Baker McKenzie.

2017

Doing Business in the Netherlands

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Aaron Siskind, *Bahia*, 1984

Baker McKenzie

Baker McKenzie:
Proud sponsor of Amsterdam's Rijksmuseum for 10 years

Baker McKenzie has proudly supported the Rijksmuseum since 2007. Thanks to this support the museum has been able to acquire important and rare masterpieces from 20th century photography. The collection includes internationally recognized artists such as Man Ray, William Klein, Lisette Model and Saul Leiter, alongside over 100 other famous pieces.

In honor of this 10-year partnership, the Rijksmuseum is exhibiting 31 impressive examples of modern art and documentary photography in *Star-Vu. 10 years of photo acquisitions thanks to Baker McKenzie.* The publication before you is designed in the spirit of this extraordinary exhibition.

Baker McKenzie

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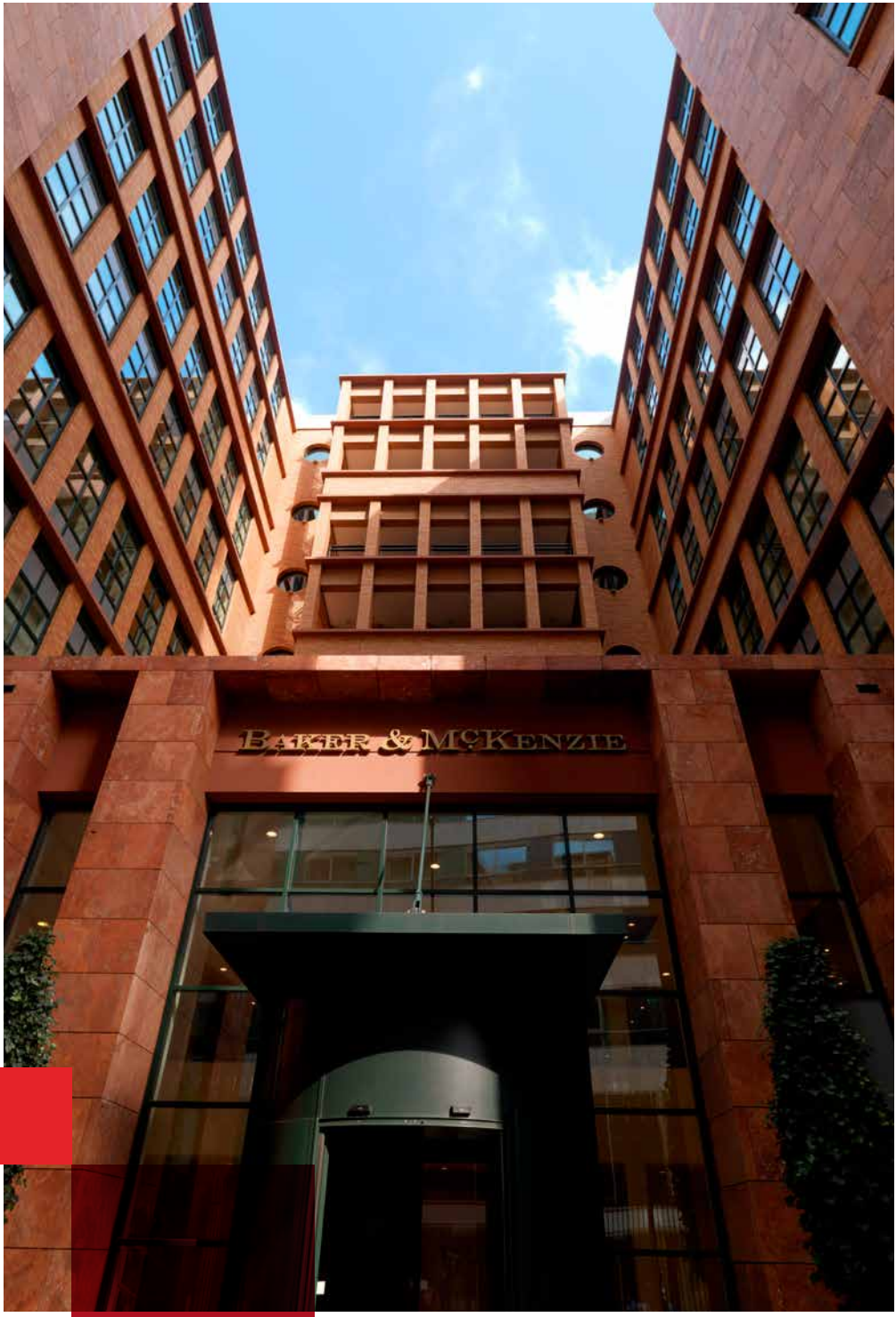

BAKER & McKENZIE

Introduction

We are pleased to present to you the Doing Business in the Netherlands Guide 2017.

Doing Business in the Netherlands is your personal guide to the Dutch legal and taxation system and beyond.

Based on our experience with establishing businesses in the Netherlands, the 2017 edition gives you an informative view of the key aspects of doing business and investing in the Netherlands. It covers a wide array of topics, such as the main aspects of corporate law, real estate law, tax law and energy law, as well as many other legal aspects and regulations of relevance. Not to mention, the central geographical position of the Netherlands combined with its excellent infrastructure - including Europe's largest port - make it the ideal gateway to enter the EMEA market.

With a rich history dating back to 1949, Baker McKenzie is well 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 very happy to assist you.

We hope that you find this guide useful and would like to wish you every success in the Netherlands.

Best regards,
on behalf of the Board of Baker McKenzie

Folkert Idsinga
Managing Partner
Baker & McKenzie Amsterdam N.V.

Baker & McKenzie Amsterdam N.V.

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

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

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

1.1 Multidisciplinary teams for your industry

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

1.2 Innovative ways to inform you

We use a variety of new media methods, including online videos, electronic newsletters, electronic bibles and a collaborative extranet.

To provide you with more in-depth knowledge in person, we organize seminars, conferences and roundtables on a broad variety of interesting topics. We can even arrange an exclusive in-house training especially tailored for you and your organization. These tools and events give you easy access to the latest legal and business developments in the timeliest manner, allowing you to take the appropriate actions when necessary.

1.3 Commitment to diversity

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

1.4 Caring for people and society

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

1.5 The Baker McKenzie House

The Baker McKenzie House, located at the Zuidas in the Amsterdam business district, is designed and operated to reduce the overall impact of the built environment on human health and the natural environment. We efficiently use energy, water and other resources. We continuously strive to mitigate our CO^2 footprint by reducing the amount of paper used, reducing our professionals' usage of airplanes and cars, and purchasing environment-friendly goods, such as eco-friendly cleaning products.

Steve Fitch, *Star Vu Western Landmarks*, 1980–1981.

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	17,102,732 (as of 17 February 2017)*
Total area	41,543 km²
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 833.624 inhabitants** The Hague: 519.988 inhabitants** Rotterdam: 629.606 inhabitants** Utrecht: 338.967 inhabitants**

Kingdom of the Netherlands

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

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

* Source: CBS
** 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.

Man Ray, *Électricité / La Ville (met Eiffeltoren)*, 1931

1.2 Infrastructure, traffic and transport

Traffic and Transport 2015	
Main airport	Amsterdam Airport Schiphol
Number of (air) passengers	58 million*
Passenger destinations	295*
Air freight capacity	1.6 million tons*
Main seaport	Port of Rotterdam
Annual throughput	466.4 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.

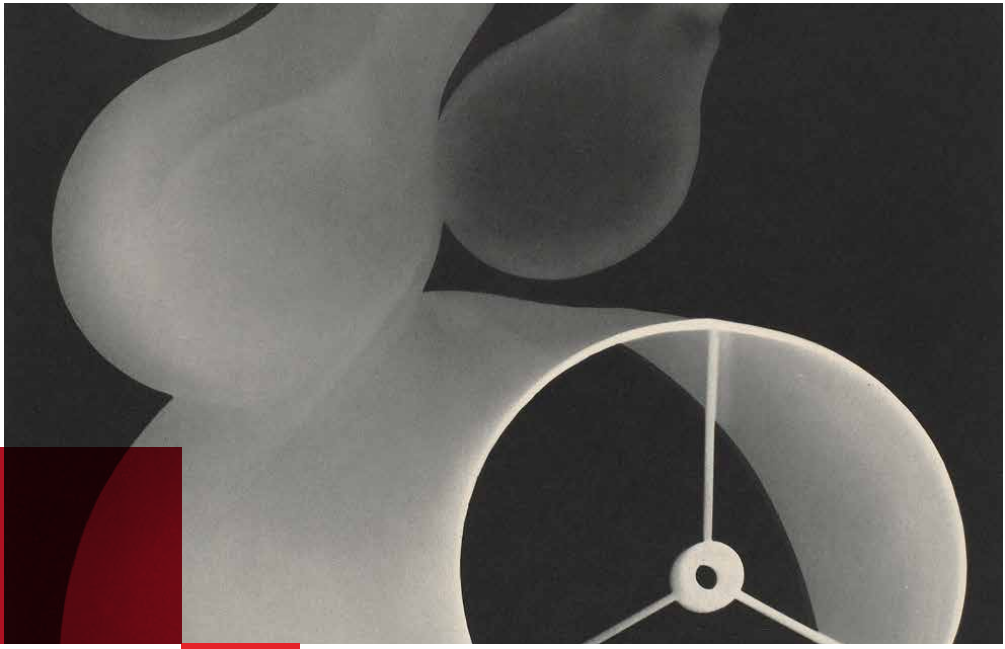
Amsterdam Airport Schiphol

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.

Main port and distribution centre

The Netherlands plays an important role as a main port and distribution centre for companies operating worldwide because of its favourable location by the North Sea. The port of Rotterdam counts as one of the largest logistic and industrial hubs in Europe. With an annual

* Source: Schiphol
** Source: Port of Rotterdam



Man Ray, *Électricité / La Maison*, 1931

throughput of 465 million tons of cargo, Rotterdam is by far the largest seaport of Europe. Rotterdam's position may be attributed to its excellent accessibility via the sea, hinterland connections and the many companies and organisations 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 km.

Amsterdam Internet Exchange

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

Gateway to Europe

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

1.3 Government

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

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

Dutch Parliament

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

1.4 Economy

Macroeconomic Figures, 2015	Value
Gross domestic product ("GDP")	EUR 676.5 billion*
GDP growth	2.0%*
Inflation rate	0.6%*
Total workforce	8.907.000*
Unemployment rate	6,9%*

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

Trade (Import and Export), 2015	
Exports	EUR 727.266 million*
Export country comparison to the world	7**
Exports - commodities	Food and live animals; beverages and tobacco; crude materials; inedible substances, except fuels, mineral fuels, lubricants relative materials, animal and vegetable oils, chemicals; machinery and transport equipment; miscellaneous manufactured articles
Imports	EUR 383.205 million*
Import country comparison to the world	8

* Source: Statline
** Source: CBS

Trade (Import and Export), 2015	
Imports - commodities	Food and live animals; beverages and tobacco; crude materials; inedible substances, except fuels, mineral fuels, lubricants relative materials, animal and vegetable oils, chemicals; machinery and transport equipment; miscellaneous manufactured articles

The Netherlands' exports totalled EUR 427.266 million in 2015. Dutch prominence in European exports can be attributed mainly to transit exports to other European countries. In this sense, the Netherlands really is the gateway to Europe for many products from other regions. Half of the exports are transit ones.

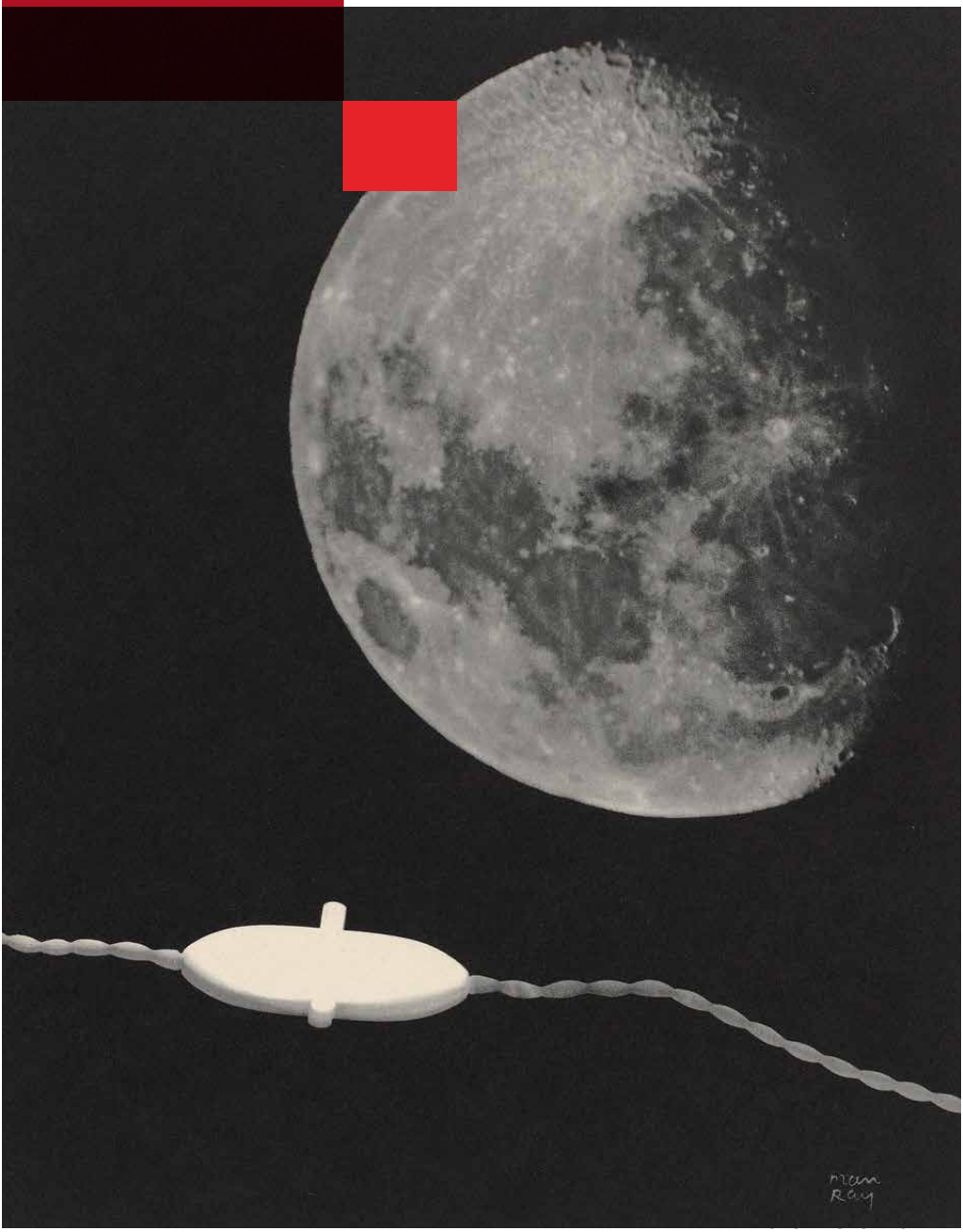
1.5 Dutch people and culture

The People	
Total population	17,102,732
Languages	Dutch (official), Frisian (official)
Life expectancy (born in 2013)	Men: 79.9 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 41,500 square kilometres of land, which is just a little more than half the size of Scotland. The Netherlands is thus one of the world's most densely populated countries. Dutch professionals are internationally oriented and are among the most multilingual in the world, enabling them to operate successfully in companies in any industry, serving customers across the globe. Another distinctive fact is the attractive cultural climate. Dutch people are anti-authoritarian, innovative and open-minded.

Man Ray, *Électricité / Le Monde*, 1931



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

Museums

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

Dutch creative climate and Dutch design

Dutch design is famous around the world. The minimalist, economical approach that characterises 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.

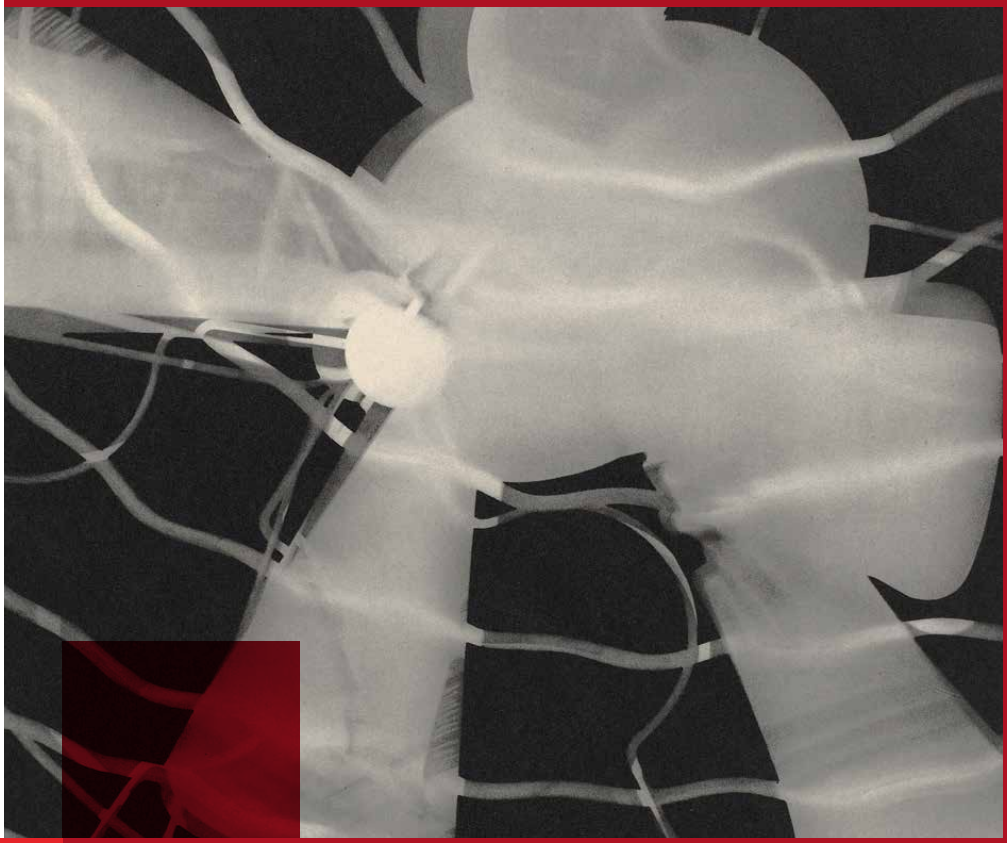
Holidays

National holidays are important in Dutch culture. Several holidays have a rich history and have been celebrated for a very long time, with some of them having strong cultural ties to local regions. For instance, King's Day, which the Dutch celebrate in April, is an annual holiday in honour 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 organised on Liberation Day and an official day-off is granted in honour of this holiday once every five years. St. Nicholas (Sinterklaas) is a very popular mythical figure, in whose honour 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.

Man Ray, *Électricité*, 1931

1.5.3 Did you know...

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



Man Ray, *Électricité / Le Souffle*, 1931

- Holland has nearly 35,000 km of cycle paths?
- Holland is the second biggest exporter of agricultural produce, preceded only by the US, even though only 3 percent of the Dutch population works in the agriculture sector?
- The Dutch are among the tallest people in the world?
- Amsterdam was built entirely on piles?
- There are 22.7 million bicycles and 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 6.74 m below sea level?
- 'Gezelligheid' is a typical Dutch word for which there is no good equivalent in other languages and which stands for pleasant social gatherings and a fine atmosphere?
- Holland has more than 4,400 km of navigable rivers, canals and lakes?
- The Dutch saying "Act normally, that's crazy enough" fits the Dutch like a glove?
- There is no country in the world where more licorice is consumed than in the Netherlands: 32 million kilos per year?
- The Netherlands has approximately 1.62 million cows, which together produce 12.2 billion litres of milk?
- On average, the Dutch eat 20.4 kilos of cheese per person per year?
- Nearly 600 million kilos of cheese are exported per year?

2

Legal Forms of Doing Business

A company may engage in business in the Netherlands through 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 organisation 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 organisation 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 licence)
- 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 licence)
- 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 met beperkte aansprakelijkheid* 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:

- B.V.s (as opposed to N.V.s) cannot issue bearer shares.
- N.V.s with bearer shares can be listed at the Dutch Stock Exchange. If certain conditions are met, the shares in a B.V. could be listed as well.
- N.V.s must have a minimum issued and paid-in capital of 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 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 or share certificates that are in bearer form or are officially listed on a regulated stock exchange.

2.3 Branch versus subsidiary

The most important difference between a branch and a subsidiary lies in the exposure to liability. A subsidiary has limited liability. As a result, a shareholder, in principle, is liable only to the extent of its capital contribution. A branch 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 wilful 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 favourable tax treatment and its corporate flexibility. A cooperative is an association established as a cooperative 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, 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 organised 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:

- 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; or
- a conversion of a cooperative into an SCE.

The principal objective of an SCE is to satisfy its members' needs. Contrary to 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, which 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 centres 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. The Dutch Tax Administration is consistent, approachable, transparent and focused on finding solutions within the parameters laid down in legislation, policy and case law. This includes giving businesses certainty in advance on proposed juridical acts including foreign investment decisions. Expatriates who

are temporarily assigned to a Dutch office may qualify for a special tax regime, known as the 30 percent ruling.

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 sufficient.

The Dutch corporate income tax ("CIT") rate is 25 percent. However, profits of up to EUR 200,000 are subject to a reduced 20 percent rate.

3.2 Tax ruling

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

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

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

The Dutch State Secretary of Finance has previously emphasised that the APA and ATR practice has his full attention and is important in safeguarding the Netherlands as a preferred place of business for multinationals. The following typical examples can be given on tax rulings granted to foreign investors in the Netherlands:

- Ruling on the application of the participation exemption to income from shares (see 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 centre.
- Distribution centres: 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 Centres/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 in 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 18, Sections 1.84.2 and 18.4.3.

Certain limitations on interest deductions may apply in the Netherlands (see Chapter 18). Tax treaties concluded by the Netherlands generally provide that withholding tax on dividends distributed to a Dutch company holding at least 25 percent of the shares in the distributing company is reduced to a substantially lower percentage, often to 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. 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 any withholding tax on interest or stamp duty.

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

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

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

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

A) Substance

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

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

As from 1 January 2014, all FSCs (either with or without an APA) must declare in their tax return that these substance requirements are fulfilled. A lack of substance may cause spontaneous exchange of information to foreign tax authorities and disallowance of tax treaty benefits. The adoption 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 in due course will limit the use of tax treaties by FSCs lacking appropriate substance.

B) 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 the lower of 1 percent of the total outstanding loans or EUR 2 million. For licensing, the lower of 50 percent of the net royalties received per annum or EUR 2 million as minimum equity 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 easily combined with holding or operating activities in one Dutch company.

Dutch entities that do not incur sufficient risk (as outlined above) may not credit any foreign withholding taxes related to interest or royalty income. Moreover, interest and royalties received and paid by 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.

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.

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

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 Capitalisation

N.V./SE

An N.V. and an SE must have an authorised 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 authorised 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 authorised 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 authorised 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, (authorised and) issued share capital, the number of all registered shares, the names and (electronic) addresses of the shareholders, pledgors and usufructuaries, the extent to which the par value of the shares has been paid up, as well as the particulars of the incorporation, any amendment to the articles of association, and issuance, transfer, pledge, attachment, or usufruct on the shares.

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

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

4.6 Issuance of new shares

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

The issuance of registered shares requires a notarial deed executed before a Dutch civil law notary in the Netherlands and 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 authorised to fully represent and bind the company. A provision to this effect may be invoked against third parties.

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

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

4.8 Board of supervisory directors

An N.V., a B.V. and a cooperative may institute a supervisory board to advise and supervise the managing directors, but 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.

4.9 Proxy holders

Dutch law does not recognise 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 the registration with the Trade Register of the Chamber of Commerce.

4.10 Large companies regime

An N.V., a B.V. or a cooperative is subject to the Large Companies Regime if the company, 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 executive members of the board of managing directors will be appointed by the general meeting of shareholders instead of the supervisory board or the non-executive directors.

An international holding company that restricts its activity exclusively or almost exclusively to the management and financing of group companies and of its and their participations in other legal persons may be exempted from the Large Companies Regime, 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 a few 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

As a result of new legislation introduced in July 2016, it is now 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 new 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 is expected in relation to disclosure of information on UBOs. Our Minister of Finance announced that 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. New legislation is expected to enter into force before 26 June 2017.

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 ("R&D") activities.

Pursuant to the Dutch Corporate Governance Code (the "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 one of the Member States of the European Communities ("EC"). If the company makes use of the aforementioned possibility, 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 which are used in their corporate tax filings when preparing their statutory annual accounts (*commerciële jaarrekening*). This is to prevent the preparation of two different sets of annual accounts.

5.4 Other information

The annual accounts prepared by the board of managing directors may include: 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 make use of the exemption, the following requirements must be fulfilled:

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

- group companies, the combined significance of which is not material to the whole;
- group companies, the required information of which can only be obtained or estimated at disproportionate expense or with great delay; and
- group companies, the interest in which is only held for disposal.

Consolidation may be omitted if:

- on consolidation, the company qualifies as a small company;
- no company to be involved in the consolidation has securities in issue officially listed on an exchange; and
- 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, provided:

- 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; and

- 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 authorised to appoint the auditor.

6

Corporate Governance Code

The Dutch Corporate Governance Code (the "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 ((i) and (ii) are referred to in this chapter as "Listed Companies").

The Code sets out general principles, each followed by specific best practice provisions. These principles are generally considered as reflecting widespread views on good corporate governance and have been supplemented in the form of 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 of shareholders). 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 was first adopted in 2003 and was amended in 2008. On 8 December 2016, the Corporate Governance Code Monitoring Commission (the "Commission") published a revised Code. This revised Code

replaced the 2008 Code. The most relevant reform is the focus on long-term value creation. Listed Companies will be expected to take account of the revised Code for financial years starting on or after 1 January 2017.

The revised Code is divided into several chapters containing best practice provisions in relation to:

- long-term value creation;
- effective management and supervision;
- remuneration;
- the general meeting of shareholders; and
- one-tier governance structure.

Below are the most important best practice provisions of each chapter. The full text of the Code and additional information thereon can be found on the Commission's website: www.commissiecorporategovernance.nl/information-in-english.

6.1 Long-term value creation

Long-term value creation

The management board is responsible for the continuity of the company and its affiliated enterprise. The Code emphasises 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. The supervisory board should furthermore supervise the manner in which the management board implements the long-term value creation strategy. The supervisory board should regularly discuss the implementation of the strategy and the principal risks associated therewith.[1]

1 Principle 1.1 and Best Practice Provision 1.1.2-1.1.3 Dutch Corporate Governance Code 2016.

Risk management[2]

The 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 should 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[3]

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 in this process. This plan should be submitted for approval to the management board and, subsequently, to the supervisory board.

Accountability in the management report[4]

The management board describes the design and operation of the internal risk management and control systems in the management report. The company's annual report must include a description of the main risks it encounters in carrying out its tasks.

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

Statement by the management board[5]

The management board should make a statement confirming that it has provided sufficient insight into the risks, including risks that are foreseen in the future and will be relevant to the continuity of the company. This includes both material shortcomings that have been identified and material risks and uncertainties that can reasonably be foreseen at the time the statement is being issued.

6.2 Effective management and supervision

In the 2008 Code, the composition of the management board and the supervisory board was already set out in great detail. With the introduction of new provisions related to effective corporate governance and independent supervision, the revised Code aims to strengthen the checks and balances in this respect.

Diversity policy[6]

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 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. The current state of affairs with respect to any diversity targets should be described in the corporate governance statement. If any targets have not been achieved, an explanation should be given as to the contemplated measures to achieve the targets and the set timeframe in this regard.

5 Best Practice Provision 1.4.3 Dutch Corporate Governance Code 2016.
6 Best Practice Provision 2.1.5 Dutch Corporate Governance Code 2016.

Shareholders of more than 10 percent

Compared to the 2008 Code, the revised Code adopts a slightly more lenient approach in terms of the number of non-independent supervisory board members that are permitted to have (or represent a shareholding of) more than 10 percent. In this respect, share ownership is regarded as a sign of long-term involvement and parallel interests. The independence of these supervisory directors continues to be safeguarded, as the revised Code still stipulates an independent majority within the supervisory board.

Appointment of supervisory directors

Instead of appointment of supervisory board members for three periods of four years pursuant to the 2008 Code, the revised Code provides for appointment for two four-year periods. Reappointment after this is possible for up to two additional two-year periods and must be justified in the report of the supervisory board. Such justification promotes a greater focus on the composition of the supervisory board.

Executive committee

The design of an executive committee, if the company has one, often depends on the specific characteristics of the company, but tends to be made up of members of senior management and members of the company's management board. The executive committee fulfils an important role in the management board's decision-making. Nevertheless, the members of senior management fall outside the scope of direct supervision by the supervisory board. In order to guarantee an appropriate system of checks and balances, the revised Code stipulates that supervisory board members are expected to pay specific attention to the dynamics and relationship between the management board and the executive committee.

6.3 Remuneration

Remuneration policy

In comparison to the 2008 Code, more responsibility for remuneration has been given to the management board and supervisory board members. Pursuant to the revised Code, the remuneration policy applicable to management board members should be clear and understandable, focus on long-term value creation for the company and its affiliated enterprise, and take 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.[7] The general meeting of shareholders must adopt the remuneration policy in order for it to become applicable.

Determination of management board remuneration

The supervisory board determines the remuneration of the individual board members within the limits of the remuneration policy adopted by the general meeting of shareholders. 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. Correspondingly, each management board member is expected to reflect on its own remuneration from a broad perspective.

7 Principle 3.1 Dutch Corporate Governance Code 2016.

Remuneration supervisory board[8]

The supervisory board should submit a clear and understandable proposal to the general meeting for its own remuneration. In this respect, the remuneration of supervisory board members should promote an adequate performance of their role and, moreover, should not be dependent on the results of the company.

The general meeting of shareholders

Given that the outcome of the pending legal developments, at both a European and national level, with respect to the position and rights of shareholders is currently uncertain, this part of the Code has been carried over from the 2008 Code. Its main principle underlines the idea that good corporate governance requires the fully-fledged participation of the shareholders.[9]

6.4 Proposal of the general meeting of shareholders[10]

A proposal on the agenda of the general meeting of shareholders, which is subject to shareholders' approval or authorisation, requires a written explanation from the management board, which should, in turn, 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 of shareholders. Furthermore, the profit retention/dividend policy (and changes thereto) will be placed on the agenda of the general meeting of shareholders in a separate manner.

8 Principle 3.3 Dutch Corporate Governance Code 2016.
9 Best Practice Provision 4.1.1 et seq. Dutch Corporate Governance Code 2016.
10 Best Practice Provision 4.1.3 Dutch Corporate Governance Code 2016.

Exercise voting rights (response time management board)[11]

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

Proxies[12]

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

Bilateral contracts with shareholders[13]

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

Institutional investors' policy on voting rights[14]

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

11 Best Practice Provision 4.1.6 and 4.1.7 Dutch Corporate Governance Code 2016.
12 Principle 4.3 Dutch Corporate Governance Code 2016.
13 Best Practice Provision 4.2.2 Dutch Corporate Governance Code 2016.
14 Best Practice Provision 4.3.5 and 4.3.6 Dutch Corporate Governance Code 2016.

6.5 One-tier governance structure

The Code is focused on the two-tier governance structure, which is traditionally the governance basis of Dutch corporate law. At companies with a two-tier board, management and supervision 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 which 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.[15]

15 Principle 5.1 and Best Practice Provisions 5.1.1-5.1.3 and 5.1.5 Dutch Corporate Governance Code 2016.

6.5 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 is deviates from them.

The management- and supervisory board account for compliance with the Code in the general meeting of shareholders. For any deviation from the principles and best practice provisions, the management- and supervisory board shall give a substantive and transparent explanation in the general meeting of shareholders with regard to any non-compliance with the Code. The Commission recommends that Listed Companies provides the general meeting of shareholders (also as a separate agenda item for the annual general meetings in 2018 in which the financial statements for the financial years starting on 1 January 2017 or thereafter will be addressed) with a chapter in the management report broadly outlining the corporate governance structure and compliance with the Code. Subsequently, it is up to the shareholders to call the management board and supervisory board to account for compliance with the Code.

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 full-fledged production and sales operation (with the customary business risks for bad debts, etc.), it will be required to report an increased arm's-length remuneration in respect of its increased activities and the increased risks to which it is exposed. However, the company 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:

- 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 business-to-business ("B2B") relationships, this protective legislation will only apply if both parties are established in the Netherlands. In addition, this legislation cannot be invoked by: (a) legal entities that have recently published their annual accounts at the time of 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 a reasonable opportunity to take notice of these terms.

8.3 Consumer protection/Consumer sales

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

This legislation is mostly mandatory in nature; i.e. 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, e.g. its identity, the characteristics of the goods/services, price, address, delivery, etc. Not providing such information will be qualified 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 case of B2C online trading, EU traders who engage in online sale or services contracts, and all online marketplaces established within the

EU, should provide:

- an electronic link to the European Commission's online dispute resolution (ODR) platform on their website, which is easily accessible; and
- 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:

- an electronic link to the ODR platform in an email, if a commercial offer is made to a consumer via email; and
- 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 EUR 900,000. 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").

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 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.

The termination of an agency agreement with "small" agents used to be subject to prior approval from the Dutch Employee Insurance Agency (*UWV WERKbedrijf*). However, due to a restructuring of Dutch employment laws, this requirement expired on 1 July 2015.

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

Recently, a franchise code was developed as a matter of self-regulation (the "Franchise Code"). The Franchise Code provides directives on proper behaviour for franchisors and franchisees prior to, during and after termination of the franchise agreement. Although the Franchise Code does not have force of law, it is expected that a proposal will be filed before March 2017 to embed the Franchise Code into the Dutch Civil Code. We do not expect to see the ratification thereof before the end of 2017.

Although 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 labour 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 consensus, commonly laid down in written form, such as a sale and purchase agreement, as well as (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 (currently) 6% 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. The information registered in the Land Register includes ownership, mortgages, easements and other rights *in rem*. Furthermore, other administrative restrictions in the use of real estate are also registered (such as designations as a protected monumental building, municipal preemption 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.

Restricted rights in relation to property can be divided into (i) rights attached to a certain capacity and (ii) servitudes. Rights attached to a certain capacity are those rights which arise from an agreement and relate to immovable property, for instance an agreement with a neighbour to refrain from felling a tree. An example of a servitude is the obligation to tolerate rainwater falling from the neighbour's roof on one's own yard. 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 (for example building height, volume, number of floors, etc.). 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 others: 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 to 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 follow from 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 – a result of the recent financial crises – but also due to the coinciding circumstance that the current stock is being occupied by the wrong target groups within the population and due to the fact that a strict tenant protection scheme applies to residential leases. 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, allowing 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 lessor is required to initiate. The lessor 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 favours 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.

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

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

9.7 Public housing

The Dutch government aims to ensure that there is sufficient housing for various social population groups in order to promote a suitable living environment. To this end, the Dutch government has implemented the Housing Act (*Woningwet*), which stipulates the obligations and powers of the different housing authorities and regulates the government's housing policy. The Dutch government is focusing on regulating the social housing agencies 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 ("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 which have as their object or effect to appreciably prevent, restrict or distort competition in the EU and which may have an effect on trade between EU Member States.

Agreements and practices caught by the prohibition of Article 101(1) 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, specialisation agreements, R&D agreements and other agreements in specific sectors, such as the insurance sector and 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 exempted 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 behaviour 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*, "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 scrutinising 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 centres 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 behavioural 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; (ii) of which at least EUR 30 million 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 the so-called "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 licence 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 licence is required, the parties are allowed to implement the transaction.

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

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 (before 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 (before 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 (before 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 (before 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 as of 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 modernise 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 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; and
- Guidelines (including the Proportionality Guide and the Works Procurement Regulations 2016, "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 defence 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 favouring 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 honour 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 requires that the requirements, terms and conditions in any tender procedure should be in a reasonable proportion to its subject.

10.3.3 Contracting authorities

The public procurement rules apply to "contracting authorities", which include the state, regional or local authorities, bodies governed by public law or associations formed by one or several of such authorities (jointly referred to as "public authorities"). The definition of "state" is given a functional interpretation rather than a formal approach. More than 1,000 entities in the Netherlands qualify as public authorities 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 emphasises 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 licences 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 Standardisation

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 harmonise 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 adhered to the Berne Convention. It is one of the oldest copyright laws in the world. Although the DCA has been amended numerous times, it has never been completely revised. 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. 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 which is destined to serve as evidence of the transfer and which is executed by a "wet ink" or electronic signature of the original copyright owner (the assignor).

Licences can generally be granted in any form. The only exception to this is the exclusive licence, granted by a private individual. This licence 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 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 Neighbouring rights

Performing artists, producers of sound recordings and broadcasting/film/record companies can claim neighbouring rights. Neighbouring rights are related to copyrights under the Dutch Neighbouring Rights Act ("DNRA" or *Wet op de naburige rechten*), which implements the Conventions of Rome and Geneva. The DNRA entitles the neighbouring right holders to decide whether: (a) a performance may be recorded; (b) a recording may be reproduced and put on the market; (c) a recording may be broadcasted, shown or played, and put on the market; and (d) a recording may be broadcasted, shown or played. It is not necessary to register neighbouring rights. Neighbouring 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 unauthorised extraction and/or reutilisation of the contents of the database. The protection covers any unauthorised 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, two types of registered trademarks are acknowledged; Benelux trademarks and European trademarks. 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 Treaty for Intellectual Property ("BTIP" or *Beneluxverdrag inzake Intellectuele Eigendom*).

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

Unregistered trademarks are, in principle, not protected.

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

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

identical or similar for other products or services if the trademark has a reputation in the Benelux and the use of that sign, without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or reputation of the trademark; and (iv) for other purposes than to distinguish a product or service if this use, without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or the reputation of the trademark.

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

In addition, a European Trademark ("EUTM") registration that covers all 27 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 European Union Trade Marks (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 on lapses or is cancelled within five years after the international registration. Opting for an international

registration may also have strategic advantages, which differ per case. Countries that are party to the Madrid System and/or the Paris Treaty can claim priority rights within six months after the application date of the first application of the identical trademark.

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

11.5 Designs and models

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

Novelty and having a "distinctive character" are conditions for protection, but originality of a design is not required. Nevertheless, a design is still considered "new" if it 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 of the EU.

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

11.6 Trade names

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

A company cannot acquire the right to a trade name merely by registering it with the Business Register, but must also use it as a business name. Similarly, even names that were used as business names but not registered as such in the Business Register enjoy protection under the Dutch Trade Name Act and can be invoked to object to any confusingly similar business names of third parties.

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

11.7 Patents

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

In order to obtain a Dutch patent, the invention must meet three material requirements. It should: (i) be novel, 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 NL Octrooicentrum (www.octrooicentrum.nl) in Rijswijk, the Netherlands. Although the description of the patent application may be filed in English, the patent claims in the application must be submitted in Dutch. European patent applications can be filed with the European Patent Office in Munich, Germany, or with its subdivision in Rijswijk, the Netherlands.

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 analysed 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 utilise the patented invention; for example, the supply of raw materials. In order to be held liable for patent infringement, the "indirect infringer" should be aware or should have been aware that the goods supplied were intended to be used in the infringing products/process.

Under Dutch patent law, any person or entity engaging in an infringing act can be held liable for patent infringement. Potential defendants may include producers/manufacturers, suppliers, distributors, importers, exporters, and retailers, to purchasers and end users. Furthermore, Dutch patent owners may claim the cease and desist of 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 in 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 sets forth that intentional patent infringement is subject to criminal proceedings, Dutch Prosecuting Authorities rarely prosecute patent infringers.

Apart from opposition proceedings before the Dutch Patent Authority, there are no administrative actions applicable to patent infringement. Furthermore, the patent right holder may grant licences 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 licence. Compulsory licensing can also be enforced if there is a certain level of dependency between an existing patent and the application for which the licence has been requested, and if it involves important new technology.

11.8 IP enforcement

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 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 defences) have increased dramatically. The courts have issued guidance 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 amount of legal fees on a case-by- case basis and deviate from their guidance. 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 harmonise 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 beforehand. 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

Computer software may be protected under the DCA, provided it satisfies the originality requirement. The courts in the Netherlands directly apply the doctrine of the European Court of Justice in respect of copyrights to software products. Similar to all other works of literature, science and art, no formalities are required to obtain copyright

protection for computer software and its graphical user interface; the first is protected under the Software Directive (2009/24/EC), while the second is protected under common copyright law.

A developer of computer software may have, and be able, to enforce its copyrights if (parts of) the source code and/or the particular behaviour 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 licences if the licences 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 licence 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 licence 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 Chapter 22, Financial Regulations).

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 the public interest, public order or common decency. Advertising that misleads the public (e.g. with regard to the price or origin of a certain product) is prohibited. Specific regulations apply to, inter alia, advertising directed at children and to that of alcoholic beverages, pharmaceuticals and financial products.

Both consumers and competitors are entitled to file complaints with the Advertising Code Committee and its Board of Appeal. Although the decisions of either group are not legally binding, negative decisions are normally respected by the affiliated media (which is almost all media in the Netherlands), which will refrain from publishing the advertisement in question. The Advertising Code Committee and its Board of Appeal can render an "individual recommendation", which is communicated only to the plaintiff and the offender in question, or it can render a "public recommendation", 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 organisation 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 organiser of a promotional game of chance must use general terms and conditions that include specific information, such as the name and address of the organiser, 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

Trade secrets can currently be protected by contract (and, under certain circumstances, by tort law (see 11.12, Unfair competition)) rather than by specific provisions in the law. Under the future implementation of the Trade Secrets Directive, which entered into force on 5 July 2016, this will be different.

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, licences and pledges (such as patents, trademarks, design and models, topographies or plant breeders' rights) to be effective against third parties, they must be registered with the applicable registration offices.

11.16 Treaties and general European legislation

In addition to the treaties previously mentioned, the Netherlands is also a party to, 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 2002 EU Technology Transfer Regulation has a direct effect in the Netherlands. It is mainly concerned with the competition law aspects of technology transfer. Furthermore, Regulation No 316/2014 contains certain categories of technology transfer agreements that (provided certain requirements are met) 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. Suppliers of computer products and services may use standard terms and conditions that are available (either free of for payment). A number of standard terms and conditions are mentioned below.

12.3.1 Nederland ICT conditions

Nederland ICT, the industry organisation 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 Arbit terms and conditions are for the purchase and supply of IT goods and services by the Dutch government. These terms and conditions were last updated in October 2016 after a consultation organised by the Dutch Ministry of Internal Affairs. The 2016 version, as well as its predecessors, is regarded as favourable to end-users.

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

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

12.5 Shrink-wrap licence 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 licence 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, solely in the case of specific triggering events, such as the bankruptcy of a licensor. In order to provide for that, source codes are made available when the licensor is no longer able to maintain the software and, at the same time, to prevent the licensee from having access to these files in all other situations, an independent escrow agent is placed in the middle. Both active and passive escrow agents make use of tripartite agreements with the licensor and the licensee.

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

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 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 Electronic Signatures Directive (also implemented in the Dutch Civil Code) provides for a special electronic signatures regime. So-called "advanced electronic signatures" are subject to the statutory presumption that they are "sufficiently reliable" if certain conditions are met. 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 certificates". Such qualified certificates can only be issued by

certification service providers, which may act as trusted third parties to certify that the identity of the signatory was verified on the basis of an actual meeting with the signatory and an inspection of the signatory's photo ID. In order to become a certification service provider, a registration process with the ACM must be completed.

12.8 Encryption

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

12.9 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.

On 20 December 2016, a new legislative proposal, the Act on Computer Crime III (*Wet computercriminaliteit III*), passed the House of Representatives. This draft bill of law, which introduces new investigative powers in order to detect and close down cybercrime, was pending in the Dutch Senate as of the last update of this chapter.

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, since time and energy must be invested in order to obtain them.

12.10 Online gambling

In principle, offering games of chance over the Internet in the Netherlands requires a government permit. In 2006, the Ministry of Justice successfully took down a number of illegal gambling sites. Most illegal gambling sites in the Netherlands have since shut down.

However, the market for online games of chance will slightly open, as a new bill is pending that will introduce additional permits for the offering of online games of chance, under strict conditions. The proposed act was adopted by the House of Representatives in 2016, and will be debated in the Senate in 2017.

13

Data Protection

13.1 General

The European Data Protection Directive (95/46/EC) is implemented in the Personal Data Protection Act ("PDPA" or *Wet bescherming persoons-gegevens*). The PDPA is applicable to any type of automated personal data processing. This is a broad concept and includes the collection, processing, storage and deletion of personal data.

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

The obligations under the PDPA mainly concern the legitimacy of data processing and transparency. As an illustration, any data processing operation must be based on a statutory data processing ground and must be proportionate to its aim. In addition, data subjects (meaning the individuals to which personal data relates) must be informed on the data processing activities carried out.

13.2 Data transfer

In addition, specific requirements apply to the transfer of personal data outside the EEA. Such transfer ("data export") includes situations where the data is made accessible to recipients/viewers from outside the EEA. Data export is only permitted on limited grounds, which include explicit consent of the data subject, the use of EC-approved, standard contractual clauses and approved binding corporate rules.

For data transfers between businesses in Europe and the US, an additional instrument is available: the so-called Privacy Shield. The Privacy Shield is the successor of the so-called "safe harbour" programme, which was invalidated in European Court of Justice's decision in the *Schrems* case in 2015. This data transfer legitimation ground can only be relied upon if the recipient of the personal data is based in the US and has certified itself under the Privacy Shield Framework

13.3 Notification of data processing operations and data breaches

In most situations, a notification must be filed with the Dutch Data Protection Authority ("DPA" or *Autoriteit Persoonsgegevens*). Unlike in other countries, in the Netherlands, notifications must be filed per data processing operation and not per entity that is processing the data.

On 1 January 2016, a general data breach notification obligation was introduced in the Netherlands. Data controllers must report data security incidents to the DPA if the incident is likely to have serious adverse effects on data protection. Data subjects that are potentially affected must also be informed if the data breach at hand is likely to have an adverse effect on their privacy.

13.4 Enforcement

The DPA can impose administrative fines of up to EUR 820,000 or 10 percent of the national annual turnover for failure to comply with the rules of the PDPA. The increased maximum penalty will also apply to the new data breach notification obligations.

In 2016, the new General Data Protection Regulation ("GDPR") was approved by the European Parliament. The GDPR will replace the Data Protection Directive (95/46/EC) and the Dutch implementation thereof in the PDPA. The GDPR provides for similar rules as the Data Protection Directive, but introduces a tougher enforcement scheme (with fines of up to EUR 20 million or 4 percent of the annual worldwide turnover of the organisation). In addition, the GDPR intends to widen the applicability of the European data protection rules to organisations that are

not located in the EU, but do target their products or services at EU citizens.

13.5 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 company doing so is not established in the Netherlands. In 2016, a Dutch court confirmed a decision of the Dutch DPA, holding that the Canadian company WhatsApp was subject to the PDPA as it was using "equipment" located in the Netherlands. The "equipment" in this case concerned the smartphones of WhatsApp's end users in the Netherlands.

13.6 Data retention

In 2014, the Court of Justice of the EU declared the Data Retention Directive invalid. In March 2015, the court of The Hague invalidated the Dutch Data Retention Act. The Dutch government has not appealed this decision, but a new legislative proposal was presented in September 2016 and is subject to debate by the House of Representatives. 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.

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, or the "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 intended primarily to give the ACM an overview of market players in order to ensure effective supervision. The registration itself is free of charge. However, for its supervisory activities, the ACM charges an annual fee, 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) interna-

tional signalling point codes; (5) transit network signalling 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 signalling point codes; and (vi) transit network signalling point codes.

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

Numbers may not be traded as a business activity, but the holder of numbers may allow third parties to use its numbers, provided this is done in a 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 (numbers in the 0800, 0900 and 0960 ranges). The information that must be provided to consumers and the maximum fees that may be charged are set forth in a decree based on the TA: the regulation on universal services and end-user interests (*Regeling universele dienstverlening en eindgebruikersbelangen*). When a number in the 0900 range is being used for service line purposes, the costs for the call to the number in question may not exceed EUR 1 per call if the usage of the information service is charged per call. If the usage is charged on a per time unit basis, then the standard telephone charges are the only costs that may be charged to the caller.
Moreover, a user of a 0900 service line number is obligated to provide its platform operator with a 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.
Users of 0800 service numbers may not be charged at all.

14.4 Net neutrality

In June 2012, the principle of "net neutrality" was passed into law in the Netherlands, making it the first European country with a net neutrality law in the books. 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.
In November 2016, new net neutrality provisions passed the Senate. These new net neutrality provisions are more rigid than those in the EU regulation; this regulation allowed 'zero-rating' (excluding certain use of data, for example streaming videos, from incurring costs), which is prohibited in the Netherlands. In December, the ACM confirmed this in a decision against T-Mobile and ordered it to cease zero-rating.

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 Personal Data Protection Act apply to providers of public electronic telecommunications services as well. In general, providers must take the appropriate organisational 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. See chapter (13)

14.6 Data retention

In 2014, the Court of Justice of the EU declared the Data Retention Directive invalid. In March 2015, the court of The Hague invalidated the Dutch Data Retention Act. The Dutch government has not appealed this

decision, but a new legislative proposal was presented in September 2016 and is subject to debate by the House of Representatives. 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.

14.7 Unsolicited communications (spam)

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

A strict regime applies to tracking cookies, which are intended to be used to collect, combine or analyse data about the use of different services of the information society 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 processing, as defined in the Dutch Data Protection Act. Therefore, this tracking is subject to the rules in that Act.

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 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 analyse 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 data breach notification obligated under the Dutch Personal Data Protection Act, a specific data breach notification obligation applies to providers of communication networks and services. Under this notification obligation, the Dutch Data Protection Authority must be notified, as well as the affected data subject, 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 lead to fines being imposed in the amount of up to EUR 900,000.

15

Labour 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.

15.1.1 Probationary period

Parties to an employment contract may agree on an initial probationary period in writing only. The statutory maximum probationary period for an indefinite-term employment contract is two months. As of 1 January 2015, it is no longer possible to agree on a probationary period in fixed-term contracts that do not exceed six months. For a fixed-term employment contract exceeding a period of six months and

less than two years, a one-month probationary period is allowed. A two-month probationary period is allowed if the fixed- term employment contract is entered into for a period of two years or more. Deviation to the detriment of the employee is only possible pursuant to a collective labour agreement or by an order of an administrative body.

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

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

15.2 Non-competition clause

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

15.3 Termination

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

Employment for an indefinite period

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

Termination by the UWV

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 due to illness for longer than two years before it can give a notice of termination of the employment contract. As an exception to this general rule, the employer does not have to obtain written approval to give notice of termination of an employment contract to a managing director.

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 periods will be reduced by the duration of the UWV procedure, subject to a minimum notice threshold of one month. Obtained permission from the UWV is valid for four weeks.

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

Termination by the court

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

The Cantonal Division of the competent court will 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 same company is not possible.

The employer must file a petition with the competent court to dissolve the employment contract. The employee may file a statement of defence, 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.

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

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

The transition budget is calculated as follows:

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

A transition budget cannot exceed EUR 77,000 gross or an amount equal to the employee's annual salary, if this is higher than EUR 77,000. Rules are laid down by order in council[1] concerning what costs – particularly those related to facilitating a transition to alternative employment (e.g. education or outplacement) – may be deducted from the transition budget. The latter does not affect contractual arrangements in individual employment contracts that entitle the employee to severance compensation (i.e. "golden parachutes"). If a company employs less than 25 employees, an alternative, cheaper transition budget will apply.

Moreover, as of 1 July 2015, if an employee is of the opinion that the termination of his/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*). This could, for example, apply in case of termination of the employment contract after a long-term disability or in a situation where the employee is wrongly dismissed for business economic reasons, but where, in the meantime, the relationship with the employer is irreparably disturbed.

1 In Dutch: "*Besluit voorwaarden in mindering brengen kosten op transitievergoeding*".

Fixed-term employment

As of 1 January 2015, the employer will be obliged to inform the employee (including a managing director) at least one month before a fixed-term contract of six months or more ends of:

(i) whether the contract will be continued; and
(ii) what conditions will apply to the continued employment.

Penalties for non-compliance are as follows:

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

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

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

If an employer enters into consecutive fixed-term employment contracts with the same employee, the last employment contract entered into will terminate by operation of law, without the need for a notice of termination upon obtaining approval from the UWV. However, the total number of employment contracts entered into must not exceed three, and the total duration of these fixed-term employment contracts must not exceed two years. If more than three fixed-term

employment contracts are concluded between the same parties at intervals not exceeding six months, or if the total duration of consecutive employment contracts at intervals not exceeding six months is two years or more, the last employment contract will qualify as an employment contract for an indefinite period. In the latter scenario, the employer will consequently have to: (i) obtain prior approval from the UWV in order to give notice of termination of employment; or (ii) request the court to dissolve the employment contract (depending on the reason for termination).

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

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

15.3.1 Manifestly unreasonable dismissal

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

If an employee is of the opinion that the termination of his or 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. For example, this could apply in the event of termination of the employment contract after a long-term disability or in a situation where the employee is wrongly dismissed

supposedly for business economic reasons, but is due, in fact, to having an irreparably disturbed relationship with the employer.

15.3.2 Termination by mutual consent

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

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

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

15.3.3 Immediate termination for urgent cause

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

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. However, ultimately, only the competent court can assess whether the circumstances of a case at hand actually constitute an urgent cause justifying an immediate termination.

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

Managing director

The termination of the employment contract of a managing director (*statutair directeur*) that is appointed pursuant to the Articles of Incorporation of a legal entity differs from that of a regular employee. The reason is that a managing director has a twofold relationship with the company:
(i) a corporate relationship; and
(ii) an employment relationship.[2]

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

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

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.

As of 1 July 2015, 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 reasonable grounds; and/or (iii) the managing director could have been reassigned to another alternative position within the organisation 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. In cases where the managing director has been unable to work due to illness, the compulsory route as of 1 July 2015 will be the UWV.

A managing director is also entitled to the transition budget if:

(i) the employment contract has lasted for at least two years;
(ii) the managing director's termination is involuntary; or
(iii) a temporary contract will not be extended.

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

15.4 Works council

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

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

The management of the company and the Works Council must meet at least twice a year to discuss general subjects concerning the company. The management is obliged to provide the Works Council with relevant company data and documentation such as the financial results and the legal structure of the company. Furthermore, the management must inform the Works Council about the results and the prospects of the company. The Works Council is also entitled to receive information on the scope and content of the terms and conditions of employment with respect to different groups of employees within the company, including the general development of their remuneration.

Prior to the adoption of intended decisions that, for example, relate to the transfer of control of the company, the termination of or a major change in the company's activities, major investments, significant reorganisations, 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 statu-

tory 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.

15.4.1 Small companies

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

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

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

In the absence of a Works Council and an employee representative body, a company with at least 10 but less than 50 employees is obliged to give its employees the opportunity to meet with the management twice every calendar year during a personnel meeting. Furthermore, the employees in such a company should be given the opportunity to render their advice on any proposed decision that may lead to a loss of jobs or to major changes in the terms of employment or working conditions of at least 25 percent of the persons working in the company. The Dutch Works Councils Act provides the personnel meeting with the same advisory powers as an employee representative body in a company with at least 10 but less than 50 employees.

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

16

Social Securities and Pensions

16.1 The social security system

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

- National insurance
- Welfare provisions
- Employee insurance

16.2 National insurance

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

a) General Old Age Pensions Act

The General Old Age Pension Act (*Algemene Ouderdomswet* or "AOW") provides for a basic old-age pension for all residents of the Netherlands. The national pension benefit is accrued between the ages of 15 + 9 months and 65 + 9 months (2017) with 2 percent for every insured year, and differs for: (i) singles; (ii) single parents with children up to age 18; and (iii) married couples or registered partners. Until 2012, the standard 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.

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 >
AOW pension age (in years + months)	66 +4	66+8	67	67+3	Linked to increased life expectancy

At the same time, the age on which the AOW benefit will be accrued, increases accordingly. The AOW accrual currently takes place between 15 + 9 months and 65 + 9 months (2017). 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, will increase from 67 to 68 as of 1 January 2018.

b) Surviving Dependants Act

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

c) General Child Benefit Act

The General Child Benefit Act (*Algemene 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.

d) Long-term Care Act

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

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

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

The employer or the social security authorities will have to pay a mandatory income-related contribution of 6.65 percent (2017) of the maximum annual salary of EUR 53,697 (2017) to the Dutch health insurance institution.

16.3 Premiums

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

The premiums are, in general, levied up to an income of EUR 33,791 (2017). As of 1 January 2016, 17.9 percent is levied for the AOW premiums, while 9.65 percent is levied for the AWBZ and 0.10 percent for the ANW premiums. The AKW premium is 0 percent because it is funded by the government.

16.4 Welfare provisions

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

a) Social Securities Supplements Act (*Toeslagenwet*)
b) Invalidity Insurance (Young Disabled Persons) Act (*Wet arbeidsongeschiktheidsvoorziening jonggehandicapten* or "Wajong")
c) Older and Partially Disabled Unemployed Workers Income Scheme Act (*Wet inkomensvoorziening oudere en gedeeltelijk arbeidsongeschikte werkloze werknemers* or "IOAW")
d) Older Unemployed Workers Income Scheme Act (*Wet inkomensvoorziening oudere werkloze werknemers* or "IOW") (The IOW expired on 1 July 2016.)
e) Older and Partially Disabled Former Self-Employed Persons Income Scheme Act (*Wet inkomensvoorziening oudere en gedeeltelijk arbeidsongeschikte gewezen zelfstandigen*)
f) Participation Act (*Participatiewet*)
g) Artists' Work and Income Act (*Wet werk en inkomen kunstenaars*)
h) Act providing pregnancy and childbirth benefits to the self-employed (*Wet Zwangerschaps- en bevallingsuitkering zelfstandigen* or "ZEZ")
i) Social Support Act (*Wet maatschappelijke ondersteuning*)

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 will continue to exist until 2020. During the period 2015 - 2020, the IOW will be phased out.

16.5 Employees' insurance

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

*16.5.1 Sickness Benefits Act (*Ziektewet*)*

Under Dutch law, an employer is, in principle, obliged to pay 70 percent of the last salary (capped at 70 percent of the maximum daily wage) of the employee during the first 104 weeks of disability, or up to the date of termination of the employment contract if that date is earlier. During the first 52 weeks, the salary should be at least equal to the minimum wage. The maximum daily wage amounts to EUR 205.77 per workday (2017).

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 upon the IVA, as of 1 January 2007, full and permanently disabled employees are entitled to 75 percent of their last salary, maximised to the maximum daily wage. Based upon the WGA/WhK, partially disabled employees who meet the requirements are entitled to a wage-related benefit maximised to the maximum daily wage. In the first two months, the benefit amounts to 75 percent of

the monthly wages minus the current income. After these two months, the benefit amounts to 70 percent of the monthly wages minus the current income. The duration of this benefit can be three to 38 months, depending on one's employment history.

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

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

The basic WGA/WhK and IVA contributions, together with the basic contribution of the WAO and WIA (which also includes a contribution for childcare) are paid by the employer and are equal for all employers (in 2017, 6.66 percent of the annual salary maximised to an annual salary of EUR 53,697).

The percentage of the differentiated WhK and WGA per 1 January 2017 contribution depends on the disability risk of the company and whether the employers decided to either self-fund this disability benefit and/or insure this risk with private insurers or pay contributions to a government agency (UWV).

16.5.4 Unemployment Insurance Act

The Unemployment Insurance Act (*Werkloosheidswet* or "WW") insures employees and civil servants, under certain conditions, against the financial consequences of unemployment. The WW benefit for the first two months is 75 percent of the most recent salary (maximised by the maximum day wage) and 70 percent from then on. The duration of the benefit will depend on the labour 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. By 2019, the maximum unemployment benefits period will be a maximum of two years.

- Since 1 January 2016, the accrual of time for unemployment benefits has been reduced. During the first 10 years of employment, one month of unemployment benefits will be accrued during each year of service.

  In subsequent years, 0.5 months of unemployment benefits will be accrued during each year of service. Before 1 January 2016 accrued WW-rights retain their duration of 1 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 is there to stimulate people with an illness or handicap to work. These people are entitled to assistance, according to this Act, 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 may apply for employers who hire employees who are, for example, disabled or aged 56 or older ("mobility bonus"). To this end, detailed requirements apply.

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 (standard pension age for the AOW is 65 and nine months for 2017). 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. By 2023, the state pension age will be linked to life expectancy and will be calculated 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 labour 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. The retirement age will increase from 67 to 68 as of 1 January 2018.

After 2019, the retirement age will be linked to 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 percent to 1.9 percent; and
(ii) for an average pay system, from 2.25 percent to 2.15 percent.

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

As 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 percent to 1.657 percent; and
  (ii) for an average pay system, from 2.15 percent to 1.875 percent.

- The net contribution scales for the DC system have decreased accordingly.

- 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.

- The minimum offset has been amended.

- The pensionable salary that could be taken into account for tax-facilitated pension accrual has been maximised to gross EUR 103,317 (2017). This cap is expected to further decrease in the future.

- A net pension facility has been introduced for employees earning a gross salary of EUR 103,317 (2017) 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.

- 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.

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 labour contracts), existing collective labour 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 1,000,000. In this light, second-pillar pensions could be administered by the following pension providers:

- an industry-wide pension fund (this might be mandatory);
- a (multi) company pension fund (i.e. a self-administered fund);
- a general pension fund ("*Algemeen pensioenfonds APF*") (See 16.7.5, New pension providers);
- an insurance company that is licensed by the Dutch Supervisory Authorities;
- a licensed pension institution registered in another EU Member State; and
- a Premium Pension Institution (*Premiepensioeninstelling* or "PPI") (see 16.7.5, New 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 an individual pension plan with an insurer themselves (the so-called c-policy). Only the employer is entitled to set up a pension plan with a pension provider and to become the policyholder. An exception exists for existing c-policies (individual pension plans that were effective prior to 1 January 2007), 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:

- the determination of the pension contributions;
- the payment (terms) of the pension contribution;

- the information the employer provides the pension administrator;
- the proceedings when the employer does not meet the payment obligations concerning the pension contributions;
- the proceedings for drafting and changing the pension scheme in connection with the closing and changing of the pension agreement;
- the criteria and conditions for indexation;
- the assumptions and procedures for the decision-making on deficits, surpluses or profit-sharing;
- the termination conditions of the administration agreement with an insurance company, PPI or APF;
- the criteria the PPI applies for choosing an insurance company for the purchase of a pension benefit;
- the costs for the implementation of the pension schemes which can be deducted from the separated equity held by an APF;
- the costs which can be paid out of the contribution for the separate equity which is held by the APF; and
- the 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*); or
- 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 rarely promised by employers anymore.

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 in expectations and in the final result, the employees will collectively carry the actuarial/investment risks and benefits; and
- 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 the fundamental principles of the current Dutch pension system as much as possible (collectively, solidarity and compulsory membership). The Dutch Cabinet has indicated that it follows most of the conclusions and recommendations of the commissions.

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

As per 1 January 2015, the New Financial Assessment Framework Act (*Nieuw Financieel Toetsingskader* or "FTK", an updated version, in Dutch) became effective 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 percent).

- It is still possible to smooth discount rates over a (maximum) period of 10 years to determine the required contributions. It is also still possible to use the expected return on assets (as a discount rate) to determine the required contributions under certain conditions, including financing and future conditional indexations (instead of the solvency buffer).

- A 12-month moving average funding ratio has been introduced, replacing the previous point-estimate funding ratio. This is relevant for decisions related to indexation, benefit reductions and recovery plans.

- The maximum pensionable salary is capped at EUR 103,317 (2017). 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 percent.
  - Full indexation is only allowed at funding ratios higher than 130 percent (plan-specific and depending, in particular, on the maturity of the membership).
  - Current recovery plans no longer apply and are replaced by rolling 10-year recovery plans when funding ratios are below the full funding level.
  - Benefit reductions is now required when recovery to full funding within 10 years is not expected.
  - Reductions amount to one-tenth of the deficit.
  - Further benefit reductions apply when funding ratios are below 105 percent on six consecutive annual measurement dates.

In general, these changes that increased the size of funding targets result 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 employee, 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 (*Toekomst-perspectiefnota*) 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 which mutes yields (IV-C-R); and
   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 labour market.

The government will establish a framework for this transition in the upcoming period, in cooperation with the pension sector and the social partners, and endeavours to transit to the new pension system and the new pension agreements by 2020.

16.7.3 New pension fund governance

On 7 August 2013, part of the Strengthening Pension Fund Board Act (*Wet versterking bestuur pensioenfondsen*) came into force. The remaining part of this act 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; (iii) 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 Labour 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 Labour Foundation.

16.7.4 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, e.g. premium method, conditions for indexation, and choice of both national and international pension provider.

16.7.5 New pension providers

The European Pension Directive (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 API is to contribute to the attractiveness of the Netherlands as a country of residence for pension institutions.

The Dutch Cabinet has split the legislative process 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 API, 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 with 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 to transform their entities into an APF.

16.7.6 New act regarding 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.

16.7.7 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 of a revision of the IORP Directive, known as IORP II. 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 Member States have two years from then to transpose it into national law.

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 Current trends

Work permit requirements for Japanese nationals

Further to a ruling of the Dutch Council of State in 2014, Japanese nationals were no longer subject to work authorisation (a work permit) in order to perform work activities in the Netherlands. The work authorisation requirements will, however, be reintroduced as of 1 January 2017.

Implementation of the Intra-Corporate Transfer Directive

The Dutch implementation of the Intra-Corporate Transfer Directive (2014/66) (the "ICT Directive") entered into force on 29 November 2016. Multinationals that second employees to the Netherlands are impacted. The ICT Directive has introduced a European-wide standard to mobilise educated non-EU employees within the same group of companies throughout the EU. The scope of the ICT Directive overlaps with several other permit categories available in the Netherlands (e.g. the Highly

Skilled Migrant permit, the intra-company transfer work permit and the European Blue Card). These other permit categories remain available, but permit applications thereunder will not be granted if the ICT permit conditions are triggered.

17.3 Key government agencies

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

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

17.4 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; El Salvador; Macedonia; Grenada; Guatemala; Vatican City; Honduras; Israel; Japan; Kiribati; Malaysia; Marshall Islands; Mauritius; Mexico; Micronesia; Moldavia; Monaco; Montenegro; New Zealand; Nicaragua; Panama; Palau; Paraguay; Peru; Salomon Islands; Samoa; San Marino; Seychelles; Serbia; Singapore; South Korea; Saint Kitts and Nevis; Saint Lucia; Saint Vincent and the Grenadines; East Timor; Tonga; Trinidad and Tobago; Tuvalu; Vanuatu; United States of America; United Arab Emirates; Uruguay; 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 authorisation (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 authorisation to perform work activities. Consequently, in the absence of a work authorisation 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 authorisation, provided that the activities are limited in duration (the maximum is four weeks within a 13-week period).

Furthermore, a work permit is not required for a foreign employee who will be in the Netherlands to install, adapt to and/or provide instructions on the use of software 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 authorisation. The majority of intended work activities in the Netherlands will not qualify for an exemption.

17.5 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, Switzerland, Vatican City State, Japan, Canada, Australia, Monaco, South Korea, Unites States of America and New Zealand.

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

c) If the residence permit does not provide work authorisation 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 organisation in the Netherlands. In the absence thereof, the employer can be penalised (not the employee). The next paragraph of this chapter provides further information regarding work permit requirements.

Provisional residence permit (MVV)

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; or
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 labour 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.

17.6 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 labour 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* for 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 labour market scan/reporting obligations, it is advised to consult our Immigration Desk in advance. In order to avoid an 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 can be used that exempts the company from having to meet the foregoing obligations and/

or that allows for permit application via an accelerated/prioritised procedure.

Permit application procedures require extensive preparation, which can easily take several weeks (notwithstanding the time it takes the authorities to process the application). This is necessary not only for the application as described above, but also with permit applications for 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').

17.7 Highly skilled migrants

As of 2004, skilled and highly educated foreign nationals do not require a separate work permit for employment in the Netherlands. Instead, a residence permit for a Highly Skilled Migrant will suffice. In order to define a "Highly Skilled Migrant" the choice has been made for one objective criterion, the salary. A Highly Skilled Migrant is a foreign non-EU/EEA national who will be employed in the Netherlands and who will receive a gross monthly salary of at least EUR 4,240 (EUR 4,579.20, including 8 percent holiday allowance) or at least EUR 3,108 (EUR 3,356.64, including 8 percent holiday allowance) if age 30 years or younger. The foregoing salary levels reflect the thresholds applicable in 2016. As of 1 January 2017, and in accordance with market price movements, the salary thresholds will be raised.

Employers who want to hire Highly Skilled Migrants must hold so-called authorised 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 authorised sponsors yet should consider an additional two to three months in order to apply for authorised sponsorship first.

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 authorised sponsorship.

A Highly Skilled Migrant may receive a residence permit for up to five years, assuming that his/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 require a work permit to perform work activities in the Netherlands. Upon receipt of their residence permits, they will obtain residence and work privileges similar to those granted to the Highly Skilled Migrant.

The European Blue Card

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

In order to qualify for the European Blue Card, the foreign national must have an employment contract for at least one year and must earn a gross minimum of EUR 5,365.44 per month (2016 rate, including holiday allowance). On 1 January 2017, this salary threshold will be raised.

Furthermore, the foreign national must have a degree for the completion of higher education that lasted at least three years. The degree

must be accredited, measured against the Dutch educational system (*Nuffic*).

A potential advantage for companies is that they do not require the authorised 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/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/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 (labour 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 authorisation.

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

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

18

Personal Income Tax

18.1 General

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

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

18.2 2001 Personal Income Tax Act

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

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

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

Income in Box I is taxed at a progressive rate with a maximum of 52 percent. Box II is taxed at a flat rate of 25 percent (2017) and income in Box III is taxed at a flat rate of 30 percent. Box III income is set at a fixed notional yield of 2.87, 4.60 and 5.39 percent (tax brackets apply) respectively, depending on the taxpayer's total assets. There are impermeable "walls" between the three boxes: losses that the taxpayer incurs in Box I may be set off (i.e. carried backward or forward, against Box I income only) and the same applies to losses in Box II. The taxable income in Box III is calculated at the applicable national yield percentages of the fair market value of the taxpayer's property, minus the amount of the taxpayer's outstanding debts and a basic allowance of EUR 25,000 (for 2017). In other words, the tax burden on savings and investments that fall within the scope of Box III, minus debts and basic allowance, is between 0.86 and 1.62 percent (national yield percentage of income x 30 percent tax rate).

18.3 Business profits in income tax

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

long tradition of government support for entrepreneurship. Therefore, certain tax reductions are available for entrepreneurs.

18.4 Income from employment

18.4.1 Managing and supervisory directors

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

18.4.2 Other employees

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

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

18.5 Income tax ruling

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

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

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

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

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

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

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

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

The individual must have a specific expertise. This specific expertise is deemed to be present if the annual salary exceeds EUR 52,857 (2017) (gross salary inclusive of the 30 percent ruling allowance).[1]

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

For individuals with a Master's degree (highly educated individuals) under the age of 30 and PhD graduates under the age of 30, a reduced salary requirement of EUR 40,179 (2017) (gross salary inclusive of the 30 percent ruling allowance) is applicable.[2] Researchers are excluded from the salary requirement.

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

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

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

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

The eight-year period commences on the first day of employment or on prior arrival in the Netherlands. However, this period will be reduced by counting all periods of previous stays and/or work performed by the individual in the Netherlands in the last 25 years.

1,2 Please note that if the salary of the employee is below the salary requirement, the 30% ruling could still be partially applied if the annual salary is at least gross EUR 37,000 (2017) or EUR 28,125 (2017). Instead of a tax-free compensation of 30%, a lower percentage will then be applied.

18.5.3 Status of the employer

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

18.6 Levy of taxes

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

On balance, this may result in a refund or payment of personal income tax. Non-residents are not eligible for personal deductions (e.g. for alimony payments or losses incurred for venture capital investments). The only exception is the deduction for mortgage interest paid on a house located in the Netherlands, provided that certain requirements are met.

Labour costs are deductible by means of a "labour tax credit" for both resident and non-resident taxpayers.

18.7 Income tax rates

18.7.1 General tax credit

The general tax credit is not specifically related to one of the boxes and is set off against the combined amount of tax due in respect of Boxes I, II and III incomes. Some specific expenses that are not related to one of the boxes (e.g. some personal obligations or exceptional expenses) are deducted by means of a reduction on Boxes I, II, or III incomes. The maximum general tax credit is EUR 2,254 (2017) for individuals up to the age of 65 and nine months.

18.7.2 Personal income tax rates

The following tax and national insurance rates will apply in 2017 for individuals up to the age of 65 and nine months who are residing in the Netherlands.

The rate in the first bracket (36.55 percent) consists of 8.90 percent for income tax and 27.65 percent for national insurance contributions.

The rate in the second bracket (40.80 percent) consists of 13.15 percent for income tax and 27.65 percent for national insurance contributions. The rates in the third and fourth brackets consist of income tax only.

Tax and premium rate	Taxable income
36.55%	up to EUR 19,982
40.80%	EUR 19,982 up to EUR 33,791
40.80%	EUR 33,791 up to EUR 67,072
52%	in excess of EUR 67,072

The following tax and national insurance rates will apply in 2017 for individuals born after 1 January 1946 who are older than the age of 65 and nine months and also reside in the Netherlands. The rate in the first bracket (18.65 percent) consists of 8.90 percent for income tax and 9.75 percent for social security contributions. The rate in the second bracket

(22.90 percent) consists of 13.15 percent for income tax and 9.75 percent for social security contributions. The rates in the third and fourth brackets consist of income tax only.

Tax and premium rate	Taxable income
18.65%	up to EUR 19,982
22.90%	EUR 19,982 up to EUR 33,791
40.80%	EUR 33,791 up to EUR 67,072
52%	in excess of EUR 67,072

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

Tax and premium rate	Taxable income
18.65%	up to EUR 19,982
22.90%	EUR 19,982 up to EUR 34,130
40.80%	EUR 34,130 up to EUR 67,072
52%	in excess of EUR 67,072

18.7.3 Special rates

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

18.8 Substantial interest

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

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

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

An individual who owns a substantial interest is taxed on all of the benefits derived from that holding, including periodic benefits, such as dividends and capital gains received upon the disposal of shares in the company, at a flat rate of 25 percent (2017). A capital gain or loss consists of the transfer price minus the acquisition price. A capital loss from a subscribed capital may only be deducted from income from substantial interests in Box II.

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

18.8.1 Fictitious salary

An employee or a manager who works in a company in which he or she has a substantial interest has to take a fictitious salary into account, which will be taxed in Box I. The salary earned in a calendar year is, in principle, at least EUR 45,000 (2017) per employment contract. As a result, an employee with a substantial interest has to earn at least the fixed amount of EUR 45,000 (2017), which is treated as taxable income.

However, the fictitious salary may be higher or lower, depending on the specific circumstances of employment. The company has to pay wage tax over this fictitious salary. The wage tax is a deductible salary cost item for CIT purposes. As of 1 January 2010, the company should not file wage tax returns if the manager will not receive a salary from the company and the fictitious salary is less than EUR 5,000 per year (e.g. for passive companies).

19

Corporate Income Tax

The Dutch Corporate Income Tax Act (*Wet op de vennootschapsbelasting 1969* or "CITA") 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 world-wide income.

19.1.1 Tax rates

Up to and including 2017, profits up to EUR 200,000 are taxed at a CIT rate of 20 percent and profits exceeding EUR 200,000 are taxed at a rate of 25 percent.

The first bracket to which the 20 percent rate applies will be increased over a period of four years. The profit bracket will be increased from EUR 200,000 to EUR 250,000 in 2018, from EUR 250,000 to 300,000 in 2020 and from EUR 300,000 to EUR 350,000 in 2021.

19.1.2 Residency

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

19.1.3 Computation of taxable profits

The CITA 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 (50 percent 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 nine 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 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

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

a) One or more patents have been granted to the taxpayer and these patents are of material significance for the exploitation of the invention; and/or
b) The taxpayer benefited from the R&D Wage Tax Facility (*Wet Bevordering Speur-en Ontwikkelingswerk* or "WBSO"), which is further explained below, in connection with the R&D that was undertaken for the development of the invention.

The costs of R&D are immediately and fully deductible from the taxable profit and must be recovered first. The qualifying income is taxed at a 5 percent rate to the extent it exceeds the previously reported costs.

Please note that, on 20 September 2016, the government presented the Tax Plan 2017. The bill includes changes in the current innovation box legislation. The proposed legislation is an implementation of the Organization for Economic Co-operation and Development's (OECD) Action Plan 5: Countering Harmful Tax Practices.

The new rules for the Dutch innovation box regime came into effect on 1 January 2017. 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 percent, which may be reduced by applicable tax treaties. Furthermore, no dividend withholding tax is levied on dividend distributions to companies residing in a Member State of the EU that have a minimum shareholding of 5 percent in the nominal paid-up share capital of the Dutch entity, to the extent that the EU shareholder has one of the legal forms as set forth in the appendix of the EU Parent-Subsidiary Directive.

If a foreign company established in an EU Member State is exempt from CIT (such as a pension fund) and that company would also be exempt from CIT if it would have been established in the Netherlands, any Dutch dividend withholding tax that has been withheld upon a dividend distribution to that company will be refunded. This does not apply if the activities of the foreign company are similar to that of a

Dutch investment company or an exempt investment fund (please see Sections 19.14, Fiscal investment institution, and 19.15, Exempt investment institution). A change of law has been adopted by the Dutch parliament, which (under conditions) allows taxpayers who can claim a *refund* of Dutch dividend withholding tax under current law to opt for an exemption of Dutch dividend withholding tax in the described situations instead. The amended legislation is expected to come into effect later in 2017.

The Dutch Cooperative

A profit distribution by a Dutch Cooperative is, in principle, not subject to dividend withholding tax. Consequently, using a Dutch Cooperative as a top holding entity in the Netherlands may allow dividends to be expatriated from the Netherlands free of Dutch dividend withholding tax.

However, a profit distribution by a Dutch Cooperative becomes subject to Dutch dividend withholding tax if:

(i) the main (or one of the main) purpose(s) of using the Dutch Cooperative is to mitigate the levy of Dutch dividend withholding tax or foreign (withholding) tax; and
(ii) an artificial arrangement or a series of artificial arrangements is in place.

No artificial arrangement is in place (and the profit distribution by the Dutch Cooperative is therefore not subject to Dutch dividend withholding tax) if either:

(i) the Dutch Cooperative has independent real economic significance; or
(ii) the membership right of a member of the Dutch Cooperative can be allocated to a business enterprise conducted by that member. This criterion is met if the member of the Dutch Cooperative is the top holding company with substantial management involvement in the group activities. The criterion is also met if the member of the Dutch Cooperative 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.

A profit distribution by a Dutch Cooperative is, in principle, not subject to Dutch dividend withholding tax if the membership right of a member of the Dutch Cooperative can be allocated to a business enterprise conducted by that member. However, if the membership right of a member of the Dutch Cooperative can be allocated to a business enterprise conducted by that member, the profit distribution by the Dutch Cooperative may still become subject to Dutch dividend withholding tax in the following situation:

(i) the Dutch Cooperative holds an interest in a company that resides in the Netherlands;
(ii) the Dutch Cooperative distributes profits that consist of the **existing** Dutch profit reserves of that company which would normally be subject to Dutch dividend withholding tax; and
(iii) the Dutch Cooperative does not have independent real economic significance.

If a Dutch Cooperative is subject to Dutch dividend withholding tax, the domestic Dutch dividend withholding tax rate of 15 percent is often reduced (even to 0 percent) by a tax treaty between the Netherlands and the jurisdiction in which the member of the Dutch Cooperative is resident.

19.1.7 Non-resident shareholder taxation

A non-resident entity that owns at least 5 percent 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 percent Dutch CIT in relation to profit distributions, capital gains and interest from loans in connection with the substantial shareholding. This is an anti-abuse rule that only applies if:

(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 or Dutch dividend withholding 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.

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:

- 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 percent), provided that the shares cannot be allocated to a(n) (active) business enterprise and are not held for tax avoidance (see 19.1.7); and
- 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 percent for profits exceeding EUR 200,000 and 20 percent for profits up to EUR 200,000).[1]

1 This 20 percent bracket will be increased step-by-step to EUR 350,000 from 2018 until 2021; please see Section 19.1.1.

19.2.5 Foreign branch profits

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

Under the grandfathering rules, applicable as of 1 January 2012, foreign branch profits realised up to 2011 can be utilised in future years as a tax credit. Foreign branch losses that have been deducted will not be subject to immediate recapture and will continue to be subjected to the old recapture rules. Both the branch profits and branch losses should be determined in a separate decision by the Dutch tax inspector.

19.3 Branch versus subsidiary

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

The main differences are described below.

a) Most tax treaties provide that certain auxiliary activities carried out in the Netherlands do not constitute a branch for CIT purposes and, as a result, do not give rise to Dutch taxation. This exception does not apply to Dutch subsidiaries.

b) Profits from a Dutch branch may be transferred to its headquarters free from any withholding tax. Dividends paid by a subsidiary to a foreign parent company are, however, subject to Dutch dividend withholding tax at the ordinary rate of 15 percent (reduced to a lower percentage, or even to zero, by virtue of a tax treaty or EU law).

c) Interest 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 percent or more of the nominal paid-up share capital of the subsidiary, a so-called qualifying shareholding,

unless the shareholding in the subsidiary is (deemed to be) held as a passive investment. Such shareholding is classified as a so-called "low-taxed passive investment participation".

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

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

The Subject-to-tax test

If a subsidiary is not subject to a tax on its profits, resulting in a tax levy that is considered realistic according to Dutch standards (usually considered to be a rate of at least 10 percent), the subsidiary does not meet the Subject-to-tax test. Whether or not a subsidiary is subject to a realistic levy of tax on its profits has to be determined by comparing the effective tax rate to which the subsidiary is subject with the rate that would 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 percent 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 realised on loans that are used to fund participations may be recognised 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. Please note that 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 realises 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.

19.4.3 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 percent 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".

19.4.7 Mutual investment funds and private equity funds

In respect of mutual investment funds, the participation exemption regime used to only be available to 5 percent 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.

19.4.8 Hybrid instruments

Formerly, Dutch tax law allowed 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.

19.4.9 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". Please note that 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. Please note that, 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, provided that:

- 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; and
- 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; or
- 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. A change of the definition of "affiliated entity" came into effect on 1 January 2017 to combat certain private equity and joint venture structures. Under the new definition, 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 that:

- the debt and the related transaction are predominantly business-driven; or
- the interest payments are effectively taxed in the hands of the creditor at a tax rate of 10 percent 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 realised 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 percent or more) from an arm's-length interest rate.

If the redemption date of the loan is postponed, the term of the loan will be deemed extended accordingly as of the date of issuance of the loan.

19.6.4 Thin capitalisation rules

The thin-cap rule described below was abolished on 1 January 2013, but it may still be relevant with respect to fiscal years for which a final tax assessment is yet to be issued by the Dutch tax authorities.

The CITA included restrictions on the deductibility of interest expenses for companies that are largely financed with debt.

In principle, the thin capitalisation rules provide for a fixed maximum 3:1 debt-to-equity ("D/E") ratio, which means that interest (including expenses) will not be deductible if the total debt exceeds three times the total equity plus EUR 500,000.

Whereas all debt is taken into account in establishing the D/E ratio, only interest paid to related parties may be disallowed (and only if such interest exceeds the interest received from related parties). Consequently, interest on third-party debt will remain fully deductible. Nevertheless, under certain circumstances, third-party debt may be considered related-party debt if guaranteed by a related company.

The basic rules are reasonably clear: the D/E ratio is established on an annual basis by taking into account the non-weighted average equity at the beginning and at the end of the year. In addition, a *de minimis*

rule is applicable, whereby interest on the first EUR 500,000 of debt in excess of the ratio remains deductible. However, if other restrictions on interest deductions apply (e.g. Article 10a CITA, see 19.6, Limitations on deductions of interest), the interest on the first EUR 500,000 may still be non-deductible.

For the purpose of calculating this D/E ratio, "debt" is defined as the balance of all assets and liabilities that (can) lead to taxable or deductible interest (e.g. for a company with 200 equity, 1,400 debt and 800 loans receivable, and hence 600 net debt – all interest remains deductible), to the effect that the thin capitalisation rules will not affect the mere borrowing and lending of funds within a group. Assets and liabilities, such as bank accounts or financial leases, also have to be included in the calculation of the D/E ratio. If a debt falls within the scope of another article of the CITA which restricts interest deduction, such debt is not included in the calculation of the D/E ratio.

However, the interest relating to this debt is taken into account as non-deductible interest for the thin capitalisation rules. Furthermore, "equity" is the company's equity for tax purposes, excluding fiscal reserves and with a deemed minimum of EUR 1. As an alternative to applying the fixed D/E ratio, a company may, from year to year, decide to apply the average D/E ratio of the (international) group to which it belongs as its maximum D/E ratio. Unlike the fixed ratio for this purpose, the respective D/E ratios will be established on the basis of the respective statutory (consolidated) accounts, if possible, following the same accounting principles.

This alternative may serve companies active in a business with relatively high debt financing or with a high D/E ratio due to losses.

19.6.5 Interest deduction rules for excessive participation debt

This rule limits the deductibility of excessive interest expenses and costs related to debt that is used for the acquisition of shares in, or capital contribution to, the share capital of subsidiaries that qualify for the Dutch participation exemption. Acquisitions of, or capital contributions to, a subsidiary that see to an expansion of the operational

activities of the group to which the taxpayer belongs are not targeted by the new rule. Furthermore, the new rule contains an annual allowance for the first EUR 750,000 of excessive interest expenses.

The rule only applies to the extent that the annual average cost price of the subsidiaries exceeds the annual average equity for tax purposes. This excessive part is deemed to be financed out of debt (the "Participation Debt"). The Participation Debt is reduced with debts of which the interest expenses are not deductible pursuant to other provisions in Dutch tax law. The potential limitation of the deduction of interest and costs related to the total debt outstanding amounts to the total interest expenses and costs multiplied by the factor Participation Debt divided by the total annual average debt outstanding. The total annual average debt outstanding includes both related party debt as well as third-party debt, and excludes loan payables of which the interest expenses are not deductible pursuant to other provisions in Dutch tax law. Assets and liabilities attributable to a foreign branch are not taken into account when determining the non-deductible interest expenses under this rule.

Acquisitions, expansions of, or capital contributions to subsidiaries that relate to an expansion of the operational activities of the group are not targeted by the rule, provided that the expansion of the activities commences within 12 months before or after the acquisition, expansion or capital contribution. However, this exception is not applicable if: (i) the debt financing of the acquisition or contribution is structured in such a way that interest expenses can also be deducted in another country (a so-called "double dip"); (ii) the debt financing is used by the Dutch taxpayer to grant a hybrid loan of which the interest expense is deductible abroad and not taxed in the hands of the Dutch taxpayer, and the interest expense due by the Dutch taxpayer is not subject to reasonable taxation in the hands of the lender; or (iii) the transaction is unlikely to have been executed by the Dutch taxpayer if no interest could have been deducted in the Netherlands.

During the parliamentary debate, two important amendments were made:

(i) Dutch taxpayers that are actively involved in group financing activities are allowed to disregard debts – as well as the interest and costs relating to these debts – insofar as these debts are connected to group loans receivable.

(ii) In determining the Participation Debt, the taxpayer has the option to disregard 90 percent of the fiscal cost price of subsidiaries that were acquired (or to which capital was contributed) in fiscal years that started on or before 1 January 2006.

Any potential overlap of this new rule with the interest limitation rule regarding acquisition holdings (as described in Section 19.6.6) has been avoided through a regulation issued by the State Secretary of Finance.

19.6.6 Interest deduction rules for acquisition holdings

It is common practice to use acquisition holdings to structure the acquisition of a Dutch target company. Such acquisition is commonly partially financed with debt at the level of the acquisition holding. Subsequently, the acquisition holding forms a fiscal unity with the Dutch target company, or (de)merges so that interest expenses can be set off against the operating profits.

The deduction of the interest is disallowed at the level of the Dutch target company if and to the extent the D/E ratio of the fiscal unity or (de)merged company exceeds 60 percent of the acquisition price of the target company. Debt on which the interest is not deductible on the basis of other provisions will not need to be taken into account when determining the debt level.

The 60 percent is reduced to 55 percent in the second year, 50 percent in the third year, etc., until it reaches 25 percent of the acquisition price. Notwithstanding, this provision contains a *de minimis* rule in the sense that there is an allowance for the first EUR 1 million of interest expenses. The excessive interest expenses will only be deductible from

the acquisition holding's own taxable profit and not from the target company's taxable profit. Interest charges that are not deductible on the basis of the new rule can be carried forward to future years and may only be settled with profits from the acquisition holding company. Profits of a target company, the acquisition price of which is fully financed out of equity or is fully repaid, will be regarded as profit of the acquisition holding company.

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 percent 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 percent of the expected gross royalty payments to be made by it, or EUR 2 million and at least 50 percent of that amount has been paid in advance to the licensor.

19.8 Anti-dividend stripping

A refund, reduction, exemption, or credit of Dutch dividend withholding tax on the basis of Dutch tax law or on the basis of a tax treaty between the Netherlands and another jurisdiction will only be granted under the Dutch Dividend Tax Act of 1965 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 it may be assumed that:

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; and

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 percent.[2]

Investment	Percentage
EUR 0 - EUR 2,300	0%
EUR 2,301 - EUR 56,192	28%
EUR 56,193 - EUR 104,059	EUR 15,734
EUR 104,060 - EUR 312,176	EUR 15,734 less 7.56% of the amount exceeding EUR 104,059
EUR 312,177 and more	0%

2 2017 amounts.

In addition, an investment allowance of 58 percent is available for energy-saving investments (up to EUR 120 million). Furthermore, an investment allowance of 13.5 percent, 27 percent or 36 percent is available for certain qualified environment investments (but not if an energy investment has already been applied for).

If, within five years after the beginning of the calendar year in which the investment took place, more than 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 *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, 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 ("equalisation reserve").

19.10 Losses

A tax loss incurred during a fiscal year may be carried back to the preceding year or carried forward for nine subsequent years, subject to certain detailed anti-abuse provisions. This means, for example, that a tax loss in 2017 may be credited with taxable profit of 2016 or 2018 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 percent of the ultimate ownership of a company changed as compared to the oldest year in which the losses were incurred; and (ii) the change of control occurred after the company terminated or largely reduced its former business activities.

Losses incurred in years during which the taxpayer qualifies as a "holding company" (i.e. for 90 percent of the year, 90 percent or more of the company's activities consist of holding or group financing activities) may solely be set off against profits derived in years during which the taxpayer also qualifies as a holding company. This rule is intended to prevent pure holding companies from initiating active operations with the (exclusive) aim of setting off their (holding) losses against operating profits. A holding company may also not carry forward its losses if a holding company increases the balance of its intercompany loans and liabilities (compared to the balance in the year when the loss was incurred) in order to generate additional interest income, which is to be set off against previous losses.

The law provides for a safe harbour rule: companies with at least 25 full-time employees who are not engaged in the holding (management) of subsidiaries or the financing of affiliates are not deemed holding companies for loss compensation purposes.

19.11 Liquidation

Capital gains arising from the liquidation of a company are subject to CIT at normal rates, unless an exemption applies (e.g. participation exemption for a capital gain on a qualifying shareholding).

Liquidation distributions to shareholders are treated as follows:

- Repayment of paid-in capital, including share premiums and 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 percent 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 realised 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 percent CIT rate.
e) The shares acquired by the transferring company are not disposed of within three years.

Under Dutch tax law, mergers and demergers may be exempt from Dutch CIT, provided that certain requirements are met. In general, the legal merger and demerger exemption does not apply if the merger/demerger is predominantly pursued with the aim of avoiding or deferring taxation.

The Ministry of Finance issued several regulations in the form of "standard conditions" that must be met for the merger exemption to apply. This exemption has 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 percent 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; and
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 (an 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 percent is held. The main advantages of the fiscal unity regime are that profits and losses may be freely set off among members of the fiscal unity and members can avoid the realisation of income on transactions between them. After the formation of a fiscal unity, only the parent company is actually recognised as a taxpayer for Dutch CIT purposes. Any income or expense at the level of the subsidiary company is automatically aggregated at the level of the parent company.

The most important characteristics of a fiscal unity are as follows:

a) To opt for fiscal unity, a parent company must (directly or indirectly) own at least 95 percent of the nominal paid-up share capital of a subsidiary, including statutory voting rights and profit entitlement.
b) Under certain conditions, qualifying subsidiaries may enter into a fiscal unity with the parent company during the fiscal year (e.g. as of the date of acquisition of the subsidiary).
c) Fiscal unities may be ended with respect to one or more consolidated subsidiaries during the course of the fiscal year (e.g. as of the date of disposal of the subsidiary).
d) A company leaving the fiscal unity may, under certain conditions, retain losses that have not yet been set off and that were incurred during the fiscal unity period, provided that these losses were attributable to that company.
e) Under certain conditions, Dutch permanent establishments of foreign companies may enter into fiscal unity with a Dutch (resident) company or another Dutch branch of a foreign company, provided there is a shareholding of at least 95 percent between the companies.

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

19.14 Fiscal investment institution

A fiscal investment institution (*Fiscale Beleggingsinstelling* or "FBI") enjoys a beneficial tax regime, provided certain requirements are met. Based on this regime, profits are subject to CIT at a rate of 0 percent. Profit distributions by an FBI to its shareholders will give rise to Dutch dividend withholding tax at a rate of 15 percent, unless reduced by an applicable tax treaty or the Parent-Subsidiary Directive.

In order to qualify as an FBI, a company must meet the following cumulative requirements throughout the entire tax year:

a) The FBI must be set up as a Dutch public company (N.V.), a Dutch limited liability company (B.V.), an open-ended investment fund for joint account (*fonds voor gemene rekening* or "FGR") or a comparable foreign legal entity established under the laws of Bonaire, Sint Eustatius, Saba (the BES Islands), Aruba, Curacao, Sint Maarten, an EU Member State or any other state in case a double tax treaty has been concluded with that other state that contains a 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 maximised at 60 percent of the tax book value of real property investments and 20 percent of the tax book value of other investments.

d) An FBI is required to distribute all of its profits to its shareholders within eight months after the end of its financial year. An FBI is allowed to exclude the net balance of capital gains and losses from its taxable profit and allocate this balance to a so-called reinvestment reserve. Distributions from the reinvestment reserve are not subject to Dutch dividend withholding tax under certain circumstances.
e) If an FBI is listed on a financial market within the meaning of the Financial Supervision Act (WFT) or if the FBI or its manager (*beheerder*) has a licence under the Financial Supervision Act (or has been exempted from being licensed):

    i) not more than 45 percent of the FBI may be held by an entity (or by two or more related entities, as defined by law) subject to a profit tax; and
    ii) a single individual may not hold an interest of 25 percent or more.

f) If the FBI is not listed on a financial market or if the FBI or its manager does not have a licence under the Financial Supervision Act (nor has it been exempt from being licensed):

    i) at least 75 percent 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 percent or more.

g) 25 percent 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 percent or more in the FBI, unless the latter entity is an FBI listed in a financial market within the meaning of the Financial Supervision Act.

The FBI must restrict its activities to passive real estate investments; it is not permitted to develop real estate itself. Real estate development activities are allowed under the following limitations:

a) The FBI is allowed to hold shares in a subsidiary that conducts real estate development activities. Such subsidiaries should be subject to tax at the general CIT rate. If the FBI wishes to develop its own real estate investments, the subsidiary may develop the real estate held by the FBI in exchange for an arm's-length remuneration.
b) The improvement and expansion of existing real estate by the FBI itself are allowed as long as the investments do not exceed 30 percent of the market value of the real estate, 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 has been concluded with that other state that contains a non-discrimination provision.
- The VBI is set up as an open-end investment fund.
- The activities of the VBI consist of collective passive investments.
- The VBI is only allowed to invest in "financial instruments," as defined in the Markets in Financial Instruments Directive or MiFID (e.g. shares, bonds, options, futures, swaps). It is allowed to invest in

Dutch and foreign real estate indirectly (i.e. via a non-transparent, Dutch or foreign entity or real estate fund).

A VBI cannot credit withholding taxes incurred as it is not subject to tax. Since it is not subject to tax, the VBI is not eligible to tax treaty protection. Withholding tax levied on income received by the VBI will be an actual cost for the VBI.

The VBI has no specific shareholder requirements; both individuals, corporations 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 (realised and unrealised) 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 should 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.

As per 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 http://www.oecd.org/ctp/transfer-pricing/beps-action-13-country-by-country-reporting-implementation-package.pdf; 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 filed with the Dutch tax authorities. 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 ultimately on the last day of the relevant fiscal year 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. The first notification deadline would thus be 31 December 2016. However, for the first year, the notification requirement in the Netherlands has been extended until 1 September 2017. Thus, before this date, MNEs may need to make a decision on which

entity in the group will act as a surrogate parent for CbCR purposes. The notifications should be made online via the notification tool prepared by the Dutch tax authorities.

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 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 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.

Failure to comply with the information and documentation obligations mentioned above can result in a reversal of the burden of proof from the tax authorities to the taxpayer, or administrative penalties. Intentionally not meeting the obligations or any gross negligence may (in extreme cases) also result in criminal prosecution. The 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 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.[3] 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 characterised as pragmatic. All the OECD transfer pricing methods are accepted and so are Pan-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 organisations. 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.

3 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.

As such, taxpayers should be able to better substantiate that their supply chain structure and their intercompany transactions are in line with value creation.

19.16.3 Certainty in advance

APAs and ATRs are encouraged and the Dutch tax authorities aim to be the premier service providers in that they strive to provide for relatively efficient processes in achieving advance certainty for a mutually agreed period of time. Please 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 finalised within eight weeks upon receipt of the request. This period can be extended if additional information is required to assess the request properly.[4] 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.[5] The tax authorities aim to process and finalise all APA and ATR requests in the shortest possible period.

19.16.4 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. Thus, Member States are required to adopt and publish relevant provisions necessary to comply with this directive by 31 December 2017, which shall be applied from 1 January 2017. At the time of printing, the Netherlands was still developing the legislation that should apply from 1 January 2017.

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

5 Handling procedure for APA requests, Decree DGB 2014/3098, 12 June 2014.

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 1 January 2012. However, there will be 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.

Considering the new instrument on the automatic exchange of information, taxpayers should consider whether an APA or ATR is preferred, or if there are other ways to obtain the required level of certainty in advance.

19.17 Competent authority/Arbitration Convention

Although the Dutch transfer pricing regime can be characterised 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 residing in the Netherlands for tax treaty purposes who is subject to economical or juridical double taxation is allowed to invoke competent authority proceedings under an applicable bilateral tax treaty. All bilateral tax treaties for the avoidance of double taxation concluded by the Netherlands contain a provision similar to Article 25 of the OECD Model Convention. Since 1992, the Netherlands has generally been in favour 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 favours 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 EEIG and SE

19.18.1 EEIG

Since July 1989, it has been possible to form an EEIG (Europees Economisch Samenwerkingsverband or EESV) in the Netherlands. An EEIG must be registered with the Trade Register of the Chamber of Commerce. An EEIG with an official address in the Netherlands is considered a legal entity under Dutch law. A regulation has been published with respect to the taxation of EEIGs.

The following general rules apply:

a) EEIGs are "tax-transparent" and 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:

    i) two companies based in two different EU Member States; or
    ii) an SE.

d) Through a change of corporation form from an eligible company (e.g. an N.V.) to an SE.

Although there are rules restricting the way that an SE may be incorporated, anyone can become a shareholder. An SE is able to transfer its registered office from one EU Member State to another. In addition, a group that has companies throughout the EU can now create a uniform management structure by forming an SE, since an SE may opt for a one-tier or a two-tier board system. Another practical aspect is that the formation of an SE makes international legal mergers possible between companies incorporated under the laws of an EU Member State.

19.19 EU Interest and Royalty Directive

The EU Interest and Royalty Directive took effect on 1 January 2004. Companies that are directly related and are able to meet certain conditions are no longer subject to withholding tax on interest and royalty payments. Furthermore, EU Member States have the option not to apply the directive if companies do not meet a direct shareholders' test for an uninterrupted period of two years. The directive is effective for EU Member States. Since the Netherlands does not levy a withholding tax on interest and royalty payments, the effects of the directive on Dutch legislation is limited.

19.20 EU Savings Directive

The EU Savings Directive was repealed by the European Council with effect from 1 January 2016. The EU Savings Directive required the automatic exchange of information between Member States on private savings income. With effect from 1 January 2016, the scope of the exchange based on the EU directive on administrative cooperation in the field of taxation ("Mutual Assistance Directive") has been extended to include interest, dividends and other types of income. The EU Savings Directive is therefore no longer necessary.

19.21 EU Parent-Subsidiary Directive

This directive gives complete relief from double taxation in the EU on dividend income by abolishing dividend withholding tax on dividends flowing from a subsidiary to its parent company (or to a permanent establishment of the parent company) within the EU, provided that the companies have a qualifying parent-subsidiary relationship. The withholding tax exemption may be applied under the directive if all of the following criteria are complied with:

a) The parent company holds a minimum of 10 percent of the capital of the subsidiary.
b) Both 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 percent or more of the nominal paid-up share capital. This means that the Dutch rules toward EU shareholders are more favourable than those required by the EU participation exemption.

19.22 EU Merger Directive

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

19.23 Summary of the Netherlands' bilateral tax treaties

The Netherlands has one of the most extensive tax treaty networks in the EU. The treaties generally provide for substantial reductions of withholding tax on dividends, interest and royalties. 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 Argentina Armenia Aruba Australia Austria Azerbaijan Bahrain Bangladesh Barbados Belarus Belgium Bermuda Brazil Bulgaria Canada China (excluding Hong Kong and Macau) Croatia Curacao Czech Republic* Denmark Egypt	Estonia Finland France Georgia Germany Ghana Greece Hong Kong Hungary Iceland India Indonesia Ireland Israel Italy Japan Jordan Kazakhstan Kuwait Latvia Lithuania Luxembourg Macedonia (FYR) Malaysia	Malta Mexico Moldova Morocco New Zealand Nigeria Norway Oman Pakistan Panama Philippines Poland Portugal Qatar Romania Russia Saudi Arabia Singapore Slovak Republic Slovenia South Africa South Korea Spain Sri Lanka	Suriname Sweden Switzerland Taiwan Thailand Tunisia Turkey Uganda Ukraine United Arab Emirates United Kingdom United States Uzbekistan Venezuela Vietnam Zambia Zimbabwe

**The Netherlands continues to apply the Czechoslovak treaty to the Czech Republic and the Slovak Republic. The treaty has, however, been amended by protocols with both republics.*

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

Bosnia and Herzegovina 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:

Ethiopia (2012) Zambia (2015)	Kenya (2015)	Malawi (2015)

Negotiations are underway or have already been held with the following countries:[6]

Algeria Australia Bangladesh Belgium Brazil Bulgaria Canada Chile Colombia Denmark Egypt France Georgia	Ghana India Indonesia Iraq Ireland Kyrgyzstan Moldova Mongolia Morocco Mozambique New Zealand Nigeria Pakistan Poland Philippines	Russia Senegal South Africa Spain Sri Lanka Switzerland Thailand Uganda Ukraine Uruguay Uzbekistan South Africa Vietnam Zimbabwe

6 Overview published by the Dutch Ministry of Finance regarding the (ongoing) tax treaty negotiations of the Netherlands, dated 30 September 2016.

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

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

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

Albania *air* Argentina *air/sea* Armenia *air* Azerbaijan *air* Bahrain *air* Barbados *air* Belarus *air* Bermuda *air/sea* Brunei *air* Cuba *air* Czech Republic *air* Estonia *air/sea* Georgia *air*	Hong Kong *air/sea* Hungary *air* Isle of Man *air/sea* Latvia *air/sea* Lithuania *air/sea* Macau *air* Macedonia *air* Madagascar *air* Maldives *air* Moldova *sea* Oman *air* Panama *air/sea* Poland *sea*	South Korea *sea* Qatar *air* Saudi Arabia *air* Slovak Republic *air* Ukraine *air* United Arab Emir-ates *air* Uzbekistan *air* Venezuela *air/sea* Vietnam *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 that provide supplies of goods and services, or intra-community acquisitions, in the course of a business, in the Netherlands. If a (foreign) business supplies goods and/or services, it is considered a taxable person for Dutch VAT purposes.

VAT grouping

If taxable persons that are established in the Netherlands are closely connected from a financial, economic and organisational 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; and
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 percent.

A reduced VAT rate of 6 percent 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, public transport (including taxis) and certain labour-intensive repair and maintenance activities.

A 0 percent 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 percent VAT rate.

20.1.4 Compliance

Periodical VAT return

In general, a VAT return should be submitted per quarter. If desired, you can request the Dutch tax authorities to submit the VAT return per month. Under certain conditions, an annual VAT return is allowed. VAT returns must be submitted and the VAT due must be paid within one month after the filing period. Taxable persons must file their VAT returns electronically (i.e. online or using a designated software program).

EU Sales Listing

If a Dutch VAT taxable person supplies goods and/or services to 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 1,200,000 of sales to customers in other EU Member States, or EUR 1,000,000 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 20.8.1). 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 percent VAT rate). The same applies for export supplies (to non-EU countries) from the Netherlands.

When applying the 0 percent VAT rate on cross-border supplies of goods from the Netherlands, additional VAT requirements apply, such as additional invoice requirements. Furthermore, it is recommended to keep relevant documents proving the supply and shipment of the goods at hand. 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 business-to-business ("B2B") supplies of services is that services are deemed to take place in the country where the (VAT-taxable) recipient of the service is established. In cross-border situations, the liability to pay VAT is shifted to the (VAT-taxable) recipient (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; and
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, 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 percent. The transfer tax is calculated on the purchase price or the market value, whichever is higher. Legally, transfer tax is to be paid by the purchaser. 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 percent RETT rate.

The acquisition of (the beneficial ownership of) rights to real estate, shares belonging to a substantial interest in a real estate company and certain certificates entitling the holder to a proportionate share of immovable property are, under certain conditions, also subject to 6 percent 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 reorganisation 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 percent 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 percent of the shares in the distributing company and which are residents in the Netherlands or in another EU country. Furthermore, tax treaties may provide for a limitation or an exemption of the dividend withholding tax.

A dividend withholding tax return must be filed with the local tax inspector by the distributing company and the dividend withholding tax must be paid to the tax collector within one month after the date on which the dividend becomes payable. The tax inspector may impose a penalty if a dividend tax return is filed late.

20.4 Interest and royalties

There is no Dutch withholding tax on interest and royalties paid by companies that reside in the Netherlands.

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International Distribution Centres/ Customs Facilities

Upon the importation of goods into the free circulation of the EU, import duties and import VAT (and, if applicable, excise duties), in principle, become due (see Section 20.1). Import duties are calculated based on the customs value of the goods multiplied by the applicable tariff rate. The applicable tariff rate depends on the customs classification and the (preferential) origin of the goods.

Once paid, import duties are, in principle, 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 20.2). Postponement of the levying of import duties using the applicable customs procedures may also present the possibility of a cash flow advantage. Therefore, it may be advantageous to either avoid or defer the levy of import duties for goods entering the Netherlands.

Once goods are brought into free circulation, they can be transferred to other EU Member States without import duties becoming due on arrival. However, such a transfer may give rise to VAT compliance requirements (see Section 19.1.6 and Section 20.8).

As of 1 May 2016, the Community Customs Code (CCC) and the Community Customs Implementing Code have been replaced by the new Union Customs Code (UCC) and the implementing provisions contained

in the Union Customs Delegated Act on the one hand and the Union Customs Implementing Act on the other. Under the UCC, the customs procedures are streamlined and simplified. For example, under the new customs procedure, 'processing' comprises the old procedures 'inward processing', 'outward processing' and 'processing under customs control'. As a rule of thumb, the procedures of the new UCC will offer the same facilities as the procedures of the CCC.

In the new UCC, compliance is key. Most simplifications, exemptions and authorisations 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 obtained the status of trusted party, or 'Authorised Economic Operator' (AEO; see Section 20.7). 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, in principle, the associated customs debt will 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, i.e. the person in whose name the declaration is filed, is the customs debtor. Under certain conditions, it is possible to file a customs declaration in the name and/or on behalf of another person. For customs purposes, 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, i.e. the declarant, must be established in the EU. If the designated declarant is not established in the EU, another person must act as the declarant on its behalf.

In the Netherlands, it is also possible to have an importer of record for VAT purposes, which is not the importer of record for customs duty purposes. This gives rise to a situation in which a non-EU based entity, although (indirectly) represented for customs duty purposes, could account for VAT on importation (see Section 20.8).

21.1.2 Customs value and applicable customs rate

Import duties are calculated based on the customs value of the goods multiplied by the applicable tariff rate. The applicable tariff rate depends on the customs classification and the (preferential) origin of the goods. For certain products, the levying of import duties is suspended. In addition, a reduced or even a 0-percent duty rate may be applicable for specific processing of certain products (so-called 'end use').

In order to determine the customs value of goods imported into free circulation, several methods can be used, which have to be applied in sequential order. This means that one is 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, it is no longer possible to use the "first sale for export" as a basis for the customs value. Instead, the last sale based on which goods are considered to have entered the customs territory of the EU must be used. A sales transaction between two EU established entities may not have to be taken into account in this respect. In general, for valuation purposes, a ruling can be obtained from the Dutch customs authorities. However, this ruling is only valid in the Netherlands.

The tariff classification number determines the customs duty rate assessed on the importation, whether the goods are eligible for special duty privileges and whether these are subject to import restrictions (e.g. quota, antidumping or countervailing duties, or specific licences).

Customs classification in the EU is based on the Combined Nomenclature, which, in turn, is based on the Harmonised 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 obtain legal certainty regarding customs classification. Under the UCC, BTIs will be valid in all EU Member States for a period of up to three years. During this period, however, BTIs can be revoked. This will (in principle) not affect prior and pending imports. BTIs issued by the customs authorities in different EU Member States are an important tool to take into consideration when classifying products for customs classification purposes. A BTI is collected in an EU database by the relevant Member State authorities. This database can be accessed through this link: (http://ec.europa.eu/taxation_customs/dds2/ebti/ebti_consultation.jsp?Lang=en). Although this database is a useful tool to assess the customs classification of products, 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, e.g. embargoes, quotas, antidumping or countervailing duties, etc. ('non-preferential origin' or 'economic origin'). The country of origin may be defined as the country where the imported products were grown, manufactured or produced. While this may appear to be a simple concept, the rules related to country of origin are diverse and often complex. In order to obtain legal certainty with respect to the (preferential) origin, it is possible to obtain Binding Origin Information ("BOI"), which is comparable to a BTI. There is no publicly available database for BOIs issued by the authorities of the different EU Member States.

21.2 Use of customs procedures

In order to defer or prevent payment of import duties, goods brought into the customs territory of the EU can be kept under customs bond by placing them under a customs procedure. Depending on the procedure used, the goods can be stored (see Section 20.3), transferred (see Section 20.4), processed (see Section 20.5) or re-exported. For the use of certain procedures, a licence 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 20.7), the amount of the guarantee may be reduced to 30 percent of the customs debt.

If goods are sold while placed under a customs procedure, this may trigger a VAT taxable event. However, if such a transaction takes place in the Netherlands, this supply for VAT purposes will usually be subject to a 0-percent VAT rate.

21.3 Customs warehouses

One of these customs procedures is 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-community goods (also called "T-1 goods") can be stored. Operating such a warehouse requires an inventory system authorised 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 20.5.

21.4 Customs bonded transport

Goods under customs bond can be transported through the customs territory of the EU (so-called 'external Union transit' or 'T-1 transit'). As a result, no customs duties and import VAT are to be paid when the goods physically cross a border (see Section 19.1.4 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 licence, the procedures foresee in the possibility to 'transfer' goods to another location without them having to be placed under the 'external Union transit' procedure. For example, this may be applicable for goods that are moved to another storage location of a customs warehouse.

Using the 'internal Union transit' (or 'T-2 transit') procedure is reserved for the transportation of goods categorised as Union goods, between two places in the customs territory via the territory of a third country. An example of this is the transportation of goods in free circulation from Germany (EU) via Switzerland (non-EU) to Italy (EU). The procedure is also used to 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, including the so-called 'economic conditions', 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, referred to under the CCC as 'processing under customs control' (PCC), can be advantageous if the imported unprocessed goods are subject to a higher duty rate than the processed goods. A number of pharmaceutical products may benefit from this regime, as, when they are a finished product, they are subject to a 0-percent 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 percent.

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 authorised 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. When 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 a so-called 'End Use' licence, based on which the importer can claim suspension for products that are used for that specific use. It is possible to transfer the goods to another licence holder.

21.7 Authorised economic operator ("AEO")

In order to facilitate international trade and to enhance security, EU regulations now provide for the so-called 'Authorised 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 this link: (http://ec.europa.eu/taxation_customs/dds2/eos/eos_home.jsp?Lang=en).

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 secure partners by customs and their compliance and reliability will have been thoroughly checked before issuing the AEO certificate.

There is no legal obligation to become recognised as an AEO, although it may be beneficial for the operator, as the recognition demonstrates compliance with the solid security criteria and controls. This will 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 20.1.2) to which certain amounts are added. Provided that certain conditions are met, an import licence 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 licence (the so-called "Article 23 deferment licence") 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 20.2), 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-percent VAT rate, followed by a VAT taxable Intra-Community Acquisition (ICA) in the EU Member State of the arrival of the goods. The consignee 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 19.1.6).

If goods are sold for export to a consignee's non-EU country, the 0-percent VAT rate for export can be applied to the supply of these goods. The application of this 0-percent VAT rate is subject to the 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.

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 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.

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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 organisations, state governments and local authorities.

The collection of subsidies described below offers an impression of the various funds available. It is always worthwhile to verify subsidy opportunities before making investments and when exporting to foreign countries. Our office has up-to-date information and contacts with competent authorities, and can offer you effective and sound advice.

22.1 Tax incentives

Several tax facilities are granted. First, tax relief is granted in the form of 75-percent 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.

Second, the Energy Investment Relief (*Energie-investeringsaftrek* or "EIA") grants a one-off tax deduction of 58 percent (2016) of the investment cost of an energy-efficient investment. Qualifying investments are determined by the Ministry of Economic Affairs, Agriculture and Innovation. In 2016, the budget amounted to EUR 161 million.

Third, the Environmental Investment Deduction (*Milieu-investeringsaftrek* or "MIA") also grants a one-off tax deduction of 36 percent, 27 percent or 13.5 percent (2016), depending on the nature of the investment, for investments in environmentally friendly assets. The Ministry of Infrastructure and Environment determines which investments qualify.

In 2012, the R&D deduction (*Research and Development Aftrek*) was introduced for Dutch income tax. This new tax regime allows the taxpayer an extra deduction of 60 percent (2015) of R&D expenses, excluding wage costs. The right to this deduction will be determined by the Ministry of Economic Affairs, Agriculture and Innovation. The process of reaching a decision on the application will take the same form as the WBSO-declaration (see 21.4.1). Please note that the R&D deduction was abolished on 1 January 2016 and has been integrated into the R&D wage withholding tax deduction ("WBSO").

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 percent of the original investment cost in one year.

22.2 (International) investment enhancing credits

If you intend to export goods or services, it is generally advisable to contact the Netherlands Enterprise Agency (*Rijksdienst voor Ondernemend Nederland*, or "RVO") at the Ministry of Economic Affairs, Agriculture and Innovation for information on foreign markets and exporting in general.

The government has several special programmes to stimulate companies' export activities. These programmes 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-three 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

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, nationalisation, 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 programme would run until 31 December 2014. However, the programme has since been extended. The aim of the programme 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

Qualifying income that results from endeavours in the field of R&D is taxed at an effective tax rate of only 5 percent (the normal tax rate is 25 percent). Any income that is the immediate result of R&D activities undertaken for the account of the taxpayer in 2007 and successive years will, in principle, benefit from this reduced rate. However, at least one of the following conditions must be met:

a) One or more patents have been granted to the taxpayer and these patents are of material significance for the exploitation of the invention.
b) The taxpayer benefited from WBSO, which is further explained below, in connection with the R&D undertaken for the development of the invention.

The costs of R&D are immediately and fully deductible from the taxable profit, and must be recovered first. The qualifying income is taxed at a 5-percent rate to the extent it exceeds the previously reported costs.

Please note that, on 20 September 2016, the government presented the Tax Plan 2017. The bill includes changes in the current innovation box legislation. The proposed legislation is an implementation of the Organization for Economic Co-operation and Development's (OECD) Action Plan 5: Countering Harmful Tax Practices.

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:

- a software program;
- a (pending) patent;
- an authorisation for the marketing of a medicine/drug;
- a supplementary protection certificate;
- a utility model; or
- an exclusive licence 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. 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 proposed legislation includes a grandfathering rule for qualifying intangible assets developed before 1 January 2017. Please note that existing tax rulings regarding the application of the 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 for a reduction in wage withholdings (i.e. wage tax and certain social security contributions) withheld from the salary of experts engaged in R&D in the Netherlands. This results in a decrease in R&D labour costs, which benefits the employer. The reduction for a given year is 32 percent 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 percent. The reduction for wages in excess of EUR 350,000 is 16 percent of the wage withholdings. Self-employed persons may request a reduction of their taxable profit of EUR 12,484 (2016). First-time self-employed persons may request an additional reduction of EUR 6,245 (2016). 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 2017, the WBSO budget is EUR 1.205 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 programme 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 for up to 45 percent 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 2016, 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

The Dutch economy is in good shape. Exports have sized up, producers are optimistic and consumer confidence has further increased as the unemployment rate has decreased. The Dutch economy is expected to have moderate growth in 2017. Despite this positive forecast, next year's challenges for the global economy, such as uncertainty regarding Brexit and the global economy, will remain and may affect the Dutch market.

For 2017, 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 if 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.

With digital innovation driving an unprecedented shift in financial services, financial institutions and FinTech innovators need legal advice to develop and adopt products and services such as crowdfunding, e-payment platforms, cryptocurrencies, digital banking and peer-to-peer lending. The impact of technology-enabled innovation on financial stability cannot be underestimated. 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 'common' way of financing by means of a senior and a mezzanine debt. Contrary to the common way of financing, unitranche offers advantages such as allowance of higher leverage, covenant lite-structures, no need for syndication and no or lower amortisation (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 standardised approach has been formed in some areas, further developments are expected.

Supply chain finance

Corporations are always searching for more efficient financing terms. An alternative way of financing the corporations' liquidity (which is seen more and more in the Dutch market) is the so-called supply chain financing or supplier financing. Buyers and suppliers join forces in obtaining preferred financing terms for both: 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 programme 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 programme 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 programme, and receives a fee for its services.

In future years, an increase in alternative financing models is expected to shape the supply chain finance optimisation. Since the Netherlands has a leading (international) role in the facilitation of logistic shipments, the potential of supply chain finance programmes 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, SMEs 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 increase in specific areas in the coming years. We particularly expect an increase in the residential, hotel, logistics and student accommodation sector, where office refurbishment and relocation still offer many opportunities. The current favourable financing market for real estate is especially enhanced by the low interest rate offered by German banks and alternative investors which act as direct lenders, such as pension funds and insurance companies.

Recalibration of Dutch insolvency laws

The Dutch Bankruptcy Code (the "Bankruptcy Code") is being renewed by improving the reorganisational abilities of enterprises. This change is not expected to adversely affect the position of (secured) lenders, but it may be of interest to lenders in the Dutch market where it relates to two topics: pre-pack and compulsory settlement.

As part of the recalibration, the Bankruptcy Code is to provide a legal basis for a so-called pre-pack: a preparatory construction whereby the relevant court – at the debtor's request – informally appoints the envisaged receiver (*curator*) and supervisory judge (*rechter-commissaris*) prior to any formal insolvency, to enable the debtor to prepare for its bankruptcy under the supervision of such receiver and supervisory judge at relative ease. Over the last few years, the Dutch market has seen several restructurings whereby a pre-pack was applied in restructuring and the sale of assets prior to insolvency, in order to enable a sale immediately following a formal insolvency. Providing a legal basis in the form of a framework for pre-pack settlements enhances legal certainty, while leaving sufficient flexibility for the market to apply the pre-pack practically.

The compulsory settlement that is going to be part of the Bankruptcy Code relates to pre-insolvency restructurings and provides for creditors or shareholders who are unreasonably hindering a restructuring of debts that is supported by the majority of the creditors or shareholders of the debtor, forcing them to cooperate with such a restructuring if a bankruptcy could thus be prevented. To this end, creditors are to be divided into different classes. Each class can then be provided with a separate proposal for settlement. If the majority of the creditors of that class approve the proposal, it would be declared binding for all creditors in that class. As it diminishes the risk of a creditor frustrating a settlement, the introduction of the compulsory settlement improves the chances of a successful restructuring and prevents the debtor – acting under pressure – from either requesting its formal bankruptcy itself or satisfying the relevant creditor's claim(s) for payment.

Brexit

The UK's vote to leave the European Union, the so-called Brexit, raises challenges and potential opportunities for the Dutch and European market. Issues to be resolved include policy and legislative consequences of repatriating EU competencies back to the United Kingdom. It is unclear which form the post-Brexit regulatory framework will take. The current figures show that consumers clearly do not expect the Brexit vote to have a direct negative effect on the Dutch economy. However, uncertainty in the financial markets is expected to arise once Article 50 of the Treaty of the European Union is invoked, and this will affect the Dutch trade market. 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

Divestiture strategies deployed by financial institutions during recent years has led to an increase in activity on the non-performing loans market. The implementation of a 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 on 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) if:

a) the act was performed without a legal obligation to do so;
b) the act is detrimental to other creditors of the company; and
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*, "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:

a) the loan (and interest received by and any security granted to the N.V.) is made on reasonable market conform terms;
b) the equity capital (*eigen vermogen*) of the N.V. minus the amount of the loan is not less than the amount of the paid-up and called capital (*gestorte en opgevraagde deel van het kapitaal*) and any statutory reserves;
c) the creditworthiness of the N.V.'s counterparties has been carefully assessed; and
d) if the loan is made for a subscription of shares in connection with an increase in the share capital for the acquisition of shares held by the N.V. in its own capital, the purchase price for the shares is reasonable.

The board resolution to grant the loan is subject to shareholder approval, which requires a qualified majority (or a 95 percent majority if (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*, "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 whether:

a) the objects clause in the articles of association of the company allows the transaction;
b) the transaction is in the corporate interest of the company; and
c) the transaction jeopardises 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 stamping, no actual records are being maintained). Such registration with the Dutch tax authorities is free of charge and could be completed within two weeks.

Possessory pledge. This form of pledge is created by bringing the asset in the (physical) possession of the pledgee or a third party as agreed between the pledgor and the pledgee. No deed is required, but claims to bearer should be endorsed. Whenever the pledgor regains control over the pledged asset, the pledge automatically terminates. This form of pledge is rarely used in practice, except for pledges over title documents in certain trade finance transactions.

Disclosed right of pledge. This form of security is created by a written (non-notarial) deed and notice of the right of pledge to the debtor. Receivables against a bank in relation to a bank account (including in respect of cash deposits administered to the bank account) are to be encumbered with a disclosed right of pledge.

Undisclosed right of pledge. An undisclosed right of pledge is to be created by a written deed of pledge, which is either: (i) executed in the form of a notarial deed; or (ii) registered with the Dutch tax authorities, 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 which 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 authorised 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 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; and
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 realised 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; and
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 that:

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 favour 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; and

e) legal acts performed by the insolvent company on the date of it being declared bankrupt or granted a suspension of payments lose their effect, as the declaration of bankruptcy/suspension of payments has a retroactive effect and, as such, the company has lost the authority to bind its assets as per the beginning of that day (the so-called "00.00 hours-rule"). This is especially relevant where a right of pledge is granted over future assets, as mentioned above. The 00.00 hours-rule 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 characterised 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 characterised as such, certain Dutch law provisions should be waived (to the extent permitted by law).

Sale and leaseback

In a typical sale and leaseback, the user/lessee of an asset sells it to a buyer/lessor, who then leases it back to the user/lessee. In a finance lease, the lease period would be equivalent to (or at least 75 percent of) the useful life of the asset and the lease instalments are equal to (or are at least 90 percent of) the fair value of the asset. At the end of the lease term, title to the asset transfers to the lessee or the lessee can purchase the asset at an advantageous price. In an operating lease, the term is shorter, the sum of the lease 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 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 favour 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 ("**Hague Trust Convention**") and, as such, any trust validly created under its governing law will be recognised by the Dutch courts, according to, and subject to the limitations of, the act on the law applicable to trusts (*Wet conflictenrecht trustkantoren*) ("**Trust Act**"), which implements said convention. However, the agency concept is recognised in the Netherlands as a contractual arrangement only. Although, in theory, Dutch law will recognise 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 favour 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. Examples of SFIs are:

- 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; and
- Special Purpose Vehicles ("SPVs") created by foreign originators whose balance sheets almost exclusively contain foreign assets and foreign liabilities.

An SFI must notify the DCB within three weeks after its incorporation in order for the DCB to assess whether monthly and yearly or bi-yearly reporting obligation should be imposed. Such reporting obligation is set out in the 1994 Foreign Financial Relations Act (*Wet financiële*

betrekkingen buitenland 1994) and the 2003 Reporting Provisions (*Rapportagevoorschriften betalingsbalansrapportages 2003*).

If a reporting obligation is imposed, the company has to file reports with the DCB for the benefit of the DCB composing 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 a business from the public. Please note that, until a European definition of "the public" is given, the Dutch legislator will interpret this as beyond a restricted circle (*besloten kring*) from parties other than the so-called professional market parties (*professionele marktpartijen*).

Any party undertaking this activity, combined with the granting of loans for its own account in the Netherlands, qualifies as a "bank" and must obtain a banking licence 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 the so-called professional market parties (*professionele marktpartijen*).

Under the AFS, any funds that must be repaid, for whatever legal reason, qualify as "repayable funds," provided that it is clear beforehand what the nominal repayable amount is and in what manner any applicable compensation (such as interest) is to be calculated.[1] The definition of "repayable funds" could entail more than just the borrowing of funds. For instance, it is possible that monetary obligations, created in the context of complex financing structures (which do not necessarily entail an obligation to repay borrowed money), may nevertheless be considered to qualify as obtaining "repayable funds" within the meaning of the AFS. Similarly, taking into account the wide scope of the term "bank" under the AFS, certain finance companies may also qualify as "banks" within the meaning of the AFS.

1 Note that shares must not be regarded as "repayable funds", as there is no upfront obligation to repay the nominal amount.

As follows from the above, 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; and
- 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 licences granted to banks within the EEA. If a licence is granted to a bank within the EEA, this licence can be "passported" to the Netherlands or any other country within the EEA. To passport such licence, the supervisory authority of the country in which the licence 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 licence to the Netherlands is not under an obligation to apply for a Dutch banking licence for the provision of banking activities in the Netherlands.

The ECB closely supervises the administration, liquidity and solvency of all banks established in the EEA.

Dutch banks are generally involved in a wide range of financial activities, including (but not limited to):

- granting loans;
- effecting domestic and international money transfers;
- providing payment services;
- exchanging foreign currency;
- brokering publicly listed securities; and
- acting as a listing agent and underwriter in the context of an application for admission to trading on NYSE Euronext Amsterdam N.V.

The AFS also regulates the activities of the so-called "financial institutions" (*financiële instellingen*) in the Netherlands, i.e. 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[2] 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) licence obligation. The type of licence may vary, depending on the characteristics of the activities.

EEA-based financial institutions that are granted a licence by the supervisory authorities in their home state in respect of certain services may rely on such licence for the provision of the same services in the

2 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, travellers' 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.

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[3] to the public in the Netherlands or to have securities admitted to trading on a regulated market[4] situated or operating in the Netherlands, unless a prospectus is drafted in accordance with Prospectus Directive 2003/71/EC (the "Prospectus Directive").

Prior to such offering of securities or admission to trading, a prospectus must be approved by the AFM or by the relevant competent EEA supervisory authority. If 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 AFS and related regulations pursuant to the AFS contain exemptions from the prospectus requirement pertaining to, among other things:

- 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"; and
- offerings of securities with a minimum consideration per investor/minimum denomination per security of EUR 100,000.

3 Securities are: (i) negotiable shares or other negotiable securities or rights equivalent to negotiable shares; (ii) negotiable bonds or other forms of negotiable debt instrument or (iii) other negotiable securities issued by a legal person, company or institution through which securities meant under (i) or (ii) may be acquired by the performance of the rights pertaining thereto or by conversion or giving rise to money settlement.

4 Within the meaning of the Markets on Financial Instruments Directive 2004/39/EC.

A peculiarity under Dutch law is the inclusion of a prescribed warning sign in the event of certain exemptions to the prospectus obligation. This 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 the "put up or shut up" rule, the target company can request the AFM to demand that the potential offeror clearly clarifies its intentions regarding a possible public takeover offer by publishing – within six weeks – either: (i) a "put up" statement (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 a 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 percent or more of the voting rights in the general meeting of shareholders of the Public Company. The obligation to launch a public takeover offer will also apply to persons or entities that acquire predominant control while acting in concert, together with other persons or entities.

Undertakings

In the event of a friendly takeover offer, the management board of the target company may require 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 containing a standstill provision ("NDA") 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 3 July 2016, 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 behaviour which:

   (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 behaviour establishes that such transaction, order or behaviour has been carried out for legitimate reasons, and conform with an accepted market practice;

b) entering into a transaction, placing an order to trade or any other activity or behaviour which 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 rumours, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading; and

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 behaviour which manipulates the calculation of a benchmark.

The AFM has a large amount of 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. Per violation, the penalty for violating insider trading rules may amount to: (i) EUR 5 million for private individuals; (ii) EUR 10 million or, if higher, 10 percent 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 "Issuing Institutions", being:

(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; and
(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:

a) reporting requirements applicable to Issuing Institutions themselves in respect of their issued share capital (e.g. reporting requirements for each 1-percent 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"; and

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 percent, 5 percent, 10 percent, 15 percent, 20 percent, 25 percent, 30 percent, 40 percent, 50 percent, 60 percent, 75 percent and 95 percent. The reporting requirements are applicable to changes in both the participating interest held (i.e. shares) and the total number of votes a person is entitled to cast at the general meeting of shareholders of an Issuing Institution.

The AFS contains a detailed regime for determining what entity is obliged to report the relevant participating interests and/or total votes held, and how these must be calculated. For example, a parent company is deemed to hold both the participating interests and the voting rights held by its subsidiaries; a subsidiary is deemed not to hold any participating interests or voting rights. This rule may result in the parent company being obliged to aggregate and disclose different participating rights and/or votes held in the same Issuing Institution by different subsidiaries. Similarly, a person is deemed to indirectly hold the voting rights that a third party holds if such person has entered into a lasting voting agreement (i.e. for a period of time longer than one shareholders' meeting) with such third party (and vice versa). The obligation to report changes also applies to indirect control held through (security) interests (e.g. right of pledge, right of usufruct). The AFS also contains specific provisions with regard to participating interests and votes held by undertakings for collective investment and/or their management companies. In certain cases, (temporary) exemptions may apply.

The disclosure of major holdings in listed companies is supervised by the AFM.

Furthermore, Issuing Institutions are subject to transparency obligations prior to the convening of a general meeting of shareholders. In particular, under certain circumstances, Issuing Institutions are obliged 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 licence/must hold a licence in order to provide their investment services in the Netherlands. To obtain such a licence, investment firms must comply with certain financial, administrative and organisational 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 licence to offer their services in another EEA country may offer their services in the Netherlands after due notification to the AFM by the supervisory authority of that EEA country. If all notification requirements are met, such investment firms may offer their services either through a branch office in the Netherlands or on a cross-border basis. Please note that the majority of Dutch rules governing the investment firm's conduct of business in the Netherlands will still apply to branch offices located in the Netherlands. For a variety of such rules, dispensation can be requested, 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 licence 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).

24.2.7 Investment funds

In the Netherlands, two types of collective investment funds are regulated: the so-called "alternative investment funds" and "undertakings for collective investment in transferable securities". An undertaking for collective investment in transferable securities is an undertaking with the sole object of collective investment in transferable securities or in other liquid financial assets of capital raised from the public and which operate on the principle of risk-spreading. An alternative investment fund is an investment fund that (i) does not qualify as an undertaking for collective investments in transferable securities, and (ii) raises capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors. Typical examples of alternative investment funds are hedge funds and private equity funds.

Pursuant to the AFS, participation rights in an investment fund, whether it be an undertaking for collective investment in transferable securities or an alternative investment fund, may only be offered in the Netherlands if (the management company) of such undertaking has been granted a licence by the AFM. A licence to operate as (a management company of) an investment fund in the Netherlands will be granted if certain financial, administrative, organisational, 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 licence and its statutory seat in a jurisdiction other than an "appointed state"; or (iii) has appointed the Netherlands as its "Member State of reference". A Member State of reference is an EEA Member State where that manager intends to undertake, broadly speaking, most – if not all – of its European business. In essence, this appointed state becomes a fund manager's "European seat" for regulatory purposes. Please note that the provisions allowing a fund manager to appoint the Netherlands as its Member State of reference have yet to enter into force. Furthermore, exempted managers still have to comply with certain AFS provisions, such as reporting to the DCB.

Non-EEA alternative investment fund managers may be exempted from the requirement to obtain a licence 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; and
- acquisition of qualified holdings (i.e. 10 percent or more) in a clearing and settlement institution (*afwikkelonderneming*), a bank, a management company of an undertaking for collective investment in transferable securities, an investment firm, an entity for risk acceptance or an insurer established in the Netherlands.

24.3 Money laundering

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 organisations have published guidelines pertaining to the assessment of whether a transaction could be potentially unusual.

Scope

Institutions to which the Wwft applies include:

- financial enterprises, such as banks, payment service providers, money transfer offices, life insurers, investment firms, alternative investment funds and financial service providers; and
- 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 if:

- a business relationship is entered into with a customer;
- one or more (incidental) cash transactions with an aggregate value of EUR 15,000 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; or
- 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.

25

Liability

25.1 Liability

Introduction

Under the Dutch liability law, every person bears his or her own damages. A person is only liable for (part of) another person's damages if there is either a basis in contract or a basis in law for such liability.

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. The basis for non-contractual liability is committing a wrongful act.

The two types of liability may coincide; e.g. 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 attribut-

able 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 not 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, in principle, are professional judges and appointed for life.

On 1 July 2011, the jurisdiction of the cantonal divisions was extended. In civil and commercial cases, the cantonal branches of the 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 and lease, and since 1 July 2011, consumer purchases and consumer credit as well.

The civil branches of the district courts essentially hear all other civil and commercial first-instance claims. The judgments given by both the civil branches and the cantonal branches of the district courts may be appealed before a court of appeal. The court of appeal fully reassesses the case, both factually and legally.

A judgment given by the court of appeal may, in principle, be submitted for review or cassation before the Supreme Court of the Netherlands on issues of law only. The Supreme Court will not, therefore, 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 corporate law issues. The so-called Enterprise Chamber (*Ondernemingskamer*) decides on disputes in the first instance on: (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: (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.

As from 1 January 2017, the Netherlands Commercial Court (NCC), has been established in Amsterdam. The NCC will be a commercial court aimed at settling international trade disputes in the Netherlands. It will primarily focus 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 will be a special facility with dedicated judges who have expertise and experience in large commercial disputes. It will offer the possibility to litigate in English.[1]

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

1 https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Raad-voor-de-rechtspraak/Nieuws/Paginas/Plan-voor-speciale-voorziening-handelsconflicten-definitief.aspx.

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 appearance, the court customarily grants the defendant a six-week extension within which to submit a written answer (the statement of defence).

After the statement of defence 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.

The Ministry of Security and Justice and the Council for the Judiciary have jointly set up a Quality and Innovation Judiciary programme (*Kwaliteit en Innovatie*, KEI) with the aim of digitising, improving and simplifying civil and administrative procedures.

KEI aims to introduce a new digital basic procedure that will merge the existing summons proceedings and the application proceedings into one single application. The changes will be rolled out in phases. Ultimately, by 2019, professional parties in litigation will be obliged to use the digital system.[2]

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 defence, 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).

2 https://www.rijksoverheid.nl/onderwerpen/rechtspraak-en-geschiloplossing/inhoud/vernieuwing-in-de-rechtspraak/programma-kwaliteit-en-innovatie-rechtspraak-kei.

The court has a great degree of latitude to decide on the procedure at a hearing. Although witnesses cannot be heard in the context of summary proceedings, the court may hear people as "informants" if they are present at the hearing. That way, although no sworn statements are taken, the court is still able to obtain information from the people involved before deciding on the issue.

The court generally hands down its decision in summary proceedings within 14 days from the hearing, but may do so earlier if the case is urgent. A summary judgment is immediately enforceable. The judgment can be sanctioned by a (substantial) penalty to be forfeited if the judgment is not complied with. The judgment may be appealed before the competent court of appeal (within four weeks after the judgment in first instance is rendered). It is also possible to lodge a summary appeal, so that the proceedings before the court of appeal are conducted more swiftly. In that case, there is no appellant's brief, as the grounds for the appeal must be included in the notice of appeal. A decision by the court of appeal may be submitted for cassation to the Supreme Court (on issues of law).

After the summary proceedings, either of the parties may start principal proceedings in which the case is judged on its full merits (since summary proceedings are merely a provisional remedy). The court is in no way bound by a judgment given in summary proceedings. However, it is quite common for parties not to initiate principal proceedings after summary proceedings, but to decide to accept the judgment given in summary proceedings (whether or not on appeal).

26.4 Prejudgment attachment

To secure its claim, the plaintiff may levy one or more prejudgment attachments, before or during legal proceedings. Under certain circumstances, it is also possible to attach documents, data and data carriers for the purpose for preserving evidence (*bewijsbeslag*).[3]

3 HR 13 september 2013, ECLI:NL:HR:2013:BZ9958, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2013:BZ9958.

The leave of the district court is required for a prejudgment attachment. Such leave is generally easy to obtain (often on the same day or the 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 (No. 44/2001).

This regulation has replaced the Brussels Convention. With regard to Switzerland, Norway and Iceland, the (new) Lugano Convention applies.

Prior to the enforcement of a judgment handed down by a court in one of the states referred to above, 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 recognised 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 recognised 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 familiarise 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 organisation 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 organisation and the responsible party or parties negotiate a possible settlement agreement. The articles of association of the representative organisation 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 organisation 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 summarises 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.

27

Energy Law

27.1 General market situation

27.1.1 Dutch energy markets

The Netherlands is a liberalised market economy and ranks among the leading countries in terms of market integration, investment and innovation. It has substantial investments in energy infrastructure facilities, ports, modern power plants and efficient industrial processes. It is the second largest producer of natural gas in Europe and maintains competitive oil-refining and industrial processes. The Dutch energy sector contributes around 11 percent of GDP and annually generates around EUR 15 billion in exports. The Netherlands is one of Europe's largest hubs in energy trade. Based on the agreement reached by the Liberal-Labour Government in 2012, under the guidance of the Social Economic Council, a nationwide Energy Accord (*Energieakkoord*) was reached in 2013 to achieve affordable, sustainable and secure energy supply by target years 2020, 2023 and beyond.

The Energy Accord sets out 10 pillars for boosting Dutch green growth and includes the following overall targets:

i) reduction of the total final energy consumption by 100 petajoules (PJ) in 2020 and a saving of 1.5 percent per year in final energy consumption; and
ii) increase in the proportion of energy generated from renewable sources from 4.5 percent to 14 percent by 2020, in line with EU commitments, and a further increase to 16 percent by 2023.

The reduction of total final energy consumption by 100 PJ in 2020 should enable the Netherlands to contribute to the EU-wide goal of saving energy consumption by 20 percent by 2020 and the target of 1.5 percent savings per year at end-user level, as required under the EU Energy Efficiency Directive. As interim goals, the Netherlands aims to reach 35 percent of this reduction (100 PJ) by the end of 2016 and at least 65 percent by the end of 2018.

27.1.2 National Energy Report

In October 2016, the Dutch Minister of Economic Affairs published the third edition of the National Energy Report 2016 (*Nationale Energieverkenning 2016*). This is a yearly research report on the status of the Dutch energy supply and its expected development, based on government policies and other measures and agreements. The National Energy Report 2016 concludes that the greenhouse gas emissions are expected to decrease between 20 percent and 26 percent compared to 1990 greenhouse gas emission levels.

The National Energy Report 2016 also pays special attention to the targets of the nationwide Energy Accord. The report shows that the target of 16 percent of renewable energy by 2023 appears achievable, mainly due to the construction of offshore wind farms. However, the targeted reduction of the total final energy consumption by 100 PJ by 2020 does not seem achievable. Such targeted reduction is expected not to exceed 68 PJ by 2020. Table 1 below shows an overview of the expected renewable energy statistics according to the 2015 and 2016 National Energy Reports in relation to the Energy Accord's targets.

Table 1 - Overview expected renewable energy results in relation to the Energy Accord's targets

Goals	National Energy Study 2015	National Energy Study 2016	Target
Share of renewable energy			
2020	12.4%	12.7%	14%
2023	16.1%	15.9%	16%
Energy saving			
Energy Efficiency Directive (2014-2020)	540 PJ (523 / 578)	520 PJ (474 - 636)	480 PJ
Pace of energy saving	1.5%	1.5%	1.5% per year
Energy saving in 2020	55 PJ (33 - 76)	68 PJ (37 - 99)	100 PJ
Employment (2014-2020)	80,000	91,000	90,000 (15,000 full time jobs per year)

27.1.3 Major developments

Major developments in the Dutch energy markets include, among other things:

i) the comprehensive long-term policy to boost renewable power generation, notably through onshore and offshore wind generation and solar PV capacity;
ii) the shift in the Netherlands from being a net importer to a net exporter of electricity from 2025; and
iii) the shift in the Netherlands from being a net exporter to net importer of natural gas expected between 2030 and 2035.

The latter transition will change the gas composition and requires investment in conversion and new appliances in industries and households. This affects the whole energy system and its use of fuels and technologies. The Netherlands is preparing for this transition by transforming itself into a "gas hub for Europe" through large gas storages, networks, a liquefied natural gas ("LNG") terminal and the Dutch Title Transfer Facility (the "TTF"), as well as a 'power hub' of Northwestern Europe. The Dutch electricity market dynamics are changing fast too, with high volumes of low or zero short-run marginal cost, low carbon prices and the strong competitiveness of coal over gas. These dynamics have a major impact on the market position of the utility sector and lead to power generation overcapacity.

27.2 EU legislation/unbundling/liberalisation

27.2.1 EU legislation

The regulation of the Dutch energy markets is largely influenced by the European liberalisation drive that started with the first EU Electricity Directive in 1997 and the first Gas Directive in 1998. The objective of these directives was to address market imperfections, introduce unimpeded competition and reduce prices by creating a unified liberalised European energy market. These directives have been significantly amended twice, most recently by the third EU Electricity Directive in 2009 and the third Gas Directive in the same year (collectively, the "EU Third Package"). These directives are implemented in Dutch law to ensure access to transportation infrastructure, a level playing field, market transparency and consumer protection in the Dutch energy markets. In view of worldwide efforts to combat climate change, (i) the European Trading Scheme was created, (ii) European targets for the reduction of greenhouse gasses were set, and (iii) the use of renewable energy was promoted throughout the EU.

27.2.2 Ownership unbundling grids

Unbundling electricity and gas grids is regulated in the 1998 Dutch Electricity Act (*Elektriciteitswet 1989*) and the 2000 Gas Act (*Gaswet*) (together the "Dutch Network Unbundling Act" (*Wet onafhan-*

kelijk netbeheer)). Dutch law requires ownership unbundling between grid activities on the one hand and energy generation, supply and trade activities on the other hand. It prohibits grid operators from being part of a vertically integrated group. Grid operators are not allowed to be privatised or to be part of a group or engage in privatised or commercial, non-infrastructure activities.

The Dutch Network Unbundling Act has been challenged by three energy incumbents. In 2013, the European Court of Justice ruled that the Dutch Unbundling Act is in line with EU requirements on free movement and referred the matter to the Dutch Supreme Court to decide on the proportionality of any ownership restrictions contained in the act. On 26 June 2015, the Dutch Supreme Court ruled that the act's prohibitions are justified by the public interest and in line with EU law. The Dutch Supreme Court referred the cases of two energy incumbents to the Amsterdam court of appeal to assess the act's relation to the European Convention on Human Rights. In a final ruling on 1 November 2016, the Amsterdam court of appeal decided that the unbundling of one of the energy incumbents is in line with the European Convention on Human Rights. With respect to the second energy incumbent, the court of appeal ruled in an interim decision that the unbundling might lead to an individual and excessive burden, as the unbundling would result in the sale of the nuclear plant in Borssele. Further explanations are required before the court of appeal can render its final decision. In July 2016, the Dutch Authority for Consumers and Markets (ACM) required the relevant energy incumbents to comply with the act and unbundle their companies by 31 January and 1 July 2017 at the latest. In October 2016, a legislative proposal was submitted to the parliament to amend the Dutch Network Unbundling Act in order to partially lift the abovementioned group prohibition for regional grid operators. The legislative proposal (i) states that the current group prohibition will only apply to the Dutch electricity and gas transmission system operators ("TSOs"), and (ii) contains less stringent unbundling rules for grid operators, not being the Dutch electricity and gas TSOs.

27.2.3 Regulation grid services

Grid services performed by transmission or distribution grid operators are regulated. Owners of such grids must appoint an "independent grid operator" to operate the grid. Operation takes place on the basis of regulated tariffs and conditions set by the ACM (see 26.3.1 (i) and 26.3.2). Grid operators have exclusive powers to construct, maintain, renew and operate their grids, to provide for connections to their grids, and to provide metering services to small-scale users (they will also need to provide "smart" metres to small-scale users). There are various statutory provisions to ensure the financial and operational independence of the grid operators. Under the Gas Act, an operator must also be appointed for liquefied natural gas and gas storage facilities, but these fall under a lighter regulatory regime. Regulated third-party access is guaranteed by law; grid operators must provide third parties with a connection and transportation at regulated tariffs and conditions, except in case of lack of capacity or when the safety of the grid is at stake.

27.2.4 Liberalisation generation and supply

The supply of electricity and gas was liberalised in 2004. Customers are free to choose their supplier and to negotiate prices. As a form of consumer protection, a supply licence from the ACM is required for supply to small-scale users. The licence requires reasonable supply conditions and tariffs. There is no licence requirement for generation of electricity or gas, but general permits from local and national government authorities (or both) may be required for various construction, operation or decommissioning activities. For large-scale investments, a coordination mechanism was put in place that shortens the duration of the permitting process. For exploration and production ("E&P") of oil and gas in the Netherlands (including the Dutch part of the Continental Shelf), a licence from the Minister of Economic Affairs is required pursuant to the Dutch 2003 Mining Act (*Mijnbouwwet*). This licence may be obtained if production is economically feasible. Producers who supply their electricity or gas directly to end users through a 'direct line' must register the same at the ACM. The trading of electricity or gas does not require a licence from the Ministry or the ACM, but traders have to obtain certain licences from the Dutch electricity and gas TSOs.

27.3 Key institutions

27.3.1 Key governmental institutions are:

i) the Ministry of Economic Affairs, with overall responsibility for Dutch energy policy, including renewable energy, energy transition and the state coordination of large infrastructure projects;
ii) the Ministry of Infrastructure and Environment, which is responsible for policies on climate, the environment, transport, water and public works;
iii) the ACM, which supervises electricity and gas markets as well as district heating markets;
iv) the Authority for Nuclear Safety and Radiation Protection, which ensures nuclear safety;
v) the State Supervision of the Mines, being the supervising authority for mining activities, including oil and gas production and geothermal energy; and
vi) the Netherlands Enterprise Agency ("RvO"), implementing R&D policy and funding sustainable and innovative programmes.

27.3.2 Energy regulator

The energy regulator, the ACM, is established as an independent authority under the Ministry of Economic Affairs. It has a number of departments, including the Energy Department, and enforces the Dutch 1997 Competition Act (*Mededingingswet*). In its capacity as the energy regulator, the ACM adopts tariffs and technical codes governing the transmission and distribution of electricity and gas. It sets the regulated tariffs for the distribution companies. The ACM has the power to impose administrative fines and issue binding orders and orders sanctioned by periodic penalty payments. The ACM handles complaints about distribution companies and monitors suppliers to small-scale users.

27.4 Oil and gas

27.4.1 General/Gas E&P

In 1959, Europe's largest gas field was discovered in the north part of the Netherlands (the Slochteren field). The country opened offshore production from small gas fields in the 1970s. The Netherlands is a significant gas producer and its gas system is linked to that of Belgium, the UK and Germany. Natural gas dominates the power supply, domestic heating and industrial feedstock.

In 1973, the Netherlands introduced the "small-fields policy", enabling gas-producing companies to enter the Dutch market. In 1995, the Netherlands opened up its licensing regime for exploration in the Dutch part of the Continental Shelf. All unlicensed acreage is available for competitive allocation and the Ministry of Economic Affairs grants licences. Under a 1976 Royal Decree, the Dutch State takes 40-percent stakes in production and exploration licences through its State-owned participation company *Energie Beheer Nederland* ("EBN").

The Netherlands has a strategic position in the European oil supply chain, as a leading importer and exporter of oil and refiner of crude, as well as a host of major oil storage capacity for the European region. The port of Rotterdam is the energy hub of Europe, with oil refineries and storages, an LNG terminal, large coal import facilities, major power plants and chemical industries. Oil reserves in the territory of the Netherlands are limited. Small amounts of oil are being extracted and produced by Dutch oil companies out of the Dutch Continental Shelf and oil fields in the inlands of the Netherlands.

27.4.2 Main legislation and regulation

The Dutch legal framework is governed by the Mining Act, which sets out the basic terms and conditions for E&P activities and storage. Pursuant to the Mining Act, all minerals and gas at depth under the Dutch soil (including the Dutch part of the Continental Shelf) are owned by the Dutch State. Ownership in such minerals is transferred to the operating licence holder of the relevant acreage at the moment of

production. As mentioned, the Mining Act requires State participation of 40 percent through EBN, and it also regulates the permitting of E&P of minerals and terrestrial heat, as well as storage and the exploration of carbon monoxide. Together with its subordinate regulations, the Mining Decree and Regulation, it sets out conditions on matters like supervision over, and financial and other requirements for operators, measurements and reporting, coordination in construction of wells, mines and pipelines, and on the use and disposal of oil and chemicals.

The Gas Act lays out the rules for the transport of gas and the functioning of the gas markets, such as the responsibilities of the TSO and the distribution system operators (the "DSOs"), the regulator, the access regime in relation to the grid, storage sites and liquid natural gas facilities. Gasunie Transport Services B.V. ("GTS") is designated as the operator of the national high-pressure gas grid. GTS is wholly owned by the Dutch State. The Ministry of Economic Affairs introduced a range of measures to improve the functioning of the gas market by amending the Gas Act with a view to integrate different gas qualities, by (i) simplifying the balancing regime for the gas grid, (ii) improving the grid's use and capacity, (iii) merging many small delivery locations into one, and (iv) providing new allocation rules for cross-border transmission. In addition, several ministerial decisions govern the delivery of gas to small consumers.

The Gas Act and ministerial regulations on the quality aspects of grid management, electricity and gas tariff structures, and conditions all guarantee the quality of gas supplies. The security of gas supply in the Netherlands is regulated in the Gas Act and specified in the Decision in Relation to Security of Supply. On the basis of the new EU regulation about the security of natural gas supply, a risk analysis of the Dutch natural gas sector was undertaken. The main conclusion was that the Dutch gas infrastructure is of a high quality and capable of dealing with unforeseen disruptions in gas supply. In line with EU regulations, the national gas TSO has been given additional tasks and responsibilities regarding the security of supply.

In 2013, the Netherlands implemented the EU Oil Stocks Directive and changed its stockpiling regime into a legal obligation of 100 days of net oil products imports, of which 75 percent to 80 percent is to be held by the central stockholding entity, and 20 percent to 25 percent is to be held by the refineries and traders. The percentage is different every year, depending on the volumes released to the inland market.

27.4.3 Unconventional gas

Several international players showed interest in the exploration of unconventional gas in the Netherlands and acquired onshore acreages. Unproven wet shale gas of technically recoverable resources is estimated at 26 trillion cubic feet.

The government has issued a total of three permits to date in connection with the exploration for shale gas in the territory of the Netherlands. However, the government put commercial drillings for shale gas on hold in 2011 until more information regarding the consequences of shale gas extraction is gathered. Research performed by the Ministry of Economic Affairs shows that the impact of shale gas exploration and extraction on the environment and society (e.g. earthquakes and soil pollution) remains uncertain. Consequently, in July 2015, the government decided that commercial exploration, drilling and extraction of shale gas shall not take place until 2020. In March 2016, the House of Representatives adopted a motion to prolong this moratorium on (onshore) shale gas extraction in the Netherlands for an additional three years, until 2023. The motion relates to shale gas extraction for commercial purposes only and does not prohibit drilling for scientific purposes. New licences for shale gas extraction will not be granted and existing licences will not be prolonged. The government will draft shale gas policies in an underground zoning plan, the *Structuurvisie Ondergrond - STRONG*.

27.4.4 Carbon capture and storage

The Netherlands supports the use of carbon capture and storage ("CCS") as part of the transition toward a low-carbon economy by 2050. The government's stated intention is to promote CCS via large-

scale demonstration projects. The Netherlands is one of a relatively small number of European countries that have developed substantial competences in CCS and the government is keen to maintain a leading position globally.

A joint venture between E.On Benelux and ENGIE Energie Nederland (formerly known as GDF Suez Energie Nederland) developed a CCS demonstration project, the Rotterdam Capture and Storage Demonstration Project ("ROAD"). According to ROAD, the project is one of the first CCS projects globally to realise an integrated chain of carbon dioxide capture, transport and storage on a large scale and aims to capture 1.1 million tonnes of carbon dioxide per year as of 2015. ROAD is co-financed by the European Commission within the framework of the energy programme for recovery, the Dutch Government and the Global CCS Institute.

27.4.5 Trading/TTF

GTS offers the Title Transfer Facility (the "TTF"), a virtual trade floor where market parties can transfer gas to another party. GTS registers the title transfers of gas via the TTF by means of an electronic message that list the volumes of gas transferred, the period, and the purchasing and selling parties involved. Delivery for trades on the physical and future exchange, APX-ENDEX, also take places on the TTF. The high-pressure gas grid is connected to Belgium, Germany and England (BBL). Programme-responsible parties arrange for the gas to be transported within the national gas grid by contracting transport capacity with the GTS on the basis of the GTS Transmission Service Conditions. GTS operates the market-based imbalance system.

27.4.6 Gas trading

Parties trading on the APX-ENDEX need to be members. Programme-responsible parties for gas must meet the administrative requirements of GTS. To participate in TTF, a party must apply with GTS for a TTF subscription.

Under the EU Regulation on Energy Market Integrity and Transparency ("REMIT"), parties active in the wholesale markets for gas are also subject to information obligations, among other things, aimed at increasing transparency and preventing insider trading. Depending on the type of contract, MiFID as implemented in the Dutch Act on Financial Supervision (*Wet op het financieel toezicht*), may apply, as derivatives may qualify as 'financial instruments' and services could be construed as 'investments services' under MiFID, and may require a licence from the Dutch Financial Markets Authority.

The European Market Infrastructure Regulation ("EMIR"), which entered into force on 16 August 2012, is designed to increase the stability of the over-the-counter ("OTC") derivative markets. The EMIR requires standard derivative contracts to be cleared through central (clearing) counterparties ("CCPs") and further establishes stringent organisational, business conduct and prudential requirements for the CCPs. It has also introduced an obligation to report derivative contracts to trade repositories. The EMIR also provides rules for bilateral risk mitigation for OTC derivatives that are not cleared.

27.5 Electricity

27.5.1 General/Liberalisation and regulation

The 1998 Electricity Act anticipated the principles that were later enshrined in the EU Electricity Directives, including the creation of a national regulatory authority, the legal unbundling of grid activities from competitive generation and supply activities, third-party access to the grid and the gradual liberalisation of the retail market. The Dutch retail market was opened in 2002 for industry and in 2004 for households. The Dutch electricity market is integrated in the Northwest region and the EU internal electricity market. In 2014, market coupling increased with the NorNed interconnector of the Netherlands to Norway. The Dutch Government supports further integration of the Netherlands into the wider regional and EU internal energy market. The COBRA interconnector between the Netherlands and Denmark is currently under construction. This interconnector is expected to be operational by the beginning of 2019.

27.5.2 Regulated transport and distribution assets

The Dutch electricity transportation and distribution system is operated by one TSO, TenneT B.V. ("TenneT") and several DSOs. TenneT operates the national high-voltage grid, which comprises all grids with a voltage level at or over 110kV. The DSOs operate lower voltage grids and are mostly owned by the Dutch municipalities and provinces. The Dutch State holds the entire issued share capital of TenneT under the "TenneT holding structure", which also holds TenneT Germany, a TSO in Germany (TenneT Offshore GmbH) and holds shares in a number of energy exchanges in Northwestern Europe, including APX-ENDEX. TenneT operates the balancing market for regulating power. The NorNed interconnector is co-owned and co-operated by TenneT and the Norwegian TSO Statnett. The BritNed interconnector is jointly owned by TenneT B.V. and National Grid, but operated independently on a merchant basis in Great Britain and the Netherlands. The COBRA interconnector is co-owned and co-operated by TenneT and the Danish TSO Energinet.dk.

Every two years, TenneT prepares a Quality and Capacity Document, the most recent being on 1 September 2016. It includes an investment plan and a construction and maintenance plan. TenneT's long-term grid development perspective, "Vision for 2030", suggests that the Dutch electricity grid will play a key role in the integration of the European power system. This especially applies in relation to renewable energies from future North Sea wind farms. It prioritises cross-border (export) capacity and expansion of the Dutch electricity grid to accommodate new conventional and renewable generation, and suggests new investments in the intraregional network interconnection capacity to Germany, Denmark and Norway.

TenneT operates within the European Network of Transmission System Operators for Electricity ("ENTSO-E") on the development and implementation of the EU-wide Ten-Year Network Development Plan. The ENTSO-E Regional Group North Sea currently operates under a Regional Investment Plan for the North Sea Region 2012-2022.

27.5.3 Power trading

Electricity trading takes place in three markets: the OTC market, the APX-ENDEX physical and futures exchange, and the imbalance market. There are currently seven electricity interconnectors on the Dutch border. In addition to the roles of producers, traders or suppliers, a participant in the Dutch electricity market can also be a "programme-responsible party". In that capacity, a party must inform TenneT of all forecasts of energy to be taken from, or fed into, the grid on a day-ahead basis. Imbalances lead to imposition of imbalance tariffs by TenneT.

27.5.4 Main legislation and regulation

The 1998 Electricity Act sets out the regulatory framework, supervision of the market and enforcement, as well as the basic terms and conditions for generation and transport of electricity, data collection and processing, and renewable power generation. Subordinate legislation and codes regulate the conditions for licences for supply of electricity to small electricity consumers; tariffs, conditions, and measurement of supply of electricity; protection granted to small electricity consumers against disconnection; rules to assure security of supply; and rules on the construction of electricity infrastructure. In March 2016, the government amended the 1998 Electricity Act. This was a major step toward enacting the renewable electricity objectives of the Dutch Energy Accord. It created the regulatory framework to (i) designate TenneT, the Dutch TSO, as the grid operator for the Dutch offshore power grid, (ii) award damages related to construction delays and interruptions in the grid connection, and (iii) expedite and facilitate the connection of onshore wind farms. The Dutch grid regulation aims to achieve cost reduction and efficiency of the TSO and DSOs, while providing moderate levels of return on investment. To this end, the Dutch apply a revenue-cap (CPI-X) regulation across total operational and capital expenditure for a period of three years (2014 to 2016). Efficiency factors are determined by benchmarking productivity growth against a basket of foreign operators. There is a special subordinate set of rules for the financial management of grid operators.

Suppliers to small-scale users need a licence from the ACM; trading on the APX-ENDEX requires membership. Moreover, programme-responsible parties for electricity must meet the administrative requirements of TenneT. REMIT information obligations may apply, as well as MiFID and EMIR.

27.5.5 Renewable energy

The Netherlands adopted a legal framework for renewable energy within the context of the EU Renewable Energy Directive. The directive requires each EU Member State to increase the share of renewable energy in its gross final consumption in order to achieve an EU-wide 20-percent share by 2020. Under the directive, the Netherlands needs to achieve a 14-percent share of renewable energies by 2020. The European Environment Agency notes that the Netherlands stood at a 5.5-percent share of renewable energy in 2014 and has not reached its interim targets of 7.2 percent under the Dutch National Renewable Energy Action Plan ("NREAP") and 5.9 percent under the directive.

To encourage the production of renewable energy, the government reformed the feed-in tariff scheme, the *Stimulering duurzame energieproductie*, into a market-based, cost-effective premium scheme, financed by a surcharge on the end consumer bill, and renamed it to SDE+. In 2016, the SDE+ premium feed-in support scheme is available for the production of renewable electricity, renewable gas and renewable heat or combined heat and power in the Netherlands. Companies and (non-profit) organisations intending to produce renewable energy may apply for the SDE+. The variable feed-in premium encourages the most cost-effective technologies and promotes cost reductions. The SDE+ distinguishes between different categories, i.e. energy generated from (i) biomass, (ii) geothermal sources, (iii) water, (iv) wind, and (v) the sun. Each category has its own requirements, timing and rates. The wind category comprises offshore wind, onshore wind, wind on primary flood defences and wind on lakes. The tender procedure for offshore wind is held separately from the main SDE+ scheme. Therefore, a different subsidy and permit allocation procedure applies to offshore wind projects, of which the second round of offshore wind tenders for Borssele wind farm sites took place on 16 September 2016.

In 2012, the Liberal-Labour Government accord raised ambitions toward a renewable energy target of 16 percent by 2020. The nationwide Energy Accord of September 2013, however, remains with the EU commitment of 14 percent by 2020 and aims to achieve 16 percent by 2023. The Energy Accord confirms that the SDE+ scheme will remain the main support instrument for renewable energies. The Energy Accord prioritises wind power generation by planning to install additional onshore wind power (6 GW by 2020 and 7 GW by 2023) and offshore wind power (2 GW by 2020 and 4.5 GW by 2023). It also supports decentralised renewable production through tax incentives for smaller photovoltaic ("PV") projects. The Dutch National Water Plan 2016-2021, the National Spatial Strategy and the Integrated North Sea Management Plan plot the deployment of around 6 GW wind power by 2020 and designate areas for wind farms. In July 2016, the Minister of Economic Affairs and the Minister of Infrastructure and Environment designated new wind energy areas within the 12-mile zone, through a draft partial revision of the National Water Plan 2016-2021.

27.5.6 Nuclear power generation

Nuclear plays a small part in the Dutch energy supply, constituting about 4.3 percent of the total generating capacity in 2016. The only nuclear power plant in operation is located in the southwest part of the country and has a net electrical capacity of 482 MW. In 2013, the plant's operating life was extended from 2014 to 2033.

The government considers nuclear power a transition technology to a sustainable low-carbon energy system, in combination with renewable energy, energy savings, and CCS. Thus, nuclear energy is considered an option for electricity generation in the future, provided that Health Safety and Environment ("HSE") conditions are met. Recent governments have taken the necessary steps to facilitate the planning and the licensing procedure for new nuclear capacity and to update legislation.

Nuclear facilities operate under a licence granted by the Directorate for Nuclear Installation and Safety under the 1963 Nuclear Energy Act (*Kernenergiewet*). Licensees of nuclear installations perform a compre-

hensive safety review every 10 years. The Department for Nuclear Safety, Security, Safeguards and Radiation Protection is responsible for the supervision, inspection and assessment of nuclear facilities. A legislative proposal is pending in the Dutch Parliament which will regulate the establishment of an Authority for Nuclear Safety and Radiation Protection as an independent administrative organisation.

27.6 Climate change

27.6.1 General

The Netherlands ratified the Kyoto Protocol in May 2003 and has a commitment to reduce greenhouse gas emissions on average by 6 percent within the 2008-12 period, compared to 213 Mt CO^2-eq in the base year. By 2012, the Netherlands reached its Kyoto target. By a decision by the European Commission, the Dutch national Kyoto target for 2008-12 was translated into an emissions level, which was then split between the European Union Emissions Trading Scheme ("EU-ETS") sector and the non-ETS sectors.

In the 2011 Climate Letter 2050, the previous Dutch Government reaffirmed its commitment and set out the four core elements to achieve a climate neutral economy by 2050:

i) CO^2-free electricity supply;
ii) sustainable use of biomass;
iii) energy savings; and
iv) CCS.

On 24 June 2015, the Dutch Supreme Court ruled in the Urgenda climate case that the Dutch State has to take more action in reducing the greenhouse gas emissions in the Netherlands. The State also has to ensure that the Dutch greenhouse gas emissions in 2020 will be at least 25 percent lower than those in 1990. Even when the government has decided to appeal, such climate change litigation ordering the Netherlands to step up its climate change actions was publicised worldwide.

27.6.2 Main legislation and regulation

Since 2008, the Netherlands has been continuing to implement climate policies through a broad range of measures under the Clean & Efficient Programme ("CEP"), which remains largely in place even today. However, national energy and climate targets, and the support scheme for renewable energies has changed considerably over time. The 1979 Environmental Management Act (*Wet Milieubeheer*) and the National Climate Policy Implementation Plan form the legal framework for Dutch climate and energy efficiency policies, in line with the Kyoto target and the objectives of the EU-ETS under the EU energy and climate package for 2020. The main instruments include: the EU-ETS, energy taxation and green tax incentives (such as energy investment allowances); subsidies on renewable energy; and a broad range of energy efficiency measures, including voluntary agreements with the industry.

On 12 December 2015, the Paris Agreement was adopted by 195 nations. The Paris Agreement is the outcome of the 21st conference of the parties (COP21) to the United Nations Framework Convention on Climate Change (UNFCCC) and aims to:

i) keep global temperature increase this century well below 2 degrees Celsius and drive efforts to limit temperature increase even further to below 1.5 degrees Celsius;
ii) significantly reduce the emissions of greenhouse gases; and
iii) encourage developed countries to invest in developing countries to help them reach their reduction goals. The latter investment is to be financed by the developed countries through an annual reservation of USD 100 billion (plus voluntary contributions by other countries) between 2020 and 2025, after which new goals will be determined.

For the Paris Agreement to be legally binding, it will have to be ratified by at least 55 countries that account for at least 55 percent of global emissions. It will enter into force 30 days after such milestone had been reached. On 5 October 2016 such threshold was achieved and the Paris Agreement entered into force on 4 November 2016.

27.7 Energy efficiency

27.7.1 European energy efficiency directive

The European Energy Efficiency Directive was implemented in the Netherlands. This directive deals with matters like energy-saving requirements for appliances and the distribution of smart energy metres. An action plan for energy savings was promulgated to increase awareness for the potential of energy savings in buildings. In addition, the Dutch Government entered into a "Green Deal". This deal aims to encourage energy saving and the generation of local sustainable energy, as well as indicate that "green" and "growth" can be combined.

One of the abovementioned energy-saving requirements concerns the obligation for larger companies to carry out an energy audit every four years. This has been implemented in the provisional regulation of implementation Articles 8 and 14 Energy Efficiency Directive (*Tijdelijke regeling implementatie artikelen 8 en 14 Richtlijn energie-efficiëntie*). Such regulation sets out the target group of the energy audit obligation and the associated exceptions.

Appendix I

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

The details regarding the procedure for incorporating a Dutch N.V. (*naamloze vennootschap met beperkte aansprakelijkheid* or a public limited liability company), a B.V. (*besloten vennootschap met beperkte aansprakelijkheid* or a private limited liability company) and a cooperative (*coöperatie*) follow.

Procedure

1) The incorporator(s) execute a power of attorney to sign the notarial deed of incorporation.
2) Open a separate bank account in the name of the company in incorporation.*
3) Issue a bank statement to the notary confirming the payment of the incorporation capital, or issue an auditor's statement to the notary confirming that the value of the contribution is at least equal to the nominal value of the incorporation capital.*
4) Execute the notarial deed of incorporation, including the articles of association.
5) Register the company or cooperative, managing directors and sole shareholder (if applicable) with the Trade Register of the Chamber of Commerce within eight days after the execution of the notarial deed.

* *Steps 2 and 3 are not applicable to the incorporation of a B.V. or cooperative.*

Appendix II

Overview of Tax Rates for Inbound Income under Dutch Tax Treaties

1 Dividends column

The lower rate in the column generally applies if the recipient is a company that owns at least 25 percent of the capital 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 for an exemption for certain types of interest, e.g. 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 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, e.g. copyright payments, payments for the use of films and computer software, payments for the use of patents, trademarks and knowhow.

Appendix	Dividends	Interest	Royalties	
Country	Reduced rate under tax treaty for qualifying participa-tions	Reduced rate under tax treaty for indi-viduals and companies	Reduced rate under tax treaty	Reduced rate under tax treaty
Albania	0%/5%	15%	0%/5%/ 10%	10%
Argentina	10%	15%	0%/12%	3%/5%/ 10%/15%
Armenia	0%/5%	15%	0%/5%	5%
Aruba	5%/7.5%/ 8.3%	15%	0%	0%
Australia	15%	15%	10%	10%
Austria	0%*/5%	15%	0%	0%/10%
Azerbaijan	5%	10%	0%/10%	5%/10%
Bahrain	0%	10%	0%	0%
Bangladesh	10%	15%	0%/7.5%/ 10%	10%
Barbados	0%	15%	5%	0%/5%
Belarus	0%/5%	15%	5%	3%/5%/ 10%
Belgium	0%/5%	15%	0%/10%	0%
Bosnia and Herzegovina	5%	15%	0%	10%
Brazil	15%	15%	10%/15%	15%/25%
Bulgaria	0%*/5%	15%	0%	0%/5%
Canada	5%	15%	0%/10%	0%/10%
China	10%	10%	10%	10%
Croatia	0%	15%	0%	0%

Appendix	Dividends	Interest	Royalties	
Country	Reduced rate under tax treaty for qualifying participa-tions	Reduced rate under tax treaty for indi-viduals and companies	Reduced rate under tax treaty	Reduced rate under tax treaty
Curaçao	5%/7.5%/ 8.3%	15%	0%	0%
Czech Rep.	0%	10%	0%	0%*/5%
Denmark	0%	15%	0%	0%
Egypt	0%	15%	0%/12%	12%
Estonia	0%*/5%	15%	0%/10%	0%*/5%/ 10%
Ethiopia (not in force)	5%	10%/15%	0%/5%	5%
Finland	0%	15%	0%	0%
France	0%*/5%	15%	0%/10%/ 12%	0%
Georgia	0%/5%	15%	0%	0%
Germany	0%*/5%/10%	15%	0%	0%
Ghana	5%	10%	0%/8%	8%
Greece	0%*/5%/10%	15%	0%*/8%/ 10%	0%*/5%/ 7%
Hong Kong	0%	10%	0%	3%
Hungary	0%*/5%	15%	0%	0%
Iceland	0%	15%	0%	0%
India	5%[1]/10%	15%	10%/15%	20%
Indonesia	10%	10%	10%	10%

1 Based on the most-favoured nation principle.

Appendix	Dividends	Interest	Royalties	
Country	Reduced rate under tax treaty for qualifying participa-tions	Reduced rate under tax treaty for indi-viduals and companies	Reduced rate under tax treaty	Reduced rate under tax treaty
Ireland	0%	15%	0%	0%
Israel	5%	15%	10%/15%	5%/10%
Italy	0%*/5%/10%	15%	0%/10%	0%*/5%
Japan	0%/5%	10%	0%/10%	0%
Jordan	5%	15%	5%	10%
Kazakhstan	0%/5%	15%	0%/10%	10%
Korea	10%	15%	10%/15%	10%/15%
Kosovo	5%	15%	0%	10%
Kuwait	0%	10%	0%	5%
Latvia	0%*/5%	15%	0%*/10%	0%*/5%/ 10%
Lithuania	0%*/5%	15%	0%*/10%	0%*/5%/ 10%
Luxembourg	0%*/2.5%	15%	0%/2.5%/ 15%	0%
Macedonia	0%	15%	0%	0%
Malaysia	0%	15%	10%	0%/8%
Malta	0%/5%	15%	0%*/10%	0%/10%
Mexico	5%	15%	0%/5%/ 10%	10%
Moldova	0%/5%	15%	0%/5%	2%
Montenegro	5%	15%	0%	10%
Morocco	10%	25%	10%/25%	10%
New Zealand	15%	15%	10%	10%

Appendix	Dividends	Interest	Royalties	
Country	Reduced rate under tax treaty for qualifying participa-tions	Reduced rate under tax treaty for indi-viduals and companies	Reduced rate under tax treaty	Reduced rate under tax treaty
Nigeria	12.5%	15%	12.5%	12.5%
Norway	0%	15%	0%	0%
Oman	0%	10%	0%	8%
Pakistan	10%	20%	10%/15%/ 20%	5%/15%
Panama	0%	15%	0%/5%	5%
Philippines	10%	15%	0%/10%/ 15%	10%/15%
Poland	0%*/5%	15%	0%/5%	0%*/5%
Portugal	0%	10%	0%/10%	0%*/10%
Qatar	0%	10%	0%	5%
Romania	0%/5%	15%	0%/3%	0%/3%
Russia	5%	15%	0%	0%
Saudi Arabia	5%	10%	5%	7%
Serbia	5%	15%	0%	10%
Singapore	0%	15%	10%	0%
Slovak Rep.	0%	10%	0%	0%*/5%
Slovenia	0%*/5%	15%	0%/5%	0%*/5%
South Africa	5%	10%	0%	0%
Spain	0%*/5%	15%	0%*/10%	0%*/6%
Sri Lanka	10%	15%	5%/10%	10%
Suriname	7.5%/15%	20%	0%/5%/ 10%	5%/10%
Sweden	0%	15%	0%	0%

Appendix	Dividends	Interest	Royalties	
Country	Reduced rate under tax treaty for qualifying participa-tions	Reduced rate under tax treaty for indi-viduals and companies	Reduced rate under tax treaty	Reduced rate under tax treaty
Switzerland	0%	15%	0%	0%
Taiwan	10%	10%	0%/10%	10%
Tajikistan	15%	15%	0%	0%
Thailand	5%/10%	25%	10%/25%	5%/15%
Tunisia	0%	20%	0%/7.5%/ 10%	7.5%/11%
Turkey	5%/10%/15%	20%	10%/15%	10%
Uganda	0%	5%/15%	0%/10%	10%
Ukraine	0%/5%	15%	0%/2%/ 10%	0%/10%
United Arab Emirates	0%/5%	10%	0%	0%
United Kingdom	0%	15%/10%	0%	0%
United States	0%/5%	15%	0%	0%
Uzbekistan	0%/5%	15%	0%/10%	0%/10%
Venezuela	0%	10%	0%/5%	5%/7%/ 10%
Vietnam	5%/7%/10%	15%	0%/7%/ 10%	5%/10%/ 15%
Zambia	5%	15%	10%	10%
Zimbabwe	10%	20%	10%	10%

* Zero-percent rate based on the EU Parent-Subsidiary Directive/EU Interest and Royalty Directive.

Please see Section 19.23 for more details about current treaty negotiations.

Please note that, in a business-driven structure, using a Dutch cooperative as a top holding entity in the Netherlands may allow dividends to be expatriated from the Netherlands free of Dutch dividend withholding tax. Please refer to Section 19.1.6.

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