aansprakelijkheid or B.V.*). The main differences between these two entities are as follows:

- [1]
- Shares in N.V.s 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 EUR 45,000. 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 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

[1] On 1 July 2019, the "Act on the conversion of bearer shares" ("**Act**") entered into force. Under the Act, bearer shares can only be issued by way of a global certificate held by the central institute or an intermediary. Dutch N.V.s will have to convert issued bearer shares into registered shares before 1 January 2020 if the bearer shares are not yet included in a global certificate.

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 either be individuals or legal entities, regardless of their nationality. 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 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 is not considered a separate legal entity. Therefore, 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 now 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 coopera-tive by a notarial deed. The cooperative does not have shareholders, unlike an N.V. or B.V., but members. At incorporation, the cooperative must have at least two members (*leden*). By law, the cooperative's objective is to provide 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 object is generally 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)

There are four ways to incorporate an SE, which is 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:
    - two companies based in two different EU Member States; or
    - 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 at 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, an 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 based on registration in one Member State and 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. Unlike a Dutch cooperative, an SCE has a subscribed share capital of at least EUR 30,000. 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 only liable 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 Act, the management of such 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. Companies that are subject to the laws of the EEA, however, are exempt from most of the provisions of the FFCA.

3

Tax Benefits of Regional Headquarters/ Coordination Centres

Regional headquarters or coordination centers are generally established to supervise the operations of European and often Middle Eastern and African (EMEA) subsidiaries. Sales and marketing coordination, administration and accounting, cash management, central billing, re-invoicing, advertising and public relations, as well as group financing and licensing, are typical activities of regional headquarters. The Netherlands, in most cases, is a 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 of 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; for some exceptions, see paragraph 3.5.2. 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% ruling."

Generally, Dutch companies must report taxable income in the national currency, i.e., the euro. They may also report taxable income in another

currency, the US dollar for instance, 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 certain typical shareholders' activities on a full-cost basis to affiliates 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 appropriate (at arm's length) and sufficient.

For 2020, the corporate income tax rate on profits up to EUR 200,000 will be 16.5% (to be reduced to 15% in 2021); the general corporate income tax rate on profits is 25% (to be reduced to 21.7% from 2021).

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. In principle, rulings (Advance Pricing Agreements "**APA**" and Advance Tax Rulings "**ATR**") are issued by the local tax inspector and assisted by a team of government experts to guarantee a consistent ruling policy ("**College IFZ**"). 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, however the Dutch government has successfully appealed the Starbucks case. 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 commenced with the automatic exchange of information on rulings by the European Commission and the OECD in 2016, and this is now a standard element of each APA or ATR file. APAs and ATRs are granted for periods of four to five years, unless the facts of a specific case require a deviating term. It is possible to arrange a pre-filing meeting with the Dutch tax authorities to discuss the information to be submitted by the taxpayer Since July 2019, all rulings are published (although anonymized).

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 Section 3.3, Holding of shares)
- Headquarter companies: Usually, a cost-plus ruling on management services, providing for a fixed profit mark-up on management costs charged to affiliates; Headquarter activities are often combined with a shared services center.
- Distribution centers: Usually, a cost-plus ruling on supporting activities (warehousing, distribution) conducted for the benefit of affiliates (see 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 Section 3.4, Group financing and group licensing): It is also possible to reach an agreement with the Dutch tax authorities with regard to the tax treatment of central invoicing, leasing and foreign exchange clearing, and cash management and treasury activities performed within the group, provided in combination with the appropriate level of substance (see 3.4.a.).

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 the 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 non-resident 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 19, Sections 19.4.2 and 19.4.3.

Certain limitations on interest deductions may apply in the Netherlands (see Chapter 19). Tax treaties concluded by the Netherlands generally provide that withholding tax on dividends distributed to a Dutch company holding at least 25% of the shares in the distributing company is reduced to a substantially lower percentage, often to zero. 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 (see also paragraph 20.3). 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 zero. Appendix II contains a chart showing the applicable reductions. Moreover, the Netherlands does not impose stamp duty or a withholding tax on interest (except in case of abuse, see paragraph 3.5.2).

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, often to zero. Appendix II contains an overview of the available reductions. The Netherlands does not levy withholding tax on (outbound) royalties, except in case of abuse, see paragraph 3.5.2.

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.

3.4.1 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% of all authorized directors are tax residents of the Netherlands;
2. The directors residing in the Netherlands have the relevant professional knowledge and skills to execute their obligations as directors;
3. The FSC has qualified personnel to execute and administer its transactions;
4. The (main) directorial decisions are taken in the Netherlands;
5. The FSC's (main) bank account is maintained in the Netherlands;
6. The FSC's books and accounts are kept in the Netherlands;
7. TThe FSC is a tax resident of the Netherlands and is not deemed a resident of any other country.
8. The FSC has a minimum of EUR 100,000 labor costs in relation to the licensing and/or financing activities; and
9. The FSC has its own office space at its disposition (minimum 24 months lease).

The FSC (either with or without an APA) must declare in its tax return that these substance requirements are fulfilled. Lack of substance may cause spontaneous exchange of information with foreign tax authorities and disallowance of tax treaty benefits. The adoption of the final action

reports of the Base Erosion and Profit Shifting Project ("BEPS reports") in October 2015 and the introduction of anti-abuse provisions in tax treaties (see also paragraph 3.5.2 below) will limit the use of tax treaties by FSCs lacking appropriate substance. In addition, the Netherlands government announced that a withholding tax on interest and royalties will be introduced as of 1 January 2021 for payments to related companies in certain situations (see paragraph 3.5.2.).

3.4.2 Minimum risk profile

FSCs must be subjected 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 1% of the total outstanding loans or EUR 2 million, whichever is lower. For licensing, 50% of the net royalties received per annum or EUR 2 million as minimum equity, whichever is lower, is generally assumed sufficient. As mentioned, this equity must be at risk in case 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 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 the 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.

3.5 Anti-abuse provisions

The Dutch fiscal investment climate for multinational companies has been leaning for decades on its "crown jewels", such as the participation exemption, the extensive tax treaty network and the absence of withholding taxes on interest and royalties as described above. These "crown jewels", along with the fact that the Dutch tax authorities are prepared to give certainty in advance through tax rulings, makes the Netherlands an attractive place for multinationals to do business. This also applies to the use of Dutch companies exclusively for international holding, financing and licensing activities without material business substance, which left the Netherlands with the image of facilitating tax avoidance.

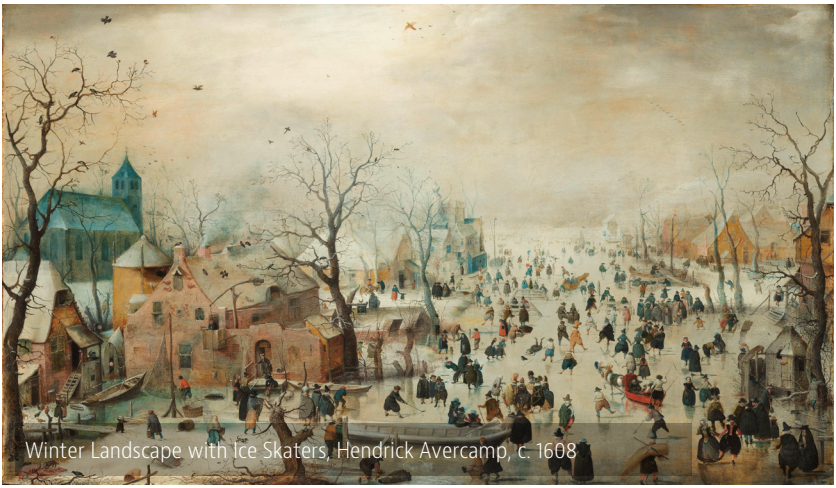
In order to overturn this image, the Dutch government has introduced a number of changes to the existing policy and legislation. These may affect some of the tax benefits described above, depending on the circumstances.

3.5.1 New ruling policy

A new Dutch ruling policy entered into effect as of 1 July 2019. Under this new Dutch Decree regarding rulings, a taxpayer applying for an ATR or APA will be required to have sufficient 'economic nexus' in the Netherlands to conclude a ruling. In short, this means that a business activity must be carried out by a sufficient number of relevant employees in the Netherlands. A ruling will not be granted if the purpose or one of the main purposes of the transaction is to avoid Dutch or foreign taxation, or if low-taxed (tax rate lower than 9%) or EU blacklisted jurisdictions are involved in the transaction.

3.5.2 Introduction of withholding tax on interest and royalties

As of 1 January 2021, interest and royalties that are directly or indirectly paid to a related company or PE resident of a low-taxed or EU blacklisted jurisdiction will become subject to 21.7% withholding tax. In this respect, the Dutch Ministry of Finance will publish a limitative list of low-taxed and EU blacklisted jurisdictions annually.



Winter Landscape with Ice Skaters, Hendrick Avercamp, c. 1608

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. in incorporation. After the issuance of this bank statement, the N.V. can be incorporated by execution of a notarial deed. It is not necessary to obtain a bank statement for the incorporation of a B.V.

If, on 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. For 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 for 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 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.

4.2 Incorporation of a cooperative

A cooperative is incorporated by a Dutch civil-law notary executing a notarial deed in the Dutch language 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: WA for *wettelijke aansprakelijkheid* (full statutory liability), BA for *beperkte aansprakelijkheid* (limited liability), or 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% of the authorized capital must be issued and at least 25% of the par value of each share issued must be paid in. The minimum issued share capital is EUR 120,000 for an SE and EUR 45,000 for an N.V.

B.V.

The incorporator(s) of a B.V. may determine the amount of capital to be paid, without considering the specific capital requirements that apply for N.V.s. It is possible to choose an authorized capital in the articles of association of a B.V., but it is not mandatory. The nominal value of shares may be denominated in another currency other than the euro.

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 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 from 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 shall 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, pledgers 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 kept for the cooperative and contains information with respect to the name, corporate seat, member's interest, contributions, members, pledgers, usufructuaries, and any amendment to the articles of association, transfer, pledge and usufruct on interest.

Each shareholder, member, pledger 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% of the par value of the shares must be paid up. This requirement does not apply to the issuance of B.V. shares. 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 is 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 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.

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 are 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. Instead of a two-tier board structure, consisting of a separate management board and a supervisory board, a one-tier board of management directors can be installed, consisting of executive and non-executive members. This board structure is further described in paragraph 4.11.

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 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 shall act under the responsibility of the board of managing directors. The proxy holders are known to third parties due to their 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, for three consecutive years, meets the following criteria:

- The issued capital of the company, together with reserves as reflected in the balance sheet, amounts to at least EUR 16 million.

- The company and/or an affiliated company (i.e., an enterprise in which the company owns at least 50% 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.

Therefore, the N.V., B.V. or cooperative should install a board of supervisory directors, or alternatively, 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 an N.V. or B.V. In the event the mitigated regime applies, the board of managing directors will be appointed by the general meeting of shareholders instead of the supervisory board.

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, provided that majority of their employees, employed by the company and by group companies, work outside the Netherlands.

The Large Companies Regime does not apply to SEs.

4.11 One-Tier Board

For several years, it has been possible to install one single board of directors for a Dutch N.V. or B.V., which comprises both executive and non-executive directors. As opposed to Anglo-American jurisdictions, the Netherlands (as with 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, particularly as a result of international discussions on a more active role for supervisors or non-executives and on corporate governance in general. In the one-tier board system, the general course of affairs shall be 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 shall be charged with the day-to-day business of the company. The one-tier board system is considered an alternative to the two-tier board system.

4.12 Developments

Director disqualification

It is possible for a natural person to be suspended from managing a Dutch legal entity or being associated as a supervisory director of the entity for a maximum of five years.

The purpose of this act is to combat bankruptcy fraud and prevent managing directors from continuing mala fide activities through existing or new legal entities.

A disqualification will be registered on a special list kept by the Trade Register of the Chamber of Commerce, which will be made public though their website. The list and the legislation governing it are yet to be developed.

Register of Ultimate Beneficial Owners (UBOs)

In order to comply with the fourth EU anti-money laundering directive, new legislation in relation to disclosure of information on UBOs will become effective in January 2020. A public UBO register will be kept by the Trade Register of the Chamber of Commerce. This register will contain information about UBOs of legal entities that are registered in the

Netherlands. Entities in scope must then register their UBOs within 18 months of the date on which the new law becomes effective.

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 the balance sheet, the profit and loss account and explanatory notes, and the consolidated annual accounts, if applicable. Cooperatives shall 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, the board of managing directors prepares annual accounts. All managing directors and supervisory directors (if any) shall sign the annual accounts. If one or more of their signatures are missing, this shall 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., respectively. The adoption should take place within one month (cooperative) or two months (N.V., SE and B.V.) after 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 (cooperative) or two months (N.V., SE and B.V.) 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 shall 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 (unless this conflicts with legitimate interests) on investments, financing, personnel, the development of turnover and profitability, as well as information about research and development activities.

Pursuant to the Dutch Corporate Governance Code ("**Code**"), listed N.V.s and SEs are expected to devote a chapter in the annual report to the broad outline of their corporate governance structure, to the compliance with the corporate governance code, as well as to 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, shall 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, shall provide such a view enabling 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 justified by the international structure of its group, the annual accounts may be prepared in accordance with generally accepted accounting principles in any of the Member States of the European Communities (EC). If the company makes use of such option, it shall 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 that 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: an auditor's report or information as to the reason for its absence; proposed allocation of profits, including the determination of amounts available for dividends or the treatment of losses for the financial year; a summary of profit-sharing certificates or similar rights; important events after the balance sheet date that have material financial consequences; and a list of branches and the countries where those branches are located.

Furthermore, Dutch law contains detailed requirements for the composition of the balance sheet, as well as the profit and loss statement, the explanatory notes, the valuation principles, and 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 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. Small companies do not need to publish their profit and loss accounts and 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:

	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 be exempt, the following circumstances must exist:

- 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 are to be filed for deposit with the Trade Register of the Chamber of Commerce.

5.9 Consolidated accounts

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

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

- Group companies whose combined significance is not material to the whole
- Group companies whose required information can only be obtained or estimated at disproportionate expense or with great delay
- Group companies whose interest is only held for disposal.

Consolidation may be omitted under the following circumstances:

- 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 if 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 is to 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 applies to: (i) Dutch companies with shares (or depositary receipts of shares) that are admitted to trading on a regulated market or any comparable system; and (ii) Dutch companies with a balance sheet value of more than EUR 500 million and whose shares (or depositary receipts of shares) are admitted to trading on a multilateral trading facility or any comparable system. The companies under (i) and (ii) are referred to in this chapter as "**Listed Companies**."

The Dutch Corporate Governance Code was first adopted in 2003 and was amended in 2008. On 8 December 2016, the Corporate Governance Code Monitoring Commission ("**Commission**") published a revised Dutch Corporate Governance Code 2016 (the "**Code**"), which replaced the Dutch Corporate Governance Code 2008". The Code is legally enshrined in the Dutch Civil Code as per 1 January 2018.

The Code sets out general principles, which are considered as reflecting widespread views on good corporate governance. These principles are each followed by and supplemented with specific best practice provisions. Together, the principles and best practice provisions aim to define responsibilities for long-term value creation, risk control, effective management and supervision, remuneration, and the relationship with shareholders (including the general meeting) and stakeholders. In short, the Code provides guidance for effective cooperation and management with regard to the governance of Listed Companies, and in this respect, facilitates a sound and transparent system of checks and balances.

Compliance with the Code is based on the "comply or explain" principle. Listed Companies are obliged to comply with each principle and provision of the Code, but may deviate therefrom. In case of a deviation, the company in question must explain, in a separate chapter of its management report, the extent to which it did not comply with any principles and best practice provisions during the relevant financial year.

The Code is divided into several chapters containing principles and best practice provisions in relation to the following:

- Long-term value creation
- Effective management and supervision
- Remuneration
- The general meeting
- One-tier governance structure

The most important principles and best practice provisions of each chapter are set out in the paragraphs hereunder. The last paragraph focuses on the compliance with and the enforcement of the Code. The full text of the Code and additional information thereon can be found on the Commission's website: http://www.mccg.nl/english.

6.1 Long-term value creation

Long-term value creation[2]

The management board is responsible for the continuity of the company and its affiliated enterprise. The Code emphasizes the relevance of the management board to focus on long-term value creation for the company and to take into account the stakeholder interests that are relevant in this context. The supervisory board monitors the management board in this and should be engaged early on in defining the strategy for realising long-term value creation. Furthermore, the supervisory board supervises the manner in which the management board implements the long-term value creation strategy.

[2] Principle 1.2 and Best Practice Provision 1.2.3 Dutch Corporate Governance Code 2016.

It should therefore regularly discuss the implementation of the strategy and the principal risks associated with it.

Risk management[3]

Pursuant to the Code, a company should have adequate internal risk management and control systems in place. The management board is responsible for identifying and managing the risks associated with the company's strategy and activities. At least once a year, the management board should monitor the operation of the internal risk management and control systems and carry out a systematic assessment of their design and effectiveness. This monitoring should cover all material control measures relating to strategic, operational, compliance and reporting risks.

Internal audit function[4]

The duty of the internal audit function is to assess the design and the operation of the internal risk management and control systems. The management board is responsible for the internal audit function. The supervisory board oversees the internal audit function and maintains regular contact with the person fulfilling this function. The internal audit function should draw up an audit plan, involving the management board, the audit committee and the external auditor. This plan must be submitted for approval to the management board and subsequently to the supervisory board.

Accountability in the management report

The management board describes the design and operation of the internal risk management and control systems in the management report. The

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[3] Principle 1.3 and Best Practice Provision 1.3.3 Dutch Corporate Governance Code 2016.

[4] Best Practice Provision 1.4.2 Dutch Corporate Governance Code 2016.

company's annual report must include a description of the main risks it encounters in carrying out its tasks in this respect.

Statement by the management board[5]

The management board should make a statement confirming that it has provided sufficient insight into the risks, including foreseeable risks relevant to the continuity of the company. In this regard, material shortcomings that have been identified and material risks and uncertainties that can reasonably be foreseen at the time the statement is being issued should be included.

Role of the supervisory board[6]

The supervisory board should supervise the policies carried out by the management board and the general affairs of the company and its affiliated enterprise. Furthermore, the supervisory board should also focus on the effectiveness of the company's internal risk management and control systems and the integrity and quality of the financial reporting. Moreover, the supervisory board should submit the nomination for the appointment of the external auditor to the general meeting and should supervise the external auditor's functioning.

6.2 Effective management and supervision

The Code aims to strengthen the checks and balances between the management board and the supervisory board with provisions related to effective corporate governance and independent supervision.

[5] Best Practice Provision 1.4.3 Dutch Corporate Governance Code 2016.
[6] Principle 1.5 and 1.6 Dutch Corporate Governance Code 2016.

Executive committee[7]

In the management report, account should be rendered of: (i) the choice to work with an executive committee; (ii) the role, duty and composition of the executive committee; and (iii) the way in which the supervisory board and the executive committee are in contact with each other. The supervisory board should be informed adequately and pay specific attention to the dynamics and the relationship between the management board and the executive committee.

Diversity policy[8]

A diverse composition of the supervisory board and the management board is essential when it comes to effective management and supervision. To this end, the supervisory board should draw up a diversity policy for the composition of the management board, the supervisory board and the executive committee, if any. This policy should address the concrete targets relating to diversity, such as nationality, age, gender, education and work background. If the composition of the management board and supervisory board diverge from the diversity targets, the current state of affairs should be described in the corporate governance statement, along with an explanation as to which measures are being taken to attain the intended target and the expected timeframe to achieve the target.

Independence of the supervisory board[9]

The composition of the supervisory board is such that the members are able to operate independently and critically towards each other, the management board and other stakeholders involved. In order to safeguard its independence, the supervisory board is subject to certain criteria. A supervisory board member is not independent if they or their spouse,

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[7] Best Practice Provision 2.1.3 Dutch Corporate Governance Code 2016.
[8] Best Practice Provision 2.1.5-2.1.6 Dutch Corporate Governance Code 2016.
[9] Best Practice Provision 2.1.7-2.1.8 Dutch Corporate Governance Code 2016.

registered partner or life companion, foster child or relative by blood or marriage up to the second degree:

(i) has been an employee or member of the management board of the company in the five years prior to the appointment[10]

(ii) receives personal financial compensation from the company, or a company associated with it, other than the compensation received for the work performed as a supervisory board member and in so far as this is not in line with the normal course of business

(iii) has had an important business relationship with the company or a company associated with it in the year prior to the appointment

(iv) is a member of the management board of a company in which a member of the management board of the company that he supervises is a supervisory board member

(v) has temporarily performed management duties during the previous 12 months in the absence or incapacity of management board members

(vi) has a shareholding in the company of at least 10%

(vii) is a member of the management board or supervisory board – or is a representative in some other way – of a legal entity that holds at least 10% of the shares in the company, unless the entity is a group company.

The supervisory board should not be composed of more than one supervisory board member that falls under any of the abovementioned criteria as referred to under (i) to (v). The total number of supervisory board members to whom the criteria referred to above are applicable

[10] Including associated companies as referred to in Section 5:48 of the Financial Supervision Act (Wet op het financieel toezicht).

should account for less than half of the total number of supervisory board members. In the case of a shareholder or group of affiliated shareholders who directly or indirectly holds more than 10% of the shares in the company, the supervisory board should not be composed of more than one supervisory board member that falls under the abovementioned criteria as referred to under (vi) and (vii) and can be considered to be affiliated with or representing the (group of affiliated) shareholder(s).

Appointment of management board and supervisory board members[11]

A management board member is appointed for a maximum period of four years and can only be reappointed for consecutive terms with each a maximum period of four years. Pursuant to the Code, supervisory board members can be appointed for two consecutive four-year terms.

Reappointment is possible for up to two additional two-year periods and must be justified in the report of the supervisory board. The purpose of such justification is to promote a greater focus on the composition of the supervisory board. A member of the supervisory board or the management board should retire early in the event of inadequate functioning, structural incompatibility of interests and in other instances in which this is deemed necessary by the supervisory board. Early retirement should be published by way of a press release.

Culture[12]

The management board is responsible for creating a culture aimed at long-term value creation for the company, whereas the supervisory board should supervise the activities of the management board in this regard. The management board should draw up a code of conduct and monitor the effectiveness and compliance with such code. Additionally, the

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[11] Best Practice Provision 2.2.1-2.2.3 Dutch Corporate Governance Code 2016.

[12] Principle 2.5 and 2.6 and Best Practice Provision 2.5.2 Dutch Corporate Governance Code 2016.

management board should establish a procedure for reporting irregularities within the company.

Preventing conflicts of interest[13]

Dutch law sets out the conflict of interest-rule, which stipulates that management board members and supervisory board members cannot participate in the consultation and decision-making process whenever they have a direct or indirect conflict of interest with regard to the interest of the company. In addition to that, the Code applies a stricter conflict of interest-rule, stipulating that any form of conflict of interest between the company and the management board members or supervisory board members should be prevented.

Takeover situations[14]

In takeover situations, the management board and supervisory board should ensure that the stakeholders' interests are carefully weighed and any conflict of interest is avoided. They should consider the interests of the company in takeover situations, whereby the management board must ensure that the supervisory board is involved in the takeover process closely and in a timely fashion.

6.3 Remuneration

Remuneration policy[15]

Pursuant to the Code, the remuneration policy applicable to management board members should be clear and understandable, should focus on long-term value creation for the company and its affiliated enterprise, and take

[13] Principle 2.7 Dutch Corporate Governance Code 2016.
[14] Principle 2.8 and Best Practice Provision 2.8.1 Dutch Corporate Governance Code 2016.
[15] Principle 3.1 Dutch Corporate Governance Code 2016.

into account the internal pay ratios. To this end, the remuneration policy should not encourage management board members to act in their own interest, nor to take risks that are not in line with the strategy and the defined risk appetite. The supervisory board is responsible for formulating the remuneration policy and its implementation. The general meeting must adopt the remuneration policy in order for it to become applicable.

Determination of management board remuneration[16]

The supervisory board determines the remuneration of the individual board members within the limits of the remuneration policy adopted by the general meeting. The Code does not stipulate any explicit requirements with regard to the amount of remuneration, except that in the event of dismissal, the severance payment should not exceed one year's fixed salary. However, the Code does address aspects that play a role in establishing and awarding remuneration, such as the degree to which the remuneration is in accordance with long-term value creation and the underlying social context. These aspects should be included in the remuneration report prepared by the remuneration committee (under the supervision of the supervisory board) and must be posted on the company's website. Furthermore, when determining the amount and structure of the remuneration, the supervisory board should take the management board member's own view into consideration.

Remuneration supervisory board[17]

The supervisory board should submit a clear and understandable proposal to the general meeting for its own remuneration. In this respect, their remuneration should promote an adequate performance of their role and

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[16] Principle 3.2 and 3.4 and Best Practice Provision 3.1.2 and 3.2.2-3.2.3 Dutch Corporate Governance Code 2016.

[17] Principle 3.3 and Best Practice Provision 3.3.2 Dutch Corporate Governance Code 2016.

should not be dependent on the results of the company. Supervisory board members may not be awarded remuneration in the form of (rights to) shares.

6.4 The general meeting

The general meeting should be able to exert such influence on the policies of the management board and the supervisory board of the company that it plays a fully-fledged role in the system of checks and balances in the company. Good corporate governance requires such level of participation of the general meeting.[18]

Proposal for approval or authorisation[19]

A proposal on the agenda of the general meeting, which is subject to shareholders' approval or authorisation, requires a written explanation from the management board. This explanation should be published on the company's website. Material changes to the company's articles of association and proposals for the appointment of members to the management board or supervisory board shall be presented separately in the general meeting. Furthermore, the profit retention/dividend policy (and changes thereto) will be placed on the agenda of the general meeting separately.

Placing of items on the agenda by shareholders and response time management board[20]

Shareholders may exercise their respective rights to put items on the agenda only after having consulted with the management board. If the management board stipulates a response time, this should be a reasonable period of time that does not exceed 180 days from the moment the

[18] Principle 4.1 Dutch Corporate Governance Code 2016.
[19] Best Practice Provision 4.1.4 Dutch Corporate Governance Code 2016.
[20] Best Practice Provision 4.1.6 and 4.1.7 Dutch Corporate Governance Code 2016.

management board is informed by one or more shareholders of their intention to put an item on the agenda to the day of the general meeting at which the item is to be dealt with is held. The management board should use the response time for further deliberation and constructive consultation with the relevant shareholder(s), and should explore the alternatives.

Bilateral contracts with shareholders[21]

The company should formulate a policy on the outlines of bilateral contracts with shareholders. This policy should be published on the company's website.

Proxies[22]

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.

Institutional investors' policy on voting rights[23]

Institutional investors must annually publish their policy on the exercise of voting rights of the shares held in listed companies on their website.

6.5 One-tier governance structure[24]

The Code is focused on the two-tier governance structure, which traditionally is the governance basis of Dutch corporate law. Within companies making use of a two-tier board, management and supervision

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[21] Best Practice Provision 4.2.2 Dutch Corporate Governance Code 2016.
[22] Principle 4.3 and Best Practice Provision 4.3.2 Dutch Corporate Governance Code 2016.
[23] Best Practice Provision 4.3.5 and 4.3.6 Dutch Corporate Governance Code 2016.
[24] Principle 5.1 and Best Practice Provisions 5.1.1-5.1.3 and 5.1.5 Dutch Corporate Governance Code 2016.

are divided between two corporate bodies: the management board and the supervisory board. Companies with a one-tier board have a single management board made up of executive and non-executive directors. In this scenario, the non-executives supervise the executives. Non-executive directors and executive directors have joint management responsibility.

The Code equally applies to Listed Companies with a one-tier governance structure. The provisions in the Code that pertain to supervisory board members also apply to non-executive directors, without prejudice to the other responsibilities these non-executive directors may have.

The composition and functioning of a management board comprised of both executive and non-executive directors must be such that the supervision by non-executive directors is properly carried out, and independent supervision can be assured. The majority of the board must be made up of non-executive directors. The independence requirements for supervisory board members apply in full to non-executives.

The non-executive directors render account of the supervision exercised in the past financial year. Furthermore, the chairperson of the management board cannot be a (former) executive director of the company; he or she should be independent. In addition, the chairperson should ensure that the management board as a collective, as well as the management board committees, function properly and have a balanced composition.

6.6 Compliance with and enforcement of the Code

Both the management board and the supervisory board (or in case of a one-tier board, the board) are responsible for the company's corporate governance and compliance. The broad outline of the governance of a Listed Company is set out in a separate chapter of the management report or published on its website each year. As mentioned above, compliance with the Code is based on the "comply or explain" principle. Any deviation from its principles and best practice provisions should therefore be

specifically disclosed in a separate chapter of the company's management report or published on the company's website. Therein, the Listed Company explicitly states the extent to which it complies with the principles and best practice provisions in the Code and to what extent it deviates from them.

The management board and supervisory board account for compliance with the Code in the general meeting. For any deviation from the principles and best practice provisions, the management board and supervisory board shall give substantive and transparent explanations in the general meeting with regard to any non-compliance with the Code. Listed Companies either provide the general meeting with a broad outline of the corporate governance structure and compliance with the Code in a chapter in the management report, or publish the outline on the company's website.

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.

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 probably 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 only performs routine functions and bears little risk, the arm's-length remuneration may be moderate.

7.3 Production

If the company enters into the third and final stage by organizing a fully fledged production or 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 can then 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 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).

The principles of reasonableness and fairness (*redelijkheid en billijkheid*) underlie Dutch contract law. These principles 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. The 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, 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 current obligations under the contract. To the extent that these obligations have already been performed, rescission requires one 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.

- Penalties: Parties are free to agree on a penalty. The amount of the 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

Under the DCC, parties are easily bound to general terms that were declared applicable. As a counterbalance, the DCC grants protection against 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 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 concluding the contract; or (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 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, that is, 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.

On the basis of EU consumer protection directives, the manufacturer incurs extensive information obligations with regard to, for example, its identity, the characteristics of the goods/services, price, address and delivery. Not providing such information will, among other things, qualify as an unfair trade practice. The consumer may void agreements that result from unfair trade practices. Further, a consumer can cancel a distant selling contract for any reason within 14 days, which can be extended up to 12 months if the required information is not provided. If the consumer makes use of its right of withdrawal, the trader shall reimburse all payments received from the consumer within 14 days of the withdrawal.

In the case of B2C online trading, EU traders who engage in online sale or services contracts as well as all online marketplaces established Commercial Contracts

within the EU should provide the following:

- An electronic link to the European Commission's online dispute resolution (ODR) platform on their website, which is easily accessible
- Their email address on their website

Further, traders that are committed or obliged to use an ADR entity to resolve disputes with consumers should provide the following:

- An electronic link to the ODR platform in an email, if a commercial offer is made to a consumer via email
- Information as to the existence of the ODR platform in the general terms and conditions applicable to online sales and service contracts.

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 ACM has civil and administrative enforcement remedies at its disposal for enforcing consumer laws, including imposing administrative fines. Depending on the violation, the administrative fine could be up to the higher of EUR 900,000 or 1% of the infringer's turnover (and in specific cases 10% of the infringer's turnover). The ACM may increase an administrative fine by 100% in cases where the infringer has breached the same or similar consumer law within a period of 5 years. In addition, the

Consumer Authority may publish any measures it has taken against companies within the context of its supervisory role, possibly causing negative publicity for the companies involved ("naming and shaming"). The ACM has become more active for the last couple of years in terms of supervising companies complying with consumer legislation.

If an act or omission of a non-Dutch entity established in the EU violates consumer protective legislation in the Netherlands, the ACM 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 as regards 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 termination of an agency agreement.

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 have been considered as 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 governed by the (default) rules of Dutch contract law. 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). Depending on the circumstances, notice periods may typically vary, from three months to two years (or even longer).

Generally, 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 very 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 (yet) adopted any specific legislation on franchise agreements. In the absence of any specific rules, franchise agreements, like distribution agreements, are regulated by the general (default) rules of Dutch contract law.

However, the Dutch legislator intends to specifically address the franchise agreement, and give the franchise agreement its own statutory arrangement. The background to this is that the legislator believes that franchise relationships are unfairly unbalanced towards franchisees. The Dutch legislator has therefore drafted a franchise bill. This new bill aims to protect the legal position of franchisees. In January 2019 the legislator put out a first draft bill for general (internet) consultation. Although it gained wide support from franchisees, it was generally criticized by most legal practitioners and franchisors.

It, among other things, provided for information obligations for franchisors, as well as consultation obligations and specific termination and amendment arrangements (generally for the franchisee's benefit). It would be mandatory in nature, not allowing the parties to deviate therefrom to the franchisee's detriment. Furthermore, with respect to any franchise agreements concluded before the bill taking effect, the Dutch legislator proposed that it would apply to those agreements a specific period of time after the bill taking effect. So even existing agreements would at some point be caught by this legislation.

In July 2019 the legislator sent the bill for review to the Council of State. However, it has not been made public (yet), so it is not known whether it is identical to the previous bill or if it has been amended further to the general consultation. It is not clear if this bill would actually become law at some point, and if it would, in what form.

Although (currently) franchise agreements are not defined under Dutch law, a franchise agreement typically 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 property generally requires: (i) prior agreement, commonly laid down in written form, such as a sale and purchase agreement; and (ii) the execution of a notarial deed of transfer, which must be registered at the Land Register in order for the transfer of title to take legal effect. This also applies to the establishment and transfer of restricted rights *in rem*, which includes security rights (e.g., a right of mortgage).

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

In general, the transfer of commercial real estate is subject to the payment of 6% (which will probably increase to 7% in 2021) real estate transfer tax (2% in the case of residential property) or 21% turnover tax in case it concerns "*newly developed*" real estate or building land within the meaning of the Turnover Tax Act 1968, resulting in an exemption from transfer tax.

9.2 Land Register

Rights over a property are registered in the Land Register, which is publicly accessible (through an electronic account for an administrative fee). The information registered in the Land Register includes ownership, mortgages, easements and other rights *in rem*. Furthermore, other administrative restrictions in the use of a property are also registered (such as designations as a protected monumental building, municipal pre-emption rights and decrees pursuant to the Soil Protection Act). However, the lease of a property is not recorded in the Land Register unless it concerns a ground lease (*erfpacht*), which is a right *in rem*.

Sale and purchase agreements regarding commercial properties can be drawn up without any specific formalities. This means that even oral agreements may also be regarded as binding sale and purchase agreements. During negotiations, it is therefore important to manage the expectations of the other side, and as long as there is no final agreement, to state clearly, in writing, any conditions (such as obtaining board approval, irrevocable permits, financing, or a satisfactory outcome of a due diligence audit) before establishing a binding sale and purchase agreement. This is already relevant at the stage of negotiating a letter of intent, which without the right built-in conditionality may constitute a binding sale and purchase agreement or may give rise to claims for compensation from the other party when abandoning the transaction during negotiations.

The above, however, does not apply to transactions in which a residential property is transferred and where the buyer is a private individual. In such cases, the sale and purchase agreement is required to be made in writing. Furthermore, the buyer of a residential property (who is a private individual) has the option to repudiate the sale and purchase agreement within three working days, without stating grounds.

The fees charged by the Land Registry for registration of transfer deeds are relatively low.

9.3 Other rights and obligations

The buyer of immovable property should investigate all legal aspects of the property by – amongst other things – consulting the Land Register. Furthermore, it is advisable for the buyer to investigate whether the current zoning plan allows for the existing use of the property or for any envisaged post acquisition redevelopment and to ask the seller whether he or she is aware of any (upcoming) changes in the existing zoning.

In the Netherlands, the seller is, in principle and by virtue of the law, obliged to transfer a property without any restrictions or burdens unless

the buyer expressly accepts these restrictions and burdens. This imposes an additional obligation on the seller to disclose all information in relation to the property. The seller must inform the buyer of all rights vested in the property (i.e., the rights that are known to the seller). Case law prescribes that the buyer also has a responsibility to conduct reasonable investigations.

In the Netherlands there are two types of rights in relation to property which restrict ownership: (i) qualitative rights attached to a certain capacity; and (ii) rights in rem. Qualitative rights attached to a certain capacity are those rights that arise from an agreement and relate to immovable property, such as an agreement with the municipality which gives the municipality the right of first refusal in case the property is sold in the future. Examples of rights in rem are: easements (such as the right of way (*overpad*)), the right of superficies (*opstalrecht*) or the right of ground lease (*erfpacht*). Rights in rem have to be registered with the Land Registry through a notarial deed. If the seller has not informed the buyer of such rights, the buyer can – under certain circumstances – order the seller (and/or compel a person by legal means by filing a complaint at 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 relevant municipality adopts a zoning plan to this effect. 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 of the buildings allowed on the plot (e.g., building height, volume, number of floors). Even the exact location of a new building on a plot of land can be

regulated in a zoning plan. Furthermore, the zoning plan is the decisive instrument for granting or denying a general environmental permit (*omgevingsvergunning*) by the municipality. 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, among some of which are: compliance with building and usage regulations in the zoning plan, compliance with municipal building regulations, compliance with the Building Decree 2015 (*Bouwbesluit 2015*), requirements pursuant to the Monuments Act (*Monumentenwet*) and 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 and take enforcement measures if required.

Newly constructed building(s) or renovated building(s) have to meet the requirements set by the Dutch Housing Act (*Woningwet*). Under the Dutch Housing Act, municipalities are obliged to adopt a building ordinance (*bouwverordening*), which contains building and renovation regulations. A building ordinance does not include technical building regulations, but it does contain, for example, regulations that prohibit building on polluted soil, regulations regarding the demolition of a building, and requirements regarding the external appearance of buildings. The technical regulations are included in the Building Decree 2015 (*Bouwbesluit 2015*).

9.5 Environmental aspects and soil pollution

Both in asset and share transactions, it is of the utmost importance to give sufficient attention to the possible presence of soil pollution. Moreover, the requirements and environmental aspects, which are stipulated in the Dutch Environmental Management Act (*Wet milieubeheer*) with regard to

the general environmental permit (*omgevingsvergunning*), need sufficient attention. These aspects of the permit are linked to the setup, change and operations of a property (facility) and are important regulatory instruments.

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, as opposed to historic pollution, all companies bear a general liability.

Practice has shown that these and other environmental issues can be duly managed by means of a 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 leasing regimes can be identified: (i) residential; (ii) retail; and (iii) 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.

The residential sector has become an attractive asset class, as there is a lack of affordable housing for young professionals and families due to a stagnation of new developments. In order to promote transformation of vacated offices into residences and help boost new developments, the Dutch legislator has recently eased up on the statutory tenant protection scheme, also allowing a temporary residential lease period without the tenants being able to invoke tenant protection. This will safeguard availability of the right residential segments in the market for the right target groups.

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 from a notice given by the tenant, the tenant is, by way of law, granted a suspension of its obligation to evict (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 for up to a year. This 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. This system allows the tenant to initially rent for a fixed five-year term, which 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 landlord is required to initiate. The landlord can only start court proceedings when a notice of termination has been served, stating either of the two exhaustive termination grounds under mandatory law. The district court will test the grounds for termination. Towards the end of the second five-year term, the list of termination grounds is somewhat longer. In addition, 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 the prior

consent of the district court, parties may be allowed to discard the mandatory framework in part.

The statutory framework for residential leases is adensely 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 more strictly, which has resulted in a strong increase of social housing portfolio disposals. In addition, as outlined above, new legislation has been adopted, allowing improved management of the public housing sector.

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 (the "Treaty") have a 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 that 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 under the prohibition of Article 101(1) of the Treaty 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 or practice 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 the conditions for exemption has to be determined by means of self-assessment. The European Commission has provided guidance through a set of notices to facilitate such self-assessment exercises.

In addition, the European Commission has adopted so-called Block Exemption Regulations that automatically exempt certain categories of agreements. This implies that there is a presumption of compatibility with EU competition law if the conditions of these regulations are met. EU Block

Exemption Regulations currently exist in relation to, among other things, technology transfer agreements, specialization agreements, R&D agreements and other agreements in specific sectors, such as the motor vehicle sector. All EU Block Exemption Regulations have a direct effect and are directly applicable in the Netherlands. By virtue of the Dutch Competition Act (*Mededingingswet*), these regulations 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, provided that the supplier's and buyer's respective market shares do not exceed 30% 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. In addition, non-competition restrictions imposed on a purchaser in a vertical agreement generally may not exceed five years.

If the above 30% market share threshold is exceeded, an agreement is not eligible for automatic exemption but may still be exempt on the basis of Article 101(3) of the Treaty following an individual self-assessment.

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 (a substantial part of) the EU 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. A transaction is considered to have an EU dimension if the undertakings concerned meet certain turnover thresholds. In such case, prior notification as well as clearance of the proposed 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% of the aggregate worldwide group turnover of the undertaking(s) concerned. In addition, the European Commission may impose fines of up to 10% of the aggregate worldwide group turnover if an acquiring undertaking fails to notify a concentration.

Fines of up to 1% of the aggregate worldwide group turnover may be imposed 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, respectively.

10.2.1 Restrictive agreements/Concerted practices between undertakings

Article 6(1) of the Dutch Competition Act contains a general prohibition on restrictive agreements and practices, both of a horizontal and a vertical nature. However, this prohibition 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 be exempt under certain conditions. 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* or ACM) has similarly provided guidance in this respect.

Pursuant to 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. Therefore, EU Block Exemption Regulations are the most relevant documents for scrutinizing commercial agreements in the Netherlands.

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. This prohibition generally 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. A proposed concentration (i.e., a merger, acquisition or certain types of joint ventures) falls within the scope of the Dutch merger control provisions if the following thresholds are met: (i) the undertakings concerned have generated a total combined worldwide turnover of at least EUR 150 million in the previous calendar year; and (ii) at least EUR 30 million of such turnover has 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. Significantly, lower turnover thresholds apply to certain types of healthcare institutions.

Undertakings involved in a concentration over which the European Commission has automatic jurisdiction can benefit from "one-stop shopping" under the EU Merger Regulation. This concept implies that the ACM does not have to be notified of a concentration if the EU Merger Regulation thresholds are met. In addition, the undertakings concerned may request that only the European Commission reviews the proposed transaction (and not the individual national competition authorities) if this transaction should (otherwise) be notified in three or more EU Member States.

The parties to a 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 of whether a license is required. If the ACM fails to notify the parties within this period, the proposed concentration is deemed to be approved. If the ACM decides within the four-week period that no license is required, the parties are allowed to implement the transaction.

If the ACM has reason to believe that the concentration will significantly impede effective competition in the Dutch market or a part thereof, especially as a result of the creation or strengthening of a dominant position, it may decide that a license is required (Phase 2). The parties will then need to file a separate notification, as the concentration may not be realized without such license. Upon closer examination of the proposed concentration, the ACM will either grant or refuse the license within 13 weeks. The license will not be granted if the ACM concludes that the concentration significantly impedes effective competition in the Dutch market or a part thereof, especially as a result of the creation or strengthening of a dominant position.

The Dutch Minister of Economic Affairs has the power to ultimately decide to approve a concentration on request of the parties concerned, 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

As of 1 July 2016, the maximum fines that can be imposed by the ACM for competition law infringements are significantly higher. The new maximum fines only apply to infringements committed after their entry into force. If the infringement began before this date but ended thereafter, the old maximum fines will apply.

For infringements relating to anticompetitive agreements or concerted practices, the ACM may impose fines of up to EUR 900,000 (previously, EUR 450,000) or 10% of the worldwide group turnover of the undertaking concerned (whichever is higher), multiplied by the number of years the infringement lasted — with a minimum of one year and a maximum of four years. Therefore, the relative maximum fine for such infringement may be 40% of the annual worldwide turnover of the group, which is significantly higher than the fine cap of 10% of annual worldwide turnover applied by the European Commission.

In addition, the ACM may impose fines of up to EUR 900,000 (previously, EUR 450,000) or 10% of the undertaking's worldwide group turnover, whichever is higher, for "major" infringements (e.g., abuse of a dominant position or failure to notify a concentration). The fines for "minor" infringements (e.g., withholding information or providing inaccurate or misleading information to the authorities) can be up to EUR 900,000 (previously, EUR 450,000) or 1% of the company's worldwide group turnover, whichever is higher.

The ACM can also impose personal fines of up to EUR 900,000 (previously, EUR 450,000) on natural persons that exercised de facto leadership over - or commissioned - a competition law infringement.

In case of recidivism, both the absolute and the relative maximum fines can be doubled. This applies if the undertaking concerned has received an irrevocable fine for a violation of a "same or similar statutory provision" within five years of the date of the fine report concerning the infringement. In practice, this means that the maximum fine for an infringement of the cartel prohibition can be as high as 80% of the annual worldwide turnover of the group.

10.3 Public procurement rules

10.3.1 Sources of law

Effective 1 July 2016, Dutch public procurement law was (substantially) amended due to the implementation of three directives adopted by the European Council on 11 February 2014, which aim to modernize the European procurement regime. Dutch public procurement law currently consists of legislation implementing the EU Public Procurement Directives (2014/23/EU, 2014/24/EU and 2014/25/EU) and several purely national regulations that contracting authorities are either allowed or obliged to apply.

The Dutch Public Procurement Act 2012 (inter alia) incorporates 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 (2014/23/EU, 2014/24/EU and 2014/25/EU)
- 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 2016 or "ARW 2016")

The Proportionality Guide provides guidance on the restriction for contracting authorities to refrain from imposing 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.

10.3.2 Main principles

Dutch public procurement law is based on 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 for any contract, even those that 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 stipulates that the requirements, terms and conditions in any tender procedure should be in reasonable proportion to its subject.

10.3.3 Contracting authorities

The public procurement rules apply to "contracting authorities", which include 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 that 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, it was held in Dutch case law that private entities may be subject to the general principles of procurement law if they apply a method of competitive procurement that resembles public procurement and the applicability of these principles is 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 for the procurement of public contracts:

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

In the open procedure, all interested contractors, suppliers or service providers may submit tenders. If the restricted procedure is applied, however, only those contractors, suppliers or service providers that have been invited may submit tenders. When applying the negotiated procedure (which is only possible 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. In a competitive dialogue, any contractor,

supplier or service provider may submit a request to participate in response to a contract notice by providing the information for qualitative selection, as requested by the contracting authority. Finally, the innovation partnership procedure allows contracting authorities to establish a long-term innovation partnership for the development and subsequent purchase of a new and innovative product, service or works, without the need for a separate procurement procedure for the purchase thereof – provided that such innovative product, service or works can be delivered to agreed performance levels and costs.

10.3.5 Selection criteria

Qualitative selection criteria relate to the tenderer rather than to the contract. Such qualitative criteria pertain 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 are awarded to the most economically advantageous tender, which is in principle the tender with the best price-quality ratio. However, a contracting authority may also award a contract on the basis of lowest price or lowest costs using a cost-effectiveness approach, but it then has to specifically motivate the application of such criterion in the tender documents. Case law of the European Court of Justice 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.

Notices are also commonly published in the Government Gazette (*Staatscourant*) and *Cobouw*, a journal for the construction industry.

According to the Dutch Public Procurement Act, contracts that do not meet the EU thresholds are still, to a certain extent, subject to the general principles of procurement law, including the obligation to apply a sufficient degree of transparency.

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 an award decision, as 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 its underlying reasons. The 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 prohibit all measures that tend to restrict

imports from or exports to other EU Member States. Such restrictions can only be justified in exceptional cases (e.g., 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).

Generally, 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 a 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 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 are 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. To achieve this objective, 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 the applicable EU legislation. Products that comply with such legislation are required to carry a CE mark and can be freely marketed throughout the EU.

11

Intellectual Property

11.1 Copyright

The Dutch Copyright Act (DCA or *Auteurswet*) was adopted in 1912, the year the Netherlands acceded 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. Generally, worded principles were designed in the times of paper press and vinyl records, but are nowadays still being applied in the digital era.

The DCA is especially flexible in its definition of the rights granted under copyright. Right holders enjoy two rights of exploitation, which are defined and interpreted in a very broad manner: a right of reproduction (*verveelvoudigen*) and 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 concept of a copyrighted work is in line with the "own intellectual creation" criterion of the Copyright Directive? as further detailed by the European Court of Justice in its Infopaq decision. A particular object qualifies as a copyrighted "work" if it has its own original character and bears the author's "personal stamp." The originality threshold for a work to enjoy protection as copyrighted work is low: it requires that it is not banal in nature.

In accordance with the Berne Convention, the DCA does not contain any formal requirements that must be met to obtain copyright protection. Registration is not a requirement. 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 (the 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, works for hire and transfer

The copyrights to a work are owned by the "author." This is typically the individual that created the work. If the work was created by the employee in the course of his/her employment, the employer will be considered the copyright owner by virtue of law.

The works for hire concept has a very limited scope compared to some other jurisdictions. If an independent contractor creates works, that contractor will normally be the owner of the copyrights in such work. Only if the party hiring the contractor gave very detailed instructions as to what had to be done will it be considered the owner of the copyrights in the work created.

A company that wishes to own the copyrights in the works created for it by persons others than its employees can have these copyrights assigned (transferred) to it. Copyrights can be assigned by means of a "deed" (*akte*), a document that is destined to serve as evidence of the transfer and executed by a "wet ink" or electronic signature of the original copyright owner (the assignor).

Licenses can generally be granted in any form. The only exception to this is the exclusive license, which is granted by a private individual. This license requires a deed in order to be valid and binding, similar to a transfer of copyrights.

Furthermore, independent copywriters and some other non-employed authors have a statutory right to receive equitable remuneration when

granting exploitation rights, and they have the right to receive additional remuneration in certain circumstances (e.g., the bestseller clause). In addition, a *non-usus* rule is in place, meaning 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 or *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 of a performance may be reproduced;

(c) a recording or reproduction may be sold, rented out, delivered or otherwise put on the market; and

(d) a performance, recording or reproduction may be (re)broadcasted or otherwise made available or communicated to the public.

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 or *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

In the Netherlands, three types of registered trademarks are acknowledged: Benelux trademarks, European trademarks and International registrations designating the Benelux. There is no such thing as a national "Dutch" trademark.

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 Convention on Intellectual Property (BCIP or *Benelux-Verdrag inzake de Intellectuele Eigendom*).

Unregistered trademarks are, in principle, not protected. To acquire trademark protection under the BCIP, a trademark must be registered with the Benelux Office for Intellectual Property (BOIP) in The Hague. Any sign

that is able to distinguish goods or services can be registered as a trademark. Words, symbols, colors, three-dimensional shapes and sounds are all signs that are able to distinguish goods or services. The BOIP may refuse signs for registration.

The most important grounds for refusal are the following:

1. The sign is descriptive. A sign is descriptive if, for example, it describes or recommends the product or service for which the trademark application is filed.

2. The sign lacks distinctive character. A descriptive sign automatically lacks distinctive character. In addition, a non-descriptive trademark can also be non-distinctive, such as slogans and single colors. These signs may be registered only after having acquired distinctive character through use.

3. The sign is misleading or is in violation of public order.

4. Official emblems and flags of a state or international registration are used.

5. The sign consists of a shape that results from the nature of the goods or is necessary to obtain a technical result, including where there is an overlap with another intellectual property right, such as a patent or design.

Appeal against the (provisional) decision to refuse the registration of a sign as a trademark is possible for a period of three months, which can be extended to six months.

Once accepted, the application will be published. After publication, opposition against the registration may be filed during a period of two months. This provides the possibility for prior trademark owners to oppose an application for registration of a conflicting sign before the BOIP. 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.

Under Benelux trademark law, the applicant or owner of a prior trademark can file an opposition against the following:

1. The registration of identical trademarks filed for the same goods or services.

2. The registration of identical or similar trademarks filed for the same or similar goods or services, where there exists a likelihood of confusion among the public.

3. If the newer trademark can cause confusion with a well-known trademark within the meaning of Article 6bis of the Paris Convention.

4. If the newer trademark is applied for in bad faith.

If the published application is not (successfully) opposed, the trademark is registered. A trademark registration is valid for 10 years and can be renewed for successive 10 years terms.

Once registered, prior right holders may still challenge the registration by initiating cancellation actions before the Benelux courts or BOIP, based on the same grounds as mentioned above for opposition or in the event that the trademark has not been used for a consecutive period of five years.

The owner of a Benelux trademark has the right to prohibit others from using a younger sign: (i) that is identical for identical products or services in commerce; (ii) that is identical or similar for identical or similar products or services if this may cause confusion; (iii) that 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.

As indicated above, in addition or instead of a Benelux trademark registration, a European Union trade mark (EUTM) registration that covers all 28 member states of the EU can be applied for. Trademark attorneys can file such applications from any EU country at the European Office for Intellectual Property (EUIPO). Owners of older national trademark rights in one of the member states can file an opposition against an allegedly conflicting EUTM.

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 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.

Collective trademarks/certification marks

It is possible to register collective trademarks in Benelux. Also, on 1 March 2019 the certification mark was introduced in Benelux.

A collective mark must be owned by an association or a legal entity under public law and serves to inform that the products or services are provided by a business that is a member of that organization. A collective mark can serve as an indicator of geographical origin (for example by a group of farmers from a certain region).

A certification mark, on the other hand, serves to indicate that the products or services meet certain requirements and guarantees specific characteristics of certain goods and services. It indicates that the goods and services bearing the mark comply with a given standard set out in the regulations of use and controlled under the responsibility of the certification mark owner, irrespective of the identity of the undertaking that actually produces or provides the goods and services at issue and actually uses the certification mark. The owner of a certification mark is not allowed to use the trademark itself and it cannot serve as an indication of geographical origin.

11.5 Designs and models

The provisions of the BCIP also protect registered designs and models for functional products (i.e., features of shape, ornaments or patterns). Applications for registration are filed with the BOIP 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 was not made public for the first time more than 12 months before the filing. 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 unregistered design right 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 (giving a total of 25 years of protection). Applications for this right are to be filed with the EUIPO.

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 (DTNA or *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 among 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 in the Trade Register maintained by the Dutch Chamber of Commerce; in order to claim trade name protection under the DTNA, the name must actually be used as a trade name. Similarly, even names that were used as trade names but not registered as such in the Trade Register enjoy protection under the DTNA and can be invoked to object to any confusingly similar trade names of third parties.

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

11.7 Patents

Patent law protection in the Netherlands is provided for in the Dutch Patent Act (DPA or Rijksoctrooiwet 1995). 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, meaning that the proposed patented product/process should not have been disclosed to the public prior to filing

the patent application; (ii) include an "inventive step," meaning 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 the Netherlands Patent Office 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.

Where 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 of 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." meaning 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" must 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 patent-infringing services that 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: preliminary (ex parte) injunction proceedings, proceedings on the merits and accelerated proceedings on the merits. The District Court of The Hague has exclusive jurisdiction on patent infringement and validity cases in the Netherlands. Consequently, 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 lawyers' and patent agents' fees.

Although Dutch Patent Law stipulates 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 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 important new technology.

11.8 IP enforcement

In the Netherlands, enforcement of IP rights is typically handled in proceedings before the civil courts, either in summary (preliminary relief) proceedings or in proceedings on the merits.

IP owners have many means of enforcement at their disposal in the Netherlands. These include the general civil law enforcement proceedings, such as infringement cease orders, procedures for the preservation of evidence and the protection thereof, and provisional measures, such as seizure of assets, claims for financial compensation, and surrender of profits, injunctions and damages.

In addition, remedies specifically available to intellectual property right holders include the destruction, recall or permanent removal from the market of illegal goods, as well as preliminary measures such as ex parte injunctions.

IP owners may also request that the court orders 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), the legal fees awarded to the party winning IP infringement claims (or defenses) have increased dramatically. In both 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 legal fees. In this regard, the courts have issued guidelines in respect of the amounts that are considered "standard," which are significantly higher than the compensation in matters not involving IP rights. Moreover, the courts can still award the actual amount of legal fees on a case-by-case basis and deviate from their guidelines. Dutch courts appear to award higher legal fee compensation amounts to IP owners (and defendants against ill-founded infringement claims) than the 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 measures concerning the importation of counterfeit goods into the European Community. These measures provide an effective tool for protecting most IP rights against counterfeit trade.

Under the Council Regulation, customs can seize goods that are suspected of infringing certain IP rights and notify the IP rights holder, provided that an appropriate notice was filed with customs before- hand. Filing a customs notice is relatively simple and straightforward. Customs charges no administrative costs on processing such notice.

Once customs has detained potentially infringing goods, there is a customs procedure available for rights holders to have the goods (voluntarily) surrendered by the importer, either by explicit or implied consent, after which the counterfeit goods can be destroyed, or to 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 (cost-) effectively fight 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

In the Netherlands, computer software may be protected by copyright 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 the 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

In 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 "off the shelf" software licenses if the licenses are sold for a set amount and are not limited in time (Dutch landmark case *Beeldbrigade*). This means

that specific provisions with respect to conformity, obligation to complain and prescription apply to the purchase of this software.

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 of whether the software was provided in a physical medium or downloaded by the licensee. The first sale doctrine applies to such "sale," meaning that the licensee can sell its rights and the original licensor cannot enforce its right against the purchaser of second-hand software. Moreover, the European Court of Justice held that a 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 actually 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, the doctrine of which has been applied by courts in the Netherlands in various decisions.

Ownership

Software that is being developed by employees will, in principle, be owned by the company that employs them by virtue of law (see 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 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 implemented in hardware. Foreign companies should at least verify whether their computer software qualifies for patent protection in the Netherlands (see also Chapter 22, Investment Incentives).

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 materials, 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 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," which is published in various media sources.

Tobacco

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.

Pharmaceuticals

Advertising 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 is strictly regulated. Public advertising of non-prescription pharmaceuticals is allowed under certain conditions, but public advertising

of prescription pharmaceuticals is prohibited. Strict rules apply to comparative advertising for pharmaceuticals.

Complaints regarding violations of the Code of Conduct for the Advertising of Pharmaceuticals can be filed with the Code Committee of the *Stichting Code Geneesmiddelenreclame*. Complaints regarding violations 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.

Promotional games of chance

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 offence.

Under the Code of Conduct on Promotional Games of Chance, a maximum of one promotional game of chance per product, service or organization is allowed per year. 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 EUR 0.45 per entry and must be clearly communicated beforehand. 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 EUR 100,000 per year. 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 specific 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 other similar details.

For "small promotional games of chance" where the total value of the prizes is less than EUR 4,500, 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 under Article 10 of the ECHR for commercial advertising is limited. It does not provide advertisers with 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 a conflict between commercial advertising and, for instance, the intellectual property rights of a competitor, the court will weigh the interests involved.

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

The scope of protection of trade secrets in the Netherlands has broadened due to the introduction of the new Dutch Trade Secrets Act (DTSA) on 23 October 2018. The DTSA implements the EU Trade Secrets Directive (Directive 2016/943/EU) and provides protection to companies in the Netherlands that are confronted with unlawful disclosures of their trade secrets. The DTSA provides for protection of information as a trade secret if:

1. the information is secret, meaning that it is not generally known among or readily accessible to persons within the circle of people that would normally deal with the kind of information concerned
2. the information has commercial value because it is secret
3. reasonable steps have been taken by the person lawfully in control of the information to keep it secret.

What steps are reasonable for protection as a trade secret will depend on the circumstances, but may typically include implementing strict non-disclosure policies and implementing procedures or measures to secure the relevant data from unauthorized access.

The DTSA contains measures and remedies to enforce trade secrets. For example, the holder of a trade secret may start civil proceedings to prohibit the further use or disclosure of an unlawfully obtained trade secret and/or claim damages. Also, the DTSA provides for various remedies against 'infringing goods,' meaning goods the design, characteristics,

functioning, production process or marketing of which significantly benefits from trade secrets unlawfully acquired, used or disclosed.

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 (of, for example, patents, trademarks or designs) to be effective against third parties, they must be registered with the applicable registration offices.

11.16 International IP Treaties and legislation

In addition to the treaties previously mentioned, the Netherlands is also a party to, among others, 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

Regulatory requirements in respect of ICT products and services are concentrated around consumer protection rules and e-commerce laws, as well as data protection laws (see Chapter 13). In addition, telecommunication laws (see Chapter 14) regulate cookies, direct marketing and specific aspects of telecommunication services and associated equipment.

Apart from these areas, much is left to the agreement between the parties, and thus general contract law. The Dutch principle of freedom of contract goes hand in hand with a large amount of non-mandatory rules in the Dutch Civil Code, which provides default rules for situations of default, non-conformity, 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 EU Technology Transfer Regulation (316/2014) has a direct effect in the Netherlands. It is mainly concerned with the competition law aspects of technology transfer agreements. Under this Regulation, certain categories of technology transfer agreements that meet certain requirements are valid from a competition law perspective.

12.3 ICT agreements and standard terms

As in many jurisdictions, suppliers and distributors of ICT products use a plethora of provisions to, for instance, restrict warranties and liability in an agreement. Often, such provisions are laid down in general terms and conditions declared applicable to the agreement. In practice, small- and medium-sized suppliers in particular may use the standard general terms and conditions made available by NL Digital, formerly known as Nederland

ICT, the main Dutch industry association for suppliers of ICT products and services.

12.3.1 ICT supplier standard conditions

NL Digital, the industry organization for suppliers of computer products and services, provides a set of standard terms and conditions for activities such as the sale of hardware, the development and licensing of software, and the provision of maintenance and computer services. Generally, these terms and conditions are considered to be drafted in a 'supplier friendly' manner.

12.3.2 Arbit conditions

The Dutch government has developed standard terms and conditions for the purchase and supply of IT goods and services by market players to the Dutch government. These terms and conditions, also known as the "Arbit terms" are intended to govern small and medium-sized ICT procurement by the public sector, rather than large IT projects. The Arbit terms were last updated in 2018 and are publicly available in the English language as well.

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 specialized 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). The SGOA has become a relevant market player for dispute resolution, especially because the standard ICT conditions (developed by NL Digital, see above) and its predecessors contain an arbitration clause that appoints it as the arbitral tribunal having exclusive jurisdiction.

12.5 Shrink-wrap license agreements

Many (larger) 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 mainly depend on the manner in which they have been brought to the attention of the licensee. In order to rely on shrink-wrap or click-wrap license terms, the supplier must be 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 at ensuring that a licensee will get access to the source code of the licensed software in the case of specific triggering events, such as the bankruptcy of a licensor. Typically, an independent escrow agent is placed in the middle to ensure that source codes are made available only in the case of such triggering event. Both active and passive escrow agents make use of tripartite agreements with the licensor and the licensee.

Over the last couple of years, the use of software source code escrow has decreased in popularity for a couple of reasons.

Firstly, the supply of software in SaaS and cloud has increased in popularity. Source code dependency is overshadowed by more acute business continuity threats, which require different kinds of mitigating arrangements. Such arrangements include SaaS escrow solutions, which

claim to not only preserve a copy of the source codes, but also keep a copy of the run-time environment in escrow, including all user and configuration data required to deploy an identical software platform in the event of the SaaS/cloud provider's bankruptcy.

Secondly, the commercial relevance of source code escrow is viewed differently nowadays. Due to advancing programming technologies, the costs of rewriting and reengineering software have considerably decreased. 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.

Finally, after years of legal debate, the question of whether the liquidator of a bankrupt software supplier must honor already granted licenses in the Netherlands has been clarified by the Supreme Court in 2018. The Supreme Court clarified that the liquidator is not entitled to actively terminate a granted license in the case of the licensor's bankruptcy. This is based on the general principle of the insolvency law, which states that bankruptcy does not affect existing reciprocal agreements nor does it change parties' commitments or obligations thereunder.

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 non-compliance 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 Dutch Civil Code and arranges for 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, for convenience and at no cost, from agreements that were entered into online. The withdrawal term is set at 14 days under normal circumstances but can be extended to up to one year if certain information requirements are not met.

12.7.3 Electronic signatures

The eIDAS Regulation, which has direct effect and is also represented in the Dutch Civil Code, provides for a special regime concerning electronic signatures and e-identification. Under the regulation, "advanced electronic signatures" are subject to the statutory presumption that they are "sufficiently reliable" if certain conditions are met. Contracting parties can also agree that an electronic signature is, as between them, considered "sufficiently reliable," in which event any kind of e-signature – such as a pin code and associated device – could be used to replace wet ink signatures. Absent of such agreement, it is to be assessed on a case-by-case basis whether the method used satisfies the statutory requirements.

If so, 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 electronic signatures." Such qualified electronic signatures are the types of advanced electronic signatures that are issued by a qualified trust services provider. Qualified trust services providers must register with, and are subject to, supervision by the Dutch Telecoms Agency

12.8 Computer crime

The Dutch Act on Computer Crime (*Wet computercriminaliteit*) contains criminal provisions related to computers. The Act on Computer Crime is incorporated in the Dutch Criminal Code and the Dutch Code of Criminal Procedure. Deletion of data and the addition of worms or viruses that lead to damage may constitute a criminal offence (although the definition of a virus is somewhat unclear). The law also provides broad investigative powers for enforcement agencies in a digital context, including decryption orders and search powers in computer systems and networks.

As of 1 March 2019, the Act on Computer Crime III (*Wet computercriminaliteit III*) entered into force. The bill has introduced new investigative powers in order to detect and fight cybercrime.

At the end of 1996, the Dutch Supreme Court issued a judgment holding that computer data cannot be referred to as "goods" within the meaning of the Criminal Code. In the landmark 2009 *Runescape* case, the Dutch Supreme Court held that virtual goods can be stolen as they have an intrinsic value, and since time and energy must be invested in order to obtain them.

12.9 Online gambling

In principle, offering games of chance over the internet in the Netherlands is prohibited. In the past, the Ministry of Justice successfully took down a

number of illegal gambling sites. Many illegal gambling sites in the Netherlands have since shut down.

However, the market for online games of chance will slightly open as a result of a new bill which will introduce additional permit schemes for the offering of online games of chance, under strict conditions. On 19 February 2019, the Senate adopted the bill, however it is uncertain when the new law will enter into force.

13

Data Protection

13.1 General

The Dutch Personal Data Protection Act (PDPA) includes the General Data Protection Regulation (GDPR) of 25 May 2016 and its Dutch GDPR Implementation Act (UAVG) of 16 May 2018, which serves to supplement the GDPR. In the Netherlands the GDPR is referred to as the 'Algemene Verordening Gegevensbescherming (AVG)'. Moreover, the Dutch Telecommunications Act ("Telecommunicatiewet") implemented some relevant data privacy provisions laid down in the EU ePrivacy Directive.

The GDPR provides rules similar to the former Data Protection Directive, but introduces, among other things, a tougher enforcement scheme (fines of up to EUR 20 million or 4% of the organization's annual worldwide turnover), stronger data subject rights (meaning the data privacy rights of the individuals to which the personal data relates) and calls upon the accountability of the processing organizations. In addition, the GDPR extends the territorial applicability of the European data protection rules to organizations that are not located in the EU, but target their products or services at EU citizens.

As the GDPR has a direct effect, not all EU Member States are obligated to transpose their provisions into local laws. That said, the Netherlands established an "implementation act" to arrange the revocation of the former PDPA, confirming the Dutch Data Protection Authority (Dutch DPA) as the supervising authority and ensuring other relevant laws and regulations correctly refer to and interact with the GDPR. Moreover, the GDPR leaves room for some national discretion to arrange a limited number of data protection aspects as a matter of local law. This is further elaborated on in the *Baker McKenzie - GDPR National Legislation Survey* (link)

13.2 Personal Data

The PDPA is applicable to any type of automated personal data processing. Processing is to be understood broadly and includes the entire data lifecycle from collection, usage, storage and deletion of personal data.

"Personal data" is defined as any information that relates to a directly or indirectly identifiable natural person. This includes, for example, information relating to an individual in their capacity as a representative or owner of a company. Data regarding a legal entity of a deceased person will not fall under the scope of the definition of personal data.

Central obligations under the PDPA are the legitimacy of the data processing and the transparency towards the data subjects concerned. To clarify, any data processing operation must be based on a statutory data processing ground and has to adhere to the GDPR principles of personal data processing. This includes, among others, the principle of purpose limitation, data minimization and storage limitation. Moreover, the principles of transparency and fairness require that individuals must be informed on the data processing activities carried out with their data in an easy accessible and understandable manner, e.g., via a privacy notice provided on the website.

13.3 Data transfer

Specific requirements apply to the transfer of personal data outside the EEA. Such a transfer (i.e., data export) includes situations where the data is made accessible to recipients (including read-only viewers) from outside the EEA. Data export is only permitted with appropriate data transfer safeguards in place, which include, among others, explicit consent of the data subject, the use of EC-approved, standard contractual clauses and binding corporate rules.

For data transfers between businesses in Europe and the US, an additional instrument is available – the so-called Privacy Shield. This data transfer safeguard can be relied upon if the recipient of the personal data is based in the US and has certified under the Privacy Shield Framework. More information on the framework can be found on the Privacy Shield website (https://www.privacyshield.gov), as well as a list of companies that have undergone certification.

13.4 Notification of data breaches

On 1 January 2016, a general data breach notification obligation was introduced in the Netherlands, which has been confirmed by the GDPR. Data controllers will have to report data security incidents to the Dutch DPA if the incident is likely to have serious adverse effects on the privacy rights and freedoms of the individuals concerned. Data subjects that are potentially affected might also have to be informed if the incident at hand is likely to have significant adverse effects on their personal situation.

13.5 Enforcement

The Dutch DPA is empowered to impose administrative fines of up to EUR 20.000.000 or 4% of the total worldwide annual turnover of the organization for failure to comply with the rules of the PDPA.

That said, the Dutch DPA generally favors the enforcement instrument of an 'order subject to a penalty payment', which means in practice that an organization is ordered to remedy a non-compliance within a given "grace period." If that period is left unused and the issue has not been addressed appropriately, a monetary fine might be levied to enforce the order. Given this enforcement practice, the risk of being taken by surprise and hitting an immediate fine without prior warning is limited. Finally, the Dutch DPA published in 2019 dedicated policy guidelines regarding the determination and application of the available administrative fines categories.

13.6 International aspects

Similar to data protection authorities in other European countries, the Dutch DPA asserts jurisdiction in matters involving the processing of personal data relating to individuals in the Netherlands, even if the organization processing the data is not established in the Netherlands. In 2016, a Dutch court confirmed such a decision of the Dutch DPA, holding that a Canadian company was subject to the PDPA as it was using "equipment" located in the Netherlands. The equipment in this case concerned the smartphones of the app's end users in the Netherlands.

14

Internet, Technology and Telecommunications

14.1 Registration requirement for providers of public networks and telecommunications services

A party that offers public electronic communication networks or services on the Dutch market is required to register with the Dutch regulator, the Authority for Consumers and Markets (ACM). This obligation is also imposed on parties that offer associated facilities or certification services. This register of telecom providers active in the Netherlands is publicly available. Registration is primarily intended to give the ACM an overview of market players in order to ensure effective supervision. The registration itself is free of charge. However, the ACM charges an annual fee for its supervisory activities, which is tied to the annual net turnover for telecom providers. When a provider can demonstrate that its net turnover is under EUR 2 million, the annual fee is zero.

Registered telecom providers that offer services to consumers are further obliged to register with the Dutch Foundation for Consumer Complaints Boards (*Geschillencommissie*), an alternative dispute resolution scheme acknowledged by the Dutch government and the European Commission.

14.2 Numbers

The designated use of numbers is indicated in a number plan. Number plans have been drawn up for, among other things: (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. However, the holder of numbers may allow third parties to use its numbers, provided this is done in a non-discriminatory 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.

14.3 Service numbers

Specific requirements apply to so-called information numbers, that is, numbers in the 0900, 0909 and 0906 ranges. These requirements, including requirements related to information that must be provided to consumers and the maximum fees that may be charged for the use of such numbers, are set forth in a decree based on the TA the regulation on universal services and end-user interests (*Regeling universele dienstverlening en eindgebruikersbelangen*).

This includes an obligation for a user of a 090X service line number to provide its platform operator with a pre-recorded 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.

Following the judgment of the European Court of Justice in 2017 (case C-568/15) on the concept of "basic rate" in the Consumer Rights Directive, the rules in the Dutch regulation on universal services and end-user interest changed starting 1 July 2017. From that date, charges for service numbers in the 090X range used for customer service may not exceed the basic rate, meaning that no additional fees other than the standard costs may be charged to such customer.

Users of 0800 service numbers may not charge or be charged at all.

14.4 Net neutrality

The Netherlands is the first European country where the principle of "net neutrality" was passed into law - in the Dutch Telecommunications Act. Under the net neutrality provisions, providers of public electronic communication networks that deliver internet access services are prohibited from blocking, hindering or slowing traffic generated by specific applications or services on the internet. The net neutrality provisions ware later revised in 2016, introducing terms that are more rigid than those in the EU Net Neutrality Regulation. Where the regulation allows "zero-rating" - excluding certain use of data, such as streaming videos, from incurring costs, this was prohibited under the Dutch Telecommunications Act. In April 2017, in an appeal of ACM's order against T-Mobile to cease its offering "data free music" data bundles, the Court of Rotterdam overturned the order. The court held that although T-Mobile's "data free music" data bundles offering constituted a breach of the zero rating prohibition in the Dutch Telecommunications Act, this provision itself was declared non-binding for being contrary to the EU Net Neutrality Regulation.

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 General Data Protection Regulation 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.

In July 2017, WIV 2017 was passed in the Senate, introducing the widening of powers of the Dutch Intelligence Agencies. It introduces bulk surveillance powers and decryption orders, and extends to "over the top" services, such as webmail and internet telephony. In 2018, additional safeguards were implemented in the WIV, obligating intelligence agencies to use their powers in the most targeted way possible and accelerating the process around international cooperation with foreign agencies.

14.6 Data retention

In reaction to the invalidation of the Data Retention Directive and the Dutch Data Retention Act, the Dutch government presented a new legislative proposal. The proposed act contains a compulsory obligation for telecommunication service providers to retain internet and telephone traffic data for periods of six months and 12 months, respectively. The legitimacy of this new proposal may, however, again be impacted by more recent EU case law (cases C-203 and C-698/15). The responsible minster is currently assessing this.

14.7 Unsolicited communications (spam)

The TA contains an opt-in regime for spam (i.e., unsolicited electronic commercial communications), which includes not only email and SMS, but also messages sent via social media and via apps The regime generally applies to spam sent to natural persons, whether or nog using a private or business email address, as well as to businesses. There are some

exemptions to the opt-in requirements, including a soft opt-in regime for existing customers.

Also, a recipient must be given the opportunity, in each message, to object, in an easy manner, to receiving any further messages (opt-out). The ACM has a history of taking a proactive approach with regard to combating spam and can impose severe penalties for 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 only be processed when rendered anonymously to the extent necessary to provide the services, or 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.

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 consent from the end user. In addition, whoever uses cookies must provide sufficient information regarding the purposes of the cookies.

This strict regime applies to tracking cookies, which are intended to be used to collect, combine or analyze data about the use of different information society services by the user or subscriber for commercial, charitable or ideological purposes. Under the cookie legislation, the tracking of users in such a manner will presumptively be considered an act of personal data processing, as defined in the General Data Protection Regulation. Therefore, this tracking is subject to the rules in the General Data Protection Regulation Cookies that are strictly necessary for the

functioning of the particular website visited, among other things, are not subject to the prior consent requirement. Further, analytics cookies and other analytics measures are not 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 implementation of the cookie legislation, the ACM has become more and more proactive in its enforcement operations. In addition, the Dutch Data Protection Authority can enforce data protection rules if personal data is collected through the use of 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, unless proven otherwise.

14.9 Data breach notification

In addition to the general data breach notification obligated under the General Data Protection Regulation, a specific data breach notification obligation applies to providers of communication networks and services. Under this notification obligation, the Dutch Data Protection Authority, as well as the affected data subject, must be notified in the event that the breach adversely affects the protection of personal data and is likely to have adverse consequences for the data subject's private life. Failure to do so may be subject to administrative enforcement (incl. fines).

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/her 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.

15.2 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. It is not 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 only possible 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, 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.

15.3 Non-competition clause

Indefinite-term contracts

Non-competition 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 non-competition clause must be agreed upon in writing and signed by both parties (the employee must be at least 18 years of age at the time of signing).

Mere reference to a non-competition 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 non-competition clause, such as by signing an employment contract that includes the non-competition clause.

A request by the employer for the enforcement of a non-competition 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 non-competition clause when attempting to find a new position.

Furthermore, a non-competition clause may become invalid if the responsibilities ensuing from the employee's position are substantially amended in the course of employment as a result of which the non-competition clause has become more burdensome to the employee.

Fixed-term contracts

It is not possible to agree on a non-competition clause in fixed-term contracts, irrespective of their duration, unless the employer can substantiate, in writing, that it has a weighty business or service interest that necessitates a non-competition clause. The substantiation must be part of the non-competition clause and is aimed at preventing employers from making light use of a non-competition clause in a fixed-term contract.

15.4 Termination

15.4.1 Employment for an indefinite period

The employer has generally five ways to terminate an employment agreement:

- Termination by mutual consent — by means of a settlement agreement
- Termination proceedings before the UWV (Employee Insurance Agency)
- Termination proceedings before the cantonal court
- Immediate termination for urgent cause
- Termination with consent of the employee

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 termination of the employment contract.

In the event that the 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.

Termination by the UWV

The UWV procedure is the compulsory route if an employment contract is to be terminated for economic reasons or in case of incapacity for work for longer than two years due to illness. An employer must obtain prior written approval from UWV in case the employment contract is to be terminated for economic reasons or in case of incapacity for work for longer than two years due to illness 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.

An application for dismissal is, in principle, handled within a period of four weeks as of the date the UWV deems the request for approval complete. Should the UWV give permission for the termination, the notice period 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 (subject to a minimum notice threshold of one month) while granting a transition payment. If the employer has not acted in line with the rules of termination, 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.

Note that parties are allowed to appeal (and appeal in cassation) the decision of the UWV in court and claim reinstatement.

Termination by the court

The court procedure is the compulsory route if an employment contract is terminated for performance-related or other personal reasons. Either the employer or the employee may file a request with the Cantonal Division of the competent court to dissolve the employment contract if the employment contract is terminated for performance-related or other personal reasons. The latter includes (but is not limited to): inadequate performance; (ii) imputable acts or omissions of the employee; and (iii) a damaged working relationship. The Balanced Labor Market Act (*Wet arbeidsmarkt in balans*, hereinafter the WAB), which will come into effect on 1

January 2020, will allow an employer to combine different grounds for dismissal except for the dismissal on business economics grounds and dismissal because of long-term incapacity for work. In the event an employment contract is terminated based on two or more dismissal grounds, the court can grant, in addition to the transition budget, a severance of up to half of the transition budget.

The Cantonal Division of the competent court will only dissolve the employment contract if: (i) it has a reasonable ground for doing so; and (ii) relocation of the employee within a reasonable time, whether with the aid of training or not, in a different suitable job within the group of companies 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 or may not dissolve the employment contract, 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 has been caused by the severe culpable conduct or negligence of the employer.

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 (e.g., pregnancy, parental leave, etc.). Failure to meet this requirement can result in the court denying the request for dissolution.

Again, parties are allowed to appeal (and appeal in cassation) the decision of the court with the competent higher court and claim reinstatement.

Immediate termination for urgent cause

Either party to an employment contract may face circumstances in which one cannot be reasonably expected to continue the employment relationship any longer. If the employee's conduct raises an "urgent cause," the employer can, under certain 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. Ultimately, however, 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 (*vernietiging van de opzegging*) or reasonable compensation (*billijke vergoeding*). The employee must file a petition for this within two months after the summary dismissal.

Termination with consent of the employee

The employer can terminate the employment contract with the written consent of the employee. The employee can withdraw his or her consent to termination within two weeks of the termination date, by giving the employer written notice to that effect. The employee does not have to state his/her reasons for doing so.

15.4.2 Fixed-term contract

Termination

The aforementioned rules and procedures also apply to the premature termination of a fixed-term contract. Note, however, that notwithstanding summary dismissal, premature termination of a fixed-term employment contract is, in principle, only possible if parties have agreed to a premature notice period.

Notification requirement

The employer is obliged to inform the employee (and 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 non-compliance are as follows:

- Failure to inform the employee on whether the employment contract will be continued may result in an obligation to pay one month's gross salary.
- If the employer informs the employee too late, this may result in an obligation to pay one day's gross wages for each day the employer has been late in notifying the employee (up to a maximum of a month gross salary).

If the employment contract is continued but the employer has not fully complied with this information obligation, the employment contract will be continued under the same conditions and duration as the previous contract. This time, however, the duration will be extended to one year if the parties tacitly continue the employment relationship without making further arrangements.

Provisions on succession of fixed-term employment contracts

If an employer enters into consecutive fixed-term employment contracts with the same employee, 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. Note that under the WAB, employers can enter into three fixed-term employment contracts with an employee within a three-year period. 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 three years or more, the last employment contract will qualify as an employment contract for an indefinite period.

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 succession 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.

15.4.3 Financial compensation

Transition budget

Where an employment contract has lasted for at least two years[25], 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 of the 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 of the monthly gross salary for every six-month period the employee served the employer.

A transition budget cannot exceed EUR 81,000[26] gross or an amount equal to the employee's annual salary, if this is higher than EUR 81,000. Rules are

[25] Please note that this will change with effect from 1 January 2020. Employees will then become entitled to a transition budget from the first day of their employment.
[26] As of 1 January 2019.

laid down by order in council[27] 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 applies.

Note that under the WAB, employees will become entitled to a transition budget from the first day of their employment. The calculation of the transition budget will also be adjusted. Instead of one-sixth of the monthly salary per half year, an employee will receive a third of the monthly salary per calendar year. The higher accrual for older employees (as set out under (iii) above) will be abolished.

Reasonable compensation

If an employee is of the opinion that the termination of his/her employment contract was caused by the severe culpable conduct or negligence of the employer, the employee can request the court to award reasonable compensation (*billijke vergoeding*) on top of the transition budget, if applicable.

15.4.4 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 that of a regular employee.

[27] In Dutch: "*Besluit voorwaarden in mindering brengen kosten op transitievergoeding.*"

The reason is that a managing director has a twofold relationship with the company: (i) a corporate relationship; and (ii) an employment relationship.[28]

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 (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 will 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. Alternatively, 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.

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

The managing director can only claim reasonable compensation (*billijke vergoeding*) if: (i) there is severe culpable conduct or negligence from the employer; (ii) the dismissal lacks a reasonable ground; 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 termination of the corporate relationship.

A managing director is also entitled to the transition budget under any of the following circumstances:

(i) The employment contract has lasted for at least two years.

(ii) The managing director's termination is involuntary.

(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.

15.5 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.). Generally, intended decisions that could affect employees are likely to 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. This 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 is to 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 if the employment contract is to be terminated for business economic reasons.

15.5.1 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% 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% 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, the following distinctions can be made:

- National insurance (*premies volksverzekeringen*)
- Welfare provisions
- Employee insurance (*premies werknemersverzekeringen*)

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 working abroad. The following acts fall under the national insurance category:

16.2.1 General Old Age Pensions Act[29]

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 16+4 months and 66+4 months (2020) with 2% 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 pensionable age for the AOW was 65. As of 1 January 2013, the standard pensionable age for the AOW was set to be increased as stated in the table below. The standard pensionable age is known five years prior to the retirement date.

[29] https://www.svb.nl/int/nl/aow/wat_is_de_aow/wanneer_aow/

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	2023	2024	2025 >
AOW pension age	66+4	66+4	66+4	66+7	66+10	67	Linked to 2/3 of the remainder life expectancy at 65 years

At the same time, the age at which the AOW benefit will be accrued increases accordingly. The AOW accrual currently takes place between 16+4 months and 66+4 months (2020). A bridging scheme was introduced for low earners who are in an early retirement scheme and who were unable to take advanced measures for this increase.

The target retirement age, which is a basic assumption for the adoption of the fiscal maximum pension scheme, increased from 67 to 68 as of 1 January 2018.

16.2.2 Surviving Dependents Act

Under specific conditions, the Surviving Dependents 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 the age of 18 who does not belong to another family, or partners who are at least 45% disabled. Furthermore, the partner of the deceased should be younger than the standard pension age for AOW.

16.2.3 General Child Benefit Act

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

16.2.4 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 that are not covered by the Health Insurance Act (see item e) and the Act on the Health Insurance Allowance.

16.2.5 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 to the Dutch health insurance institution a mandatory income-related

contribution of 6.70% (2020) of the maximum annual salary of EUR 57,232 euro (2020).

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 EUR 34,712 (2020). As of 1 January 2016, 17.90% is levied for the AOW premiums, while 9.65% is levied for the AWBZ and 0.10% for the ANW premiums. The AKW premium is 0% 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 Security's Supplements Act (*Toeslagenwet*)

(b) Invalidity Insurance (Young Disabled Persons) Act (*Wet arbeidsongeschiktheidsvoorziening jonggehandicapten* or Wajong)

(c) Older and Partially Disabled Unemployed Workers Income Scheme Act (*Wet inkomensvoorziening oudere en gedeeltelijk arbeidsongeschikte werkloze werknemers* or IOAW)

(d) Older Unemployed Persons Income Scheme Act (Wet inkomensvoorziening oudere werklozen or IOW)

(e) Older and Partially Disabled Former Self-Employed Persons Income Scheme Act (*Wet inkomensvoorziening oudere en gedeeltelijk arbeidsongeschikte gewezen zelfstandigen or Ioaz*)

(f) Participation Act (*Participatiewet*)

(g) Act providing pregnancy and childbirth benefits to the self-employed (*Wet Zwangerschapsen bevallingsuitkering zelfstandigen* or ZEZ)

(h) Social Support Act 2015 (*Wet maatschappelijke ondersteuning 2015*)

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 government.

Over the past few years, the government has severely tightened the conditions for qualifying for the welfare provisions and the national insurance allowances. The government and social partners have agreed that the IOAW will expire for employees born after 1965 and the IOW would expire on 1 January 2020. In the coalition agreement however, it was agreed to extend the IOW for a period of 4 years, until 1 January 2024.

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 Dutch law, an employer is, in principle, obliged to pay 70% of the last salary (capped at 70% 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 be at least equal to the minimum wage. The maximum daily wage amounts to EUR 216.90 per workday (July 2019).

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 as of 1 January 2006, 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 fully incapable of working due to full permanent disability (IVA); and (ii) for individuals who are deemed able to work and therefore have a residual earning and can still earn some income (WGA/ WhK). Based on the IVA, as of 1 January 2007, full and permanently disabled employees are entitled to 75% of their last salary, increased to the maximum daily wage. Based on the WGA/WhK, partially disabled employees who meet the requirements are entitled to a wage-related benefit increased to the maximum daily wage. In the first two months, the benefit amounts to 75% of the monthly wages minus the current income. After these two months, the WGA benefit amounts to 70% of the monthly wages minus the current income. Since 1 January 2016, the maximum WGA benefit period of 38 months has been reduced by one month every quarter. Since 1 April 2019, the maximum WGA benefit period is 24 months at maximum. The maximum benefit period for benefits under the Unemployment Insurance Act reduced similarly to 24 months as of 1 April 2019.

In Q2 2017, the social partners agreed to a private additional CLA (CLA PAWW) that provides for an additional third year of WW and wage-related WGA benefit payments based on which the maximum benefit period can be restored to 38 months. Employers can decide to affiliate

with the CLA PAWW. The additional contributions (0.4% in 2020) are paid by the employees and deducted from the gross salary by the employer.

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% disabled (but who earn more than 65% of the maximum hourly wage) (*maatman inkomen per uur*) are not eligible for WGA/WhK benefits or for 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 are equal for all employers (in 2020, 7.27% of the annual salary maximized to an annual salary of EUR 57,232).

The percentage of the differentiated WhK and WGA contribution depends, as of 1 January 2018, 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% of the most recent salary (increased to the maximum day wage) and 70% 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 WAO, 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.
- Since 1 April 2019, the maximum unemployment benefits period is two years. In Q2 2017, the social partners agreed to a private additional CLA (CLA PAWW) that provides for an additional third year of WW and wage-related WGA benefit payments based on which the maximum benefit period can be restored to 38 months. Employers can decide to affiliate with the CLA PAWW. The additional contributions (0.4% in 2020) are paid by the employees and deducted from the gross salary by the employer.
- 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 month's unemployment benefits will be accrued during each year of service. Before 1 January 2016 accrued WW rights retain their duration of one month.
- Since 1 July 2015, the obligation to take on any work generally accepted as suitable has taken effect after six months of unemployment. Furthermore, the calculation method of the day wage has been changed. Months in which no wage was paid will not be taken into account for the calculation of the maximum day wage.

16.5.5 The Participation Act

The Participation Act (*Participatiewet*) replaced the Work and Social Assistance Act, the Sheltered Employment Act, and a part of the Work and Employment Support (Young Disabled Persons) Act as of 1 January 2015. This Act aims to stimulate people with an illness or handicap to work. According to this Act, these people are entitled to assistance when they meet the requirements, are not able to provide basic living standards for themselves, and are not entitled to any other benefit.

Temporarily, certain reductions to the social insurance contributions was applicable for employers hiring employees who were, for example, disabled or aged 56 or older ("mobility bonus"). However, as of 1 January 2018, the mobility bonus system was replaced by a labor cost benefit ("*Loonkostenvoordeel*"), which is based on the Reimbursement Wage Domain Act ("*Wet tegemoetkoming loondomein*"). Under the Loonkostenvoordeel, the employer may be entitled to a 'subsidy' from the Dutch tax authorities for hiring employees who are, for example, disabled or aged 56 or older. The Loonkostenvoordeel can be requested via the Dutch wage tax return of the employer.

16.6 The Dutch pension system

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

(a) The first pillar of the Dutch pension system is the national pension insurance, known as the AOW ("state pension"). This is a national insurance for which the current benefits are paid by the current working population ("pay-as-you-go system"). There is no relation between the amount of AOW benefits and the amount of paid contributions. All residents of the Netherlands are entitled to AOW as of the date they reach the state pension age. Prior to 1 January 2013, the state pension age was 65. On 1 January 2013, the state

pension age was set to increase to 66 in 2018, and 67 and three months in 2022.

In 2015, it was decided to increase the state pension age at a faster pace to 66 in 2018 and 67 in 2021, given the increase in life expectancy at 65. After that, the state pension age will be based on life expectancy and will be fixed five years in advance.

In 2017, it was decided that the state pension age will not increase in 2023, due to the relatively slower increase in life expectancy than in prior years. The state pension age from 2024 will be determined based on life expectancy and is fixed five years in advance.

In 2019, the government and the social partners established that, despite the gradual nature of the increase of the state pension age, elderly people feel overwhelmed by this increase and experience difficulty reaching the state pension age while working. Therefore, it was decided to set the increase of the state pension age at a slower pace as of 1 January 2020, by freezing the state pension age at 66 and four months in 2020 and 2021. After that, the state pension age will increase to 66 and seven months, and 66 and ten months in 2022 and 2023 respectively, and to 67 in 2024. As of 2025, the state pension age will be determined based on 2/3 of the remainder life expectancy at the age of 65 and will be fixed five years in advance.

(b) The second pillar 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 (collective labor agreement (CLA) or industry-wide) to the employer and employee. Sometimes, the second-pillar pension includes disability pension supplementary to WIA benefits, or more often, a surviving relative pension supplementary to ANW benefits (ANW-Gap Pension) (see

AOW, WIA and ANW benefits under 15.2 National insurance). The second-pillar pensions are financed by contributions paid by the employer to the pension provider. These contributions can be shared between the employer and the employee. There are many ways in which second- pillar pension benefits can be arranged (see Sections 16.6.2 up to 16.6.9).

Due to the raised and rising of the state pension age (see above under a), the tax framework for second-pillar pension has also been changed.

As of 1 January 2014, the target retirement age for tax legislation has been increased from 65 to 67. As of 1 January 2018, the target retirement age increased from 67 to 68.

Since 2019, the target retirement age is linked to the increased life expectancy. Furthermore, the maximum tax-facilitated pension accrual rates have been decreased since 1 January 2014, as follows:

(i) For a final pay system, from 2% to 1.9%

(ii) For an average pay system, from 2.25% to 2.15%

New maximum age scales have also been published for the defined contribution (DC) system.

As of 1 January 2015, the tax framework for second-pillar pension has changed again, as follows:

The maximum tax-facilitated pension accrual rates have been decreased further:

(i) For a final pay system, from 1.9% to 1.657%

(ii) For an average pay system, from 2.15% to 1.875%

(iii) The net contribution scales for the DC system have decreased accordingly.

(iv) The accruals for partner and orphan pension have also been decreased. Due to the lower accrual rates, most employees face lower insured partner's pension from 2015 onwards.

(v) The minimum offset has been amended.

(vi) The pensionable gross salary that could be taken into account for tax-facilitated pension accrual has been maximized to EUR 110,111 (2020). This cap is expected to further decrease in the future.

(vii) A net pension facility has been introduced for employees earning a gross salary of EUR 110,111 (2020) or more in order to build up a net retirement provision via a DC plan. The contribution for this plan will be paid from the net salary. Consequently, 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 net pension.

(c) The third pillar of the Dutch pension system consists of private insurance for the employee's salary that is in excess of second-pillar benefits, and can be taken out by the employees themselves.

Subject to detailed tax legislation, second-pillar and third-pillar pension contributions are not classified as taxable wages, and in principle can be paid to the pension provider (e.g., the 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 pillar and tax-excessive pension accrual.

16.6.1 Second pillar

In January 2007, the Dutch Pension Act came into force and replaced the former Dutch Pension and Savings Fund Act. Both acts describe conditions for the second-pillar pension.

In principle, the employer is not obliged to make pension commitments, unless contractually agreed upon or in case the employer falls within the scope of a mandatory Industry Wide Pension Fund (*Verplichtgesteld Bedrijfstakpensioenfonds* or BPF), which applies to an entire branch (industry). An employee who belongs to a group of employees that has been offered a pension plan by the employer will be considered to have been offered the same pension plan, unless explicitly agreed otherwise with the employer.

Furthermore, legislation on equal treatment (e.g., based on age, gender, full-time/part-time work, temporary/indefinite labor contracts), existing collective labor agreements or a transfer of undertaking might lead to (additional) pension obligations for the employer.

16.6.2 Administering second-pillar pensions

In the event that the employer has offered a pension promise to its employees, the employer is legally obliged to administer that promise with an external pension provider within the meaning of the Dutch Pension Act. Otherwise, it may be subject to a fine of EUR 1 million.

In this light, second-pillar pensions could be administered by the following pension providers:

- An industry-wide pension fund (this might be mandatory)
- A company pension fund (i.e., a self-administered fund)
- A general pension fund (*Algemeen pensioenfonds* or APF) (See 16.7.5, Alternative pension providers)

- 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* or PPI) (see 16.7.5, Alternative pension providers)

Pension providers are supervised by supervising authorities such as the Dutch National Bank (DNB) and the Netherlands Authority for the Financial Markets (AFM).

Since 1 January 2007, employees are no longer entitled to set up by themselves an individual pension plan with an insurer (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), which can be continued as long as the employee is employed by the same employer.

The employer is obliged to enter into an agreement with the pension administrator where the implementation of the pension promise is administered. In this agreement, in any event, the following is agreed:

- Determination of the pension contributions
- Payment (terms) of the pension contribution
- Information the employer provides the pension administrator
- Proceedings when the employer does not meet the payment obligations concerning the pension contributions

- Proceedings for drafting and changing the pension scheme in connection with the closing and changing of the pension agreement
- Criteria and conditions for indexation
- Assumptions and procedures for the decision-making on deficits, surpluses or profit-sharing
- Termination conditions of the administration agreement with an insurance company, PPI or APF
- Criteria the PPI applies for choosing an insurance company for the purchase of a pension benefit
- Costs for the implementation of the pension schemes, which can be deducted from the separated equity held by an APF
- Costs that can be paid out of the contribution for the separate equity held by the APF
- Agreements with regard to the service quality with an APF

16.6.3 Ways to finance second-pillar pension benefits

There are several ways in which pension benefits can be financed:

- A defined benefit (DB) system that can be formed as a final pay system, an average pay system or as a lump sum system (*Vaste bedragenregeling*)
- A DC system, either individual (IDC) or collective (CDC).

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 (back 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. Due to the costs, which can be substantial with a final pay scheme, this pension scheme is now rarely promised by employers.

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 costs. A frequent provision stipulates that the pensionable salary after a certain age (55 or 60 years) will only be taken into account 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.

These kinds of stipulations are no longer allowed based on conflicts with Dutch equal treatment law. Allowed alternatives are the use of a maximum pensionable salary or an increased franchise.

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 only accrued 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 A lump sum system

In this system, a fixed amount, based on the participation period, is allocated to the pension entitlements, regardless of the pensionable base.

16.6.8 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.

As of 1 September 2016, the new and improved contribution scheme (*Wet verbeterde premieregeling*) applies. This act makes it possible to make pension benefits less dependent on the interest percentage on the retirement date. Employees can now choose to avoid (extremely) low interest rates at the retirement date by purchasing a variable or hybrid (fixed and variable) benefit from (a part of) their pension capital. In case a variable pension was chosen, the employee must purchase a fixed benefit of the remaining part of the capital after a certain period of time.

16.6.9 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 the IFRS used leads to high-pension liabilities in the company books as 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 a pre-fixed pension premium annually (within a few years).
- 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 between the expectations and 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 towards CDC pension plans and, therefore, 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 financial 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 as much as possible the fundamental principles of the current Dutch pension system (collectively, solidarity and compulsory membership). The Dutch Cabinet has indicated that it follows most of the conclusions and recommendations of the commissions.

In previous years, social partners have concluded several pension agreements that 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 for pension funds (for insurance companies, Solvency II applies). This act includes changes to the previous applicable financial framework for pension funds. A number of sections of the act were 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%).
- 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.
- The maximum pensionable salary is capped at EUR 110,111 (2020). Above this amount, pension can no longer be accrued with tax relief (pension cap). The maximum pensionable salary is indexed annually.
- 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%.
    - Full indexation is only allowed at funding ratios higher than 130% (plan-specific and depending, in particular, on the maturity of the membership).
    - Current recovery plans no longer apply and are replaced by rolling 10-year recovery plans when funding ratios are below the full funding level.
    - Benefit reductions are now required when recovery to full funding within 10 years is not expected.
    - Reductions amount to one-tenth of the deficit.
    - Further (immediate) benefit reductions apply when funding ratios are below 105% on six consecutive annual measurement dates.

In general, these changes that increased the size of funding targets result in an overall increase in the costs associated with providing DB pensions in the Netherlands. Some companies that adjusted the pension scheme, and therefore the pension promise to the employees, offered the employees compensation for the aforementioned changes. However, compensation was often only offered for the pension cap.

16.7.2 Framework memorandum on pension

The Dutch government published a framework memorandum (*Hoofdlijnenbrief*) 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.

On 8 July 2016, the government published a memorandum (*Toekomstperspectiefnota*) in which it discusses the steps to elaborate these pillars in more detail. With regard to the main pillars (i) and (ii), it considers the following steps necessary:

(i) The government values the following variants of new pension agreements and considers further investigation useful:

  (a) Personal retirement assets with comprehensive risk-sharing by use of a collective buffer that mutes yields (IV-C-R)

  (b) Ambition agreement in which conditional entitlements are valued based on a risk-free interest rate (1B RTS)

The opportunities for integration of existing rights and facilitating claims in a new agreement will also be investigated.

(ii) The abolition of the flat-rate system of pension contributions and the transit to a new pension system based on decreasing pension accrual is necessary to take the next steps and to better align the system with the labor market.

On 10 October 2017, the Dutch government published the new government agreement (*Regeerakkkoord*). The main task for pensions is to come to a revised pension model together with social partners. The new system will apply as from 2020. The period up to 2020 will be used for discussion with the social partners and for the legislation process.

The government agreement describes the following steps:

(i) The new system will be based on the models included in the SER reports and comprise of personal retirement assets with comprehensive risk-sharing and a collective buffer.

(ii) The method of using a flat-rate premium (*doorsneepremie methode*) will be replaced by an age-dependent premium.

(iii) The possibility to take up part of the pension capital as a fixed amount at retirement date will be investigated.

The SER will provide the government with additional advice on the renewed pension contract shortly. It is then up to the social partners to develop a new pension contract based on the new model.

The government indicates that it will facilitate the transition to the renewed pension system by temporarily expanding the tax framework and by facilitating a collective transition of existing pension entitlements into personal pension assets. During the implementation period, social partners

will get the opportunity to adjust the pension schemes to the new system of pension accrual and to transfer to the renewed pension system.

16.7.3 Pension Agreement: to a new pension system

On 5 June 2019, the government, the employee and employer's association and the social and economic council (SER) reached an agreement in principle on the renewal of the Dutch pension system ("**Pension agreement**"), in order to ensure a good retirement provision for current and future generations. The Pension agreement includes, amongst others, the following intended changes to the Dutch pension system:

- The state pension age will increase at a slower pace and will remain 66 and 4 months until 2021. Thereafter it will rise to 66 and 7 months in 2022, to 66 and 10 months in 2023, rising to 67 in 2024 and thereafter it will be linked 2/3 to the development of the increase of the remainder life expectancy at 65 years (see paragraph 16.2 under A).

- The flat-rate system will be replaced by a degressive pension accrual on the basis of an age independent premium in all pension contracts.

- A new pension contract will be introduced: a defined contribution scheme with extensive risk sharing during the accrual phase, in which the premium will be converted into a more conditional pension entitlement than the current nominal pension entitlement. Moreover, the improved defined contribution scheme will be made accessible for industry-wide pension funds.

- All pension entitlements and pension rights that have been accrued under the 'old' pension contract (age-dependent premiums) will be collectively transferred to the 'new' pension contract (age independent premiums), in order to keep the accrued pensions together.

- Every participant can decide to withdraw a cash amount of the accrued pension capital at once at the retirement date (max. 10% of the value of the accrued elderly pension).
- Over the period of 1 January 2021 to 31 December 2025, the pseudo final levy on early retirement arrangements (in Dutch: RVU) will be eased, provided that (a) the early retirement starts three years before reaching the state pension age; and (b) the employee receives a maximum amount of approximately EUR 19,000 per annum from the employer as of the date that the employee stops working until state pension age. An earlier or postponed date of retirement under (a) will affect the exempt amount under (b) pro rata.

The aforementioned changes still require further development and legislative changes, which will be worked out in the upcoming months and years by a steering group that will be formed by representatives of the government and the employee and employer's associations.

The first legislative change was adopted by the Upper house on 2 July 2019, in order to realize the aforementioned postponement of the increase of the state pension age. The government intends to have implemented all legislative changes by 1 January 2022.

16.7.4 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 became 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 were 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; an

independent model (solely external experts); (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 board model opted for, specific rules apply with respect to internal supervision.

Furthermore, on 1 January 2014, the Pension Fund Code became effective. This code was compiled by the Federation of the Dutch Pension Funds and the Labor Foundation, which, in doing so, 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, published in 2005 by the Labor Foundation.

16.7.5 The Works Council's extended right of consent

On 1 October 2016, the right of consent of the Works Council was extended to changes in rules under a pension agreement of all pension providers, and not just insurance companies. The rules under a pension agreement also include the administration agreement, as far as the pension agreement is affected by the changes, such as premium method, conditions for indexation, and choice of both national and international pension provider.

16.7.6 Alternative pension providers

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

introducing the APl 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 into the following phases:

- introduction of a PPI;
- introduction of a Multi-Company Pension Fund; and
- introduction of API/APF.

In 2011, the PPI was introduced as a 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 was approved in December 2010.

By means of a Multi-Company Pension Fund, company pension funds could cooperate. This is especially important for smaller pension funds, which could thus achieve cost savings and economies of scale, strengthen their negotiating position *vis-à-vis* operators, such as asset managers and administrators, and make joint progress in meeting pension fund governance requirements. The legislative proposal for the introduction of a Multi-Company Pension Fund was approved in May 2010. Until 2016, only a few Multi-Company Pension Funds were established. This is probably due to the many conditions imposed.

Instead of introducing the APl, the General Pension Fund (*Algemeen Pensioenfonds* or APF) was introduced on 1 January 2016. The APF is a new pension provider and is designed to serve as an alternative for pension funds considering liquidation. It offers pension funds various arrangements and has the ability to operate under a single independent board while

keeping their assets ring-fenced. The APF will replace the Multi-Pension Fund in time. The Multi-Pension Funds have a transition period of five years (after 1 January 2016) to transform their entities into an APF or to opt for another form of administration of the pension scheme (in other words, by 1 January 2021).

16.7.7 Pension communication

Effective since 1 July 2015, the act regarding pension communication came into force in phases. 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.

16.7.8 Revision of the European Pension Directive (IORP II)

On 30 June 2016, the European Parliament, the Council and the European Commission agreed on the text IORP II, which is a revision of the IORP Directive. The new directive improves pension funds' governance, increases transparency of information to pension scheme members and beneficiaries, improves supervision of pension funds, and lays down new rules for cross-border activities and transfers.

Overall, the new rules will encourage IORPs to play their role as key long-term institutional investors in the context of the Commission's Capital Markets Union initiative. The compromised text of the Directive was adopted at first reading in the European Parliament's plenary on 24 November 2016, and then adopted by the Council on 8 December 2016. The Directive came into effect on 12 January 2017, and EU Member States had two years from then to transpose it into national law (until 13 January 2019).

The implementation act IORP II was adopted by the Lower House on 18 October 2018 and then adopted by the Upper House on 18 December 2018, and has been in force since 13 January 2019.

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 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 (*Immigratieen Naturalisatiedienst* or IND) is part of the Ministry of Justice and in general is responsible for decisions in visa and residence permit applications. The Public Employment Service (*UWV WERKbedrijf*) handles work permit applications, with investigations and enforcement actions involving employers and foreign nationals being 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 stay 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: Albania; Andorra; Antigua and Barbuda; Argentina; Australia; the Bahamas; Barbados; Bosnia and Herzegovina; Brazil; Brunei Darussalam; Canada; Chile; Colombia; Costa Rica; Dominica; East Timor; El Salvador; Georgia, Grenada; Guatemala; Honduras; Israel; Japan; Kiribati; Macedonia; Malaysia; Marshall Islands; Mauritius; Mexico; Micronesia; Moldavia; Monaco; Montenegro; Nauru; New Zealand; Nicaragua; Palau; Panama; Paraguay; Peru; Saint Kitts and Nevis; Saint Lucia; Saint Vincent and the Grenadines; Salomon Islands; Samoa; San Marino; Serbia; Seychelles; Singapore; South Korea; Taiwan; Tonga; Trinidad and Tobago; Tuvalu; Ukraine; United Arab Emirates; United States of America; Uruguay; Vanuatu; Vatican City; and Venezuela.

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 still 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 13 weeks within a 52-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 produced and supplied by an 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 intending to work and reside in the Netherlands must usually obtain three types of documents:

(a) A provisional residence permit (*Machtiging tot Voorlopig Verblijf* or MVV), which enables the holder to enter the Netherlands. Please note that an MVV is not required for citizens of the EEA, Australia, Canada, Japan, Monaco, New Zealand, South Korea, Switzerland, United States of America and Vatican City.

(b) A residence permit, which enables the holder to live in the Netherlands

(c) If the residence permit does not provide work authorization in addition to residence privileges: a work permit that 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 deployment of the foreign national within its organization in the Netherlands. In the absence thereof, the employer can be penalized (not the employee). The next section of this chapter provides further information regarding work permit requirements.)

Provisional residence permit (MVV)

Either of the following two application procedures can be considered in order to obtain an MVV:

(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 five years. If no changes of

circumstances have occurred, the permit can be extended. 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 of the full mobility of the workforce in respect of EU member Croatia, which 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, and 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 demonstrate that he/she searched for a suitable candidate in the Netherlands and Europe for, in principle, 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, as well as the use of the internet and the assistance of (international) recruitment offices. Furthermore, the employer must report the vacancy to the Dutch *UWV WERKbedrijf* at least five weeks prior to the work permit application. If the employer appreciates the 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, it 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 on whether or not a permit category that exempts the company from having to meet the foregoing obligations and/or that allows for permit application via an accelerated/prioritized procedure can be used.

Permit application procedures require extensive preparation, which can easily take several weeks (aside from 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 foreign nationals who want to stay in the Netherlands as self-employed individuals, or for 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. One is considered a "Highly Skilled Migrant" primarily on the basis of his or her salary. A Highly Skilled Migrant is a foreign non-EU/EEA national who will be employed in the Netherlands (based on a local contract) and who will receive a gross monthly salary of at least EUR 4,500 (EUR 4,860 including 8% holiday allowance) or at least EUR 3,229 (EUR 3,487.32 including 8% holiday allowance) if aged 30 years or younger. The foregoing salary levels reflect the thresholds applicable in 2019.

Employers who want to hire Highly Skilled Migrants must hold so-called authorized sponsorship with the IND. Authorised sponsors benefit from the IND's assumption that they fulfil 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 acquire authorized sponsorship accreditation.

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 the foreign national no longer qualifies as a Highly Skilled Migrant (for example, he/she no longer meets the salary threshold) or 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 or her employment in the Netherlands is intended to last for at least five years. Should this not be the case, 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 be required to hold 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 European Blue Card, the foreign national must have an employment contract for at least one year and must earn a gross minimum of EUR 5,272 per month (EUR 5,693.76 including holiday allowance; 2019 rate).

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*).

A potential advantage for companies is that they do not require the authorized sponsor status with the IND in order to apply for a European Blue Card.

Intra-Corporate Transfer

The Intra-Corporate Transfer permit category applies to non-EU employees who reside outside of the EU and who are bound (and remain bound during their secondment) by a work contract with a non-EU entity belonging to the same group of companies established in the EU Member State to which they are seconded. Further, non- exhaustive terms and conditions are as follows:

- The individual must have been employed within the group of companies for at least three consecutive months immediately prior to the secondment.
- The individual must qualify as a "manager," "specialist" or "trainee" under the definition thereof stipulated in the European ICT Directive (2014/66).
- The individual must have the qualifications and experience required by the host company to which he or she is seconded as manager or specialist. If the individual is seconded as trainee, a university degree and training agreement are required.
- The individual must enjoy equal treatment with nationals occupying comparable positions as regards the remuneration he or she receives during the entire secondment. In principle, the salary thresholds for a Highly Skilled Migrant are considered for this purpose.
- The individual is intended to return to a group company outside of the Netherlands after the secondment.

If the ICT permit conditions are triggered, other (labor related) permit categories (e.g., the Highly Skilled Migrant permit and the European Blue Card) will not be available as alternative means to obtain work and residence authorization.

The maximum duration of the ICT permit is three years (one year for trainees).

Companies do not require the authorized sponsor status with the IND in order to sponsor an ICT permit.

18

Personal Income Tax

18.1 Resident versus non-resident taxpayers

In general, every individual who lives in the Netherlands is subject to taxation on their worldwide income and wealth. An individual is deemed to live in the Netherlands if the socio-economic center of their life's interests factually lies in the Netherlands: they are then a so-called Dutch resident taxpayer. Such a person may be entitled to certain deductible items and tax credits, depending on their personal situation. In case other jurisdictions also claim the right to taxation on (parts of) their income and wealth, relief of double taxation may be claimed via the Dutch tax treaty network, or the Dutch unilateral rule for the prevention of double taxation.

An individual who does not live in the Netherlands (i.e., a non-resident Dutch taxpayer) is only subject to taxation on certain sources of income in the Netherlands, such as income from employment carried out in the Netherlands, benefits from a substantial shareholding in a Dutch company, the value of Dutch real estate etc. A non-resident Dutch taxpayer may however be granted the status of *qualifying* non-resident taxpayer if they meet certain conditions. In that case, they are entitled to the same deductible items and tax credits as a resident Dutch taxpayer. Briefly speaking, this is the case for a non-resident taxpayer:

- who is taxed as a resident of another Member State of the European Union, the EEA, Switzerland or the so-called BES islands
- whose income is wholly or almost entirely (>90%) subject to wage or income tax in the Netherlands, and
- who provides an income statement from the tax authorities of his country of residence

We note that the 90% requirement as explained above is currently under scrutiny due to recent Dutch case law.

Finally, a so-called *partial non-resident status* is available for individuals who qualify for the Dutch 30% facility. We refer to section 5 below for a more detailed description of the 30% facility.

18.2 The "Box" system

The Dutch Personal Income Tax Act distinguishes between three types of income: "Box I", "Box II" and "Box III". Each box has its own rules to determine the tax rate and the taxable base.

- Box I taxes the income from work (e.g., private enterprise, employment, pensions etc.) and the private dwelling. Income in Box I is taxed at progressive rates with a maximum of 49.50% (2020).
- Box II taxes income from a substantial interest (i.e., 5% or more of any class of shares) in a company. Box II has a flat tax rate of 26.25% (2020). Please note that the Dutch government intends to increase the tax rate to 26.90% in 2021.
- Box III taxes income from savings and investments. The tax is levied on the net value of the taxable assets as of 1 January of the relevant calendar year, to the extent that the net value of such assets exceeds the annual exempt amount of EUR 30,846 for 2020 (€61,692 for tax partners). The 2020 tax brackets are as follows:
    - Up to and including EUR 72,797: 0.54%;
    - EUR 72,798 - EUR 1,005,572: 1.27%;
    - EUR 1,005,573 and up: 1.60%.

Under a very recent legislative proposal, as of 2022, taxpayers with *only savings* up to approximately EUR 440,000 per person may no longer owe any Box III income tax.

18.3 Box I tax on income from private enterprise

In general, this taxation applies to entrepreneurs who earn profits in one-person businesses or small companies without limited liability. Certain specific Dutch tax deductions are available for entrepreneurs, which reduce their tax base. The total profit less the relevant deductions and less the tax reduction for entrepreneurs forms the basis of taxation.

18.4 Box I tax on income from employment

18.4.1 Employees

Employees who are resident taxpayers of the Netherlands are subject to Dutch income tax on their worldwide income, which includes their worldwide employment income. Non-resident employees are subject to Dutch income tax on their employment income only to the extent that the employment is physically performed in the Netherlands.

In cross-border employment situations, double tax treaties (if applicable) will normally allocate the right to taxation between the countries involved. In general, the country where the employment activities are performed (i.e., the 'host' country) has the right to tax the employment income under the treaty. However, such income is instead typically taxable in the country of residence (i.e., the 'home' country), in case:

- the employee spends less than 183 days in a 12-month period in the host country, and
- the remuneration is not paid by an employer in the host country, and
- the remuneration is not recharged to a branch of the employer in the host country

18.4.2 Wage tax and social insurance

Wage tax is to be withheld by the employer and is due by the employee on his salary. Wage tax is a so-called advance levy on the total income tax liability. This means the total income tax liability is reduced by the amount of wage tax already withheld. The employee's withholding agent (typically the local Dutch employer) needs to withhold wage tax and social insurance premiums and remit the amounts due to the appropriate authorities timely via the company payroll. A deduction for employment costs can be granted via the so-called "employment tax credit."

The Dutch social insurance system comprises of national insurance and employee insurance. If an employee lives in the Netherlands, they will typically be subject to the Dutch social insurance system. However, in cross-border employment situations, the application of social insurance treaties or (EU) regulations may alter this principle.

The national insurance scheme consists of:

- General Old Age Pensions Act (AOW)
- General Surviving Relatives Act (Anw)
- Long-Term Care Act (Wlz)
- General Child Benefit Act (AKW)

The employee insurance scheme consists of:

- Sickness Benefits Act (ZW)
- Disability Insurance Act (WAO)/Work and Income according to Labor Capacity Act (WIA)
- Unemployment Insurance Act (WW)

Finally, employers should in principle pay contributions for the Healthcare Insurance Act (Zvw), which provides compulsory insurance against medical expenses. Employees who are subject to the Zvw are obliged to conclude health insurance in private.

18.4.3 Statutory directors

Under most (but not all) tax treaties, the remuneration that a statutory (executive or supervisory) director receives from a company located in the Netherlands is allocated for taxation to the Netherlands, even if the director is not a resident of the Netherlands and/or performs their activities outside the Netherlands. The company paying the remuneration must typically withhold wage tax and social insurance contributions, if applicable, from fees paid to such directors. Tax treaties that take an approach based on the director's physical presence rather than the place where the company is located include those with the UK and the USA.

Please note however that contrary to executive directors, supervisory directors are not considered as being 'employed' for Dutch wage tax purposes. This is because they are not legally under the authority of the company they supervise. In principle, supervisory directors will therefore not have to be included in the company payroll. However, if there is a wish to process the fees via the payroll administration, then this can still be applied for (so-called 'opting-in'). This creates a voluntary, fictitious employment relationship. To achieve this, a joint statement from the supervisory director and the company must be submitted to the Dutch tax authorities.

18.5 30%-facility

The 30%-facility is a Dutch tax benefit that is available for a particular group of foreign employees in the Netherlands (so-called expatriates). Based on this facility, 30% of the Dutch taxable salary may be paid out as a tax-free compensation for extraterritorial costs (regardless of the actual

amount of any such costs incurred). The Dutch tax authorities may grant the 30% facility to foreign employees who are hired from abroad by a legal entity or branch based in the Netherlands, and who meet certain additional conditions. The purpose of the facility is to promote the assignment or hiring from abroad of personnel with specific expertise. For this purpose, the 30%-facility has two main tax incentives:

1. The reduction of the effective Dutch tax rate to a maximum of (rounded) 34.65% (2020), by allowing the employer to pay out 30% of the employee's wages as a tax-free compensation for extraterritorial costs. This payment can be made without any further evidence of the actual costs. The 30%-facility is applicable to all wages from current employment (including e.g., bonus amounts, equity incentives and the private use of the company car). In addition, international school fees can be reimbursed free of tax under the 30%-facility. However, payments made after the end of the employment should carefully be reviewed for applicability of the 30%-facility, and the facility cannot be applied on severance payments.

2. The employee may request to be treated as a non-resident taxpayer for income derived from a substantial interest (Box II) and from savings and investments (Box III). This status has the advantage that non-employment income is only taxable in the Netherlands if it is derived from a Dutch source (e.g., real estate located in the Netherlands). Other income, such as assets outside of the Netherlands, interest from bank accounts and capital gains will not be taxable in the Netherlands under this status.

18.5.1 Conditions

To qualify for the 30%-facility, the following conditions must be met:

Hired from abroad

Employees must be hired from abroad to qualify for the 30%-facility. Non-resident statutory directors (executive directors or supervisory directors under 'opting-in') of a Dutch company may also qualify for the facility, in case they are subject to taxation in the Netherlands.

Specific expertise

Employees must have specific knowledge or expertise that is scarce on the Dutch labor market. This specific expertise is deemed to be present if the taxable annual salary exceeds EUR 54.781 (2020). For employees below the age of 30 who have a Master's degree or who are PhD graduates, a reduced salary requirement of EUR 41.641 (2020) applies. Specific conditions may apply for scientist researchers, medical specialists and PhD graduates.

In cases where the employee's salary remains below the salary threshold, the 30%-facility could still be applied partially, provided that the taxable annual salary is at least EUR 38,347 (2020) or (for Master's and PhD graduates below the age of 30) EUR 29,149 (2020). Instead of a tax-free compensation of 30%, a lower percentage will then be applied.

Employees should fulfil the specific expertise condition on a continuous basis, i.e., they have to meet the salary requirement throughout the entire period for which the 30%-facility is granted. If the salary requirement is not met at any given time, the facility will lapse immediately with retroactive effect for that year, and can no longer be applied.

150 kilometers from the Dutch border

Cross-border employees living within a 150-kilometer radius of the Dutch border in principle are not eligible for the 30%-facility. As a main rule, any 30%-facility applicant should have lived at a distance of more than 150 kilometers from the Dutch border for more than 16 months within a timeframe of 24 months prior to the start date of their employment agreement.

This condition however, does not apply to PhD students who graduate or have graduated in the Netherlands (or within the 150 kilometer-radius) and have started their employment in the Netherlands within one year of graduation. Finally, please note that in certain situations it may be possible to reimburse an expatriate's *actual* expenses that qualify as extraterritorial, in cases where (some of) the formal conditions for the 30%-facility are not fulfilled.

18.5.2 Administrative requirements

The employer and the employee have to file a joint request for the 30%-facility with the Dutch tax authorities. Please note that the 30%-facility will only have retroactive effect as of the starting date of the employment in the Netherlands, if it is filed within four months from that date. Once that period has expired, the facility will only take effect as of the first day of the month following the month in which the request was filed.

The facility should be processed via the company payroll of the Dutch wage tax-withholding agent. After filing the 30%-facility and pending approval by the Dutch tax authorities, the employer is already entitled to apply the 30%-facility. However, if it turns out later on that the facility will not be granted, the additional wage tax due on the 30%-facility must be withheld and paid to the Dutch tax authorities with retroactive effect.

The employer and the employee should formally agree in writing to apply the 30%-facility on the salary (e.g., via an addendum to the employment agreement).

18.5.3 Duration of the 30%-facility

Since 2019, the 30%-facility is granted for a maximum period of five years. The five-year period normally commences on the start day of the employment, and will be reduced by any period(s) of time spent in the Netherlands (including previous employments in the Netherlands) in the last 25 years.

This reduction does not apply if the employee worked in the Netherlands for a maximum of 20 days in each calendar year of the 25-year period. Furthermore, if the presence in the Netherlands has been for personal circumstances and was (a) no more than six weeks each calendar year and/or (b) a one-off continuous stay of 3 months, the duration period of the 30%-facility will not be reduced by these periods of previous stays.

Prior to 2019, the term of the 30%-facility was eight years instead of five. Transitional rules therefore apply to determine the revised end date of 30%-facilities that were granted before 2019. The following table shows how these rules work out in the various scenarios possible:

Original end date of facility	Revised end date
2019 or 2020	Unchanged
2021, 2022 or 2023	31 December 2020
2024 or later	3 years less the original end date

18.5.4 New employer, new 30%-facility request

In case an employee changes employers, a new 30%-facility request has to be filed with the Dutch tax authorities. To remain eligible for the 30%-facility, the period between the end of the previous employment and the start of the new employment may not be longer than three months.

18.6 Box 1 tax and social insurance rates

The following tax and social insurance rates will apply in 2020 for resident Dutch taxpayers who have not yet reached the age when they become eligible for the General Old Age Pensions Act (AOW).

Bracket	Taxable income	Tax percentage
1	Up to and including EUR 68,507	37.35%
2	As of EUR 68,508	49.50%

The rate in the first bracket (37.35%) consists for 10.00% of income tax and for 27.65% of national insurance contributions. The rate in the second bracket (49.50%) consists of income tax only.

18.7 Box II tax on substantial interests

Generally, an individual has a substantial interest if, alone or together with their partner, they directly or indirectly:

1. own 5% or more of any class of capital of a company, and/or
2. have the right to acquire 5% or more of the subscribed capital of a company (e.g., through stock options), and/or
3. have a profit-sharing right entitling to 5% or more of the annual profits or liquidation revenue

Even if an individual holds less than 5% of the capital, they may still have a substantial interest if certain relatives hold a substantial interest in that capital. If an individual holds a substantial interest, all of their other holdings in the company, including stock options, claims and other forms of profit participation, will qualify as substantial interest as well, and will be subject to Box II tax.

An individual owning a substantial interest is taxed on all proceeds derived thereof, including periodic benefits such as dividends and capital gains received upon the disposal of shares, at a flat rate of 26.25% (2020). A capital gain consists of the transfer price less the acquisition price, and can also be a negative (i.e., a capital loss). A capital loss resulting from a substantial interest may in principle only be deducted from the income from substantial interests in Box II.

Notwithstanding the above, if the individual places an asset at a company's disposal while that individual also 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.

18.7.1 Usual wages

An employee or a manager who works in a company in which they have a substantial interest has to have that company pay them a so-called usual wage, which will be taxed in Box I. The minimum usual wages to be earned in a calendar year is in principle approximately EUR 45,000 (2020) per employment contract. As a result, an employee with a substantial interest has to be paid at least the fixed amount of around EUR 45,000 (2020), which is treated as taxable income.

However, the usual salary may well need to be set either higher or lower, depending on the specific circumstances of the individual's employment. The company has to withhold and remit wage tax and (if applicable) social insurance premiums on the usual wages. The wage tax paid constitutes a deductible salary cost for corporate income tax purposes.

18.8 Income tax return filing obligations

Dutch personal income tax is levied through a personal income tax assessment, which is issued following submission of a tax return to Dutch tax authorities. Taxpayers usually receive a notice to file a tax return for a certain year automatically, which they must then comply with before 1 May of the following calendar year. An extension of this period may be obtained upon request.

Advance levies such as Dutch wage tax and dividend tax already paid can generally be offset against the personal income tax due. Certain deductions that are not specifically connected to any box in particular (e.g., certain personal obligations or exceptional expenses) can be deducted by means of a reduction of Box I, II or III incomes. Furthermore, a general tax credit (not specifically connected to any box in particular) reduces the combined amount of tax due on all income. The maximum general tax credit is EUR 2,711 (2020) for individuals who have not yet reached the age when they become eligible for the General Old Age Pensions Act.

On balance, the return may result in either a zero income tax liability, a refund of overpaid income tax, or an additional payment of income tax due.

19

Corporate Income Tax

The Dutch Corporate Income Tax Act (*Wet op de vennootschapsbelasting 1969* or CITA) distinguishes between resident and non-resident taxpayers. Dutch subsidiaries of foreign companies are regarded as resident taxpayers, while Dutch branches of foreign companies are regarded as non-resident taxpayers. In recent years, the CITA has been amended more than once with respect to 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, among other things.

19.1 Subsidiaries

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

19.1.1 Tax rates

Under current legislation, profits up to EUR 200,000 are taxed at 16.5% (in 2019: 19%), while profits exceeding EUR 200,000 are taxed at 25% (in 2019: 25% as well). In 2021, the lower CIT rate of 16.5% will decrease to 15% and the higher CIT rate will decrease to 21.7%.

19.1.2 Residency

A company incorporated under the laws of the Netherlands is deemed to be 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 based on 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 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 only allowed 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 complies 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 not to comply 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 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 (100% of) the *Waardering Onroerende Zaken* (WOZ) value. This value 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.

The time periods over which losses can be carried forward or carried back are six years and one year, respectively (see Section 19.10 on Losses).

19.1.4 The arm's-length principle (ALP)

The ALP is codified in Article 8b of the CITA. This article requires taxpayers to maintain information in their administration on how the transfer prices between the taxpayer and the associated enterprises have been determined. This article further prescribes that taxpayers document in their administration that the intercompany transactions they entered into were done so under arm's-length circumstances.

In addition to the provisions contained in Article 8b, supplementary and contemporaneous transfer pricing documentation requirements were introduced in the Netherlands, which are applicable to fiscal years starting on or after 1 January 2016, for multinational enterprises with consolidated revenues of EUR 50 million or more. Given the legislative history of the Netherlands, tax authorities will provide the taxpayer with a reasonable term to submit information or transfer pricing documentation upon request by the Dutch tax authorities. Section 19.16, Transfer pricing regime, provides an overview of the Dutch transfer pricing regime and the additional transfer pricing documentation requirements starting from 2016.

19.1.5 Innovation box and R&D deduction

Under the Dutch innovation box qualifying income that results from endeavors in the field of R&D is taxed at an effective tax rate of only 7% (the normal tax rate is 25%).

The new rules for the Dutch innovation box regime entered into force on 1 January 2017. Under the new regime, a taxpayer can only apply the innovation box for intangibles that originate from activities for which an R&D Declaration (*S&O Verklaring*) has been granted by the Ministry of Economic Affairs. Independent access solely through a patent or plant breeders' rights is therefore no longer possible.

Companies with: (a) more than EUR 50 million global group-wide turnover; and (b) at least EUR 7.5 million per year in gross revenues from all IP assets,

will only have access to the regime when their intangibles originate from activities for which an R&D Declaration has been granted and when additional requirements in relation to the qualifying intangibles are met. In that case, the qualifying intangible needs to qualify as any of the following:

- A software program;
- A (pending) patent;
- An authorization for the marketing of a medicine/drug;
- A supplementary protection certificate;
- A utility model;
- An exclusive license to use the above-listed intangible assets.

Under the new regime, qualifying income can be limited if, and to the extent that, a taxpayer has outsourced part of its R&D activities to a company within its group. This is the codification of the so-called modified nexus approach, which was introduced in BEPS Action Plan 5.

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 7% rate, to the extent it exceeds the previously reported costs.

For further details, please refer to chapter 21 on investment incentives.

19.1.6 Dividend withholding tax

The Dutch domestic dividend withholding tax rate is 15%, which may be reduced by applicable tax treaties.

However, dividend distributions made by a Dutch company (such as a BV or NV) are under Dutch domestic rules exempt from Dutch dividend withholding tax if the recipient is a corporate entity with a minimum

shareholding of 5% in the nominal paid-up share capital of the Dutch entity and the recipient is either of the following:

(i) Corporate tax resident in the Netherlands or a member state of the European Economic Area (including the European Union);

(ii) Resident in a jurisdiction with which the Netherlands has concluded a tax treaty that contains a dividend income clause (It is important to note that even if the dividend income clause does not provide for a 0% rate, the exemption will nevertheless apply in full based on the mere fact that a tax treaty is in place.).

The exemption principally only applies to corporate shareholders that are resident in a tax treaty jurisdiction, although specific relief is available for hybrid entities that receive dividends from a Dutch company, provided certain conditions are satisfied.

However, the exemption is rejected if: (i) the foreign shareholder holds the interest in the Dutch company with a purpose to mitigate the levy of Dutch taxation; and (ii) an artificial arrangement is in place. These two "anti-abuse" tests already existed in Dutch tax law. Similar to the existing tests, the new rules should not result in the levy of Dutch dividend withholding tax in case of dividend distributions by a Dutch taxpayer to: (i) any shareholders with an active business enterprise; or (ii) intermediate holding companies that (indirectly) link two active business enterprises, provided the intermediate holding company has relevant substance in its country of establishment (i.e., the safe harbor rule). The intermediate holding company is said to have relevant substance if, among others: (a) the intermediate holding company incurs at least EUR 100,000 (or the equivalent thereof in a different currency) in wage costs that forms the remuneration for the linking role activities of the intermediate holding company; and (b) the intermediate holding company has an office space available with the customary facilities for the performance of the linking role activities.

Until 2020, if the conditions under the safe harbor rule were satisfied, the Dutch domestic dividend withholding tax exemption could be applied. However, as of 1 January 2020, satisfying conditions under the safe harbor rule by an intermediate holding company that establishes the abovementioned link, do no longer automatically guarantee that the Dutch dividend withholding tax exemption applies. Instead, as of 1 January 2020, the Dutch Tax Authorities have the opportunity to challenge the exemption by demonstrating that the structure/transaction is abusive, even if the conditions under the safe harbor rule are met.

The Dutch Cooperative

As of 2018, profit distributions made by a Dutch cooperative to its members are, in principle, not subject to Dutch dividend withholding tax, unless the cooperative qualifies as a so called, "holding cooperative". Holding cooperatives must, in principle, withhold Dutch dividend withholding tax at a rate of 15% on profit distributions to qualifying members.

A cooperative qualifies as a holding cooperative if the activities of the cooperative usually consist of 70% or more of: (i) owning shareholdings that qualify for the Dutch participation exemption regime; or (ii) financing-related entities. A qualifying member is a member that is entitled to at least 5% of the annual profits or 5% of the liquidation proceeds of the holding cooperative.

However, holding cooperatives and its qualifying members may, be eligible for the exemption in tax treaty situations as described in this section above. Furthermore, application of bilateral tax treaties may reduce this domestic withholding tax rate to a lower rate.

19.1.7 Non-resident shareholder taxation

A non-resident entity that owns at least 5% of the issued share capital in a Dutch company (defined as a "substantial shareholding" in the Dutch Personal Income Tax Act 2001) may be subject to 25% Dutch CIT (16.5% for profits not exceeding EUR 200,000) in relation to profit distributions, capital gains and interest from loans in connection with the substantial shareholding. This is an anti-abuse rule that only applies under the following cumulative conditions:

(i) The foreign shareholder owns the interest with, as the main purpose or one of the main purposes, the avoidance of Dutch personal income tax; and

(ii) 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 fulfils a "linking function" between such a top holding company and the underlying operational companies. In this way, group structures will not be burdened with this measure. However, 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 (the so-called safe harbor rule). We refer to paragraph 19.1.6 for a more detailed description of the legislation regarding the conditions under the safe harbor rule as of 1 January 2020.

19.2 Branches

Dutch branches of non-resident companies are regarded as non-resident taxpayers for CIT purposes.

19.2.1 Domestic source income

Non-resident taxpayers are only subject to CIT 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 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 (i.e., a shareholding of at least 5%), in case the anti-abuse rule described under 19.1.7 applies
- 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 non-resident company is regarded as the taxpayer, not the Dutch branch of the company.

19.2.3 Computation of taxable profits

The CITA does not contain any provisions on how taxable income should be attributed to a Dutch branch of a non-resident 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.

The allocation of profits to a Dutch branch is cumbersome and can be subject to discussion. Generally, the Dutch tax authorities are willing to enter into agreements with taxpayers on the determination of the taxable profits of the branch by agreeing on an APA (please see Section 19.16,

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., 25% for profits exceeding EUR 200,000 and 16.5% for profits up to EUR 200,000 in 2020).[30]

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 CIT purposes. This also means that foreign losses are, in principle, not deductible.

However, similar to liquidation losses of foreign participations, foreign losses that become permanent when the foreign branch ceases its activities could be deductible in the Netherlands. Therefore, the fact that losses of the foreign branch are initially not deductible should not result in a higher tax burden. There is only a difference in the moment at which the foreign branch's losses are deductible: losses of the foreign branch are not deductible in the year in which the losses were incurred, but in the year the foreign branch ceased its activities. 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%, 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

[30] Under current legislation, the lower CIT rate of 16.5% will be further decreased to 15% and the higher CIT rate will be decreased to 21.7% in 2021, please see Section 19.1.1.

foreign branch profits, unless a double tax treaty provides for an exemption.

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 may, however, be subject to up to 15% Dutch dividend withholding tax (although in many cases a withholding exemption will apply; see Section 19.1.6).

(c) Interest expenses on loans and royalties either accrued or paid by a subsidiary are, in general, tax deductible if such interest or royalty is considered to be at arm's length (however, see Section 19.6, Limitations on deductions of interest). Internal interest and royalties 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 (e.g., dividends, capital gains and liquidation proceeds) 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% 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% 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 participation exemption if the subsidiary is subject to a "realistic levy of tax" by Dutch standards (the "Subject to tax test") or if the assets of the subsidiary consist of less than 50% 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%), 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 be 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.

The Asset test

If the assets of the subsidiary consist of more than 50% of free portfolio investments, the subsidiary does not meet the Asset test. Free portfolio investments are 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. Immovable property is, by definition, not a free portfolio investment.

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 19.6, Limitations to deductions of interest), all expenses incurred in connection with a subsidiary qualifying for the participation exemption are generally 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 also not 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, which can be obtained by filing an ATR request with the Dutch tax authorities.

19.4.3 Capital losses under the participation exemption

Generally, 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 could be deductible. This exception is subject to complex anti-abuse rules, which 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 applies if the loan was revaluated downward by the creditor at 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 the specific facts and circumstances.

19.4.6 Active companies located in "tax havens"

Shareholdings of 5% or more in active operations that are completely exempt from local taxation are eligible for the Dutch participation exemption. This makes the Netherlands very attractive for all sorts of active investments in jurisdictions that do not traditionally levy a profit tax or grant extensive tax holidays and that are currently referred to as "tax havens." However, we refer to our paragraph below with respect to the measures against controlled foreign companies.

19.4.7 Controlled foreign company rule ("CFC rule")

Dutch tax law did not provide for a specific CFC legislation other than the regulation for low taxed investment subsidiaries and the general arm's length principle.

Based on the ATAD, EU Member States are obliged to implement a CFC Rule according to which the non-distributed earnings of a foreign subsidiary or permanent establishment may be taxed in the Netherlands if certain criteria are fulfilled. The ATAD offered the following two options of implementing the CFC Rule:

- Model A: on the basis of model A, non-distributed passive income of the subsidiary or permanent establishment such as interest, royalties, dividend and financial leasing will be included in the tax base of the taxpayer.
- Model B: on the basis of model B, income generated through assets and risks which are linked to significant people functions carried out by the taxpayer (i.e. the controlling company), to be calculated in accordance with the arm's length principle, will be included in the tax base of the taxpayer.

The Netherlands already applies Model B, since the arm's-length principle is already an important part of Dutch tax legislation. This way the Netherlands government is of the view that Dutch tax law already meets the minimum standard of the ATAD CFC legislation.

However, the Netherlands has chosen to apply Model A as well for specific situations as of 1 January 2019. This is the case where the following criteria are fulfilled with respect to a foreign subsidiary or permanent establishment:

- The Dutch taxpayer - with or without affiliated persons - has a direct or indirect interest of at least 50% of the nominal paid-up capital, voting rights and the profits in the foreign subsidiary or permanent establishment; and
- The foreign subsidiary or permanent establishment is not subject to corporate income tax in its country of residence, or subject to corporate income tax in its country of residence at a statutory rate of less than 9%; or is located in a country that is included in the EU list of non-cooperative jurisdictions.

However, the CFC Rule will not apply if:

- The income of the foreign subsidiary or permanent establishment consists of more than 70% of non-passive income; or
- The foreign subsidiary or permanent establishment does not have a substantial economic activity.

19.4.8 Mutual investment funds and private equity funds

In respect of mutual investment funds, the participation exemption regime used to only be available to 5% quota holders in Dutch mutual investment funds. Currently, provided 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.

19.4.9 Hybrid instruments

Dutch tax law used to allow a Dutch parent company to derive exempt benefits from instruments, whereas the remuneration on the hybrid instrument is deductible in the country of issuance ("hybrid debt instruments"). On the basis of the participation exemption regime, no tax exemption will be allowed anymore on proceeds from instruments that result in deductibility in a foreign country.

19.4.10 Real estate companies

The application of the participation exemption regime on real estate companies is determined on the general criteria described in Section 19.4.1. For the purpose of the asset test, real estate is not considered a free portfolio investment. Therefore, the participation exemption generally applies to shareholdings in real estate companies.

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." There is a claw-back provision if 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 see Section 19.9.3, Provisions and tax-free reserves).

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. For assets with a maximum depreciation period of 10 years, the acquired asset must have 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 non-resident companies (as referred to in Section 19.4 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 19.12, Mergers and demergers)

Capital losses are deductible for Dutch CIT purposes, unless they are exempt under the Dutch participation exemption regime.

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 Interest deduction on "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. 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 under the following conditions:

- 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.
- No corresponding payment is effectively deductible for profit tax purposes (in a foreign jurisdiction).

19.6.2 Interest deduction on loans relating to "tainted" transactions

Interest expenses on loans from affiliated entities or individuals may be disallowed for Dutch CIT purposes if the loan is related to any of the following "tainted" transactions:

- A profit distribution or repayment of share capital
- A capital contribution to an affiliated entity
- An acquisition or increase of the shareholding in an entity that qualifies as an affiliated entity after the acquisition

An entity qualifies as an affiliated entity if the Dutch taxpayer has or acquires a direct or indirect interest of at least one-third in the entity or vice versa, or if a mutual (indirect) shareholder has or acquires a direct or indirect interest of at least one-third in both the Dutch taxpayer and the other entity. In addition, an entity qualifies as affiliated if it **individually** does not meet the one-third threshold but is part of a "cooperating group" of entities that **jointly** meet the one-third threshold.

Notwithstanding the above, interest expenses are allowed if the taxpayer is able to demonstrate either of the following:

- The debt and the related transaction are predominantly business-driven.
- The interest payments are effectively taxed in the hands of the creditor at a tax rate of 10% of a taxable profit calculated in accordance with Dutch tax law, and the recipient is furthermore not eligible to offset tax losses.

However, if the tax authorities can reasonably establish that: (i) the debt is provided with the intention to set off tax losses or use other claims arising in a current year or the near future; or (ii) the debt or the relating

transaction is not predominantly business-driven, then the interest expenses are not deductible.

19.6.3 Interest deduction on low-interest loans

The interest paid and capital losses realized on a loan are not deductible, provided that the following characteristics are present:

(a) The debtor and creditor of the loan are affiliated companies.

(b) The loan has no term or a term of more than 10 years.

(c) The remuneration on the loan deviates considerably (i.e., by 30% 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.

19.7 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 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:

(a) The Dutch entity receives and pays interest or royalties to and from a foreign entity within the same group.

(b) The interest and royalties received and paid relate directly or indirectly to a loan or a royalty transaction.

(c) The transactions are "closely connected."

(d) 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% of the outstanding loans, or EUR 2 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 advisers 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 50% of the expected gross royalty payments to be made by it, or EUR 2 million and at least 50% of that amount has been paid in advance to the licensor.

In addition, a flow-through entity that qualifies as a financial service company (i.e., a company with activities that consists of 70% or more of directly or indirectly receiving and paying interest, royalties, rent or lease instalments, to or from non-resident group companies, over the time of a fiscal year), must currently indicate on its annual corporate income tax return whether certain minimum substance requirements are met.

As of 1 January 2020, the existing substance requirements are expanded with the following additional requirements:

(i) EUR 100,000 salary costs

On an annual basis, the financial service company must incur at least EUR 100,000 (or the equivalent thereof in a different currency) in salary costs that form the remuneration for the

licensing or financing activities performed by the financial service company.

(ii) Office space

The intermediate holding company will be required to have an office space available with the customary facilities for performing the licensing or financing activities for a period of at least 24 months.

If these substance requirements are not met, the Dutch tax authorities can spontaneously exchange information regarding a company's factual situation to foreign tax authorities of countries that have provided a relief of taxation to the Dutch company on the basis of a tax treaty or the EU Interest and Royalty Directive (i.e., foreign source countries).

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 only be granted under the Dutch Dividend Tax Act of 1965 ("**DWTA**") 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, e.g., 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. However, these attempts were unsuccessful; after the Dutch tax authorities lost a number of cases in court, the legislator decided to

introduce anti-dividend stripping rules 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, such as the period between the moment of the transfer and the dividend distribution, the character of the dividend (regular, incidental or liquidation distribution) and the duration of the transfer.

19.9 Tax incentives

The following measures provide tax relief to taxpayers:

19.9.1 Investment allowance

The investment allowance (*investeringsaftrek*) is limited to small investments (EUR 2,301 to EUR 312,176) and comprises a deduction of a percentage at a maximum of 28%.[31]

Investment	Percentage
EUR 0 - EUR 2,300	0%
EUR 2,301 - EUR 57,321	28%
EUR 57,322 - EUR 106,150	EUR 16,051
EUR 106,151 - EUR 318,449	EUR 16,051 less 7.56% of the amount exceeding EUR 106,150
More than EUR 318,449	0%

In addition, an investment allowance of 45% is available for energy- saving investments (up to EUR 122 million). Furthermore, an investment allowance of 13.5%, 27% or 36% 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 EUR 2,300 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

[31] 2019 amounts.

desinvesteringsbijtelling). Withdrawal from an asset is deemed a disposal in this respect. Assets 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, the Dutch Minister of Financial Affairs could make an exception.

19.9.2 Random depreciation

Random accelerated depreciation (e.g., in one year) may be claimed for certain environmentally friendly assets that are on the list of assets and regions compiled by the Ministry of Environmental Affairs. In addition, other assets on this list are eligible for random depreciation.

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 the payment of certain pensions, for events that may occur in the future and for bad debts.

A company alienating an asset, whether 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. The new asset does not have to have 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 for six subsequent years, subject to certain detailed anti-abuse provisions. This means, for example, that a tax loss in 2020 may be credited with taxable profit of 2019 or up to and including 2026.

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% 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.

Old loss compensation rules that are no longer in force as of 1 January 2019, stated that losses incurred in years during which the taxpayer qualifies as a "holding company" (i.e., for 90% of the year, 90% 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 was 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. This rule still applies to tainted losses that arose before 1 January 2019.

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 capitalised profits but excluding retained earnings, is tax-free (with certain exceptions).
- Any other payment is deemed to be a dividend and is therefore subject to dividend withholding tax. Dividend withholding tax will not be levied if the recipient is:
    - 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% of the nominal paid up share capital of the distributing company; and/or
    - 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 realized on the transfer of the assets and liabilities (comprising a business or an independent part thereof) of one company to another (existing or newly incorporated) company 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% 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 only undergone 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 non- resident 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

Implementation of the EU Merger Directive has made it possible for a non-resident 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 met. 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% of the voting shares in the Dutch corporation.

19.12.3 Legal merger

The CITA 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 all the shareholders of the legal entity being demerged become shareholders of the transferee company (i.e., the

acquiring company or companies). In general, there are two main types of demergers:

(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 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 (a N.V., B.V., a Dutch Cooperative, or a mutual guarantee association) may form a fiscal unity with subsidiaries in which a participation of at least 95% 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 actually 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% 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% between the companies.

A fiscal unity can also be established between Dutch sister companies that have a common shareholder within the EU that owns at least 95% of the shares, voting rights and profit rights of these sister companies. The same applies for a Dutch parent company that holds a 95% interest in a Dutch subsidiary through a foreign company within the EU.

As of 1 January 2019, certain provisions of the Dutch CITA and Dutch DWTA must be applied as if the Dutch fiscal unity does not exist (with retroactive effect to 1 January 2018).

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%. Profit distributions by an FBI to its shareholders will give rise to Dutch dividend withholding tax at a rate of 15%, 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 non- discrimination 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% of the tax book value of real property investments and 20% 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):

(i) not more than 45% of the FBI may be held by an entity (or by two or more related entities, as defined by law) subject to a profit tax; and

(ii) a single individual may not hold an interest of 25% 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 it been exempt from being licensed):

(i) at least 75% of the shares in the FBI must be held by individuals, corporate entities exempt from CIT, or listed FBIs; and

(ii) individuals may not hold an interest of 5% or more.

(g) 25% or more of the shares in an FBI may not be held by Dutch resident companies via non-resident 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% 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% of the market value of the real estate, 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 exempt from tax. 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 that contains a non-discrimination provision has been concluded with that other state.

- 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 and 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 only one asset).

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 re-evaluate 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 generally adhere to the OECD Transfer Pricing Guidelines and apply the ALP. The ALP requires that all intra-group transactions occur at conditions 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 considered to 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.

From 1 January 2016, supplementary and contemporaneous transfer pricing documentation requirements apply to companies that are part of a multinational group with consolidated revenues of EUR 50 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[32]; hereinafter referred to as "Action Item 13").

More specifically, entities located in the Netherlands that are part of an MNE with consolidated revenues of EUR 750 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

[32] http://www.oecd.org/ctp/transfer-pricing/beps-action-13-country-by-country-reporting-implementation-package.pdf

filed with the Dutch tax authorities or must be made available to the Dutch tax authorities through automatic exchange (see below).

Entities that are part of an MNE with consolidated revenues of EUR 50 million or more, but less than EUR 750 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 an MNE with consolidated revenues of less than EUR 50 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 fiscal year that starts on or after 1 January 2015, is the relevant year for determining the applicable transfer pricing documentation requirement for 2016. MNEs must notify the Dutch tax authorities by last day of the relevant fiscal year[33] of whether the local subsidiary in the Netherlands is required to file a CbCR and, if not, which other entity in the group will file the CbCR instead.

Before the notification deadlines in various countries, MNEs will need to make a decision on which entity in the group will act as a surrogate parent for CbCR purposes. The notification(s) in the Netherlands should be filed online via the notification tool prepared by the Dutch tax authorities.

Moreover, the Dutch tax authorities require a notification to be filed by the Dutch subsidiary of a foreign MNE in case the Dutch subsidiary is required to file the CbCR with the Dutch tax authorities, but whereby the ultimate parent company of the MNE refuses to provide that Dutch

[33] Please note, however, that for the first reporting year only (i.e., fiscal years that started on or after 1 January 2016), the notification deadline was extended until 1 September 2017.

subsidiary with the information necessary to complete and submit the report.

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., within five months after the end of the fiscal year, and they should only be filed with the Dutch tax authorities upon request. If an extension is granted for filing a tax return, the Dutch tax authorities have indicated that they will also not request the Master file and Local file before this date. 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 in any case required to file the CbCR with the Dutch tax authorities if this entity is located in the Netherlands. However, on some occasions, a subsidiary of an MNE could also be required to file a CbCR in the Netherlands. The CbCR should, in short, contain aggregate tax jurisdiction-wide information on the global allocation of income, the taxes paid per country and the activities performed in these countries.

The Dutch government is a signatory to the Multilateral Competent Authority Agreement, issued by the OECD, based on which the CbCR can be exchanged between competent authorities on a bilateral basis.

19.16.2 Consequences of non-compliance with the documentation requirements

Failure to comply with the information and documentation obligations mentioned above, including the CbCR, Master file and Local file, may result in a reversal of the burden of proof from the tax authorities to the taxpayer, or in administrative penalties. In order to prevent shifting of the burden of proof from the tax authorities to the taxpayer, it is recommended to strategically consider how the arm's-length character of

intercompany transactions within an MNE can be substantiated with sufficiently detailed transfer pricing documentation. Intentionally not meeting the obligations or any gross negligence may (in extreme cases) also result in criminal prosecution.

In addition to the penalties mentioned above, for the CbCR requirements, including the related notification requirements in the Netherlands, there is a specific penalty that may apply in case of non-compliance. That is, the maximum administrative penalty for intentionally or due to gross negligence not complying with the information obligations in relation to the CbCR and the related notification for CbCR purposes is EUR 820,000.[34]

19.16.3 Dutch transfer pricing decree

Extensive guidance has been issued by the Dutch Ministry of Finance in the form of decrees, which provide further guidance regarding the interpretation/application of the ALP and procedures for obtaining an APA or ATR in the Netherlands.[35] 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.

The Netherlands' transfer pricing regime can be characterized as pragmatic. All the OECD transfer-pricing methods are accepted and so are Pan-

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[34] This *maximum* penalty for non-compliance with the CbCR requirement and the related notification requirement was increased in 2017.

[35] 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 services) between related parties. An ATR is an agreement between a multinational enterprise and the Dutch tax authorities that provides certainty on the tax consequences of a proposed transaction or a set of transactions for international issues mentioned in the ATR decrees.

European comparables. Transfer pricing documentation must be prepared in Dutch or English. For years prior to fiscal year 2016, and thereafter for MNEs with consolidated revenues of less than EUR 50 million, 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 additional transfer pricing documentation rules as set forth above apply to MNEs with consolidated revenues of EUR 50 million or more.

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 for governments and international organizations. These developments, together with the Dutch tax authorities' increased awareness of transfer pricing, will most likely result in more frequent transfer pricing audits. The government has already indicated that the Dutch tax authorities will use the CbCR as a risk-assessment tool to determine the focus of audits. As such, taxpayers should be able to better substantiate that their supply chain structure and their intercompany transactions are in line with value creation.

19.16.4 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 relatively efficient processes in achieving advance certainty for a mutually agreed period of time. Note however, that certain information on tax rulings will be subject to automatic exchange within the EU, as discussed in Section 19.16.4.

Within five days after 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 receipt of the request. This period can be extended if additional information is required to assess the request properly.[36] 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.[37] The tax authorities aim to process and finalize all APA and ATR requests in the shortest possible period.

As of 1 July 2019, a new policy is in place for rulings with an international character. Instead of meeting the minimum substance requirements, taxpayers need to have sufficient economic nexus in the Netherlands in order to obtain an APA or ATR. In addition, under the new policy, an APA or ATR with an international character will be denied if (i) the sole or decisive motive is to avoid taxes; and/or (ii) if a low-tax jurisdiction is involved.[38]

The Dutch tax authorities publish anonymized summaries of ruling requests with an international character (which have been accepted into the ruling process) and anonymized summaries of concluded APAs/ATRs with an international character, in an online publicly accessible register.

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[36] Organization and Competence regulation of the APA/ATR-team of the Dutch tax authorities, Decree DGB 2014/296M, 12 June 2014.

[37] Handling procedure for APA requests, Decree DGB 2014/3098, 12 June 2014.

[38] The Netherlands publishes a list each year with low-tax jurisdictions and non-cooperative jurisdictions against tax avoidance. This list is annually updated by the Dutch Government, which means that jurisdictions may be removed or added to this list. This list is used in several measures to combat tax avoidance, such as the measure against controlled foreign companies ("CFCs"). We refer to 19.4.7, and the conditional withholding tax that is expected to be introduced in Dutch legislation as of 1 January 2021 (paragraph 20.4).

19.16.5 Automatic exchange of information

In 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, EU Directive 2011/16/EU on Administrative Cooperation between the Member States was amended in December 2015 to provide for the automatic exchange of information on tax rulings. The Netherlands implemented this Directive in Dutch legislation effective from 1 January 2017.

Based on this amendment, 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 will, in principle, be applied retroactively to APAs and ATRs entered into on or after 1 January 2012. However, there is a transitional arrangement.

The information that will be exchanged includes the identification of the taxpayer, a summary of the ATR or APA, a description of the relevant business activities, the relevant dates, the type of APA or ATR, the amount of the transactions covered by the agreement, and information on the transfer pricing remuneration applied to the transactions included in the APA or ATR.

EU Directive 2011/16/EU was further amended in January 2017 to allow for the automatic exchange of the CbCRs that are filed in one EU Member State with the other EU Member States in which the MNE is located. The Netherlands implemented this amendment in Dutch legislation on 5 June 2017, applicable to CbCRs that are filed for fiscal years starting on or after 1 January 2016.

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 the Decree of 29 September 2008, No. IFZ2008/248M, Stcrt. No. 188, the Dutch State Secretary of Finance issued specific guidance regarding competent authority proceedings under a bilateral treaty or the Arbitration Convention.

The government actively promotes the effectiveness of both procedures. One of the more recent initiatives of the government includes the introduction of the Netherlands Accelerated Mutual Agreement Procedure. The main goals of this initiative are to improve transparency, reduce taxpayer costs and find a resolution within a target (short) timeframe.

A person who is residing in the Netherlands for tax treaty purposes and who is subject to economic 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. Since 1992, the Netherlands has generally 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, has 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 at 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.

Aside 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 for 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 found 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 European Economic Interest Grouping (EEIG) and European company (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 are therefore not subject to Dutch CIT. The profits resulting from the activities of an EEIG are only taxable 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 only be subject to tax in the Netherlands 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

Since 2004, it has been 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. It also means 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:

(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:

  (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 create a uniform management structure by forming an SE, since an SE may opt for a one-tier or a two-tier board system.

19.19 EU Interest and Royalty Directive

The EU Interest and Royalty Directive took effect on 1 January 2004. 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 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% of the capital of the subsidiary.

(b) Both the parent and subsidiary have one of the legal forms listed in the annex to the directive.

(c) The parent and subsidiary are companies that, according to the tax laws of their respective countries, are considered resident in 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 the 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% 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.

19.21 EU Merger Directive

The EU Merger Directive is implemented in Dutch law and is described under Section 19.12, Mergers and demergers.

19.22 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. Most tax treaties negotiated by the Netherlands relating to income and capital are based on the draft models published by the 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	Croatia	Israel	Pakistan
Argentina	Curacao	Italy	Panama
Armenia	Czech Republic[a]	Japan	Philippines
Aruba	Denmark	Jordan	Poland
Australia	Egypt	Kazakhstan	Portugal
Austria	Estonia	Kuwait	Qatar

[a] 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.

Azerbaijan
Bahrain
Bangladesh
Barbados
Belarus
Belgium
Bermuda[b]
Brazil
Bulgaria
Canada
China
(excluding
Hong Kong and
Macau)
Taiwan
Thailand
Tunisia Turkey

Ethiopia
Finland
France
Georgia
Germany
Ghana
Greece
Hong Kong
Hungary
Iceland
India
Indonesia
Ireland
Uganda
Ukraine
United Arab
Emirates

Latvia
Lithuania
Luxembourg
Macedonia
(FYR)
Malaysia
Malta
Mexico
Moldova
Morocco
New Zealand
Nigeria
Norway
Oman
United
Kingdom
United States
Uzbekistan

Romania
Russia
Saudi Arabia
Singapore
Slovak Republic
Slovenia
South Africa
South Korea
Spain
Sri Lanka
Suriname
Sweden
Switzerland
Venezuela
Vietnam
Zambia
Zimbabwe

[b] Only regarding individuals, i.e., not regarding corporate entities.

Tax treaties are still in force with the following countries after split or separation from the (former) Soviet Union and Yugoslavia:

Bosnia and Herzegovina Kosovo	Kyrgyzstan* Montenegro	Serbia 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, which are not yet in force, with the following countries:

Kenya (2015)	Malawi (2015)

Negotiations are underway or have already been held with the following countries:[39]

Andorra	Colombia	Pakistan
Australia	Curacao	Portugal
Austria	France	South Korea
Belgium	India	Sri Lanka
Brazil	Kosovo	Thailand
Chile	Morocco	Uganda

[39] Overview published by the Dutch Ministry of Finance regarding the expected negotiations of tax treaties in 2019.

Tax-sparing credits are granted in respect of the following less- developed countries:

Brazil (*dividends/interest/royalties*)	Philippines (*interest/royalties*)	Suriname (*dividends/interest/royalties*)
China (*interest/royalties*)	Sri Lanka (*dividends/interest/royalties*	Zambia (*dividends*)
Pakistan (*interest/royalties*)		

Tax treaties with regard to profits from air and/or sea shipping are currently in force with the following countries:

Albania *air*	Georgia *air*	Panama *air/sea*
Argentina *air/sea*	Hong Kong *air/sea*	Poland *sea*
Armenia *air*	Hungary *air*	Qatar *air*
Azerbaijan *air*	Isle of Man *air/sea*	Saudi Arabia *air*
Bahrain *air*	Latvia *air/sea*	Slovak Republic *air*
Barbados *air*	Lithuania *air/sea*	South Korea *sea*
Belarus *air*	Macau *air*	Ukraine *air*
Bermuda *air/sea*	Macedonia *air*	United Arab Emirates *air*
Brunei *air*	Madagascar *air*	Uzbekistan *air*
Cuba *air*	Maldives *air*	Venezuela *air/sea*
Czech Republic *air*	Moldova *sea*	Vietnam *air*

Estonia *air/sea*

Oman *air*

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 in the Netherlands that provide supplies of goods and services or intra-community acquisitions in the course of a business. If a (foreign) business supplies goods and/or services, it is considered a taxable person for Dutch VAT purposes.

VAT grouping

If taxable persons established in the Netherlands are closely connected from a financial, economic and organizational perspective, these taxable persons together form a so-called VAT group. For VAT purposes, the VAT group will be regarded as one single taxable person as opposed to regarding the individual taxable persons as such. Transactions between the taxable persons forming a VAT group are considered out of scope and are thus not taxable.

Under certain conditions, non-taxable persons can also be part of a VAT group, such as pure holding companies.

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 non-taxable 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

In principle, Dutch VAT is due if these transactions are considered to take place in the Netherlands. However, a VAT exemption may apply (see Section 20.1.8).

20.1.3 VAT rates

The general VAT rate in the Netherlands is 21%.

A reduced VAT rate of 9% applies to certain essential goods and services, such as food and drinks (excluding alcoholic drinks), gas, electricity, certain types of medical devices, medicines, certain pharmaceutical products, tickets to certain events, books and e-books, public transport (including taxis), and certain labor-intensive repair and maintenance activities.

A 0% VAT rate generally applies to supplies of goods not cleared through customs (either because they are merely passing through the Netherlands or because they are stored in the Netherlands), supplies of goods that are exported from EU countries, and intra-community supplies and services connected to such supplies.

Furthermore, cross-border passenger transport by airplane and sea vessels (i.e., tickets) is also taxed at the 0% 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 business-to-business (B2B) customers in 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 annually. However, VAT taxable persons should file monthly EU Sales Listings when such supplies within the EU exceed the threshold of EUR 50,000 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 EUR 1 million of sales to customers in other EU Member States, or EUR 800,000 of purchases from suppliers in other EU Member States, must file the Intrastat return monthly. Once the threshold is exceeded during a year, the obligation to file an Intrastat return starts as of the month in which the threshold has been exceeded.

Record keeping

Based on Dutch administrative laws, records should in principle be kept for seven years. However, there are exceptions. Records with regard to real property (transactions) should be kept for at least 10 years. The records can be kept as hard copies or in electronic format.

Invoicing

One can 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 to be included on the invoice. The format of the invoice is (more or less) free, as long as the authenticity of origin, the integrity of the content

and the clarity of the invoice are safeguarded. 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 EUR 100 (including VAT).

The invoice should ultimately be issued 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

For 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 of 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.

Additional rules apply for cross-border supplies within the EU ("intra-community supplies") or supplies to recipients outside the EU (see Section 21.8.1). A taxable person who sells and supplies goods from the Netherlands to a taxable person (B2B) located in another EU country will perform an intra-community supply in the Netherlands (EU country of dispatch of the goods). This intra-community supply is, in principle, exempt from VAT (the Netherlands generally refers to a supply taxed at the 0% VAT rate). The

same applies for export supplies (to non-EU countries) from the Netherlands.

When applying the 0% VAT rate on cross-border supplies of goods from the Netherlands, additional VAT requirements apply, such as additional invoice requirements. As from 1 January 2020, the recipient must provide a valid VAT identification number of the Member State of arrival on the invoice to apply the 0% VAT rate. Furthermore, it is recommended to keep relevant documents proving the supply and shipment of the goods at hand. At least two items of non-contradictory evidence, issued by two different parties need to be provided. For 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.

Non-taxable legal entities are treated as taxable persons for their intra-community acquisitions if such acquisitions exceed an annual threshold (EUR 10,000 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 determined by the EU Member State (of the recipient).

For sales from other EU Member States to recipients in the Netherlands, a threshold of EUR 100,000 applies. Once this threshold is exceeded, the underlying supply of goods is, in principle, taxable in the Netherlands.

20.1.7 Supply of services

The general rule for 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 (this includes VAT-exempt entities, such as insurance companies, banks and hospitals).

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 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 then file their VAT returns for each EU Member State in which VAT should be reported because of B2C broadcasting, telecommunication and electronically supplied services, through one single Pan-EU VAT return. 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 shall 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 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 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 is 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 actually received for the goods and/or services. The remuneration can be paid in cash or in kind (in case of a 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 non-taxable 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 in certain cases, the 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, waste and old materials, and services with regard to supplying staff in certain sectors.

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

The acquisition of Dutch real property, including the acquisition of beneficial ownership, is in principle subject to a real estate transfer tax (RETT) of 6%. 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. However, it is common 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% 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 6% transfer tax.

For 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, a RETT exemption applies when transferring newly constructed real estate or building land, provided that certain conditions are met.

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% dividend withholding tax.

However, an exemption from withholding tax on dividends may be available with respect to distributions to companies that own at least 5% 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 s filed late. In certain situations where an exemption of dividend withholding tax applies, a notification should be filed within one month after the date on which the dividend becomes payable.

20.4 Interest and royalties

There is no Dutch withholding tax on interest and royalties paid by companies that reside in the Netherlands. On 17 September 2019 the Dutch government issued a legislative proposal for a withholding tax on interest and royalties to be applied from 2021. If adopted in its current form, the application of the withholding tax is generally limited to situations where the payer and payee are (deemed to be) affiliated (as defined in Dutch law), and any of the following applies:

- the payee is a tax resident of a jurisdiction with a statutory corporate income tax rate of less than 9% (as published on an annually updated Dutch list)
- the payee is a tax resident of a jurisdiction that is listed on the EU list of non-cooperative jurisdictions
- the payments received by the payee are allocated to a permanent establishment located in a jurisdiction which meets at least one of the above criteria
- the payee is interposed with the main purpose or one of the main purposes to artificially avoid tax with another person, whereas a situation is generally considered artificial if it is not established for valid business reasons reflecting economic reality.

Furthermore, the withholding tax may apply in certain situations where an entity is involved that is considered tax transparent by one of the jurisdictions involved.

21

International Distribution Centers/Customs Facilities

Upon the importation of goods into free circulation in the EU, import duties and import VAT (and if applicable, excise duties), in principle, become due (see Section 21.1). Import duties are in most cases 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 origin of the goods.

Once paid, import duties are, in principle, non-refundable 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 21.2). 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 20.1.6 and Section 21.8).

A Customs regulations are primarily governed at the level of the EU, particularly by the Union Customs Code (UCC) and its implementing and delegating provisions contained in the Union Customs Implementing Act on the one hand, and the Union Customs Delegated Act on the other.

In the 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 if the importer has attained the status of trusted party, or "Authorized Economic Operator" (AEO; see Section 21.7). It is important to

note that when assessing the compliance record of an importer under the UCC, its compliance record with regard to other taxes, such as corporate tax and VAT, will also be taken into consideration. Furthermore, under the UCC, it pays to be in control: if an importer discovers a situation of non-compliance before the customs authorities do, the associated customs debt will in principle be eliminated if measures are taken to remedy 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. 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, that is, 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, the declarant or the represented person is not required to hold the title to the imported goods.

The importer of record for customs duty purposes, that is, the declarant, must be established in the EU. If the designated declarant is not established in the EU, another person must act as the declarant on its behalf. In the Netherlands, it is also possible to have an importer of record for VAT purposes who is not the importer of record for customs duty purposes.

21.1.2 Customs value and applicable customs rate

Import duties are, in most cases, 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 origin of the goods. For

certain products, tariff quotas or tariff suspensions apply. In addition, a reduced or even a 0% duty rate may be applicable for specific processing of certain products ("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 only allowed to use a subsequent customs valuation method if the previous method cannot be applied. The first and most common valuation method is the transaction value method. 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. Certain additions or deductions to the customs value used may have to be made depending on the circumstances of the case at hand. Under the UCC the sale occurring immediately before the goods enter EU territory – i.e., last sale principle – serves as the basis for customs valuation purposes. A sales transaction between two EU-established entities may not have to be taken into account in this respect. To obtain legal certainty on the determination of the customs value for a particular flow of goods, a ruling can be requested from the Dutch customs authorities. Such ruling is only valid in the Netherlands.

The tariff classification code determines the applicable 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, antidumping or countervailing duties, or specific licenses). Customs classification in the EU is based on the so-called Combined Nomencla-ture, 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 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 acquire legal certainty regarding customs classification. As from 1 October 2019, the application to obtain a BTI must be submitted digitally through the EU Customs Trade Portal. BTIs are valid in all EU Member States for a period of up to three years. During this period, however, BTIs can be revoked under certain circumstances. This will (in principle) not affect prior and pending imports. BTIs issued in the EU are maintained in a publicly accessible database.

This database can be accessed through the website of the European Commission[40]. Although this database is a useful tool to assess the customs classification of products, importers cannot rely on BTIs issued to other importers. BTIs only present legal certainty regarding customs classification of the associated products 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, and antidumping or countervailing duties ("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), which is comparable to a BTI. A list can be accessed through the website of the European Commission[41].

[40] https://ec.europa.eu/taxation_customs/dds2/ebti/ebti_home.jsp?Lang=en
[41] https://circabc.europa.eu/sd/a/5dfe2d97-c354-4cf2-a6ab-3bf23410f016/2016July-2019JulyBOIPublic.pdf

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 21.3), transferred (see Section 21.4), processed (see Section 21.5) 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 may become due. If the holder of the procedure is AEO-certified (see Section 21.7), the amount of the guarantee may be reduced to 30% 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% VAT rate.

21.3 Customs warehouses

One of these customs procedures is to store 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, including customs warehouses, in the EU.

A customs warehouse is a designated location (such as a tank, building or silo), in which non-EU 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 excise duties (if applicable) become due, unless the goods are placed under a subsequent customs procedure.

Customs warehousing arrangements only allow the storage of goods. If approved by the customs authorities, some basic activities are allowed with regard to the goods. These include actions to ensure the reasonable condition of the goods during storage and actions that prepare the goods for further distribution (e.g., repackaging). However, one is not allowed to actively process or alter the goods while these are stored under customs warehouse arrangements. Such processing is only possible using the customs procedure described in Section 21.5.

21.4 Customs bonded transport

Goods under customs bond can be transported through the customs territory of the EU (the "external Union transit" or "T-1 transit"). As a result, no customs duties and import VAT are to be paid when the goods physically cross a border (see Section 20.1.6 regarding Intra- community acquisitions). However, one will need to prove 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 detailed in the required license, the procedures foresee in the possibility to "transfer" goods to another location without them having to be placed under the "external Union transit" procedure.

Using the "internal Union transit" (or "T-2 transit") procedure is reserved for the transportation of goods categorized as EU 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 deliver goods to 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 would be the Channel Islands, which

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 being imposed on the importation of the goods. Strict (administrative) requirements must be met in order for the relief to be granted.

Not only can the processed goods be re-exported without being subjected to import duties in the EU, they can also be used as the basis for bringing goods into free circulation, rather than using the unprocessed goods that entered the customs territory as the basis. This regime, can be advantageous if the imported unprocessed goods are subject to a higher duty rate than the processed goods. For instance, a number of pharmaceutical products may benefit from this regime, as, when they are a finished product, they are subject to a 0% import duty rate, while the active pharmaceutical ingredient is usually classified as a chemical and is thus subject to a duty rate of up to 6.5%.

21.5.2 Outward Processing Relief (OPR)

Under this customs relief, goods that are already in free circulation within the EU can be exported for processing in a third country (i.e., outside the customs territory of the EU). Upon the processed goods' return to the 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 incurring import duties. The admission term, as well as the use of the goods authorized under the temporary admission procedure, depends on the nature and the use of the goods involved. A similar exemption can be applied for VAT purposes. Before the term for the use expires, the goods must be placed under a subsequent customs procedure, such as re-exportation or bringing the goods into free circulation.

21.6.2 End use

For products that are in short supply in the EU, the applicable import duties are suspended for a definite or indefinite period. In certain cases, this suspension only relates to the specific use of the goods. In this case, the importer can apply for an "End Use" license, based on which the importer can claim suspension for products that are used for that specific purpose. It is possible to transfer the goods to another license holder.

21.7 Authorized economic operator (AEO)

In order to facilitate international trade and to enhance security, EU regulations now provide for the "Authorized economic operator" (AEO) concept. The AEO certified operators benefit from more lenient administrative requirements regarding the import and export of goods to and from the EU. In order to qualify as an AEO, a trader has to demonstrate compliance with solid security criteria and controls set by EU regulations. AEO certified operators are listed in the EU commission database, which can be accessed through the website of the European Commission.

AEO certified operators might also benefit from simplifications in the customs procedures and from facilitation with regard to customs controls relating to safety and security. In addition, AEO operators may be informed in advance if their consignment has been selected for controls and will get priority treatment for these controls. Other benefits that AEO operators are entitled to include a reduction of the amounts of mandatory guarantees, being allowed to submit less data to customs authorities, and being subject to fewer controls. This is because they are considered to be trusted partners by customs and their compliance and reliability will have been thoroughly checked before issuing the AEO certificate.

As from 1 October 2019, the application to qualify as an AEO must be submitted digitally via the EU Customs Trade Portal. Applications can no longer be submitted by letter. Existing AEO certificates can also be viewed in the new portal.

There is no legal obligation to become recognized as an AEO, although it may be beneficial for the operator, as the recognition demonstrates compliance with the solid security criteria and controls. This can provide a competitive advantage to participating companies.

21.8 VAT and excises

The importation of goods is not only subject to import duties, but also VAT on importation and (if applicable) excises.

21.8.1 VAT on importation and on exportation

VAT on importation becomes due, in principle, 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, which is the customs value (see Section 21.1.2) 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 at the moment of physical importation. This license (the "Article 23 deferment license") can thus create a cash-flow advantage as, if the importer is entitled to a full deduction of input VAT, the VAT on importation can be deducted as input VAT in the same VAT return in which it is declared.

If the goods are placed under a customs procedure (see Section 21.2), the supply of such goods is considered a taxable event for VAT purposes. However, 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 consigned 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% VAT rate, followed by a VAT-taxable Intra-Community Acquisition (ICA) in the EU Member State where the goods will arrive. The consignee self-charges the ICA VAT, which, if the consignee is entitled to a full deduction of input VAT, can be deducted in the same VAT return. These formalities result in the goods leaving the consignor's EU Member State without being cleared of any VAT, but being subject to the levying of VAT in the EU Member State of arrival (see Section 20.1.6).

If goods are sold for export to a consignee's non-EU country, the 0% VAT rate for export can be applied to the supply of these goods. The application of this 0% VAT rate is subject to the supplier being 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. As of 1 December 2019 only EU-established entities can be mentioned as

exporter on the Dutch customs declaration for export and therefore only EU-established entities can formally act as exporter.

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. 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, the levying of duties on excise goods can also be deferred under certain circumstances. In that case, the excise goods remain under customs supervision using special excise-bonded arrangements.

In principle, the 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 into the Netherlands. However, in the event that the excise goods, after importation, are shipped to another EU Member State or exported out of the EU, the earlier-paid Dutch excise duties can be refunded after payment of excise duties in the Member State of arrival (and after showing proof of this payment to the Dutch authorities) or if the excise goods are exported out of the EU.

22

Investment Incentives

The Dutch government and EU authorities grant incentives to encourage investment in new business activities, expansions of existing activities, R&D in respect of new technologies, and investment in regions with weaker economic structures. 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 collection of subsidies described below offers an impression of the various funds available. It is always advisable 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. Firstly, tax relief is granted in the form of 75% random depreciation for specific investments (*Willekeurige afschrijving milieu-bedrijfsmiddelen* or VAMIL). These investments must be innovative, not commonly used in the Netherlands and must contribute to a better environment. The Ministry of Infrastructure and Environment determines which investments qualify.

Secondly, the Energy Investment Relief (*Energie-investeringsaftrek* or EIA) grants a one-off tax deduction of 45% (2019) of the investment cost of an energy-efficient investment. Qualifying investments are determined by the Ministry of Economic Affairs, Agriculture and Innovation.

Thirdly, the Environmental Investment Deduction (*Milieu-investeringsaftrek* or MIA) also grants a one-off tax deduction of 36%, 27% or 13.5% (2017), depending on the nature of the investment, for investments in environmentally friendly assets. The Ministry of Infrastructure and Environment determines which investments qualify.

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 for the VAMIL to coincide with either the EIA or MIA, resulting in a maximum tax deduction of 133% 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 exporting in general.

The government has several special programs to stimulate 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. Seventy 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 by the fund.

As of 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 local SMEs via intermediary funds
- financing/insuring exports
- financing/insuring import

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 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 was to run until 31 December 2014. However, the program has been extended. The aim of the program is to stimulate market parties that finance exports (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

Under the Dutch innovatiebox, qualifying income that results from endeavors in the field of R&D is taxed at an effective tax rate of only 7% (the normal tax rate is 25%).

Under the innovation box regime, a taxpayer can only apply the innovation box for intangibles that originate from activities for which an R&D Declaration (*S&O Verklaring*) has been granted by the Ministry of Economic Affairs. Independent access solely through a patent or through plant breeders' rights is therefore no longer possible.

Companies with: (a) more than EUR 250 million global group-wide turnover; and (b) at least EUR 37.5 million per year in gross revenues from all IP assets will only have access to the regime when their intangibles originate from activities for which an R&D Declaration has been granted and when additional requirements regarding the qualifying intangibles are met. In that case, the qualifying intangible needs to qualify as any of the following:

- a software program
- a (pending) patent
- an authorization for the marketing of a medicine/drug
- a supplementary protection certificate
- a utility model
- an exclusive license to use the above-listed intangible assets

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 7% rate to the extent that it exceeds the previously reported costs.

Qualifying income can be limited if, and to the extent that, a taxpayer has outsourced part of their R&D activities to a company within their group. The qualifying income is limited based on the proportion of qualifying R&D expenditures incurred by the taxpayer in relation to the overall R&D expenditures incurred by the taxpayer in respect of the relevant intangible asset. These qualifying expenditures may be multiplied by 1.3. This is the codification of the so-called modified nexus approach.

Furthermore, the legislation included a grandfathering rule for qualifying intangible assets developed before 1 January 2017.

Please note that existing tax rulings regarding the application of the (former) Dutch innovation box regime were annulled as of 31 December 2016, with the exception of the aforementioned grandfathering periods, due to the general resolutory condition included in tax rulings.

22.4 R&D

The 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 was enacted to encourage investment in R&D activities in the Netherlands. The R&D facility provides 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% of the wage withholdings on R&D wages up to EUR 350,000.

For companies who qualify as a start-up, the percentage amounts to 40%. The reduction for wages in excess of EUR 350,000 is 16% of the wage withholdings. Self-employed persons may request a reduction of their taxable profit of EUR 12.775 (2019). First time self-employed persons may request an additional reduction of EUR 6.391 (2019). 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.

In 2020, the WBSO budget will be EUR 1.281 million.

As of 1 January 2016, the Research & Development Deduction (RDA) has been integrated with the 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.

22.4.2 Innovation credit

This program was set up by the Ministry of Economic Affairs, Agriculture and Innovation to offer support to innovative companies in the SME sectors.

It entails an interest-bearing loan with a maximum of 50% of the technical development costs of a new product, with a maximum of EUR 10 million. If 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. In 2019, the innovation credit budget was EUR 70 million.

23

Lending and Taking Security

23.1 Lending in the Netherlands

23.1.1 Current state of the Dutch lending market

For 2019, 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. This is shown in the growth of alternative lending constructions, set up in case traditional bank loans cannot be obtained.

By diversifying the sources of funding, economic recovery will be further 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 few years. Banks will play a significant role as intermediaries assisting with arranging alternative credit funding.

Digital innovation is driving an unprecedented shift in financial services. Financial institutions and FinTech innovators require legal advice to develop and adopt products and services such as crowd- funding, e-payment platforms, cryptocurrencies, digital banking and peer-to-peer lending. The FinTech industry requires advice in relation to data protection, regulatory compliance, tax structuring, capital raising, consumer protection, commercial contracts, M&A, competition and employment.

23.1.2 Trends

Unitranche financing

The strong competition between banks and alternative lenders has led to product differentiation. Unitranche financing remains a very popular offering from direct lenders. It has expanded tranche sizes and evolved to become a product offered in a wide variety of forms. We expect this way

of financing to gain even more popularity in the Netherlands over the next few years.

Unitranche is a combination of senior and subordinated debt made available by several lenders on the basis of one contract applying one interest rate. It offers more flexibility to borrowers compared to the traditional 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 light-structures, no need for syndication, and no or lower amortization (allowing more retained cash for growth and investment). The documentation has increasingly become more in line with the structures in the market, and although a standardized approach has been formed in some areas, further developments are expected.

Supply chain finance

Companies are always searching for more efficient financing terms. An alternative way of financing companies is the so-called supply chain financing or supplier financing. Buyers and suppliers join forces in obtaining preferred financing terms for both: lower financing costs that improve the working capital of the supplier and longer payment terms improving the liquidity of the buyer. Generally, 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 can result in (and often has 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 and non-Dutch banks active in the Dutch market 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 (which is often the stronger party). Based on 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.

In future years, an increase in alternative financing models is expected to shape the supply chain finance optimization. Since the Netherlands has a leading (international) role in the facilitation of logistic shipments, the potential of supply chain finance programs will expand. Besides the collaboration of major corporations, it is likely that small and medium-sized companies will employ new financing tools to optimise their working capital strategy. Through government initiatives, such as the introduction of financing platforms, small to medium-sized enterprises are already able to obtain the liquidity support necessary, which may contribute to further reinforcement of the economy in the Netherlands.

Real estate finance

Last year, the increase in the number and size of many real estate financing transactions has been consolidated and we expect a further consolidation in the coming years. We particularly expect an increase in the residential, hotel, logistics and student accommodation sectors, 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 offered by German banks and alternative investors, such as pension funds and insurance companies, which act as direct lenders.

Brexit

The UK's vote to leave the European Union, the so-called Brexit, raises opportunities and challenges for the European and Dutch market. Issues to be resolved include the settlement of policy and legislative authorities between the EU and the United Kingdom. It is unclear which form the post-Brexit regulatory framework will take. Uncertainty arose in the financial markets following the invocation of Article 50 of the Treaty of the European Union on 29 March 2017. Some German and Dutch banks are reconsidering the typical use of English law as the standard position in international loan documentation and are increasingly opting for the law of the jurisdiction in which most of the obligors or assets are registered or located.

Bank asset sales

Divestment strategies deployed by several financial institutions during recent years have led to an increase in activity on the non-performing loans market. The implementation of new financial regulation will reinforce financial institutions to further engage in deleveraging balance sheets. Driven by non-bank entities' changing risk appetite, an increase in activity is expected in the market for residential and real estate loans.

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) The act was performed without a legal obligation to do so.

(b) The act is detrimental to other creditors of the company.

(c) Both the debtor and the beneficiary of the act knew, or should have known, that such detriment would occur (which 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 the debtor receives no consideration for the legal act performed, the beneficiary of the act is not affected by the nullification if it did not know and should not 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 creditors outside insolvency. However, this right is rarely invoked.

Satisfaction of a due claim may also be nullified, but only if it has been established that: (i) the beneficiary of the payment knew that a file for the debtor's bankruptcy 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 the aim of putting the creditor in a better position vis-à-vis other creditors.

Financial assistance

Unlike in the UK, there is no whitewash procedure available under Dutch law. A Dutch public limited liability company (*naamloze vennootschap* or N.V.) cannot grant security, give a price guarantee or otherwise bind itself (jointly and severally or otherwise) for the purpose of acquiring (by itself or others) 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 only under the following circumstances:

(a) The loan (and interest received by and any security granted to the N.V.) is made on reasonable and common market 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% majority if (the depositary receipts of) the shares are listed).

These prohibitions extend to all subsidiaries of the N.V., whether they are (from a Dutch law perspective) foreign companies or Dutch incorporated ones (including private companies with limited liability (*besloten vennootschappen* or 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 the 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 affects 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 a right of mortgage or 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 is actually 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), as well as 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: (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, equipment, etc., and title documents, claims to order, and claims to bearer as well as 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 more commonly; (ii) executed as a non- notarial deed and registered with the Dutch tax authorities (being date stamped, no actual records are being maintained). Such registration with the Dutch tax authorities is free of charge and should 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, in

a similar fashion 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. Security over financial collateral (as defined in Directive 2002/47/EC on financial collateral arrangements (*financiëlezekerheidsovereenkomst*) (the "Financial Collateral Arrangements Directive")) is created by way of a financial collateral agreement (*financiëlezekerheidsovereenkomst*). 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 none of the parties is a private person (not acting in the conduct of his or her business or profession) and at least one of the parties is a regulated financial institution (such as a bank), a governmental authority, central bank or 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 appropriating the encumbered asset(s) or setting off the value of those assets against the secured claim. When a financial collateral agreement relates to securities 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, such as shares, depositary receipts of shares or registered bonds, which are transferable through book-entries under the Act on the Securities Giro System (*Wet giraal effectenverkeer*) 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 created 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. (and 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 co-operative (*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 relevant entity's constitutional documents 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 (registered and unregistered patents, trademarks, copyright, domain names, designs and 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 (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*). If an 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 over 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. As such, it is common practice to use a description of an entire type of assets stored at a particular location. However, one should be aware of the risk of the encumbered assets commingling 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 the creation of a 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 mentioned previously.

23.2.2 Enforcement of in rem security

Outside bankruptcy

Rights of pledge and mortgage are generally enforced either by way of public sale or by means of an alternative procedure. Security 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 towards 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:

(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 the market through a broker or on 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, 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 co-operation 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: (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): bankruptcy and 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. This is because 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. The following order of priority applies in a 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):

(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, that is, 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; for example 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 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 would have to share in the bankruptcy costs and will have to wait for receipt of payment until the receiver has made up a distribution list. The bankruptcy costs (or any share therein) may be as high as the actual sales proceeds.

(b) If receivables that are encumbered with an undisclosed right of pledge are paid by the debtor to the pledgor in bankruptcy proceedings, then (similar to the situation described under a) above) 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, those 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. 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 of its intention 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 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 up to 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 decide to only apply the cooling-off period to certain parties, thereby exempting 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 "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 does 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. Therefore, they are terminated by operation of law whenever the secured claims are satisfied or discharged. Additionally, security rights can be terminated without any further formalities (*opzeggen*) by a written statement from the secured creditor if the security document provides for such (which is usually the case). 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 which 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 implementing structures that give a similar benefit as a security right but would not (necessarily) be characterized as such, such as sale and lease-back constructions, (reverse)factoring and hire purchase constructions. Title retention arrangements and set-off rights may also be considered quasi-security, as well as certain liens.

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 by the guarantor, and as such, is due to the freedom of contract; in principle, to be enforceable in accordance with its terms. No formalities apply, but it is advisable to make it clear 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% of) the useful life of the asset and the lease instalments are equal to (or are at least 90% 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 instalments is lower and there is no purchase option.

(Reverse) Factoring

In a factoring transaction, a creditor sells all or a certain amount of its receivables to a factor at a discount, either with or without recourse to the creditor. If the debtor satisfies the receivable, 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 a certain amount 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 a certain amount of their receivables against one and the same debtor to a factor. Depending on its terms, (reverse) factoring may be commercially 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 for financing 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.

The Dutch Supreme Court recently ruled that a buyer who has purchased an asset, subject to retention of title, can create a right of pledge on such asset, which is unaffected by the buyer's bankruptcy. The buyer obtains conditional ownership of the asset until the acquisition price has been fully paid and they are able to pledge or transfer such ownership under the same conditions. Consequently, a right of pledge can be created on an asset subject to retention of title, evolving in a right of pledge on the fully owned asset once the acquisition price has been paid.

Set-off

A debtor may set off its (due and payable) debts towards a counterparty against its claims towards the same, provided that certain conditions are met. Parties can agree to widen or restrict the scope of the set-off, and certain conditions are not applicable in a bankruptcy. The commercial outcome of exercising the right of set-off is the same if the debtor is a bank, as 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.

Mutual security surplus arrangement

The Dutch Supreme Court has recently clarified the financing option of lenders via a mutual security surplus arrangement (*wederzijdse zekerhedenregeling*). In a mutual security surplus arrangement, different secured lenders guarantee the payment obligations of the borrower by way of a suretyship (*borgtocht*). The liability of each lender under the suretyship is limited to the net value of the enforcement proceeds of the security granted by the borrower. The lender's right of recourse (*regres*) to the borrower arising from the suretyship forms part of the secured obligations of that security.

The Dutch Supreme Court recently ruled that mutual security surplus arrangements are bankruptcy-proof if: (i) they are entered into prior to the bankruptcy of the borrower; and (ii) the borrower is party thereto. The Dutch Supreme Court further ruled that recourse claims (including claims relating to mutual security surplus arrangements) that come into existence **after** the borrower is declared bankrupt can be secured, but only to the extent that they arise from a legal relationship existing prior to bankruptcy. Such clarification is good news for the Dutch financing market, as it provides lenders with further financing options.

Mutual security surplus arrangements should: (i) be entered into by the lenders and the borrower at the time the loans (and other finance documents) are executed; and (ii) contain a confirmation from the borrower that a contractual recourse claim against it has been created, which comes into existence on execution of the arrangement. A mutual security surplus arrangement that the borrower is not aware of will not hold up in bankruptcy.

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 a subordination or intercreditor agreement between the various creditors and the debtor, or 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 the senior creditor accepts it. 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 has ratified the Hague Convention on the Law Applicable to Trusts and on their Recognition 1985 (the "**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 trustkantoren*) (the "**Trust Act**"), which implements said

convention. However, the agency concept is recognized in the Netherlands only as a contractual arrangement. In theory, however, 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 the 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 the security agent, at intervals, an amount equal to the total amounts outstanding towards the finance parties (excluding the payment obligations so undertaken towards the security agent): the parallel debt. This as there is uncertainty under Dutch law and discussion 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 to the total debt, and security is held by the security agent for its own claims (corresponding 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.

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 non-residents 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 non-residents and channelling them to non-residents. The following are examples of SFIs:

- 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 and 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 obligationis set out in the 1994 Foreign Financial Relations Act (*Wet financiëlebetrekkingen*

buitenland 1994) and the 2003 Reporting Provisions (Rapportagevoorschriften betalingsbalansrapportages 2003).

If a reporting obligation is imposed, the company has to file with the DCB reports containing 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 the 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 the resident belongs.

24.2 Regulated financial activities

The Act on Financial Supervision (*Wet op het financieel toezicht*, 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 performed by the Dutch Authority for the Financial Markets (AFM). Below, a high-level overview of the main activities regulated under the AFS is set out. Please note that this description is non-exhaustive and we would 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 business from the public. Please note that until a European definition of "the public" is established, 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. The 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 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.[42] The definition of "repayable funds" could entail more than just the borrowing of funds. For

[42] Note that shares must not be regarded as "repayable funds," as there is no upfront obligation to repay the nominal amount.

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, the prohibition does not apply if the activity takes 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. The circle must also meet 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 requirements of the AFS if certain conditions are met. This 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, this 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 fulfilment of the relevant notification requirements, the 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) the following:

- 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 "financial institutions" (*financiële instellingen*) in the Netherlands, that is, 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[43] 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). In general, such companies may nevertheless 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 supervisory 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 admitting securities to trading

Pursuant to the AFS, it is prohibited to offer securities[44] to the public in the Netherlands or to have securities admitted to trading on a regulated

[43] 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 one's 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.

[44] Securities are: (i) negotiable shares or other negotiable securities or rights equivalent to negotiable shares; (ii) negotiable bonds or other forms of negotiable

market[45] situated or operating in the Netherlands, unless a prospectus is drafted in accordance with the Prospectus Regulation (EU) 2917/1129 (the "Prospectus Regulation").

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 the competent supervisory authority of an EEA country has already approved a prospectus, 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 Prospectus Regulation contains exemptions from the prospectus requirement pertaining to, among other things, the following:

- Offerings of securities within the EEA with a total consideration of less than EUR 2.5 million, which 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 EUR 100,000.

A peculiarity under Dutch law is the inclusion of a prescribed warning sign in the event of certain exemptions to the prospectus obligation. This

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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.

[45] Within the meaning of the Markets on Financial Instruments Directive 2004/39/EC.

warning sign is to be included in all commercial expressions and other documents relating to the offer of the securities. Specific rules 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. The 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 the 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 the 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 the 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 this rule, the target company can request the AFM to demand the potential offeror to clarify its intentions regarding a possible public takeover offer by publishing – within six weeks – either: (i) a "put up" statement (public takeover offer announcement as described above); or (ii) a "shut up" statement (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 target company. If 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 the acquiring person or entity is able to exercise 30% 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 the offeror to agree to a number of undertakings, a few of which are listed below.

Non-disclosure agreement/standstill provision

It is common market practice for the target company to require the offeror to enter into a non-disclosure agreement (NDA) containing a standstill provision prior to entering into the negotiations on the terms and conditions of the public takeover offer. The NDA will usually prohibit the offeror from launching 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) recommending 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

On 3 July 2016, the Market Abuse Regulation nr. 596/2014 (MAR) came into effect. As of that date, the prevention of market abuse in the Netherlands is primarily governed by the provisions of MAR, which are directly applicable in the Netherlands. MAR 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.

Inside information

Generally, MAR prohibits any person from conducting or effecting a transaction in securities with the use of inside information. Inside information is the "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 (non-public) knowledge that a public bid will be launched.

Executing one's own intention (e.g., buying securities by an offeror prior to launching a public offer) is not considered a prohibited use of inside information.

Disclosure of inside information and tipping

Generally, no one is allowed to inform a third party of data to which inside information relates, other than in the course of normal duties, profession or position. This prohibition is strict and the exemptions in the course of normal duties, profession or position are very limited.

Furthermore, MAR 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. MAR specifies four categories of market manipulation:

(a) Entering into a transaction, placing an order to trade or any other behavior that:

(i) gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of, a financial instrument, a related spot commodity contract or an auctioned product based on emission allowances; or

(ii) secures, or is likely to secure, the price of one or several financial instruments, a related spot commodity contract or an auctioned product based on emission allowances at an abnormal or artificial level, unless the person entering into a transaction, placing an order to trade or engaging in any other behavior establishes that such transaction, order or behavior has been carried out for legitimate reasons, and conforms with an accepted market practice

(b) Entering into a transaction, placing an order to trade or any other activity or behavior that affects or is likely to affect the price of one or several financial instruments, a related spot commodity contract or an auctioned product based on emission allowances, which employs a fictitious device or any other form of deception or contrivance

(c) Disseminating information through the media, including the internet, or by any other means, which gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of, a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances or secures, or is likely to secure the price of one or several financial

instruments, a related spot commodity contract or an auctioned product based on emission allowances at an abnormal or artificial level, including the dissemination of rumors, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading

(d) Transmitting false or misleading information or providing false or misleading inputs in relation to a benchmark where the person who made the transmission or provided the input knew or ought to have known that it was false or misleading, or any other behavior that manipulates the calculation of a benchmark

The AFM has wide discretion in determining the appropriate measure (such as (public) warnings, fines or incremental penalties). In this regard, any measures imposed by the AFM will be in proportion to the nature, duration and gravity of the breach. In addition, the AFM will usually take into consideration whether the breach was a "first offence." In practice, in most cases the AFM – upon establishing that a particular entity is in breach of Dutch financial regulations – will first issue a warning prior to imposing additional sanctions (such as administrative fines). The AFM may also 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 to prevent market abuse. The sanctions imposed depend on the specific circumstances of the violation of the law. The penalty for every violation of insider trading rules may amount to: (i) EUR 5 million for private individuals; (ii) EUR 10 million or, if higher, 10% of the annual net turnover for legal persons; or (iii) an amount pertaining to three times the value of any benefits derived from an offence (without reference to statutory maximum amounts).

24.2.5 Major holdings disclosure

The AFS contains reporting requirements in respect of major holdings in the following "Issuing Institutions":

(i) Public companies established under the laws of the Netherlands, whose shares have been admitted to trading on a regulated market

(ii) Legal entities with a home Member State other than the Netherlands, whose shares have been admitted to trading solely on a regulated market in the Netherlands

(iii) Legal entities established under the laws of a non-EU Member State, whose shares have been admitted to trading on a regulated market in the Netherlands

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 1% change 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

The scope of the overview below is limited to 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%, 5%, 10%, 15%, 20%, 25%, 30%, 40%, 50%, 60%, 75% and 95%. 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 the convening of 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 obligated 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 (where 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 fulfil 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 Nether lands or on a cross-border basis. 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, with either the AFM (bestowed with the conduct of business supervision) or the DCB (bestowed with prudential supervision).

Investment firms operating from a number of non-EEA countries (being the 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, with either the AFM (bestowed with the conduct of business supervision) or the DCB (bestowed with prudential supervision).

One of the center pieces of the financial markets reform of the European Union over the past years has been the adoption of the Markets in Financial Instruments Regulation (Regulation 600/2014, "**MiFIR**") and the revised Markets in Financial Instruments Directive (Directive 2014/65, "**MiFID II**").

The MiFIR / MiFID II framework introduced significant reforms in the regulatory landscape, affecting most aspects of trading within the EU. Key areas affected by MiFIR and MiFID II include, inter alia:

(i) *Trading venues*: The trade of certain financial instruments on organized venues is mandated and a new form of organized venue is introduced – the Organized Trading Facility.

(ii) *Investor protection*: New requirements are imposed with respect to product governance, internal control functions, the development of services, communication to clients, restrictions on inducements for independent advisors, and portfolio managers, appropriateness assessments and product stability.

(iii) *Conduct of business*: New provisions regarding conduct of business are introduced, including conflicts of interest.

(iv) *Transaction reporting*: Certain classes of assets, as well as certain types of investment firms, which were exempt from transaction reporting obligations under the previously existing framework, are not subject to reporting requirements. The MiFIR/MiFID II framework also imposes stricter requirements with respect to data retention and control frameworks.

(v) *Pre- and post-trade transparency*: Pre- and post-trade transparency requirements are extended to other "equity like instruments and non-equity like instruments and all trades must be reported to an approved reporting mechanism."

(vi) *Third country regimes*: The MiFIR / MiFID II framework introduces a harmonized regime for third country investment firms and market operators.

24.2.7 Investment funds

In the Netherlands, two types of collective investment funds are regulated: the "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 only be offered in the Netherlands 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 EUR 100 million (or EUR 500 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. Furthermore, exempted managers still have to comply with certain AFS provisions, such as 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 the following activities and entities (among others):

- Insurance and reinsurance activities (including (re-)insurance intermediation and advice on insurance products)

- Offering, advising and intermediating in respect of individual investment objects
- Offering, advising and intermediating 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
- Provision of technical services relating to payment transactions (*afwikkeldiensten*)
- Issuance of e-money
- Acquisition of qualified holdings (i.e., 10% 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

The Money Laundering and Terrorist Financing Prevention Act (*Wet ter voorkoming van witwassen en financieren van terrorisme*, or the Wwft) provides important and extensive money laundering provisions.

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: (i) customer due diligence; and (ii) the reporting of unusual transactions.

Customer due diligence

The Wwft provides for various levels of customer due diligence, whereby the levels are dependent on the risk level 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: (i) ordinary; (ii) simplified; or (iii) enhanced in character. The institution must assess what customer due diligence category is applicable, following an assessment of each transaction and/or client of the risk of 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 a postponement is necessary in order to avoid disrupting 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 obligated 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 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 advisers, accountants, trust offices, casinos, traders in high-value goods (all traders that accept cash payments of EUR 15,000 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 under any of the following circumstances:

- A business relationship is entered into with a customer.
- One or more (incidental) cash transactions with an aggregate value of EUR 10,000 or more are carried out.

- There are indications that a customer is involved in money laundering or terrorist financing.
- There are doubts as to the reliability of information obtained from the customer.
- The risk of potential involvement of an existing customer in money laundering or terrorist-financing activities gives cause to do so.
- 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.

If an institution reports a suspicious transaction, it is not allowed to disclose to its customer that authorities are conducting (or intend to conduct) investigations into the reported transaction.

On 25 June 2015, the EU's Fourth Anti-Money Laundering Directive (Directive (EU) 2015/849) was enacted. On 25 July 2018, the AMLD4 implemented in the Wwft in the Netherlands.

AMLD4 perpetuates the two core obligations of the rules to prevent the use of the financial system for the purpose of money laundering and terrorist financing, namely the obligation to conduct customer due diligence and the obligation to report unusual transactions to the Financial Intelligence Unit (FIU).

The following changes have been made to the Wwft:

- *Extension of scope*: The scope of the directive is extended to new categories of institutions. Primarily, the providers of gambling services. In addition to gaming casinos, other gambling providers will also be covered by the Wwft, including lotteries, sports betting providers and gaming machine halls. Secondly, the Wwft

institutions category of large-value traders (*grootwaardehandelaren*) is expanded. This category now also include the people who trade in goods and make or receive cash payments of €10,000 or more and will also be expanded to include the buyers of those goods (in addition to the sellers). Previously that limit was set at EUR 15,000 and only concerned the sellers of these goods, not also the buyers.

- *Risk based approach*: Under the new directive, the risk-based approach is extended. Institutions shall be obligated to identify and assess risks with respect to money laundering and the financing of terrorism, to keep such assessment up to date and to provide such assessment to the regulators upon request.

- *Client due diligence*: The intensity of client due diligence must be tailored to risks that have been identified. Institutions must always perform client due diligence with respect to all clients. Furthermore, the grounds for simplified client due diligence have been limited and the grounds for normal and enhanced client due diligence have been extended. The Wwft shall no longer enumerate specific circumstances under which simplified client due diligence may be applied. The application of simplified client due diligence by an institution shall solely be based on a risk-based approach on the basis of the risk factors mentioned in the annex to the new directive. Furthermore, the fact that a client cannot be physically present for the identification or verification is no longer automatically a ground for enhanced due diligence. However, in the annex to the new directive this is still considered to be a situation that carries with it more risk.

- *Ultimate beneficial owners (UBO)*: The specific definition of a UBO is replaced by a general definition, that is, a private individual who is the ultimate owner of, or who can exercise control over, a client, or the private individual who is the beneficiary of a transaction.

The current criteria of a UBO will be indicators that can be used to establish whether someone is a UBO.

- *Politically exposed persons (PEP)*: Whereas the third directive still made a distinction between domestic and foreign politically exposed persons (PEPs), that distinction has been dropped in the fourth anti-money laundering directive: in all cases of transactions or business relationships with clients who qualify as PEP or where the UBO of a client qualifies as PEP, or in cases where the beneficiary of a life insurance policy or where the UBO of that beneficiary is a PEP, stricter client investigation measures must be taken.

Miscellaneous other amendments to the Wwft in the draft implementation bill include, *inter alia*, an increase in the maximum fines and extensions of the powers of the supervisory authorities.

AMLD5

While the AMLD4 had just been implemented in the Netherlands, the fifth anti-money laundering Directive (AMLD5) had already entered into force on the 9 July 2018. AMLD5 is scheduled to be implemented in Dutch legislation by 10 January 2020, however, this implementation may be delayed further.

AMLD5 aims to extend the scope of the AMLD4. The first reason is due to the emergence of technological services that are increasingly being used as alternative financial systems. These services fell outside of the scope of AMLD4. Due to the risks associated with new financing instruments and payment options, the scope of the previous directive is expanded. Secondly, there is an increasing interdependence between organized crime and terrorism. This constitutes a threat to the security of the Union and must therefore be combated. Thirdly, better cooperation is needed

between different competent authorities, both between and within Member States.

UBO-register

AMLD4 also contained the obligation for Member States to establish and maintain a UBO-register. However, in the meantime AMLD5 had already entered into force in Europe, which imposed additional requirements to the UBO-register. In connection with the entry into force of AMLD5, the Minister of Finance decided to postpone the introduction of the UBO register.

In the UBO-register all UBOs of companies and other legal entities established in the Netherlands will be registered with personal data such as name, date of birth and social security number. The purpose of the UBO register is to combat financial and economic crime, for example money laundering, corruption, tax evasion, fraud, financing of terrorism. Because the information in the register is partly public, individuals and organizations can make better informed decisions with whom they want to do business. In 2020 the European member states must set up such a register nationally, in 2021 the UBO registers will be connected within Europe.

25

Liability

25.1 Liability

Introduction

Under the Dutch liability law, every person bears their own damages except when someone else is liable for such damages on the basis of a contract or the law.

Both types of liability – contractual liability and non-contractual liability – are regulated in the DCC (*Burgerlijk Wetboek* or the "Code"). The basis for contractual liability is the non-performance of a contractual obligation (or: "breach of contract"). The basis for non-contractual liability is committing a wrongful act.

The two types of liability may coincide, such as 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 Non-performance

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 that a party is liable for all the other party's damages resulting from the first party's non-performance of any contractual obligation (breach of contract). Such a party may avoid liability if it can prove that the non-performance 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 non-performance

In addition to the right to claim damages in case of non-performance incurred as a result of the breach, the creditor has two additional options: (i) to claim specific performance (*nakoming*) or (ii) to (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 non-performance 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 non-performance.

25.2.3 Limitation of liability

The parties to an agreement are, in principle, free to contractually exclude or limit their potential liability for damage incurred by another party, thereby deviating from the liability provisions in the Code. There are some restrictions and exceptions.

1. For 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 an 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

For 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 thereto.

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 should have reasonably discovered it. Obviously, what constitutes "appropriate time" is debatable, 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: (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: (i) violation of a party's rights to privacy by a physician who fails to keep medical records confidential; (ii) building without a permit as required by law; and (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

Liability under Article 6:162 of the Code, in principle, is liability based on fault. Under Dutch law, however, several types of non-contractual liability are based on strict liability (*risicoaansprakelijkheid*), one of the main types being a 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 a consumer can hold a manufacturer

liable if the latter has brought defective products on the market. The term "manufacturer" also includes a party importing products into the EEA, or a party that presents itself as the manufacturer by selling the product under its own brand name. The contractual party of the consumer (the seller) is, in principle, 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, considering all circumstances, particularly: (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 EUR 500. It is not possible to contractually exclude product liability toward the injured party (the consumer). Such a clause in a contract can be declared void. However, companies (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 (*Warenwet*). 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 especially aimed 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: (i) liability for a wrongful act of one's employees, one's subcontractors and one's representatives; and (ii) when an 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 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 reasonable cost made in order to avoid or limit one's damages, reasonable cost made in order to establish the damages and the liability, and reasonable cost made in order to collect one's damages out of court. "Other disadvantages" is defined as immaterial or emotional damage. This damage will be compensated only in as far as the law provides for a legal basis for such. 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.

In principle, Dutch law does not distinguish between direct damages and consequential damages. All damages suffered must, in principle, be compensated, provided that (i) there is a sufficient connection between the damage and the event that has led to liability, and (ii) the damage may

in reasonableness be attributed to the party as a consequence of that event, taking into account the nature of both the liability and 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 this 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.

In addition, if the liable party has profited because 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 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. Only the discharge by prescription is discussed in this section, 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)

Claims for contractual penalties and for damages will expire after 20 years from the day of the event that caused the damage or that triggered the contractual penalty to become due and payable.

25.5.3 Exceptions

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 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.

The running prescription period is interrupted if the injured party initiates litigation with regard to his/her 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 apply to such notice. The debtor's acknowledgement of the injured party's claims will also interrupt a running prescription period.

For most claims, 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 11 district courts (with cantonal branches), four courts of appeal and 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. Judges are professional judges and appointed for life.

In civil and commercial cases, the cantonal branches of the district courts are concerned with first-instance claims up to EUR 25,000, regardless of the cause of the claim. The cantonal branches of the district courts also have jurisdiction over disputes regarding employment law, agency, lease, consumer purchases and consumer credit. There is a requirement of mandatory representation by an attorney-at-law to conduct proceedings before the cantonal divisions of the district courts.

The civil branches of the district courts have jurisdiction in 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. The Supreme Court will therefore not decide on any factual issues. A submission for cassation to the Supreme Court may be brought on grounds of noncompliance with formal requirements (for instance, if a court fails to give adequate reasons for its judgment) or 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. Statutes may, however, be tested for compatibility with treaties to which the Netherlands is a party and with European legislation.

There is a separate division of the Amsterdam Court of Appeal dealing with certain aspects of corporate law and governance issues. The so-called Enterprise Chamber (*Ondernemingskamer*) decides on disputes in the first instance on, inter alia: (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: (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.

On 1 January 2019, the Netherlands Commercial Court (NCC) was established in Amsterdam. The NCC aims at settling international trade disputes in the Netherlands in first instance and on appeal, while appeal decisions are subject to Supreme Court review. The NCC primarily focuses on major international commercial disputes submitted by parties pursuant to a contract or a subsequent agreement. Dutch parties can also choose – either in advance by contract or after the dispute arises – to bring a commercial dispute without international character before the NCC. The NCC is a special facility with dedicated judges who have expertise and experience in large commercial disputes. By default, proceedings are conducted in English. The NCC also offers the possibility to litigate in Dutch

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. The proceedings take place before the district court. The writ of summons must include the legal and factual grounds for the claim.

In principle, one judge will hear cases, 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 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 (written) 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 is usually threefold: 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 such.

Appeal proceedings are initiated by serving 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. A three-judge panel hears the appeal.

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 even be scheduled 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 separate 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 (or even in parallel with summary proceedings), either of the parties may start principal proceedings in which the case is judged on its full merits (since summary proceedings are 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 and instead 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. Under certain circumstances, it is also possible to attach documents, data and data carriers for the purpose for preserving evidence (*bewijsbeslag*).

The leave of the district court is required for a prejudgment attachment. Such leave is generally easily obtained (often on the same day or the following day) in *ex parte* proceedings. The plaintiff must file a petition with the court in which the claim is *prima facie* explained. A bailiff levies the prejudgment attachment. An attachment on movable property may be combined with judicial custody. This means that the bailiff turns over the attached property to a person appointed by the court to keep the property in his or her custody, pending the legal proceedings.

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 non-existent 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 (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 be longer upon the petitioner's request. In addition, 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 wrongful. In that case, the attaching party is liable for any 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, Recast (No. 1215/12).

With regard to Switzerland, Norway and Iceland, the (recast) Lugano Convention applies.

Prior to the enforcement of a judgment handed down by a court in one of the states referred to above, 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 easily enforced 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 shall 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 in order 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 from 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 easily enforced 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 EUR 2,000. 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. In addition, 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 in such legal action. A judicial decision does not, in principle, affect a person whose interest the action aims to protect and who opposes the decision's effect on him personally.

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, the 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 for 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 a hearing of the court of appeal in order to give them the opportunity to file any objections against the settlement agreement and against declaring such settlement agreement 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, in principle, three months after the court decision. The affected parties not "opting out" may collect their compensation within a time frame specified in the settlement agreement. If the responsible party does not fulfil 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." Article 843a of the Code, however, does allow a party who is considered to have a justified interest to demand: (i) an 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 the 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 the relevant documents.

There are restrictions on 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, before legal proceedings are commenced, the court may be requested to hold a preliminary hearing of witnesses. 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*). The witness signs that record 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. The district court may 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 as well.

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.

Appendix I

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

Dutch N.V. (*naamloze vennootschap* or a public company), a B.V. (*besloten vennootschap met beperkte aansprakelijkheid* or a private limited liability company) and a cooperative (coöperatie) is as follows:

Procedure

1. The incorporator(s) execute a power of attorney to sign the notarial deed of incorporation.

2. A separate bank account in the name of the company in incorporation is opened.*

3. A bank statement to the notary confirming the payment of the incorporation capital, or 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 is issued.*

4. The notarial deed of incorporation, including the articles of association, is executed.

5. The company or cooperative, managing directors and sole shareholder (if applicable) are registered 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

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

1. Dividends column

The lower rate in the column generally applies if the recipient is a company that owns at least 25% of the capital in the Dutch company, or can exercise a certain proportion of the voting power in the Dutch company. There may be special conditions or exceptions.

2. Interest column

Many treaties provide 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. These exemptions are not considered in this column. The lower rates generally refer to the interest paid by banks or 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, and payments for the use of patents, trademarks and knowhow.

Appendix	Dividends	Interest	Royalties	
Country	Reduced rate under tax treaty for qualifying participations	Reduced rate under tax treaty for individuals 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%

Appendix	Dividends	Interest	Royalties	
Country	Reduced rate under tax treaty for qualifying participations	Reduced rate under tax treaty for individuals and companies	Reduced rate under tax treaty	Reduced rate under tax treaty
Armenia	0%/5%	15%	0%/5%	5%
Aruba	5%/7.5%	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%
Canada	5%	15%	0%/10%	0%/10%
China	0%/15%%	10%	10%	6%/10%
Croatia	0%	15%	0%	0%

Appendix	Dividends	Interest	Royalties	
Country	Reduced rate under tax treaty for qualifying participations	Reduced rate under tax treaty for individuals and companies	Reduced rate under tax treaty	Reduced rate under tax treaty
Curaçao	0%/15%	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	5%/10%/15%	5%/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%*/5%/ 10%	10%/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%
Iceland	0%	15%	0%	0%

Appendix	Dividends	Interest	Royalties	
Country	Reduced rate under tax treaty for qualifying participations	Reduced rate under tax treaty for individuals and companies	Reduced rate under tax treaty	Reduced rate under tax treaty
India	5%[1]/10%	10%/15%	10%/15%	10%/20%
Indonesia	10%/15%	10%/15%	5%/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	0%/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%

[1] Based on the most-favored nation principle.

Appendix	Dividends	Interest	Royalties	
Country	Reduced rate under tax treaty for qualifying participations	Reduced rate under tax treaty for individuals and companies	Reduced rate under tax treaty	Reduced rate under tax treaty
Macedonia	0%	15%	0%	0%
Malaysia	0%	15%	10%	0%/8%
Malta	0%/5%	15%	0%*/10%	0%/10%
Mexico	0% / 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%

Appendix	Dividends	Interest	Royalties	
Country	Reduced rate under tax treaty for qualifying participations	Reduced rate under tax treaty for individuals and companies	Reduced rate under tax treaty	Reduced rate under tax treaty
Qatar	0%	10%	0%	5%
Romania	0%/5%	15%	0%	0%
Russia	5%	15%	0%	0%
Saudi Arabia	5%	10%	5%	7%
Serbia	5%	15%	0%	10%
Singapore	0%	15%	10%	0%
Slovak Rep.	0%	10%	0%	0%*/5%
Slovenia	0%*/5%	15%	0%/5%	0%*/5%
South Africa	0%/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%	25%	10%/25%	5%/15%

Appendix	Dividends	Interest	Royalties	
Country	**Reduced rate under tax treaty for qualifying participations**	**Reduced rate under tax treaty for individuals and companies**	**Reduced rate under tax treaty**	**Reduced rate under tax treaty**
Tunisia	0%	20%	0%/7.5%/ 10%	7.5%/11%
Turkey	5%	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%
United States	0%/5%	15%	0%	0%
Uzbekistan	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%	7.5%
Zimbabwe	10%	20%	10%	10%

** Zero-percent rate based on the EU Parent-Subsidiary Directive/EU Interest and Royalty Directive*

Please see Section 19.22 for more details about current treaty negotiations.

Dutch tax law provides for a dividend withholding tax exemption, which may allow dividends to be expatriated from the Netherlands free of Dutch dividend withholding tax in holding situations, even if the applicable tax treaty does not provide a 0% Dutch dividend withholding tax rate. Please see Section 19.1.6.

Appendix III

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

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