DOING BUSINESS IN THE NETHERLANDS

HEUSSEN

Lawyers & Civil Law Notaries

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Published by HEUSSEN B.V.
First edition 2023

For contact details see https://www.heussen-law.nl/en/

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Preface

This guide has been specifically prepared for the benefit of international investors who consider doing business in the Netherlands as well as their advisers. Please note that the guide offers a high-level overview and summary of the relevant laws, rules and regulations only and should not be regarded as exhaustive or comprehensive, nor should it be considered to constitute legal advice. If you need specific advice on or assistance with any issue you are facing when entering the Dutch market or doing business there or if you need any information on Heussen and the services rendered by Heussen, please feel free to contact one of the Heussen partners through the Heussen website at www.heussen-law.nl.

We would like to thank the following contributors for making this publication possible: Rens Berrevoets, Niels van Gelder, Martijn Koot, Stan Robbers, Herman Ruiter, Sandy van der Schaaf, Tim Schreuders and Sam van Well. A special thanks goes to Maarten Edie, Jonne Lansink and Wouter Vosse of Hamelink & Van den Tooren N.V., who have contributed the Tax chapter to this guide.

This guide is current as at 1 June 2023.

Heussen Lawyers & Civil Law Notaries

Tim B. Schreuders   Sandy van der Schaaf

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1. THE NETHERLANDS

1.1 The country in a nutshell: statistics and facts

Country	The Netherlands
Location	North western part of Europe
Official languages	Dutch and Frisian
Head of State	King Willem-Alexander
Type of state	constitutional monarchy
Capital	Amsterdam
Seat of government	The Hague
Currency	euro (EUR, €)
Population	approx. 17.8 million
Density	520/km2
Area	41,543 km2
Land below sea level	26%
Provinces	Drenthe, Flevoland, Friesland, Gelderland, Groningen, Limburg, Overijssel, Noord-Brabant, Noord-Holland, Utrecht, Zuid-Holland, Zeeland
Largest cities	Amsterdam, Rotterdam, The Hague, Utrecht

The Netherlands (also informally referred to as “Holland”) is a country in Europe and a member state of the European Union. The Netherlands is part of the Kingdom of the Netherlands which, apart from the Netherlands, consists of the Caribbean islands Aruba, Curaçao and St Maarten. The three Caribbean islands of Bonaire, Saint Eustatius and Saba became special municipalities of the Netherlands after the dissolution of the Netherlands Antilles on 10 October 2010.

1.2 Culture and religion

The Netherlands has an attractive cultural climate. Throughout history, the Dutch have always been a trading and exploring nation, which resulted in many different foreign influences and in a diverse culture. The Dutch are considered open-minded, internationally oriented and innovative. They often communicate in a rather direct manner and avoid small talk.

In the Netherlands, more than 50% of the population consider themselves non-religious. In 2020, the largest religion was Christianity (34% of the total population), followed by Islam (5%).

1.3 Government

The Netherlands is a constitutional monarchy within a parliamentary democracy. The Head of State is King Willem-Alexander, but the country is in practice governed by the Prime Minister together with other ministers and state secretaries. The Dutch government is seated in The Hague, but the capital of the Netherlands is Amsterdam.

The Dutch parliament consists of two chambers, being the Second Chamber or Lower Chamber *(Tweede Kamer)* with 150 members and the First Chamber or Upper Chamber *(Eerste Kamer)* with 75 members. Together the chambers constitute the “States General” *(Staten Generaal)*. The members of the Second Chamber are directly elected by the people, in principle every four years. The members of the First Chamber are elected through a system of indirect elections.

1.4 Economy

The Dutch economy, the fifth largest in the European Union and the seventeenth largest in the world, has a strong international focus. Due to the relatively small size of the country and its domestic market, the Dutch economy is one of the most open and internationally orientated in the world.

Multinationals based in the Netherlands include Ahold Delhaize, AkzoNobel, Booking.com, Heineken and Philips. Multinational companies having their regional headquarters in the Netherlands include Adidas, Cisco Systems, Netflix, Nike, Panasonic and Under Armour.

The volume of goods exported by the Netherlands is among the largest in the world. The number one destination of goods from the Netherlands is Germany, followed by Belgium, France, the United Kingdom and the United States. The top goods exported by the Netherlands concern refined petroleum, broadcasting equipment, photo lab equipment and computers. The Netherlands is also one of the world's largest exporters of services.

1.5 Infrastructure

The Netherlands has an excellent infrastructure and is often called the "Gateway to Europe", as it enables companies to serve markets in the European Union and the rest of Europe.

The Netherlands borders the North Sea and has three major rivers leading into the heart of Europe: the Rhine, the Maas and the Schelde. The port of Rotterdam, handling more than 450 million tonnes of cargo per year, is the largest port in Europe. Amsterdam Airport Schiphol is Europe's third busiest airport in terms of passenger traffic and passenger volume and the busiest in Europe in terms of aircraft movements. Furthermore, there are several regional airports in the Netherlands, the main ones being Rotterdam Airport, Groningen Airport, Eindhoven Airport and Maastricht Airport.

The quality of the roads, railways and waterways is first-rate, making it easy to reach the neighbouring countries in Europe.

The Netherlands also has an excellent and highly developed telecommunications and technological infrastructure and is one of the top ten most advanced ICT economies in the world.

Other reasons why the Netherlands is often called the "Gateway to Europe"

include the number of investments in the Netherlands by other countries which is largely due to the stable and flexible work environment and the well-educated multilingual work force in the Netherlands as well as the central geographic location of the Netherlands.

2. BUSINESS FORMS

2.1 General

A foreign company can conduct its business in the Netherlands through an entity or a branch. This chapter provides a brief introduction to the most common business forms in the Netherlands.

2.2 BV

The private company with limited liability *(besloten vennootschap met beperkte aansprakelijkheid* or *BV)* is the most frequently used business form in the Netherlands. It is an entity with legal personality and is comparable to the 'Société à responsabilité limitée' (S.à r.l.)' in France, the 'limited company' (Ltd) in the United Kingdom and the 'Gesellschaft mit beschränkter Haftung' (GmbH) in Germany. Since a substantial legislative change in 2012, the BV is a very flexible business form that can easily be incorporated with articles of association tailored to the shareholders' needs.

Incorporation

A BV is incorporated by means of a notarial deed executed before a Dutch civil law notary *(notaris)*. Incorporators often grant a power of attorney to employees working in the civil law notary's office to execute the notarial deed of incorporation before the civil law notary so that no personal appearance before the notary is required. After the execution of the notarial deed of incorporation, which contains the BV's initial articles of association, the civil law notary registers the company with the trade register of the Chamber of Commerce. The articles of association can be amended by notarial deed.

Share capital

A BV's capital is divided into shares. There is no statutory minimum issued or paid-up capital and there is no statutory maximum (authorized) capital. At

least one share must be held by a person or legal entity other than the BV itself or its subsidiaries. Shares can only be issued and transferred by means of a notarial deed executed before a Dutch civil law notary.

Shares

All shares have a nominal value which may be denominated in euro or in a foreign currency. A BV can have three types of registered shares, namely: ordinary shares, priority shares and preference shares. Priority shares are shares to which certain controlling rights are allocated pursuant to the articles of association (usually voting rights). Preference shares entitle the shareholder to a fixed dividend before the holders of ordinary shares are paid. A BV cannot issue bearer shares.

Moreover, a BV can issue non-voting shares as well as shares without profit rights. It is not possible to issue non-voting shares without profit rights. It is also possible for a BV to issue depository receipts (*certificaten*) for shares in order to split the voting and profit rights attached to the shares.

The articles of association of a BV may contain restrictions regarding the transfer of shares (a so-called blocking clause), but this is not mandatory. Furthermore, the articles of association may contain several other provisions regarding the (shareholders' rights attached to the) shares, such as so-called lock-up provisions, provisions concerning additional obligations for shareholders and quality requirements.

The management board of a BV is obliged to keep an up-to-date shareholders' register. The shareholders' register must contain the names and addresses of all shareholders, the types and numbers of shares, the amount paid-up on each share and the particulars of any issue or transfer of shares, right of pledge or usufruct over the shares, or the issue of depository receipts for shares if meeting rights are attached to the depository receipts.

General meeting

The general meeting is the corporate body composed of all shareholders

of the BV. The general meeting has all powers that are not vested in the management board or other corporate bodies. Pursuant to the Dutch Civil Code *(Burgerlijk Wetboek)*, the general meeting has several powers that are important for the existence and continuation of the company or the position and rights of its shareholders, such as the right to appoint and dismiss members of the management board and the right to resolve to amend the articles of association, to issue shares, to adopt the annual accounts, to legally merge or de-merge the company, to convert the company into an entity with a different legal form or to dissolve and liquidate the company.

Unless the articles of association provide otherwise, shareholders' resolutions are adopted by an absolute majority (being more than 50%) of the votes cast. A shareholders' meeting should be held at least once a year.

The articles of association can provide that the general meeting may give directions to the management board, but it may not act as the executive body of the BV (this can only be the management board).

Management board

The management board is the executive body of the BV consisting of one or more members who are adopted by the general meeting. unless the articles provide for a different manner of appointment, and is responsible both for the BV's day-to-day operations and for defining the strategy and policy of the BV's business. Its members (the managing directors) can be natural persons or legal entities and it is not required that they are resident in the Netherlands or have the Dutch nationality. The members of the management board have a fiduciary duty towards the BV and should at all times perform their duties in good conscience. If the management board has two or more members, they have a collective responsibility for the management of the company.

In principle, the management board can adopt resolutions during a meeting or in writing. The Dutch Civil Code contains very few provisions on convening and holding board meetings and decision making by the management board. It is quite common for separate board regulations, being a set of rules that the management board may adopt for internal purposes, to provide rules

on the functioning of the management board and the allocation of tasks and responsibilities among its members. Furthermore, a BV's articles may provide that certain management board resolutions listed in the articles or to be designated by the general meeting (or other corporate body) require the prior approval of the general meeting (or other corporate body).

Since 2013, a managing director may not take part in any discussion or decision making with respect to a transaction or a topic in relation to which he has a conflict of interest with the BV.

Supervisory board

The supervisory board supervises the management board, its policy and the general course of affairs within the company, and also renders advice to the management board. It carries out its duties in the interest of the company, taking the interests of all stakeholders into account. The members of the supervisory board (the supervisory directors) are not allowed to participate in management affairs. Similar to a managing director, a supervisory director may not take part in any discussion or decision making with respect to a transaction or a topic in relation to which he has a conflict of interest with the BV.

Under Dutch law, having a supervisory board is optional, unless certain statutory requirements as to the size of the company are met. The supervisory board of a "large company" *(structuurvennootschap)* has additional powers compared to a supervisory board of a regular company. Instead of having a supervisory board, a BV can opt for a one-tier board (see below).

One-tier board vs. two-tier board

In a two-tier board structure, a separate supervisory board supervises the management board and gives advice to the management board whereas in a one-tier board structure, there is no separate supervisory board, but instead, both executive and non-executive directors are members of the (one-tier) board. The executive directors are responsible for the BV's management and the non-executive directors are responsible for supervision

of the management. Notwithstanding the fact that their primary responsibility is different, as executive and non-executive directors are members of the same board, they have a collective responsibility for the management of the company.

Directors' liability

Each managing director shall be responsible towards the company for the proper performance of his duties. In case of an improper performance of management duties, on the basis of collective responsibility each managing director shall be liable towards the company, but only in case of serious negligence and unless the managing director was not negligent in taking measures to avert the consequences of the improper management. A managing director can also be liable towards third parties for non-payment of taxes and social premiums, for the deficit in case of bankruptcy (if the managing directors have neglected their management duties and it is apparent that this is an important cause for the bankruptcy), for the deficit that has arisen as a result of a distribution to shareholders (see below), for damages caused by publishing misleading financial statements and for damages caused by a wrongful act. In exceptional cases, the BV's shareholders can be held liable for acts performed in the name of the company (also known as "piercing the corporate veil"). This might happen, for instance, if the company's action can be qualified as a wrongful act and the court rules that the shareholder and the company are not to be regarded as fully separate entities.

Distributions

Dividend distributions and other distributions to shareholders may be made without any requirement for a minimum amount of equity to remain within the company, except for reserves which must be maintained pursuant to the law or the articles of association of the BV. Furthermore, distributions may only be made with the consent of the management board. The management board may only refuse its consent if it knows or should reasonably foresee that the BV will no longer be able to continue paying its due and payable debts after the intended distribution.

The Dutch Civil Code further stipulates that if the BV becomes insolvent and the managing directors of the BV at the time of the distribution knew, or should reasonably have foreseen, that the BV would not be able to continue paying its due and payable debts, the managing directors will, in principle, be jointly and severally liable towards the BV for the deficit that has arisen as a result of the distribution. For this reason, the management board will typically perform a form of liquidity or solvency test before approving a resolution of the general meeting to make a distribution to the BV's shareholders. Also, a shareholder who has received the distribution while the shareholder knew or should reasonably have anticipated that the BV would no longer be able to continue paying its due and payable debts after the distribution, will be liable towards the BV for the deficit that has arisen as a result of the distribution up to the amount or value the shareholder has received.

2.3 NV

A company limited by shares *(naamloze vennootschap* or *NV)* is a legal entity comparable to the British 'Plc.', the German 'Aktiengesellschaft' (AG) and the French 'Société Anonyme' (SA). The NV is the legal form mostly used for large companies and listed companies.

In general, many rules applying to a BV also apply to an NV, but there are significant differences. The main differences between an NV and a BV are outlined below.

Incorporation

In addition to the incorporation requirements for a BV, the incorporation of an NV requires a declaration from a bank or an auditor's certificate confirming that the amount that must be paid on the shares issued upon incorporation has been paid.

Share capital

An NV must have an authorized share capital, being the maximum nominal

amount for which shares may be issued. Twenty percent of the authorized share capital must be issued and at least twenty-five percent of the nominal value of the issued shares must be paid up. By law, NVs must have an issued and paid-up capital of at least EUR 45,000.

Shares

Unlike a BV, an NV can issue not only registered shares, but also bearer shares. An NV cannot issue non-voting shares or shares without profit rights. Nonetheless, an NV, like a BV, has the possibility to issue depository receipts *(certificaten)* in order to split voting and profit rights.

Registered shares can only be transferred by means of a notarial deed of transfer executed before a Dutch civil law notary, unless the NV is officially listed on a regulated stock exchange. Since 1 January 2020, bearer shares can only be traded through a securities account with an intermediary (such as a bank) and therefore only by book-entry.

Distributions

An NV may only make distributions to its shareholders to the extent that its shareholders' equity exceeds the amount of the paid and called-up part of the capital plus the reserves that must be maintained by virtue of the law or the articles of association. The formal approval of the management board is not required.

Financial assistance

In principle, it is prohibited for NVs (and its subsidiaries) to provide collateral, guarantee full payment of an agreed purchase price or otherwise guarantee or bind itself jointly with or for the benefit of third parties if this is done for the purpose of the subscription or acquisition of shares in the NV's issued capital. The financial assistance rules only apply to NVs, not to BVs or other legal entities.

2.4 Cooperative

A cooperative *(coöperatie)* is an association with specific features making it suitable for business purposes. A cooperative is an entity with legal personality. Although originally, the cooperative was typically used for agricultural business purposes, until recently it enjoyed popularity as a business form used as a holding vehicle in international structures due to its flexibility and certain tax aspects. The name of a cooperative must contain the word *"coöperatief"*.

By law, the objective of a cooperative is to provide for material needs of its members under an agreement, other than insurance agreements, concluded with them in the course of its business and for the benefit of its members. It is noted that the cooperative is considered an extension of the businesses of its members.

Incorporation

A cooperative is incorporated by at least two incorporators by means of a notarial deed executed before a Dutch civil law notary. The incorporators will be the initial members of the cooperative, unless the deed of incorporation provides otherwise. A cooperative must be registered with the trade register of the Chamber of Commerce.

General meeting of members

As the cooperative is a special form of association, it has members rather than shareholders. Legal entities, partnerships and natural persons can be members of a cooperative.

The general meeting of members has all powers that are not vested in the management board or other corporate bodies of the cooperative. For example, the general meeting of members has the right to appoint, suspend and dismiss the managing directors, to approve the admission of new members and to adopt the annual accounts, to amend the articles of association, to legally merge or de-merge the cooperative, to convert the

cooperative into an entity with a different legal form and to dissolve and liquidate the cooperative. A members' meeting should be held at least once a year.

Management board and supervisory board

A cooperative must have a management board. It can have either a one-tier board or a two-tier board. The tasks and responsibilities and the liability of the members of the management board and the supervisory board are similar to those of the members of a management board and a supervisory board in a BV (see paragraph 2.2 above).

Capital

The capital of a cooperative is not divided into shares. There is no statutory minimum capital requirement for a cooperative. Typically, capital contributions by the members are recorded in so-called member accounts maintained by the cooperative for each member.

Distributions

The cooperative's profits may be distributed to its members. The members' profit entitlement is often based on the amount or value of their respective contributions to the cooperative.

Liability of the members

In general, the members of a cooperative are not liable for the obligations of the cooperative during its existence. In case of a dissolution or bankruptcy of a cooperative, its members can be liable for a possible deficit depending on the type of cooperative. There are three types of cooperatives: the cooperative with excluded liability (members are not liable in any event), the cooperative with limited liability (liability of a member is limited to the maximum amount stated in the articles of association of the cooperative) and the cooperative with statutory liability (each member is liable for the deficit in equal parts).

In case of a cooperative with excluded liability, the letters “U.A.” *(uitgesloten aansprakelijkheid)* must be placed after its name. In case of a cooperative with limited liability, the letters “B.A.” *(beperkte aansprakelijkheid)* must be added and if there is no limitation applicable, the letters “W.A.” *(wettelijke aanprakelijkheid)* must be added.

2.5 Partnership

Under Dutch law, partnerships are contractual arrangements which do not possess legal personality. There are three types of partnerships: (i) the professional partnership *(maatschap)*, (ii) the general partnership *(vennootschap onder firma* or *VOF)* and (iii) the limited partnership *(commanditaire vennootschap* or *CV).* Even though a partnership is not a legal entity, it does have a so-called “separate equity” *(afgescheiden vermogen)*, which means that business creditors of the partnership have priority over the creditors of the individual partners if they wish to take recourse on the partnership’s assets. A partnership can be a party to an agreement and sue or be sued in legal proceedings.

It is not mandatory for the parties to enter into a written partnership agreement in order to set up a partnership, although it is common to do so.

Re (i) Professional partnership

A professional partnership is traditionally used for the purpose of jointly exercising a profession (by persons such as lawyers, architects or doctors). A professional partnership must be formed by at least two partners that may either be private individuals or legal entities. Each partner must make a contribution to the professional partnership in the form of cash, labour or assets. Each partner must share in the professional partnership’s profits.

Each partner in a professional partnership is liable for the professional partnership’s deficits in equal parts, unless agreed otherwise. A partner who joins a professional partnership is also liable for debts of the partnership that were incurred before joining the partnership. A resigning partner remains liable for the debts incurred before his resignation.

Re (ii) General partnership

A general partnership is a partnership that is used by the partners to jointly conduct a business under a joint name. A VOF and its partners must be registered with the trade register of the Chamber of Commerce. Each partner is required to make a contribution to the VOF in the form of cash, labour or assets. The profits must be shared among all partners.
All partners of a VOF are jointly and severally liable for the obligations of the VOF. Creditors can take recourse not only on the assets of the VOF but also on the personal assets of the VOF's partners. A partner who joins a VOF is also liable for debts of the VOF that were incurred before joining the VOF. A resigning partner remains liable for the debts incurred during the period in which he was a partner of the VOF.

Re (iii) Limited partnership

A limited partnership *(commanditaire vennootschap* or *CV)* is a partnership between one or more general partners *(beherend vennoten)* and one or more limited partners *(commanditaire vennoten)*. The general partners are responsible for the management and the day-to-day business of the CV. Limited partners are silent partners whose primary responsibility is the financing of the CV. Only the general partners can represent the CV. The name of a limited partner may not appear in the CV's name. Each partner is required to make a contribution to the CV in the form of cash, labour or assets, whereby it is not possible for a limited partner to only contribute labour. The profits must be shared among all partners.

The general partners are jointly and severally liable for the CV's obligations. Limited partners are in principle not liable vis-à-vis creditors of the CV. The internal liability of limited partners is limited to their contribution to the CV. A general partner who joins a CV is also liable for debts of the CV that were incurred before joining the CV. A resigning general partner remains liable for the debts incurred before the resignation as a general partner of the CV.

2.6 SE

A 'Societas Europaea' or European Company *(Europese naamloze vennootschap* or *"SE")* is a supranational legal form with legal personality, introduced by the EU Regulation on the Statute for a European Company.

SEs can be transferred from one member state of the European Economic Area to another. Dutch SEs are subject to both Dutch corporate law and EU law. To a certain extent, the SE is comparable to a Dutch NV. An SE can be used for the same business purposes as BVs and NVs.

2.7 Branch

A foreign company can also conduct its business activities in the Netherlands through a branch. A branch is not a separate legal entity as it is part of the foreign legal entity. A branch of a foreign company must be registered with the trade register of the Chamber of Commerce.

3. FINANCIAL REPORTING

3.1 General

Title 9 of Book 2 of the Dutch Civil Code, which provides rules on financial reporting and annual accounts, applies to cooperatives *(coöperaties)*, mutual insurance societies *(onderlinge waarborgmaatschappijen)*, companies limited by shares *(naamloze vennootschappen)* and private companies with limited liability *(besloten vennootschappen met beperkte aansprakelijkheid)*. It also applies to limited partnerships *(commanditaire vennootschappen)* and general partnerships *(vennootschappen onder firma)* of which all partners are companies formed under foreign law and fully liable for the debts of that partnership.

The Dutch Civil Code distinguishes between “micro”, “small”, “medium sized” and “large” entities whereby, generally, the least burdensome reporting requirements apply to micro entities. A company will fall within a particular category if two of the three criteria set out below are present:

	Micro	**Small**	**Medium**	**Large**
(1)Value of assets in accounts	Not more than EUR 350,000	Not more than EUR 6 million	Not more than EUR 20 million	More than EUR 20 million
(2) Annual net turnover	Not more than EUR 700,000	Not more than EUR 12 million	Not more than EUR 40 million	More than EUR 40 million
(3) Annual average number of employees	Fewer than 10	Fewer than 50	Fewer than 250	250 or more

The value of the assets, the net turnover and the number of employees of group companies must be aggregated, as they would have been if the company would be required to prepare consolidated annual accounts. This aggregation requirement does not apply to Dutch group companies to which the consolidation exemption of Section 2:408 of the Dutch Civil Code (see paragraph 3.7 below) applies.

As a company's circumstances change, it may find that it meets the criteria for a different category. Sometimes these changes are only minor fluctuations in value or numbers that may even be only temporary. In order to eliminate the administrative burden that will accompany such fluctuations, a company will not move from one category to another until it has satisfied the criteria for that other category for two consecutive years.

As an example:

	Conditions satisfied	**Subject to requirements for**
Year 1	small company	small company
Year 2	medium company	small company
Year 3	medium company	medium company

3.2 Annual accounts, management report and additional information

Dutch law prescribes that annual accounts (comprising the balance sheet, profit and loss account and notes; *jaarrekening*), a management report *(jaarverslag)* and certain additional information *(overige gegevens)* must be prepared by the management board *(bestuur)* and made available for inspection by the shareholders at the offices of the company each year. These documents must be prepared within 5 months of the end of the company's financial year; on account of special circumstances, the general meeting may extend this period by a maximum of five months. The documents that must be prepared differ for each category.

The annual accounts shall, in accordance with generally accepted accounting standards, provide such insight that a responsible opinion can be formed about the equity of the legal entity and its result, as well as about the solvency and the liquidity of the legal entity. The management report gives a true and fair view of the situation on the balance sheet date, the development during the financial year and the results of the legal entity and the group companies whose financial data are included in its annual accounts. Additional

information is information that must be added to the annual accounts and the management report, which includes the auditor’s report (if required), the allocation of profits, important post-balance sheet events, a list of the entity’s branches and the countries where these branches are located and certain details included in the legal entity’s articles of association.

The annual accounts and the consolidated accounts may be prepared in a foreign currency if this is justified by the activities of the entity or the international structure of the group the entity belongs to. The items stated in the annual accounts must be described in the Dutch language, unless the general meeting has resolved to use another language. The management report is normally prepared in the Dutch language. However, the general meeting may decide that a different language shall be used.

The annual accounts must be signed by all members of the management board and all members of the supervisory board *(raad van commissarissen)* (if there is one). If one or more of the required signatures are missing, this must be stated, giving the reason for the omission.

3.3 Audit requirements

All entities, except micro and small entities and entities to which the exemption of Section 2:403 of the Dutch Civil Code applies (see paragraph 3.6 below), must appoint an auditor to review their annual accounts. The auditor must express an opinion as to whether the accounts constitute a fair representation of the company’s financial circumstances. In addition, the auditor must determine:

- whether the annual accounts satisfy the requirements set by law;
- whether the management report complies with the law and is consistent with the annual accounts; and
- whether certain mandatory additional information has been included in the annual accounts.

The auditor must be a Dutch registered accountant or a licensed foreign

auditor. An audit firm may also be appointed. The auditor can be appointed by (in order of priority):

- the general meeting; or
- the supervisory board (if there is one); or
- the management board.

The auditor may at any time be dismissed by the body which appointed him or by a body with a higher “priority”.

The auditor shall report to the management board and to the supervisory board (if any) concerning matters subject to his review. The auditor sets out the result of his audit in a certificate stating whether or not the annual accounts give a true and fair representation of the company’s financial situation.

3.4 Adoption of the annual accounts

The annual accounts of a legal entity must be adopted by the entity’s general meeting.

Accounts can only be adopted if the general meeting has been able to inspect the auditor’s certificate which must be attached to the annual accounts. The date of adoption must be stated on the copy of the annual accounts that is filed with the trade register of the Chamber of Commerce (see paragraph 3.5 below).

3.5 Publication of the annual accounts

The following documents (in Dutch, German, French or English) must be filed with the trade register of the Chamber of Commerce:

For large companies:
- full balance sheet, full profit and loss accounts and notes (consolidated and unconsolidated);

- management report and additional information

For medium sized companies:
- limited balance sheet, limited profit and loss accounts and notes (consolidated and unconsolidated)
- management report and additional information

For small companies:
- summary of balance sheet and notes, including information on the number of employees (consolidated and unconsolidated)

For micro companies:
- limited summary of balance sheet (consolidated and unconsolidated)

The deadlines for publication of the annual accounts are as follows:

(1) the filing must take place within 8 days of adoption of the annual accounts by the general meeting;
(2) if the annual accounts are not adopted within 7 months after the end of the financial year, then, unless (3) below applies, the management board must immediately file a copy of the unadopted annual accounts, together with a note stating that they have not yet been adopted;
(3) the general meeting may, on account of special circumstances, grant the management board an extension of the statutory 5 month period prescribed for the preparation and presentation of the annual accounts by a maximum of 5 months (see paragraph 3.5 above). If an extension has been granted, the annual accounts must be adopted within 2 months of the last day of the extended period; and
(4) the annual accounts – whether or not adopted – must in any case be filed within 12 months of the end of the financial year.

The Chamber of Commerce monitors compliance. Non-compliance is an economic offence and, in specific circumstances, if the accounts have not been published, the managing directors may be personally liable to creditors if the company is declared bankrupt.

The legal entity must ensure that its annual accounts, the management report and the additional information are all available at its offices from the day notice is given of the general meeting at which the accounts are to be discussed.

3.6 Group exemption (Section 2:403 of the Dutch Civil Code)

If certain conditions are met, under Section 2:403 of the Dutch Civil Code, a Dutch entity belonging to a group need not comply fully with the accounting and reporting provisions if its obligations are guaranteed by its consolidating parent company located within the EU (the so-called group exemption or 403-exemption). If the 403-exemption applies, it means that the relevant entity is not obligated to:

(1) prepare its annual accounts in accordance with the relevant statutory provisions that normally apply to companies;
(2) supplement the annual accounts with certain additional information normally required;
(3) instruct an auditor to audit the annual accounts;
(4) file or deposit annual accounts or a management report.

To benefit from a 403-exemption, the following requirements must be met:

(a) the balance sheet must at least show the sum of the fixed assets, the sum of the current assets and the amount of the shareholders' equity, the provisions and the liabilities;
(b) the profit and loss account must at least show the net result from ordinary operations and the net balance from any other income and expenditures;
(c) after the commencement of the financial year, but before the adoption of the annual accounts, the shareholders must have declared in writing their agreement to deviate from the provisions on the preparation of the annual accounts;
(d) the financial information of the company must have been consolidated by another legal entity or partnership (the parent company) in

consolidated annual accounts to which, pursuant to applicable law, the Seventh Directive on Company Law of the Council of the European Communities applies;

(e) insofar as the consolidated annual accounts have not been prepared in or translated into Dutch, they must have been prepared in or translated into French, German or English;

(f) the auditor's certificate and the management report must have been prepared in or translated into the same language as the consolidated annual accounts;

(g) the legal entity or partnership referred to under (c) above must have declared in writing that it assumes joint and several liability for any debts arising from the legal acts of the Dutch company; and

(h) the following documents must be filed with the trade register of the Chamber of Commerce:
   (i) the declaration under (c) (shareholders' agreement to deviate from applicable statutory provisions) – filing must take place each year within 6 months of the balance sheet date or within one month of a later publication date (if permitted);
   (ii) the documents or translations mentioned under (d) (consolidated accounts) and (e) (auditor's certificate) – filing must take place each year within 6 months of the balance sheet date or within 1 month of a later publication date (if permitted);
   (iii) the declaration under (f) (declaration of joint and several liability by parent company) above - filing must take place only once, when the company applies the 403-exemption for the first time.

The parent company may withdraw the declaration of joint and several liability by filing a separate declaration to that effect with the trade register. Notwithstanding the foregoing, the parent company's responsibility will continue in respect of debts arising from legal acts performed before the guarantee is withdrawn. This residual responsibility will cease only if all of the following conditions have been satisfied:

(a) the Dutch company no longer belongs to the group the parent company is part of;

(b) a notice of the parent company's intention to withdraw the declaration of joint and several liability has been filed with the trade register;

(c) at least two months have elapsed since the parent company announced in a nationally distributed newspaper its intention to withdraw the declaration of joint and several liability, which announcement should mention where the notice of its intention to withdraw is available for inspection; and

(e) no creditors have opposed the parent company's intended withdrawal of the declaration of joint and several liability in a timely manner or any opposition made has been withdrawn or declared unfounded by an irrevocable decision of the court.

3.7 Consolidation exemption (Section 2:408 of the Dutch Civil Code)

Section 2:406 of the Dutch Civil Code prescribes that the legal entity which, alone or jointly with another group company, heads its group shall prepare consolidated accounts which shall include its own financial data and those of its subsidiaries in the group, other group companies and other legal entities over which it has dominant control or which fall under its central management. Under Section 2:408 of the Dutch Civil Code, intermediate holding entities may be excluded from the statutory consolidation requirements, provided that:

(a) within 6 months after the commencement of its financial year, the legal entity has not been notified in writing of an objection by at least one-tenth of its members or shareholders holding at least one-tenth of its issued capital;

(b) the financial information which the legal entity should consolidate has been included in the consolidated accounts of another entity;

(c) the consolidated annual accounts and the management report have been prepared in accordance with the provisions of the Seventh Directive on Company Law of the Council of the European Communities or, if these provisions need not be observed, in an equivalent manner (even if the consolidating entity is not an EU based entity);

(d) insofar as they have not been prepared in or translated into Dutch, the consolidated annual accounts with the auditor's certificate and the

management report have been entirely prepared in or translated into French, German or English; and

(e) each year, within 6 months of the balance sheet date or within one month of a later publication date (if permitted), the documents or translations mentioned under (d) above have been filed with the trade register; and

(f) the legal entity mentions the application of the consolidation exemption in the notes to its balance sheet.

4. INSOLVENCY

4.1 General

In the Netherlands there are two main types of insolvency procedures:

(i) bankruptcy *(faillissement)*; and
(ii) suspension of payments *(surséance van betaling)*.

The rules applicable to bankruptcy and to suspension of payments are included in the Dutch Bankruptcy Act *(Faillissementswet)*, which treats domestic creditors and foreign creditors equally. A third type of insolvency procedure, the so-called debt management for natural persons *(schuldsanering natuurlijke personen)*, is governed by a separate act. It only applies to natural persons and will not be addressed here.

All bankruptcies and suspensions of payments are listed in the Central Insolvency Register *(centraal insolventieregister)*. This register can be found on the relevant website of the registrations with the Central Insolvency Register (www.rechtspraak.nl).

4.2 Bankruptcy

A Dutch company can be declared bankrupt if it has ceased paying its debts. The company or one or more of its creditors may file for bankruptcy. In exceptional cases, the public prosecutor can file for bankruptcy if the public interest requires such filing.

A petition for bankruptcy must be filed at the competent court located in the jurisdiction of the debtor's residence or registered office. A creditor filing for bankruptcy must:

- provide *prima facie* evidence of his claim against the debtor;
- demonstrate that the debtor is not paying its debts; and

- show that the debtor has multiple creditors and that at least one of these creditors has a claim against the debtor that is due and payable.

A creditor is obliged to engage a lawyer in order to file for the debtor's bankruptcy. A debtor can file a request for its own bankruptcy without legal representation. In order to do so, the debtor must complete a special form and submit it to the competent court.

If the court declares the debtor bankrupt, it will appoint a bankruptcy trustee *(faillissementscurator)*. From midnight on the day on which the bankruptcy is declared, the company's directors lose the power of disposition of the company's assets. The bankruptcy trustee will liquidate the company's assets and distribute the proceeds in accordance with the statutory priority rules amongst the company's creditors. The bankruptcy trustee is supervised by a bankruptcy judge *(rechter-commissaris)*.

4.3 Suspension of payments

A suspension of payments enables the debtor to restructure its debts and to find another way to finance its debts.

If a company is temporarily unable to pay its debts, it can request the court to grant a suspension of payments in order to secure continuation of its business. During the suspension of payments, creditors cannot collect their claims on the debtor. The claims of secured creditors and preferred creditors (such as the Dutch tax authorities) are, however, not affected by a suspension of payments.

If the court grants the requested suspension of payments, the court will appoint an administrator *(bewindvoerder)* who manages and who can assist the company together with the debtor and can assist the debtor in negotiations with its creditors. Certain legal acts of the debtor must first be approved by the administrator.

A suspension of payments may be granted for a maximum period of 18

months. This initial period may be extended by an unlimited number of 18-month periods at the request of the debtor. The suspension of payments will end when all creditors have been paid in full or if a composition agreement is accepted by both the creditors and the court (see below). If it turns out that the financial problems are not temporary and the company is structurally unable to pay its debts, the suspension of payments is usually followed by a bankruptcy.

4.4 Composition

Pending suspension of payments or bankruptcy proceedings, the debtor may propose a composition to its unsecured creditors holding claims that arose before the proceedings were opened. A composition is an arrangement between the debtor and its unsecured creditors whereby the debtor offers partial payment of the creditors against full and final discharge of their claims. If the majority of the unsecured creditors agrees to and accepts the composition, it is binding on all unsecured creditors. Upon the composition being approved by the court, the suspension of payments or bankruptcy ends.

4.5 Restructuring to prevent insolvency

On 1 January 2021, the Act on the court approval of private restructuring plans *(Wet Homologatie Onderhands Akkoord* or *WHOA)* entered into force. The WHOA is compliant with EU Directive 2019/1023 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt (the “Restructuring Directive”) and may to a certain extent be regarded as the transposition of the Restructuring Directive in the Netherlands.

The WHOA introduces an effective restructuring mechanism for distressed debtors to restructure their debts and equity and amend or prematurely terminate burdensome contracts to which it is a party outside formal

insolvency proceedings. The restructuring tool provided by the WHOA bears similarities to the English scheme of arrangement and the US Chapter 11 procedures. Under the WHOA, the debtor or a so-called restructuring expert prepares a restructuring plan in which creditors and shareholders are divided into different classes. The restructuring plan can be submitted for consideration to the creditors and shareholders whose rights are affected by the restructuring plan, whereby the debtor or the restructuring expert may decide that the restructuring plan is submitted to only specific classes of creditors or even to only one class of creditors to vote on accepting the plan. If at least one class of creditors has voted in favour of the restructuring plan, it can be submitted to the court for its approval. If the court approves the plan, it is binding on the debtor and all creditors to whom the plan was submitted for a vote. The rights of other creditors are not affected.

5. REGULATORY

5.1 Foreign Direct Investments

A foreign direct investment (FDI) is an investment made in the form of acquiring a controlling stake in a company or business by an investor or company from another country. Foreign portfolio investments which are made for the purpose of passively holding stock or other securities in foreign companies are not regarded as FDIs.

FDI screening is becoming increasingly important and relevant for in particular cross-border M&A transactions. Presently, the Netherlands has certain sector specific screening mechanisms in place in the electricity, natural gas and telecommunications sectors. Pursuant to these regulations, in the interest of public security the prior permission from the Ministry of Economic Affairs and Climate must be obtained with respect to the proposed acquisition of control over a Dutch company operating in one of these sectors by a foreign investor. On 1 June 2023, the Investment, Mergers and Acquisitions (Security) Act *(Wet veiligheidstoets investeringen, fusies en overnames* or *Wet Vifo)* entered into force, which contains FDI-like rules that are not limited to a specific sector. The Wet Vifo has retroactive effect to 8 September 2020 and may therefore affect transactions prior to its entry into force.

At the EU level, Regulation (EU) 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investments into the European Union entered into force on 10 April 2019 and is fully applicable in all EU member states as of 11 October 2020. The Regulation establishes a new EU FDI framework for screening FDIs on the grounds of national security and public order. The scope of the Regulation includes a broad range of investments of any kind which establish or maintain lasting and direct links between investors from third countries and undertakings carrying out an economic activity in an EU member state. Portfolio investments are not covered by the Regulation.

The Regulation promotes cooperation, information sharing and a minimum

level of transparency regarding FDI screening between the European Commission and EU member states rather than harmonising FDI measures in the individual members states or replacing the existing national FDI screening regulations. The Netherlands has implemented the EU FDI framework for screening FDIs with the Implementation Act on Foreign Direct Investment *(Uitvoeringswet screeningsverordening buitenlandse directe investeringen)* which entered into force on 4 December 2020.

5.2 Cross-border payments

According to its own mission statement, the Dutch Central Bank *(De Nederlandsche Bank* or *DNB)* is committed to a stable financial system: stable prices, solid financial institutions and properly functioning payment transfers. Under the Foreign financial relations act 1994 *(Wet financiële betrekkingen buitenland 1994* or *Wfbb)* the DNB shall, among other things, collect data on the balance of cross-border payments to and from the Netherlands and provide such data to the Minister of Finance. Pursuant to the Wfbb, so-called special financial institutions *(bijzondere financiële instellingen)* can be designated as reporting entities.

A special financial institution (SFI) is an institution domiciled in the Netherlands that is directly or indirectly owned by non-residents and whose purpose or main business is to receive and pay funds from and to non-residents. Examples of SFIs are:

- holding companies controlled by 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 invoice other foreign entities and are themselves mainly invoiced by foreign companies.

An SFI must register with the DNB within three weeks after its incorporation. The DNB will assess whether or not the SFI will be designated as a reporting entity.

5.3 Financial Supervision Act

The Financial Supervision Act *(Wet op het financieel toezicht* or *Wft)*, which regulates the financial sector in the Netherlands and its supervision, entered into force on 1 January 2007. The Wft provides, among other things, rules on the supervision of banks, insurers, investment firms, collective investment schemes (being investment companies and unit trusts) and financial service providers.

In respect of supervision, the Wft distinguishes between: (i) prudential supervision, which is conducted by the DNB, and (ii) conduct of business supervision, which is carried out by the Dutch Authority for the Financial Markets *(Autoriteit Financiële Markten* or *AFM)*. The AFM, whose role is comparable to that of the SEC in the United States and the BaFin in Germany, is the independent supervisory authority for the savings, lending, investment, and insurance markets. Chapter 4 of the Wft, which is concerned with the supervision of financial enterprises, provides rules that financial enterprises have to observe when providing their services, such as rules on informing consumers (transparency) and the duty of care in relation to clients. The purpose of prudential supervision is to ensure the financial soundness of financial undertakings and prudential supervision therefore contributes to the stability of the financial sector. Conduct of business supervision is concerned with orderly and transparent market processes, honest relations between market parties and the conscientious treatment of the clients of financial institutions.

5.4 Money laundering

On 25 July 2018, the revised Money Laundering and Terrorist Financing (Prevention) Act *(Wet ter voorkoming van witwassen en financieren van terrorisme* or *Wwft)* entered into force. By the entry into force of the Wwft the Netherlands has transposed the European directive on prevention of the use of the financial system for the purpose of money laundering and terrorist financing (the Fourth Anti-Money Laundering Directive or AMLD4) into national legislation. On 21 May 2020, the Fifth Anti-Money Laundering Directive (AMLD5), aimed at mitigating criminal activity, was transposed into

Dutch law by way of an amendment of the Wwft. Furthermore, the Sixth Anti-Money Laundering Directive, which supplements AMLD5, was published on 12 November 2018, but has not yet been transposed into Dutch law.

The Wwft applies to institutions such as credit institutions, financial institutions, life insurance companies, investment firms, investment institutions, financial service providers, money market institutions, trust offices, accountants, tax advisors, lawyers, notaries, casinos, companies that distribute credit cards and certain natural and legal entities trading in goods, to the extent that payments are made in cash in an amount of € 10,000 or more. It can apply to both legal entities and natural persons.

The objective of the Wwft is to prevent and combat financial and economic crime, in particular money laundering and the financing of terrorism, with a view to maintaining the integrity of the Dutch financial system. The Wwft adopts a risk-based approach rather than a rule-based approach: institutions must perform their own assessment of the risks posed by individual clients or products and may adapt their compliance efforts to those risks. The two main obligations under the Wwft are: (i) performing customer due diligence and (ii) reporting unusual transactions.

Customer due diligence

The institutions to which the Wwft applies have the obligation to verify the identity of the client and of the client's beneficial owners (the so-called UBOs) and, if necessary, to determine the origin of the funds used. This verification must be done before the transaction takes place. The depth of client due diligence should be adapted to the risks posed by the particular clients, services and transactions.

Reporting of unusual transactions

Deviating transaction patterns can be reason for the institution to consider a transaction unusual. An institution is obliged to report these unusual (proposed) transactions to the Financial Intelligence Unit (FIU-the Netherlands) without delay. A mere suspicion of money laundering or the financing of terrorism is sufficient.

UBO register

All companies, other legal entities and partnerships incorporated or established under Dutch law are required to register their ultimate beneficial owners (UBOs) in a UBO register. The introduction of the UBO register is part of the implementation of the Fourth and Fifth European Anti-Money Laundering Directives. An ultimate beneficial owner is defined as ‘the natural person who ultimately owns or controls a company or other legal entity’. The UBO register is maintained by the Chamber of Commerce. The Netherlands has also established a separate UBO register for trusts and similar legal structures which entered into force on 1 October 2022.

6. SECURITY RIGHTS

6.1 Types of security rights in the Netherlands

In the Netherlands, security is typically provided in the form of *in rem* security rights over assets. Under Dutch law, there are two types of security rights that can be created over assets: (i) a right of mortgage and (ii) a right of pledge. A right of mortgage can be established over registered property (such as real estate, registered vessels and aircrafts). A right of pledge can be established over movable assets (such as inventory, equipment, stock and commodities), receivables (such as trade receivables, intercompany receivables, bank account receivables and insurance receivables), registered shares and intellectual property rights.

A Dutch law security right can only be established to secure present and future monetary payment obligations and can only be established over assets which are sufficiently identifiable and transferable or assignable. A security assignment (i.e. transfer of legal title to assets for security purposes) is not allowed under Dutch law.

Right of mortgage over registered property

A right of mortgage can be established over real estate, registered vessels and aircrafts registered in the Netherlands and is established by means of a notarial deed of mortgage executed before a Dutch civil law notary and registration thereof in the relevant Dutch public register.

Right of pledge over receivables

A right of pledge over receivables can either be disclosed or undisclosed and requires a written pledge agreement between the pledgor and the pledgee. A disclosed right of pledge over receivables needs to be notified to the relevant debtors and is usually established with respect to intercompany receivables, insurance receivables and bank account receivables. In case of an undisclosed right of pledge over receivables, the pledge agreement needs

to be registered with the Dutch tax authorities, unless the pledge agreement is executed in the form of a notarial deed. For commercial reasons, a right of pledge over trade receivables is generally not notified to the debtors and is, therefore, created as an undisclosed right of pledge over receivables, but notification of the right of pledge to the trade debtors is necessary to enforce the right of pledge.

Right of pledge over movable assets

A right of pledge over movable assets can be created as a non-possessory right of pledge or a possessory right of pledge and is established by means of a written pledge agreement between the pledgor and the pledgee. In case of a non-possessory right of pledge, the pledge agreement needs to be registered with the Dutch tax authorities, unless the pledge agreement is executed as a notarial deed. In case of a possessory right of pledge, the pledgee (or a third party appointed by the pledgor and the pledgee and acting on behalf of the pledgee) must have effective and exclusive control over the movable assets and the control may not be held together with the pledgor.

Right of pledge over registered shares

A right of pledge over registered shares in the capital of a Dutch private company with limited liability *(besloten vennootschap met beperkte aansprakelijkheid* or BV) or a Dutch public company with limited liability *(naamloze vennootschap* or NV) is established by means of a deed of pledge over shares executed before a Dutch civil law notary. As a pledgee can only enforce his rights as a pledgee against the company in whose capital the shares are pledged if the company has been notified of the right of pledge, the company is usually a party to the notarial deed.

Right of pledge over intellectual property rights

A right of pledge over intellectual property rights is established by means of a written pledge agreement between the pledgor and the pledgee or by means of a deed of pledge executed before a Dutch civil law notary. In general, each written pledge agreement concerning IP rights or related rights

should be registered with the Dutch tax authorities for evidence purposes, and in relation to licences and domain names, this registration is a perfection requirement. In addition, the pledge agreement (or notarial deed, as the case may be) should be registered with the relevant IP register or .nl internet domain name registrar, or both (if applicable). Each register or registrar has its own requirements for registration.

Guarantees and other forms of security

Corporate guarantees and declarations of joint and several liability by the parent company and/or its (key) subsidiaries are common in group financings and are commonly included in the facility agreement. Guarantee limitations as to the maximum amount of the guarantee are uncommon in the Netherlands.

6.2 Limitations on the granting of security rights and guarantees

Ultra vires/corporate benefit

Under Dutch law, granting upstream, downstream and cross-stream guarantees or security is allowed, provided that (i) this falls within the scope of the corporate objects clause of the company, and (ii) there is sufficient corporate benefit for the company. Any legal act entered into by a Dutch company may be nullified by the company or the bankruptcy trustee in the event of bankruptcy if it is ultra vires (i.e. falls outside the scope of the company's objects). A legal act may be ultra vires if (i) the legal act is not expressly allowed by the objects clause in the company's articles of association and could not be conducive to the realisation of these objects, and (ii) the other party was aware of this or should be aware of this without an independent investigation. To determine whether a specific legal act is ultra vires, all relevant circumstances need to be considered.

Corporate authorisation and capacity

Prior to the establishment of a right of pledge over shares in a BV or an NV, it

should be checked whether the articles of association of the company allow the establishment of a right of pledge over its shares and the transfer of the voting rights attached to the shares. In addition, the articles of association may contain share transfer restrictions. Further, depending on the articles of association, a right of pledge over shares may require a shareholders' resolution of the company approving the (conditional) transfer of the voting rights attached to the shares.

Works council

A Dutch company with 50 or more employees is required to have a works council. If a works council is in place, the prior advice of the works council needs to be obtained for certain important decisions relating to the transactions listed in the Dutch Works Council Act *(Wet op de ondernemingsraden)* (such as a change of control over the company, borrowing under material loans and the granting of security for material loans, unless the granting of security takes places in the ordinary course of business).

Financial assistance

Under Dutch law, an NV may not provide collateral, give a price guarantee, or otherwise bind itself (jointly and severally or otherwise) for the purpose of the subscription or acquisition (by third parties or itself) of shares in its own capital. In addition, an NV may not grant loans for the aforementioned purpose, unless the management board of the NV has resolved to do so after having received the prior approval of the general meeting of the NV and provided that the following conditions have been met:

(i) the loan, including the interest received by the company and the security provided to the company, is provided at fair market conditions;
(ii) the equity, less the amount of the loan, is not less than the paid-up and called-up part of the capital, plus the reserves that must be maintained in accordance with the law or the articles of association;
(iii) the creditworthiness of the third party or, in the case of multiparty transactions, of each party involved, has been carefully investigated; and

(iv) if the loan is granted with a view to the subscription for shares in the context of an increase of the company's issued capital or with a view to acquiring shares held by the company in its own capital, the price at which the shares are subscribed to or acquired is fair.

The financial assistance prohibition also applies to all (Dutch or foreign) subsidiaries of the NV, including Dutch BVs, even though the financial assistance prohibition with respect to BVs was abolished upon the entry into force of the Act on the simplification and flexibilisation of the rules applicable to Dutch BVs *(Wet vereenvoudiging en flexibilisering van het bv-recht)* on 1 October 2012. Security rights, guarantees and loans granted in breach of the financial assistance prohibition are regarded as being null and void.

Actio pauliana

A legal act (such as the granting of guarantees or security rights) performed by a person or a legal entity can be nullified on the initiative of any creditor (or, in case of bankruptcy of the company, the bankruptcy trustee) if each of the following requirements are met: (a) the legal act was performed without a legal obligation to do so, (b) the person performing the legal act and the other party or parties knew or should have known that the legal act would adversely affect the recourse possibilities of present and future creditors, and (c) the legal act was prejudicial to the recourse possibilities of the creditors of the person performing the legal act.

Parallel debt

In the Netherlands, the general view is that a right of pledge cannot be validly created in favour of a person who is not the creditor of the secured obligations. Therefore, if Dutch law security is to be held by a security agent, a 'parallel debt' is created, whereby each obligor undertakes as an additional and separate obligation to pay to the security agent (in its own name and not as the representative of the lenders) amounts equal to the amounts outstanding to the finance parties under the loan documentation. Subsequently, a Dutch law security right is created in the name of the security agent only (and not also in the name of the other loan parties) as security for the payment of its own claims (i.e. the parallel debt).

6.3 Enforcement of security rights

Under Dutch law, if a debtor is in default with the performance of the secured obligations, a security right can be enforced by way of a public auction or a private sale authorised by the competent Dutch court and in case of a right of pledge also by way of a private sale agreed between the pledgor and the pledgee after the pledgee has become entitled to enforce the right of pledge. The mortgagee or the pledgee may apply the proceeds from the enforcement towards satisfaction of the secured obligations as they are due and payable.

7. EMPLOYMENT

7.1 Types of employment

Employment contract

An employment contract can be defined as an agreement whereby the employee undertakes to perform work in the service of the employer against payment of a remuneration during a given period. An employment contract exists as soon as three core elements are present: work, wage and authority to instruct. In ruling whether a relationship can be considered as an employment contract the court not only considers what both parties intended upon entering the contract and what they have subsequently agreed (verbally or in writing), but also (and perhaps predominantly so) how both parties act in practice. All relevant facts and circumstances are taken into account by the court.

The labour force of a company in the Netherlands usually consists of a permanent core of staff with employment contracts for an indefinite period of time. In addition, there is more flexible staff, consisting of employees who have an employment contract for a definite period of time. Aside from these two types of employment contracts and depending on the nature of the company and the business activities to be performed, employers can make use of more flexible forms of employment by means of on-call contracts and temp contracts, i.e. persons employed by and hired through temp agencies. Mandatory provisions of Dutch employment law govern these types of employment relationships.

Employment contract versus service contract

A service contract can be defined as a contract whereby an independent contractor (i.e. a consultant or service provider) agrees to perform work for a principal, other than on the basis of an employment contract. The main differences between the two can be summarised as follows:

Employee	Independent Contractor
Subject to instructions, authority and supervision	Only subject to instructions of a general nature
No entrepreneurial risk	Entrepreneurial risk
Unequal relationship	'Equal' relationship
Mandatory employment and/or CLA regulations applicable	Contractual freedom except for incidental statutory regulations
Wage tax and social security premiums	VAT

The main difference is the relationship of control (authority to instruct) which exists with an employment contract and not with a service contract. The most significant inherent risk incurred by a company when entering into a service contract is that the relationship is in fact an employment contract because in practice the independent contractor is subject to the direct control (or authority) of the company. If the service contract in question is indeed reclassified as an employment contract, a company can be faced with (retroactive) liabilities for wage tax and social security contributions, together with possible fines, penalties and/or interest. In addition, mandatory rules of employment law will apply (retroactively).

7.2 Terms of the individual employment contract

Minimum wage

Parties are free to negotiate a salary, although the statutory minimum wage for employees has to be respected. The level of the statutory minimum wage varies according to age and may be adjusted to the cost of living index twice a year (as of 1 January 2023 it amounts to EUR 1,934.40 gross per month excluding 8% holiday allowance for employees aged 21 years and more).

In addition to salary the employee is entitled to a statutory holiday allowance amounting to 8% of the gross annual salary (usually payable once a year in May or June over the preceding 12 months). In the event that the annual salary exceeds three times the annual minimum wage, statutory holiday

allowance can be considered to be included in the gross salary, provided that this is agreed in writing.

If a Collective Labour Agreement ("**CLA**") applies, the CLA will - as a rule - regulate salaries and periodic salary increases. Companies can only deviate from the regulations contained in an applicable CLA if the CLA is a so-called minimum-CLA and the deviation benefits the employees. Please refer to paragraph IV for more information about CLAs.

Working hours

The Act on Working Hours *(Arbeidstijdenwet)* provides a general framework for the number of working hours an employee is permitted to work. Employees are permitted to work for a maximum of 12 hours per day and 60 hours per week, albeit that the average working hours over a consecutive 4-week period must not exceed 55 hours per week and over a consecutive 16-week period must not exceed 48 hours per week.

Additional rules (also regarding work on Sundays or during nights) are contained in the Act on Working Hours. The statutory rules regarding maximum working hours and minimum periods of rest are not applicable insofar as the employee's salary exceeds 3 times minimum wage including holiday allowance.

Notice period

The statutory notice period to be observed by the employer depends on the length of employment and is as follows:

Years of service	Notice period
0-5 years	1 month
5-10 years	2 months
10-15 years	3 months
15 years or more	4 months

The statutory notice period, which must be observed by an employee, is

always one month. The contracting parties are, under certain conditions, free to agree to a different notice period in writing under the strict condition that the notice period of the employee does not exceed six months and that the notice period of the employer is double the notice period of the employee. A notice period contrary to the statutory provisions is null and void. The statutory notice period will then be applicable if this is more beneficial to the employee and the employee so claims.

Paid holidays and public holidays

Under statutory law, in the event of a working week (with an average maximum) of 40 hours and during 5 days per week, the employee is entitled to at least 20 paid holidays per year. On average, Dutch employers tend to offer approximately 25 holidays per year based on fulltime employment.

In addition to paid holidays, in principle, leave is granted for public holidays to the extent that these coincide with a working day. The public holidays in the Netherlands are the following:

- New Year's Day;
- Easter Monday;
- King's Day (King's birthday celebrations on 27 April);
- Liberation Day (every five years on 5 May, starting from 2010);
- Ascension Day;
- Whit Monday;
- Christmas Day;
- Boxing Day.

Trial period

Parties to an employment contract may agree on a trial period. In order to be valid, the trial period must be in writing and must be equal for both parties. During the trial period the employment contract may be terminated with immediate effect by giving notice. The length of the trial period is maximized and is related to the length of the employment contract and is as follows:

Employment contract	Maximum trial period
Definite period of time > 6 months and < 2 years	1 month
Definite period of time ≥ 2 years	2 months
Definite period of time whereby no specific termination date has been agreed (e.g. project basis)	1 month
Indefinite period of time	2 months

Illness/incapacity for work

In the event of illness or other incapacity to work, the employer is under a statutory obligation to continue (partial) payment of the employee's salary during a maximum period of 104 weeks. The minimum payment during illness is 70% of the employee's salary insofar as this does not exceed a statutory maximum. Quite a few employers continue payment of 100% of the actual salary during the initial 52 weeks of the employee's illness, followed by the 70% of the salary during the subsequent 52 weeks. It is possible to take out an illness absence insurance in respect of these salary payments.

Non-competition

A non-competition provision needs to be concluded in writing in order to be valid and it may be limited in time or scope or be rescinded by a court on the grounds that, in comparison with the employer's interests, which are protected by such a provision, the provision unreasonably restricts the employee from accepting a job commensurate with his/her abilities and experience. It is not possible to include a non-competition clause in respect of an employment contract for a definite period of time, unless the non-competition clause contains a written explanation that there are substantive company/business interests which necessitate the inclusion of a non-competition clause.

Fringe benefits

Companies can use several fringe benefits to attract and retain personnel, such as extra paid holidays, employee saving plans, pension scheme

contributions, a company car, (net) expense allowances, a stock-option or other incentive plan, a contribution towards supplemental health insurance, additional disability insurance coverage, and variable compensation schemes such as bonuses.

7.3 Termination of employment

Termination of individual employment contracts

Individual employment contracts can be terminated by the employer in the following manner:

(i) during the trial period without any formalities to be observed (apart from confirmation in writing);
(ii) by means of written notice of termination with due observance of the notice period, after having obtained prior permission from the Employee Insurance Agency (*Uitvoeringsinstituut Werknemersverzekeringen or UWV*);
(iii) by the court;
(iv) through instant dismissal;
(v) by mutual consent; or
(vi) with consent of the employee.

Re (ii): notice of termination after permission from the UWV

The UWV only grants permission to terminate an employment contract if, after considering all of the relevant facts and circumstances, it is convinced that there is a valid ground (or grounds) for termination. UWV proceedings can in principle only be initiated on specifically listed grounds. These are the following:

- company economic dismissals;
- long-term illness, i.e. longer than 2 years, whereby no recovery is anticipated within the next 26 weeks, let alone that the employee can perform his/her duties in an adapted manner within this timeframe.

Re (iii): court order

A party to an employment contract may file a petition requesting the court to terminate an employment contract. If the court finds that there is a valid ground for termination, it will terminate the employment contract. Termination by the court will only be possible on the following specifically listed statutory (reasonable) grounds:

- a recurring incapacity for work due to illness or other disability of the employee with unacceptable consequences for company operations;
- incapacity of the employee to perform his/her duties other than as a result of illness or disability of the employee;
- serious misbehaviour, to such an extent that the employer cannot reasonably be expected to allow the employment relationship to continue;
- refusal on the part of the employee to perform his/her duties due to a serious conscientious objection;
- an impaired employment relationship;
- other reasons that are of such a nature that it cannot reasonably be expected that the employer should continue the employment relationship;
- a combination of circumstances mentioned in two or more of the above grounds.

Re (iv): instant dismissal

The Dutch Civil Code provides examples of 'urgent valid grounds' for which termination can take place immediately and without compensation. Urgent valid grounds for the employer are those acts/omissions or circumstances imputable to the employee, which result in a situation whereby one cannot reasonably expect an employer to continue the employment contract any longer. Urgent valid grounds justifying instant dismissal must be communicated to the employee as soon as possible after these have become known to the employer. The employee must be provided with an opportunity to address the grounds (allegations). It should be noted that the courts tend to be very reluctant to accept such instant dismissals due to the far-

reaching consequences for the employee (loss of employment and possibly no entitlement to unemployment benefit). It is therefore highly advisable to obtain legal advice beforehand.

Re (v): by mutual consent

Employment contracts may also be terminated by mutual consent. Although there is no statutory obligation to this effect, such an agreement should preferably be concluded in writing (settlement or termination agreement), stating that both parties agree upon (the conditions for) termination and settling all outstanding issues. The employee has the right to dissolve the settlement or termination agreement in writing within a period of 14 days after signing the settlement or termination agreement without having to provide reasons for doing so.

Re (vi): with consent of the employee

Alternatively to mutual consent the employer can terminate the employment contract with the explicit written consent of the employee. Here again the employee can withdraw the given consent within 14 days of the termination date without any reasons.

Financial compensation in the event of termination of employment

Under Dutch law, a statutory entitlement to severance compensation exists in the event of termination of employment. This severance compensation, referred to as 'transition compensation', is payable by the employer in the event of termination of an employment contract. The manner in which the employment contract is terminated is irrelevant, albeit that in the event that the employee himself/herself terminates by means of written notice of termination or in the event of termination with mutual consent, the employee is in principle not entitled to claim statutory transition compensation. Statutory transition compensation amounts to 1/3rd gross monthly salary (including certain other remuneration components) for every year of employment calculated over the entire period of employment, whereby incomplete years will be taken into consideration on a pro rata basis. In addition, the court is

permitted to award additional compensation in the event that the employer is considered to have been 'seriously negligent'.

Collective dismissals

An employer wishing to terminate the employment of at least 20 employees within any three-month period must (i) notify both the UWV and the trade unions of the intended dismissal and (ii) provide the UWV with a list of employees whose employment is to be terminated, as well as the reasons for termination. Upon receipt of the notification, the UWV will determine whether all necessary information has been submitted and whether the works council and the trade unions (in both cases: to the extent applicable) have been informed. If this is the case, usually a one-month period commences, during which the UWV may not take into consideration any individual request for permission on the part of the employer to terminate an employment contract in connection with the collective dismissal (reorganisation). After notifying and consulting trade unions and the UWV of the imminent redundancies, the employer can request permission from the UWV to terminate the employment contract for each individual case. When a mass redundancy is proposed, it is common practice to set up a social plan, whereby employees receive certain redundancy packages.

Termination of employment of a managing director

Unless otherwise stipulated in the articles of association, a member of the management board (a managing director) of an NV or a BV is appointed and dismissed by the general meeting of the company. In the event of a dismissal of a managing director by the general meeting there are specific (statutory) formalities which have to be observed. A failure to strictly observe these (formal) regulations results in a voidable shareholders resolution.

The dismissal of a managing director (in his/her capacity as managing director) by means of a resolution of the general meeting results in the automatic termination of the employment contract, unless there exists a statutory prohibition to terminate the employment contract or parties have agreed otherwise. Therefore and unlike with ‘regular’ employees, no prior UWV or court proceedings are required.

Termination of employment because of or after reaching the statutory pensionable age

Unless parties have agreed otherwise, the employer can terminate the employment contract because or after the employee has reached the applicable contractual or statutory pensionable age. The statutory pensionable age is the day on which the employee becomes entitled to State Old Age Pension Benefit. Termination must take place by means of written notice of termination, whereby the applicable contractual or statutory notice period must be observed. In the event of termination of employment in respect of employees who have reached or have already passed the statutory pensionable age, no transition compensation is due. Statutory transition compensation is not due in the event that the employment contract terminates or is not extended due to the employee reaching the statutory pensionable age.

7.4 Collective Labour Agreement (CLA) / trade unions

In addition to statutory rules and regulations, an employment relationship between employer and employee may be subject to a CLA. A CLA is an agreement concluded between one or more companies (i.e. employers) or employers' associations on the one hand and one or more (employee) trade unions on the other hand, which exclusively or primarily concerns employment conditions that need to be observed in respect of employment contracts. Examples of such employment conditions are salaries, working hours, paid holidays and overtime pay. It is not uncommon for a CLA to contain regulations in respect of concluding and terminating employment contracts, schooling, redundancy or negotiations with trade unions in the event of a (collective) dismissal. The applicability of a CLA may have a substantial impact on the regulations governing an employment contract. In addition to CLAs governing the regulations of an employment contract, there are also CLAs following which the employer is obliged to pay a contribution to a foundation, which is set up for certain projects (permanent schooling of employees, employability etc.).

CLA applicability depends on whether the company falls under the scope

definition of the CLA and if so, whether the company is (i) a member of an employers' association which is a contracting party to this CLA, or (ii) if the CLA has been declared generally applicable.

7.5 The (European) Works Council Act

Employee participation and co-determination have a strong tradition in the Netherlands. Since the Second World War, when employee participation and co-determination first started becoming institutionalized, the works council (and the employee representative body) has steadily developed into its current form, whereby employees are provided a certain level of participation in the management of the company specifically with the aim of protecting the interests of the employees.

Works council

Companies which – as a rule – have more than 50 persons working within the undertaking must establish a works council. Like an employee representative body, a works council is a representative body, which ensures the employees a certain level of participation in the management of the company employing them and is established in order to protect the interests of the employees. With regard to certain intended decisions to be taken by the company, the works council has the right to render its prior advice. Other specifically listed intended decisions related to the social policy in the undertaking and concerning policies/arrangements/schemes which are not related to an individual employee but concern the workforce as a whole (e.g. pension schemes, remuneration schemes, working hours arrangements etc.) require the works council's prior approval.

Employee representative body

Companies which – as a rule – have less than 50 persons working within the undertaking can establish an employee representative body on a voluntary basis, but in the event that the majority of the persons working in an undertaking with more than 10, but less than 50 employees request the establishment

of an employee representative body, the company must comply with this request, provided that there is no works council. A company (or undertaking) is for example required to provide the employee representative body the opportunity to render prior advice in respect of any intended decision which may result in the loss of employment of at least 25% of the persons working at the undertaking. In addition, the employee representative body has the right of prior approval in respect of certain intended decisions regarding policy/schemes/arrangements (e.g. working hours and rest periods, etc.).

Employee meeting

If no works council or employee representative body exists, 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. Such an employee meeting has the same right to render advice as the employee representative body as outlined above.

European works council

Lastly, community-scale undertakings and community-scale groups of undertakings are obliged to establish a European works council for the purpose of informing and consulting European employees of the undertaking on transnational matters. A community-scale undertaking is defined as *“an undertaking which over the preceding 2 years has had an average of at least 150 employees in at least two EU member states, Liechtenstein, Norway or Iceland and an average of at least 1,000 employees in the combined EU member states, unless it belongs to a Community-scale group of undertakings”.*

8. SOCIAL SECURITY AND PENSION

8.1 Social security

Social security contributions in the Netherlands can be divided in so-called National Social Insurance Schemes (compulsory for all residents in the Netherlands), such as the General Old Age Pension Act, and Employee Insurance Schemes (compulsory in case of employment in the Netherlands), such as the Disability Benefit Act. The Employee Insurance Schemes consist of both an employer's and an employee's contribution (albeit that for the last number of years the employee's contribution has been reduced to zero).

		Employer	Employee
Social Security System	National Social Insurance ("volks-verzekeringen")	Deducts and pays Wage tax (National Social Insurance premiums are included in the wage tax) from the gross salary.	Does not pay directly. Wage tax (which includes National Social Insurance premiums) is deducted from the gross salary by the employer.
	Employee Insurance ("werknemers-verzekeringen")	Pays contributions, part of which (being the employee's contribution, insofar as applicable) is deducted from the gross salary. Both the employer's and employee's contribution is paid to the tax authorities.	Does not pay directly. The employee's contribution to the Employee Insurance premium is deducted from the gross salary by the employer.

8.2 The pension system

The pension system is based on the following three pillars: (i) state pension (AOW), (ii) additional pension benefits agreed between employer and employee (either following a mandatory industry-wide pension fund or a voluntary (collective) pension scheme) and (iii) individual insurance taken out by private individuals. The second and third pillars are, if applicable, supplementary to the AOW-benefit. AOW-benefit is applicable to all residents of the Netherlands as of the date on which they reach the statutory pensionable age.

Mandatory participation

Participation in an industry-wide pension fund is mandatory in certain sectors of industry. Employers which are active in such a sector are required to participate in the respective pension fund. If this is not the case, there is in principle no obligation to offer an employee a participation in a pension scheme, let alone a contribution towards a pension scheme.

Types of schemes

There are several ways in which pension benefits can be financed, but the main schemes are a defined benefit scheme (which can be further divided into an average pay scheme or a final pay scheme), a defined contribution scheme and a combination scheme.

Defined benefit scheme

With a defined benefit scheme, the participant builds up pension each year that he/she participates in the pension scheme. This is a certain percentage - often 1.75% - of the pension base in that particular year. With an average payment scheme the final pension depends on the salary earned during the career. Salary increases only affect the future pension accrual. By contrast, in a final pay scheme, the last salary earned is always used as a starting point. With each salary increase, the pension already accrued is raised to the level of the new pension base. This is called a back-service increase. The

ultimate pension result under the final pay scheme is therefore not dependent on salary development during the entire career, but is solely based on the last earned salary (final pay). With a defined benefit scheme, the employer guarantees a certain pension. The employer bears the investment risk; if the return on investment on the deposited premiums is insufficient, the employer is responsible for the resulting deficits. In view of the fact that the employer is responsible for the ultimate return on the pension premium investment results, this type of pension scheme is relatively expensive for the employer.

Defined contribution scheme

A defined contribution scheme has no predetermined pension benefit, but a pension premium. This premium can remain the same during the employment or increase as the employee gets older. The premium is usually a percentage of the pension base and is usually invested. The final amount in the pension pot therefore depends on the investments. Upon retirement the employee buys a pension benefit from the balance of the pension pot. With a defined contribution scheme the employer does not guarantee a certain pension, but merely agrees to pay the pension premium. The ultimate pension entitlement will depend on the return on investment of the overall pension premiums paid into the scheme. The investment risk thereby lies with the employee. In view of this, this type of pension scheme is increasingly popular.

Combination scheme

In a combination scheme, there is a mix of two systems. For example, the employee builds up pension up to a certain salary level according to a final pay or average pay system and above that a defined contribution system applies.

Pensionable age

Until 2013 the statutory pensionable age in the Netherlands was 65 years. In 2013 the Government decided that in view of the increased life expectancy, the pensionable age should be increased. According to current legislation, the increases will be as follows:

Increase in	Increase in months	Pensionable age ("AOW-gerechtigde leeftijd")	Concerns people born
2017	3	65 years + 9 months	after 30/06/1951 and before 01/04/1952
2018	3	66 years	after 31/03/1952 and before 01/01/1953
2019	4	66 years + 4 months	after 31/12/1952 and before 01/09/1953
2020	0	66 years + 4 months	after 31/08/1953 and before 01/09/1954
2021	0	66 years + 4 months	after 31/08/1954 and before 01/09/1955
2022	3	66 years + 7 months	after 31/08/1955 and before 01/06/1956
2023	3	66 years + 10 months	after 31/05/1956 and before 01/03/1957
2024	2	67 years	after 28/02/1957 and before 01/01/1958
2025	0	67 years	after 31/12/1957 and before 01/01/1959
2026	0	67 years	after 31/12/1957 and before 01/01/1990

From 2025 the pensionable age will be linked to life expectancy.

9. COMMERCIAL CONTRACTS

9.1 Dutch contract law

Under Dutch law, a contract is entered into by means of an offer made by one party and the acceptance of the offer by another party. In principle, the conclusion of a contract is not subject to any legal requirements of form. This means that a contract can be in any language and may be concluded in writing, but also orally. In some cases, however, a specific legal form is prescribed.

Parties are allowed to agree on any terms to be included in the contract, provided that such terms do not violate mandatory provisions of Dutch law, public order or public morality. Any contractual provisions that are considered to violate Dutch mandatory provisions, public order or public morality are null and void.

A contract does not only have the effect and consequences expressly agreed upon by the parties, but also those which, according to the nature of the contract, apply by virtue of the law, usage or the principles of reasonableness and fairness *(redelijkheid en billijkheid)*. The principles of reasonableness and fairness require that the parties to a contract take the interests of the other party (or parties) into account. All contracts must be interpreted in line with these principles. In exceptional circumstances, the principles of reasonableness and fairness can prevent a party from relying on and invoking a provision in an agreement (the *restrictive* effect of the principles of reasonableness and fairness). Also, the principles of reasonableness and fairness can be invoked in order to supplement a contract if the contract contains a gap (the *supplemental* effect of the principles of reasonableness and fairness).

When interpreting the terms of a contract, in principle not only the literal wording of the contract must be taken into account, but also what the parties intended and what they could reasonably expect from each other (the so-called Haviltex standard). Depending on the circumstances of the case and

the nature of the agreement, however, the text of a contractual provision may be decisive (the so-called CAO standard).

9.2 General terms and conditions

General terms and conditions *(algemene voorwaarden)* often apply to commercial contracts. Part 6.5.3 of the Dutch Civil Code contains provisions that apply specifically to general terms and conditions. Section 6:231 of the Dutch Civil Code defines general terms and conditions as one or more provisions drafted for the purpose of being included in a number of contracts, with the exception of terms which define the core of the services, provided that the latter are clearly and comprehensibly worded. In principle, general terms and conditions only apply if the parties have agreed upon their applicability prior to or ultimately at the time of entering into the agreement. In principle, a copy of the general terms and conditions must be submitted by the user of the general terms and conditions to the other party at that time.

Part 6.5.3 of the Dutch Civil Code contains several provisions concerning the protection of consumers against unreasonably burdensome clauses in general terms and conditions being applied by an enterprise. A general condition appearing on the so-called black list (Section 6:236 of the Dutch Civil Code) is, vis-à-vis a consumer, by definition unreasonably burdensome and therefore null and void. A general condition appearing on the so-called grey list (Section 6:237 of the Dutch Civil Code) is presumed to be unreasonably burdensome vis-à-vis a consumer. This presumption is rebuttable: the user of the general terms has the opportunity to prove that the general condition is not unreasonably burdensome in the given circumstances.

Section 6:247 of the Dutch Civil Code provides rules of private international law concerning the applicability of Part 6.5.3 of the Dutch Civil Code in the following specific situations:

(a) the parties both act in the practice of a profession or are both conducting a business and both are located in the Netherlands: regardless of the law that governs the contract, Section 6.5.3 of the Dutch Civil Code shall apply;

(b) the parties both act in the practice of a profession or are both conducting a business and one of them is not located in the Netherlands: regardless of the law that governs the contract, Section 6.5.3 of the Dutch Civil Code shall not apply; and

(c) the other party is a consumer who has his or her habitual residence in the Netherlands: regardless of the law that governs the contract, Section 6.5.3 of the Dutch Civil Code shall apply.

9.3 Agency agreements

An agency agreement *(agentuurovereenkomst)* is an agreement in which one party (the commercial agent) acts for another party (the principal) for a fixed or indefinite period of time and for a remuneration as an intermediary in the conclusion of contracts between the principal and third parties. The commercial agent can be a natural person or a company. A commercial agent always acts for the account and risk and in the name of the principal and not on his own behalf. The commercial agent is not employed by the principal and there is no relationship of authority between the principal and the commercial agent. In order to qualify as an agency agreement, the relationship between the principal and the commercial agent may not be of an incidental nature.

The Dutch Civil Code contains various specific mandatory provisions concerning agency contracts, especially in relation to termination of the contract, such as a minimum notice period that must be observed and the obligation to pay damages if the agency agreement is terminated without observing the statutory minimum notice period.

As agency agreements may contain provisions that restrict competition, these may be prohibited under Dutch or European competition law.

9.4 Distribution agreements

Under a distributorship arrangement, a distributor purchases goods from a supplier and resells these goods to third parties in its own name and for its own account and risk.

Distribution agreements are not governed by specific statutory provisions, which means that the general rules of Dutch contract law apply. Consequently, the parties are in principle free to agree on the terms that shall govern their relationship as long as these terms do not violate mandatory provisions of Dutch law, public order or public morality. The parties can agree on the manner in which and the conditions on which the distribution agreement can be terminated and the consequences of such termination. According to case law, the principles of reasonableness and fairness dictate that if the distribution agreement does not contain a provision on termination, the agreement may in principle be terminated while observing a reasonable notice period and, in special circumstances, to pay additional damages.

Provisions in distribution agreements may prohibited by Dutch and European competition law on account of the fact that they restrict competition.

9.5 Franchise

A franchise agreement is an agreement whereby one party, the franchisor, grants another party, the franchisee, the right to sell certain goods or services using the franchisor's proven business concept. Typically, the franchisee has the right to use certain IP rights owned by the franchisor such as a trade name, a trade mark and know-how in exchange for a royalty and other payments.

Franchise agreements are governed by the Dutch Franchise Act which entered into force on 1 January 2021. The Franchise Act defines a franchise agreement as the agreement whereby the franchisor grants a franchisee a right and imposes on the franchisee an obligation to exploit, for a consideration, a franchise formula in the manner designated by the franchisor

for the manufacture or sale of goods or the provision of services. The basic principle of the Franchise Act is that the franchisor and the franchisee behave towards each other like a good franchisor and a good franchisee. Important provisions in the Franchise Act include:

- the obligation for the franchisor to provide certain information to the franchisee, both in the pre-contractual phase and during the term of the franchise agreement;
- amendments to the franchise agreement or the franchise formula that have or may have a significant impact on the position of the franchisee will require the consent of the franchisee;
- the obligation for the franchisor to provide the franchisee with the assistance and commercial and technical support that may reasonably be expected in relation to the nature and scope of the franchise formula with regard to the operation of the franchise formula by the franchisee;
- specific rules that apply to goodwill payments to be made upon the termination of a franchise agreement;
- certain restrictions that apply to non-compete clauses included in franchise agreements.

The Franchise Act is mandatory law applicable to all franchise agreements whereby the franchisee is based in the Netherlands. Contractual goodwill and non-compete provisions that are not compliant with the Franchise Act are invalid, irrespective of the law governing the franchise agreement.

Specific arrangements between the franchisor and the franchisee can be prohibited by Dutch and European competition law.

10. LITIGATION AND DISPUTE RESOLUTION

10.1 The structure of the judicial system

The legal system of the Netherlands is founded on civil law. The Dutch Civil Code and the Dutch Code of Civil Procedure include the most essential regulations.

There are three tiers of civil courts in the Dutch judicial system:

(i) civil cases are brought in the first instance to one of eleven district courts, where they are typically handled by a single judge. Complex matters are frequently referred to a panel of three judges;
(ii) a party may file an appeal with one of the four courts of appeal. Appeals are always heard by a panel of three judges;
(iii) the Supreme Court (Hoge Raad) is the highest court in the Netherlands and examines lower courts' rulings, but solely with respect to legal issues. The Supreme Court is required to evaluate all decisions brought before it, although it may dismiss objections without explanation if they are deemed to be plainly unfounded.

Two components of the judicial system merit special notice:

(i) the Enterprise Chamber *(Ondernemingskamer)* acts as the court of first instance in cases involving mismanagement and similar corporate disputes, as well as the court of appeals in certain corporate conflicts. The Enterprise Chamber is comprised of a panel of five judges, including three members of the judiciary and two non-judges with specialized knowledge;
(ii) the Netherlands Commercial Court (NCC) is a relatively young international commercial chamber comprised of the NCC District Court and the NCC Court of Appeal where (international) parties can resolve complex international trade issues. The NCC employs devoted judges with specific competence and experience in resolving complex commercial issues. Proceedings before the NCC are

conducted exclusively in English. This means that all court documents, proceedings-related communications and the judgement itself are in English. The parties must specifically agree to have proceedings conducted by the NCC. A choice of forum stated in general terms and conditions is insufficient, as such a clause can also be implicitly accepted.

Courtroom representation by counsel

Civil court proceedings require parties to be represented by lawyers admitted to the Netherlands Bar. If their case is tried in a subdistrict court presided over by a single judge and for some other unique concerns, parties do not require legal representation, although they often opt to do so anyway. Under EU law, foreign European lawyers can represent clients in Dutch courts under certain conditions.

10.2 Legal proceedings

The majority of legal proceedings in the Netherlands are handled in writing. The claims asserted by the plaintiff are detailed in the writ of summons. This is followed by a statement of defence in which the defendant may additionally assert a counterclaim. The court will then order the parties to appear in court. The purpose of this hearing is to acquire additional information from the parties and seek to achieve a settlement amicably.

The parties are permitted to submit additional written evidence throughout the proceedings. In cases with greater complexity, the court may permit or mandate a second written round (reply and rejoinder).

In an interim ruling, the court may require a party to submit evidence, appoint an expert, or schedule a witness hearing or site inspection. If a witness hearing has already taken place, the other party will have the opportunity to have witnesses heard in a counter-examination.

After a case has been filed with the court, each party has the option of launching an interim action or requesting injunctive relief. Motions opposing jurisdiction, review of documents or copies thereof, third-party claims, joinder and intervention requests, referral and consolidation of cases and production of security for litigation costs are examples of interim proceedings.

10.3 Injunctive relief / summary proceedings

A party with an urgent need for injunctive relief is permitted to begin summary proceedings. The variety of available injunctions is extensive. In summary proceedings, the court has the authority to lift prejudgement attachments or suspend the implementation of a court order. It is also possible to prohibit the distribution of products that violate copyrights, to forbid the execution of a verdict or to exercise the right to strike by employees. In addition, the court may mandate a party's specific performance. An injunction to pay a quantity of money is conceivable if it is sufficiently probable that the defendant owes this amount and if there is no risk that the claimant will be unable to return the amount if the court rules differently in proceedings on the merits of the case. Summary proceedings are significantly quicker than regular proceedings. A judgement is rendered between the time of the hearing and two weeks after the hearing.

After the summary proceedings (or even concurrently with them), either party may initiate proceedings on the merits (summary proceedings are merely a provisional remedy). In no manner is the court bound by a ruling rendered in summary proceedings. Nonetheless, it is typical for parties to decide not to begin proceedings on the merits after summary proceedings and instead accept the verdict in summary proceedings (whether or not on appeal).

10.4 Prejudgement attachment

Before or during legal proceedings, a plaintiff may levy a prejudgement attachment to secure its claim. Under some conditions, it is also possible to attach evidence-preserving documents, data, and data storage devices.

A prejudgement attachment can only be levied after permission of a district court. Generally, such permission is quickly obtained (typically on the same or the following day) in ex parte procedures. The plaintiff must submit a petition to the court that explains the claim on its face. A bailiff is required to levy a prejudgement attachment.

The party subject to a prejudgement attachment can try to have the attachment lifted in summary proceedings. If it can be shown that (i) formal attachment conditions were not met, (ii) the alleged claim is non-existent or frivolous, or (iii) the attachment is unwarranted, the court will lift the attachment. In the event of a monetary demand, the court will also release the attachment if the person subject to the attachment offers sufficient security (generally, a bank guarantee by a first-class Dutch bank).

If legal proceedings are not currently underway when the petition for the court's permission to attach is filed, the court will set a time limit within which they must be commenced. The typical period is fourteen days, but the petitioner may request an extension. In addition, this term may be extended (multiple times) upon the attaching party's request. If the claim is subsequently dismissed, the attachment is deemed to be improper. In such a situation, the attaching party is responsible for any damages suffered as a result of the attachment.

10.5 Evidence

In civil litigation, all types of evidence are admissible in theory. The court has broad discretion on the evaluation of evidence. Some types of evidence are governed by statutory regulations. Legally valid deeds provide conclusive proof, which means the court must presume the veracity of the contents of these documents until the opposing party provides evidence to the contrary. The (oral) witness testimony of a party testifying in its own favour is given limited significance; it must be corroborated by further evidence.

Expert evidence may be provided by the submission of written expert testimony by one of the litigants or through the examination of an expert as

a witness. At the request of the parties or ex officio, the court may order an (independent) expert to produce a report or be heard at a hearing.

10.6 Investigation and information collection

The Dutch judicial system lacks discovery and disclosure procedures akin to common law jurisdictions. However, there are tools available for acquiring additional information to establish the truth.

Interested parties may request inspection of, or excerpts from, particular documents from persons who have access to them. This action may be filed in summary proceedings or as an interim action in ongoing proceedings.

In addition, a party or interested party may request the court to arrange a preliminary witness hearing or acquire an expert report even if there are no active legal proceedings.

10.7 Timing and costs

From the time a writ of summons is issued until the final verdict, a typical commercial dispute takes between twelve and eighteen months. However, this period can be significantly extended in difficult cases, if motions or procedural objections are filed, or if additional evidence is required.

Parties are responsible for their own litigation expenses, although in the majority of situations, the losing party will be required to pay the winning party's litigation expenses, such as court fees and witness and expert fees. Legal fees are based on fixed sums for certain typical acts (such as filing a written statement, attending an oral hearing, or imposing a prejudgement attachment) and the value of the claim. Rarely does the amount awarded cover the actual costs and lawyer fees incurred by the successful party.

In the Netherlands, lawyers are barred from offering "no win, no fee" services. Alternative fee agreements (such as basic fee plus success fee) that are partially contingent on the outcome of the lawsuit are allowed.

10.8 Legal privilege

Legal professional privilege is applicable to every member of the Netherlands Bar Association. Insofar as the law does not stipulate otherwise, a lawyer is required to safeguard the secrecy of all information that comes to their attention in the course of their professional practice. This requirement also extends (in a derivative form) to the lawyer’s employees and colleagues, as well as to those participating in the lawyer’s professional practice, such as advisers directly retained by the lawyer.

10.9 Collective actions

The Dutch Act on the Collective Settlement of Mass Damages (WAMCA) permits court-approved, collective out-of-court settlement agreements between a representative organization and the party liable for mass damages.

After the court’s decision, affected parties who do not wish to be bound by the settlement have the opportunity to “opt out.” The affected parties who do not “opt out” may claim their compensation within the settlement’s designated time limit.

In addition, the Dutch Civil Code permits organizations and foundations to initiate actions aimed at safeguarding the rights of third parties (natural or legal persons).

The foundation or group files the claim in its own name. The interested parties shall not be included in the proceedings. An interested party retains the right to submit its own claim. In principle, a judicial decision does not affect an interested party who opposes the decision’s personal effect on it.

The most significant limitation of the class action is that no damages can be sought. Nonetheless, if a declaratory decision determines that, for example, a tort has been committed, the judgement can be used to reach a (binding) settlement between the offender and the harmed parties (e.g. through the above-mentioned WAMCA).

10.10 International enforcement

In accordance with the recast Brussels I Regulation, civil and commercial decisions made by a court of an EU member state are instantly enforceable inside the European Union without the need to obtain permission from a local court. For Switzerland, Norway and Iceland, the (recast) Lugano Convention is applicable. Judgements rendered by courts in jurisdictions with which the Netherlands does not have an enforcement treaty are not recognized and/or enforceable in the Netherlands. In order to obtain a title that is enforceable in the Netherlands, such matters must be retried in Dutch courts.

Nonetheless, if a foreign judgement satisfies the following four minimal standards, the matter will not be evaluated on its merits and the Dutch court will simply determine in conformity with the foreign judgement's decision:

- the court deemed itself competent on the basis of an internationally accepted basis for jurisdiction;
- administration of justice rules have been adhered to;
- acceptance of the verdict would not violate Dutch public policy; and
- the foreign decision must not be irreconcilable with an earlier decision of the Dutch courts between the same parties and involving the same cause of action, or with an earlier decision of a foreign court between the same parties and involving the same cause of action, provided that this earlier court decision of a foreign court meets the requirements for its recognition in the Netherlands.

10.11 Alternative dispute resolution

The most common kinds of alternative dispute resolution in the Netherlands are arbitration, mediation, and binding advice.

Arbitration

The Dutch Arbitration Act stipulates that if any party invokes an arbitration clause, the Dutch court must rule that it lacks jurisdiction over the dispute.

Even if the parties have agreed to arbitral summary proceedings, the district court may, however, be competent to award interim relief in summary proceedings if it determines that the remedy available in arbitration is inadequate or the relief sought is too urgent.

The most well-known Dutch arbitration institute is the NAI in Rotterdam, which has its own arbitration rules that parties may adopt as part of an arbitration agreement. Depending on the arbitration agreement, the NAI or the parties themselves may appoint the arbitrators. The NAI maintains a roster of qualified and seasoned arbitrators, who are frequently also lawyers.

In the Netherlands, arbitral judgements rendered in the Netherlands are easily enforceable. The Netherlands, along with several European nations and the United States, is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Consequently, arbitral awards rendered on the territory of these states are, in theory, enforceable in the Netherlands and vice versa.

In the Netherlands, there are a number of additional well-organized arbitration institutes, such as the Court of Arbitration for the Building Industry (RvA), and the arbitration institutes for shipping, shipbuilding, transport, storage, logistics and international trade (Unum), for complex financial disputes (P.R.I.M.E. Finance) and for the art world (CAfA).

The majority of international arbitrations with a seat in the Netherlands are conducted in accordance with the norms of the ICC, UNCITRAL or the NAI. The Permanent Court of Arbitration, with its seat at The Hague's Peace Palace, conducts a significant number of arbitrations annually, both in public international law and commercial arbitration.

The request to vacate an arbitral award must be brought within three months of the award's issuance, or within three months of the award debtor's receipt of leave to enforce (in which case only the debtor can make the request). One can only vacate an arbitral award on a restricted number of reasons. The Supreme Court has often declared that courts should use restraint in dealing with requests to nullify arbitral verdicts. It has held unequivocally that

proceedings to vacate an award cannot be used as a disguised appeal and that the public interest in the effectiveness of arbitration demands that a court vacate an arbitral award only in clear-cut situations.

An arbitral award is not enforceable unless leave for enforcement (exequatur) is granted, which must be granted by the court of appeal for international arbitral judgements. Once permission for enforcement has been obtained, the arbitral award may be enforced against the award debtor's assets in the Netherlands.

Mediation

In the Netherlands, mediation is firmly established as one of the basic means of alternative dispute resolution. There are no rules in Dutch law forcing parties to mediate or dictating how mediations must be performed. Business mediation is frequently utilized in high-stakes conflicts between national and international corporations. In corporate mediation, parties frequently choose a set of established mediation rules, such as those of the ICC, the Netherlands Arbitration Institute (NAI) or the Netherlands Mediation Institute (NMI).

Binding advice

Parties can agree to have their disagreement resolved by one or more advisors whose decisions are legally binding. The delivered advice is regarded as an agreement between the parties. Consequently, a party who disregards the binding advice is in breach of contract. In light of its intention to provide clarity and finality, an agreement on binding advice can be revoked only under specific conditions (such as mistake, undue influence, duress or misrepresentation). A legally enforceable binding advice agreement does not preclude the option of seeking remedies in summary proceedings. With the exception of general procedural and contractual requirements, there are no special procedural regulations pertaining to binding advice.

The procedure of binding advice is structured similarly to that of arbitration and is facilitated by a number of the aforementioned organizations.

10.12 Litigation financing

In the Netherlands, third-party litigation financing is expanding significantly. General counsels and financial directors of Dutch corporations are increasingly adopting litigation financing as an alternative form of corporate financing. The notion is compelling: a corporation obtains non-recourse financing against its portfolio of disputed claims, which would otherwise be sitting dormant on its balance sheet, while litigation expenses strain its working capital and profit margins. Typically, a litigation financer requests 30-35 percent of the proceeds (with deviations from this depending on the nature of the claim and severity of the risks). Generally, third-party litigation finance is available for claims beginning at approximately EUR 500,000. The amount of the costs that the funder is willing to finance (in stages or not) depends on the financial stakes involved in the case.

The disclosure of the litigation finance arrangements to the opposing party, the court or arbitral tribunals is not expressly required under Dutch law. Especially if the litigant also claims financing costs, the litigant may be required to disclose the financing agreement.

Dutch law imposes no particular constraints on litigation financing or the level of control a third-party litigation financer may exercise over a funded case. In the Netherlands, the common law theories of maintenance and champerty do not apply.

A financing arrangement will be controlled by the regular principles of contract, which means that parties are generally allowed to structure their financing agreement how they see proper, so long as their agreement does not violate public policy (including due process).

11. INTELLECTUAL PROPERTY

11.1 Patents

Patents are granted for inventions that are new, involve an inventive step and are capable of industrial application. A patent provides its owner the right to exclude others from commercially exploiting the invention (product or process) for a maximum period of 20 years. In the Netherlands, patents are protected under the Dutch Patent Act 1995 *(Rijksoctrooiwet 1995)*. Dutch patents are granted by the Netherlands Patent Office *(Octrooicentrum Nederland)*, which is part of the Netherlands Enterprise Agency *(Rijksdienst voor Ondernemend Nederland)*.

European patents are granted by the European Patent Office (EPO) with its seat in Munich, Germany. In the Netherlands, the EPO has a subdivision in Rijswijk. A European patent is in fact a bundle of individual national patents which provides its owner the same rights as a national patent in each country for which it is granted rather than a single patent valid in each relevant country. As such, the applicant can apply for a European patent as an alternative to obtaining individual national patents in the countries that are members of the European Patent Convention.

A patent can only be granted on inventions that are not part of the (worldwide) state of the art, being everything that has been made public either orally or in writing prior to the application being filed. Under the Dutch Patent Act 1995, in order to ascertain the state of the art a novelty search must be conducted. If the applicant has not made the request for a novelty search within 13 months following the patent application, the application will expire. Similar rules with respect to the novelty search exist under the European Patent Convention.

11.2 Trademarks

Trademarks are signs (e.g. words, numbers, sounds, symbols, forms, colours) which serve to distinguish the goods or services of a business in the market. In principle, trademarks are only protected if they are registered. A trademark can be registered as a Benelux trademark, an EU trademark or an international trademark.

Benelux trademark

A Benelux trademark is registered under the Benelux Convention on Intellectual Property *(Benelux Verdrag inzake de Intellectuele Eigendom* or *BVIE)* which entered into force on 1 September 2006 and applies in Belgium, the Netherlands and Luxembourg. Benelux trademarks must be registered with the Benelux Office for Intellectual Property *(Benelux-Bureau voor de Intellectuele Eigendom* or *BOIP).*

The BVIE distinguishes between individual trademarks, collective trademarks and certification trademarks. An individual trademark is a trademark that differentiates products or services of one company from the products or services of other companies. The vast majority of trademarks are individual trademarks. A collective trademark is a trademark used by the members of an association. The collective trade mark is owned by the association. It is used to show that the products or services bearing it are provided by a member of that association. A certification trademark is used to show that the owner of the trademark has guaranteed that the products or services bearing the certification trademark meet certain quality requirements or have certain other specific characteristics, for example goods that have been produced in a certain manner. A certification trademark can be owned by any legal entity, provided that such entity does not supply the relevant products or services itself.

EU trademark

An EU trademark gives its owner a uniform exclusive right applicable in the entire European Union. EU trademarks are created pursuant to the EU

Trademark Regulation (Regulation (EU) 2017/1001 replacing Regulation (EU) 2015/2424 (Amending Regulation)). For EU member states, the EU trademark (formerly the Community trademark) is in terms of its effect comparable to the Benelux Trademark for the Benelux countries. Applications for EU trademarks are made to the European Intellectual Property Office (EUIPO) in Alicante, Spain.

International trademark

An international trademark offers protection in all countries that have ratified the Madrid Agreement Concerning the International Registration of Marks of 1891 (the "Madrid Agreement") and the Madrid Protocol relating to the Madrid Agreement, including all EU member states (except Malta), Japan, the United States and Australia. Under the Madrid Agreement and the Madrid Protocol, it is possible to obtain protection of a trademark in all or some of the countries that are party to the Madrid Agreement and the Madrid Protocol by filing an application to the relevant agency in the applicant's country of origin, such as the BOIP. The relevant agency will forward the application to the World Intellectual Property Organization (WIPO), the organization responsible for registering the international trademark. The WIPO will conduct an examination for compliance with the requirements of the Madrid Protocol and its regulations. If these requirements are met, the International Bureau will record the relevant trademark in the International Register, publish the international registration in the WIPO Gazette of International Marks, and notify it to each country in which protection is required by the applicant. Each such country will examine the international registration for compliance with its own domestic legislation, and if the registration is not compliant, the relevant country has the right to refuse protection in its territory, normally within 12 months after the date of notification. The registration of the trademark in the International Register is valid for ten years and can be renewed every ten years.

11.3 Trade names

According to Section 1 of the Dutch Trade Name Act *(Handelsnaamwet)*, a trade name is the name under which a business is conducted. When choosing a trade name, the conditions of the Dutch Trade Name Act must be taken into account. Specifically, it is not allowed to use a trade name that is identical or similar to a trade name already being used by another company or enterprise, if such use could lead to confusion among the public. The owner of an enterprise may use various trade names.

It is possible to check in the trade register of the Chamber of Commerce whether a trade name is already being used. As registration of a trade name is, however, not mandatory the result of a trade name check in the trade register is not conclusive.

A trade name must actually be used as a trade name in order to claim trade name protection under the Dutch Trade Name Act. The mere registration of a trade name with the trade register of the Chamber of Commerce is not sufficient.

If a company wishes to use its trade name as a trademark, the trade name must be registered with the BOIP.

11.4 Copyright

The Dutch Copyright Act *(Auteurswet)*, which entered into force in 1912, defines copyright as the exclusive right of the maker of a literary, scientific or artistic work, or his successors in title, to make the work public and to reproduce it, subject to the limitations laid down by law. Presently, also computer programs, databases and photographs fall within the scope of the Copyright Act. In order to be protected, the work must have its own original character and must reflect the personal imprint of the author.

In principle, the person who created the work owns the respective copyright. However, Section 7 of the Copyright Act stipulates that the copyright on

certain works made by an employee in the course of employment is vested in the employer, unless the parties have agreed otherwise.

A copyright entitles an author to the exclusive right to reproduce his work and to make it publicly available, but also to certain so-called personality rights such as the right to oppose publication without mentioning the author's name or publication under another name, to oppose any modification of the author's work and the right to oppose any impairment of the work. Personality rights remain vested in the author even if the author has transferred his exploitation rights.

It is not required for the work to be registered in order to obtain copyright protection. A copyright notice is also not required for a work to be protected.

Copyright protection ends 70 years after the author's death. If the work is owned by a legal entity or if the identity of the author is unknown, the copyright protection ends 70 years after the work was lawfully made available to the public.

11.5 Neighbouring rights

Neighbouring rights are rights that protect the efforts and achievements of performers, music producers, film producers and broadcasters. The protection of these rights resembles that of copyrights, which is why they are called "neighbouring". Neighbouring rights are laid down internationally in the 1961 Rome Convention. In the Netherlands, neighbouring rights are regulated by way of the Neighbouring Rights Act *(Wet op de naburige rechten* or *WNR)* of 1993.

The WNR recognizes that there is a personal bond between the performing artist and his performance. The WNR therefore grants the performing artist certain specific rights that protect this personal bond, and thus the reputation of the performing artist. These rights are also referred to as personality rights. To a large extent, these rights correspond to the personality rights that the author of a work has on the basis of copyright.

For the rights of performing musicians and music producers, the term of protection is 70 years after the release of the relevant recording. For other neighbouring rights, the term of protection is 50 years.

11.6 Database protection

Under the Databases Protection Act *(Databankenwet* or *DBW)*, the data in a database are protected to the extent that the database cannot be protected as a copyright under the Copyright Act. Under the DBW, the rights are protected as a ”collection”, which means that the producer of the database has the exclusive rights to prevent the unauthorized extraction of the data in the database. The database is automatically protected when it is created. The protection is applicable for up to 15 years after production.

11.7 Designs

The appearance of a product can be protected as a drawing or as a design. A drawing (two-dimensional appearance) and a design (three-dimensional appearance) result from features such as the lines, contours, colours, shape, texture or materials of the product itself or its ornamentation. The owner of a design or drawing right has the exclusive right to use the design or drawing (jointly referred to as the “design”) and to prevent any third party from using the design without the owner’s authorization. A design can be registered as a Benelux design, a Community design or an international design.

Benelux design

A Benelux design is registered under the Benelux Convention on Intellectual Property *(Benelux Verdrag inzake de Intellectuele Eigendom* or *BVIE).* Benelux designs must be registered with the Benelux Office for Intellectual Property *(Benelux-Bureau voor de Intellectuele Eigendom)*. The BVIE stipulates that in order to be protected, the design must be new and have a distinctive character. The protection of a Benelux design under the BVIE lasts for a period of five years, which can be renewed four times, each time for a period of five years, up to a maximum of twenty-five years.

Community design

A Community design gives the owner exclusive protection in all countries of the European Union. There are two types of Community designs: registered and unregistered Community designs. The owner of a design can register the design with the European Intellectual Property Office (EUIPO). A registered Community design provides the owner an exclusive right to use the design and prohibit third parties from using the design without the owner's authorization. Similar to the protection of a Benelux design, the protection of a registered Community design lasts for a period of five years, which can be renewed four times, each time for a period of five years, up to a maximum of twenty-five years.

An unregistered Community design comes into existence not by registration, but automatically when the owner makes the design available to the public. The owner of an unregistered Community design also has the exclusive right to prohibit third parties from using the design without the owner's authorization, but only in case of counterfeiting (i.e. in case of identical designs). The protection of an unregistered Community design lasts for a period of three years from the date on which the design is first made available to the public within the European Union.

International design

An international design offers protection in the countries that are party to the Hague Agreement Concerning the International Registration of Industrial Designs of 1925 (the "Hague Agreement"). The owner of the design may request protection in a number of these countries or, if desired, all countries that are party to the Hague Agreement. Applications for international designs are made to the WIPO. The procedure that must be followed resembles the procedure for registering an international trademark.

12. DATA PROTECTION

12.1 General

The EU Data Protection Regulation (GDPR) entered into force on 24 May 2016 and became directly applicable in all EU member states on 25 May 2018. Although due to the direct effect of the GDPR it is not required for the Netherlands to transpose the GDPR into national legislation, the Netherlands has introduced the GDPR Implementation Act which supplements the GDPR and revokes the previously applicable Personal Data Protection Act (*Wet bescherming persoonsgegevens* or *Wbp*). The Personal Data Protection Act had transposed the EU Data Protection Directive (DPD) into Dutch legislation and had been in force since 2001.

The GDPR contains rules that are similar to those of the DPD, but it introduces more severe penalties in case of infringements. Furthermore, the territorial scope of the GDPR is wider than that of the DPD as it also applies to organizations that are not located in the EU where the data processing activities are related to the offering of goods or services to persons in the EU or the monitoring of behaviour of persons in the EU.

12.2 Personal data

The GDPR defines 'personal data' as: any information relating to an identified or identifiable natural person (the 'data subject'). In this context, an 'identifiable natural person' means a natural person who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person. The GDPR imposes specific obligations regarding the processing of personal data on 'controllers' and 'processors' of personal data, whereby 'controllers' are natural persons, legal entities or organizations which determine the purposes and means of the processing of personal data, and 'processors' are natural persons,

legal entities or organizations which process personal data on behalf of the controller. With respect to the processing of personal data, the GDPR provides that this must be done in accordance with the following principles:

- ‘lawfulness, fairness and transparency’: personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject;
- ‘purpose limitation’: personal data must be collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes;
- ‘data minimisation’: personal data shall be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed;
- ‘storage limitation’: personal data shall be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed;
- ‘integrity and confidentiality’: personal data shall be processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures.

The GDPR further stipulates that controllers shall be responsible for, and be able to demonstrate compliance with, these principles.

Article 6 of the GDPR stipulates that data processing shall be lawful only if and to the extent that at least one of the following applies:

- the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
- processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
- processing is necessary for compliance with a legal obligation to which the controller is subject;
- processing is necessary in order to protect the vital interests of the

data subject or of another natural person;

- processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
- processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

12.3 Data breaches

The GDPR stipulates that in case of a personal data breach the controller shall without undue delay and, where feasible, within 72 hours after having become aware of it, notify the personal data breach to the supervisory authority (in the Netherlands: the Dutch Data Protection Authority or *Autoriteit Persoonsgegevens*), unless the personal data breach is unlikely to result in a risk to the rights and freedoms of natural persons. If the notification is not made within 72 hours, the notification must include the reasons for the delay. According to the GDPR, the notification shall at least (a) describe the nature of the personal data breach, (b) communicate the name and contact details of the data protection officer or other contact point where more information can be obtained, (c) describe the likely consequences of the personal data breach, and (d) describe the measures taken or proposed to be taken by the controller to address the personal data breach. If the processor becomes aware of any data breach, the processor shall notify the controller without undue delay.

12.4 Enforcement

Enforcement of the GDPR in the Netherlands is the responsibility of the Dutch Data Protection Authority. In case of data breaches, the Dutch Data Protection Authority may impose fines. The most serious infringements could result in a fine of up to €20 million or 4% of the organization’s worldwide annual revenue from the preceding financial year, whichever amount is

higher. That said, it appears that the Dutch Data Protection Authority is more inclined to encourage and guide organizations to comply with the GDPR and the GDPR Implementation Act than to inflict punishment.

13. COMPETITION LAW

13.1 General

In the Netherlands, competition is regulated by the Dutch Competition Act *(Mededingingswet* or *Mw)*, which entered into force in 1998, and by European law, specifically certain provisions in the Treaty on the Functioning of the European Union (TFEU) and the EC Merger Regulation (Council Regulation (EC) No 139/2004) on account of the fact that the relevant provisions in the TFEU and the EC Merger Regulation have direct effect in the EU member states. The provisions in the Mw are based on and strongly resemble the corresponding provisions in the TFEU and the EC Merger Regulation. In both Dutch and European competition law, agreements, decisions and concerted practices are only prohibited if they restrict competition to an appreciable extent. A requirement that is present only in EU competition law is that it only applies if unfair practices affect trade between member states of the European Union.

The Authority for Consumers and Markets *(Autoriteit Consument & Markt* or *ACM)* is responsible for the enforcement in the Netherlands of not only the Mw, but also of the competition law provisions in the TFEU and the EU Merger Regulation. The ACM has the authority to investigate possible infringements, give binding instructions to cease infringements and impose fines and other administrative sanctions.

In this chapter, the most relevant aspects of Dutch competition law will be addressed.

13.2 Anti-competitive agreements and concerted practices

Section 6(1) of the Mw, which is the Dutch law equivalent of Article 101 of the TFEU, prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of

competition in the Dutch market or in a part thereof. This prohibition includes both horizontal arrangements (between competitors operating at the same level of the supply chain) and vertical arrangements (between parties operating at different levels of the supply chain, e.g. an agreement between a manufacturer and its distributor).

Any agreement, decision or concerted practice falling within the scope of this prohibition is null and void. However, the prohibition does not apply if the combined turnover or the combined market share of the undertakings concerned does not exceed certain de minimis thresholds. Furthermore, agreements, decisions or concerted practices which in principle fall within the scope of the Section 6(1) prohibition can be exempt in specific circumstances. The exemptions include agreements, decisions or concerted practices which fulfil the material conditions of an EU block exemption or for which the European Commission has granted an individual exemption under Article 101(3) TFEU.

13.3 Abuse of a dominant position

Section 24(1) of the Mw, which is the Dutch law equivalent of Article 102 of the TFEU, prohibits undertakings that hold a dominant position on the Dutch market to abuse that position. Section 1 under (i) of the Mw defines 'dominant market position' as a 'position of one or more undertakings which enables them to prevent effective competition being maintained on the Dutch market or in part of it by giving them the possibility of behaving to an appreciable extent independently of their competitors, suppliers, customers or end-users'.

Examples of the abuse of a dominant position include:

- directly or indirectly imposing unfair purchase or sale prices or other unfair trading conditions;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other

trading parties, thereby placing them at a competitive disadvantage;

- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The pursuit, holding or strengthening of a dominant position by normal means is not prohibited.

13.4 Merger control

Chapter 5 of the Mw, which is the Dutch law equivalent of the EU Merger Regulation, relates to "concentrations", being mergers, acquisitions and certain joint ventures. Concentrations falling within the scope of application defined in Chapter 5 of the Mw are subject to merger control under the Mw, unless they have an "EU dimension". Such concentrations must be notified to the ACM before they can be implemented.

Section 29 of the Mw stipulates that a concentration must be notified to the ACM if the combined turnover of the undertakings concerned in the preceding calendar year exceeded € 150 million, whereby at least two of the undertakings concerned have each achieved a turnover of at least € 30 million in the Netherlands. Different thresholds apply for transactions occurring in specific sectors.

The merger control procedure consists of 2 phases: the notification phase (Phase 1) and the phase in which a license can be applied for (Phase 2). The required notification may be submitted by any of the parties concerned and may also be submitted jointly on behalf of several parties. Once the ACM has received the notification, this will be announced in the Government Gazette (Staatscourant) and on the ACM's website. This will give interested parties the opportunity to submit their comments on the intended concentration. Following notification, ACM has a period of four weeks to determine whether or not the implementation of the concentration requires a license. During this period, the concentration may not be implemented, unless an exemption is granted for important reasons.

The ACM may determine that a concentration which it has reason to believe may significantly impede effective competition in the Dutch market or in a part of it, in particular as a result of the creation or strengthening of a dominant position, is subject to a license. If the ACM has determined that no license is required, the parties can implement the transaction. If the ACM has determined that a license is required, the parties may submit an application for the license. There is no deadline for applying for the license. If the parties have submitted their application for a license, the ACM has to either grant or refuse the license within thirteen weeks of the date on which the application for the license was made. If no decision has been made within that period, the license is deemed to have been granted.

Following a refusal by the ACM to grant a license to implement a concentration, the Minister of Economic Affairs may decide, on an application to that effect made by the relevant parties, to grant such license if, in the Minister's view, important reasons of public interest that outweigh the likely restriction of competition so require. There can be circumstances in which concentrations that are not permissible from a competition point of view will nevertheless be considered acceptable on the grounds of other important public interests. In such cases, the Minister of Economic Affairs may still allow mergers that the ACM has prohibited. This will be a decision of a political rather than an economic or legal nature. To date, the Minister of Economic Affairs has used his/her authority to grant such a license only once (in September 2019).

14. REAL ESTATE

14.1 Ownership and other rights

Ownership is the most absolute and comprehensive right that a person can have to a property. Pursuant to the legal concept known as accession *(natrekking)*, ownership of land also includes the buildings and other immovable assets on the ground as well subterranean structures. A limited right *(beperkt recht)* is a right which is derived from a more comprehensive right (such as ownership) encumbered with such limited right. A limited right which is created over a property is also a right in rem *(zakelijk recht).*

In relation to real property, rights in rem *(zakelijke rechten)* include the right of mortgage *(hypotheek)*, the right of superficies *(opstal)*, the right of leasehold *(erfpacht)*, easement *(erfdienstbaarheid)* and agricultural tenancy *(pacht)*. The right of mortgage is a security right established over real property (or other registered property). The right of leasehold is the right to hold and use a piece of land owned by another person. The right of superficies gives the holder the right to own buildings, works or plants in, on or over a piece of land owned by someone else. Easement is a right in rem with which an immovable property is encumbered in favour of another immovable property. An example of an easement is the right of way *(recht van overpad).* Agricultural tenancy is an agreement whereby the agricultural lessor undertakes to provide the agricultural lessee with an immovable property for agricultural use for a consideration.

Ownership of real property can be divided into several apartment rights *(appartementsrechten)* which are separately transferable and can separately be encumbered or made subject to a limited right. Houses and apartment buildings can be divided into separate apartment rights.

The transfer of ownership (legal title) and the creation or transfer of other rights in rem to real property is effected by way of a notarial deed of transfer executed before a Dutch civil law notary. In order to become legally effective, the rights over real property must be registered with the Land Registry Office *(Kadaster)* (see also paragraph 14.3 below).

14.2 Lease

Lease is not a right in rem, but rather a personal right to use certain property. With respect to real property, Dutch law distinguishes between residential lease and lease of business premises. In this paragraph, only the lease of business premises will be addressed. There are two types of business premises leases: (i) lease of retail premises and (ii) lease of other business premises.

Lease of retail premises is subject to detailed, semi-mandatory statutory provisions the parties cannot agree to deviate from to the detriment of the lessee. These provisions apply to premises that according to the lease agreement are used to conduct a retail business, a restaurant or café business, a take-away and delivery service, a craft business, or a hotel or camping business. For these provisions to apply, a publicly accessible space for the direct supply of movable goods or for the provision of services must be present. With the exception of agreements entered into for a period of no more than two years, lease agreements in this category must be concluded for an initial period of at least 5 years and are in principle extended by law for another period of 5 years. The lease agreement does not terminate automatically at the end of the five year or ten year period, but can be terminated by giving notice to the other party to take effect at the end of the five year or ten year period. A notice period of one year (or longer if agreed between the parties) must be observed. The lessor (not the lessee) must give a valid reason for the termination and if the lessee does not consent to the termination in writing, the lessor will have to go to court to have the lease agreement terminated.

Lease of other business premises (such as offices) is less regulated than lease of retail premises. The lessor and the lessee are generally free to negotiate the rent and the other terms of the lease agreement, except that special rules apply regarding the lessee’s obligation to vacate the premises in case of termination by the lessor that cannot be deviated from to the detriment of the lessee.

The Real Estate Council of the Netherlands *(Raad voor Onroerende Zaken* or *ROZ)*, an association of professional parties active in the real estate industry, has prepared model lease agreements and related general terms which are regarded as the industry standard for lease agreements. These model documents are regularly updated. Although there are model agreements and general terms for both residential lease and lease of business premises, they are most commonly used for the lease of business premises.

14.3 Land Registry Office

The Land Registry Office *(Kadaster)* registers the geographical information concerning real estate located in the Netherlands as well as mortgages and other limited rights created on real estate. Apart from registering information on real estate, it registers information on ships, airplanes and networks. The Land Registry Office is also responsible for national mapping and maintenance of the national reference coordinate system. The Land Registry Office is a non-departmental public body, under the political responsibility of The Ministry of the Interior and Kingdom Relations.

By registering certain information, the Land Registry Office protects legal certainty. In case of a sale of real estate, the buyer only becomes the legal owner upon the registration of the deed of transfer at the Land Registry Office. The civil law notary *(notaris)* before whom the deed of transfer was executed, is responsible for registration at the Land Registry office. The registered information is available to the public and can be obtained (for a modest fee) through the Land Registry Office's website, but also in person and by telephone.

14.4 Zoning Plan and All-In-One Permit For Physical Aspects

As the Netherlands is a densely populated country, the development and use of a location for residential or business purposes is heavily regulated. The choice of a particular location must be in line with the applicable municipal zoning plan *(bestemmingsplan)*. A zoning plan does not only include detailed rules on how a plot of land or premises may be used, for example, by stating

where houses, hotels and shops can be established, but also the maximum height or width of a construction or building. Zoning plans are updated regularly.

If it is intended to construct a new building or to rebuild, change or renovate an existing building, in most cases an all-in-one permit for physical aspects *(omgevingsvergunning)* will be required. An all-in-one permit can be applied for online. The application will be checked against the applicable zoning plan. In practice, it may take 2 to 6 months before the municipality decides whether an all-in-one permit is granted.

15 TAX

15.1 Corporations

Under the Dutch Corporate Income Tax Act *(Wet op de vennootschapsbelasting 1969* or *CITA)* entities incorporated under Dutch law are deemed to be Dutch tax residents for corporate income tax (CIT) purposes. A Dutch resident company is subject to CIT on its worldwide income. Non-resident entities have a limited tax liability meaning that only Dutch source income is included in the tax base. The corporate residence of an entity is based on the relevant facts and circumstances, whereby the effective place of management is an important factor in determining where the entity is resident.

A non-Dutch resident entity holding 5% or more of the shares in a Dutch company (a so-called substantial interest) can become subject to CIT on dividends, capital gains and interest on loans derived from such substantial interest, but only in certain specific situations.

Tax rates

The CITA distinguishes two different tax rates, a rate of 25.8% and a lower rate of 19% which applies to taxable income up to EUR 200,000 (2023 rates and brackets). If certain conditions are met, fiscal investment funds are taxed at a 0% CIT rate. Certain entities, such as public bodies, can opt for a tax exempt status.

Calculation of taxable profit

The CITA does not provide for a provision stating how to determine the annual taxable profit. Instead, it requires that annual profits are determined in accordance with ‘sound business practice’ *(goed koopmansgebruik)*. Sound business practice entails that profits and losses are attributed to financial years in accordance with the realization, matching, reality, prudence and simplicity practices.

Business expenses are generally tax deductible, albeit that certain deduction restrictions apply (for example with respect to interest expenses).

Loss compensation

As of 1 January 2022, the Dutch loss relief rules for corporate taxpayers have been amended. Under these rules, tax losses can be carried back one year and carried forward for an unlimited time. However, annual loss compensation is limited to EUR 1 million, increased with 50% of the taxpayer's annual taxable profit exceeding EUR 1 million. These rules apply to already existing losses as well to losses incurred after 1 January 2022.

The arm's-length principle and transfer pricing

The arm's-length principle is codified in article 8b of the CITA. Based on the arm's-length principle, the terms and conditions of transactions between related parties should be similar to the terms and conditions that would be agreed upon between unrelated parties in otherwise similar circumstances. The interpretation of the arm's-length principle in the Netherlands is based on the OECD Transfer Pricing Guidelines. In general, the Dutch tax authorities adhere to these guidelines. If a transaction is not at arm's-length the Dutch tax authorities may adjust the pricing of the transaction.

Additionally, article 8b requires that corporate taxpayers include specific information in their documentation, including documents showing that intercompany transactions were made in accordance with the arm's-length principle. Supplementary transfer pricing documentation is required for entities passing a certain turnover threshold. Entities that are part of a multinational group ("MNE") with a consolidated turnover of EUR 50 million or more are obliged to prepare a master file and local file (i.e. a file at the MNE group level and a local file at entity level, respectively). Entities that are part of an MNE with a consolidated turnover of EUR 750 million or more have to prepare a Country-by-Country Report as well (i.e. a report that provides key elements of financial information of an MNE on a per jurisdiction basis). Failure to comply with the abovementioned obligations may result in a reversal of the burden of proof and administrative penalties.

Dutch participation exemption

The Dutch participation exemption provides a full exemption of certain income received from qualifying subsidiaries (most importantly dividends and capital gains). A subsidiary qualifies for the participation exemption with respect to share interests of at least 5%, which are not held as portfolio investments (i.e. passive investments). This is known as the ’Intention test’.

Intention test

The decisive criterion for the Intention test is the intention with which the participation is held by the Dutch company. The Intention test is considered to be met if the Dutch company’s objective is to obtain a return on its investment that exceeds a return that may be expected from regular portfolio asset management. Also, if the shareholder carries out essential activities in the business of the subsidiary (e.g. via management activities, strategy/ policy-making activities or financial activities), the Intention test may be met. If a participation is held with mixed intentions, the predominant intention is decisive. A participation is not held as a passive investment if the participation is engaged in the same line of business as the Dutch company.

However, if this Intention test is not met, the Dutch participation exemption still applies if the participation can be considered a ‘qualifying portfolio investment participation’. This is a participation that meets either the ‘Subject-to-tax test’ or the ‘Asset test’.

Subject-to-tax test

The Subject-to-tax test is met if the participation is subject to a profits tax in its country of residence that results in a ‘reasonable levy’ of tax according to Dutch tax standards. This should be the case if the participation is subject to a profits tax against a regular statutory rate of at least 10%, provided that the local tax base does not significantly deviate from the Dutch tax base. In case of significant deviations, the Subject-to-tax test can still be met if the participation is effectively subject to a profits tax of at least 10%.

Asset test

The Asset test is met if the directly and indirectly held assets of a participation consist for less than 50% of low taxed free portfolio investments. Free portfolio investments are:

- assets that are not used within the business of the participation and have a portfolio character (e.g. excess cash, securities and intercompany loans), except for real estate investments (real estate assets do not qualify as assets with a portfolio character);
- intercompany loan receivables, unless these are used by an active group finance company or are financed for 90% or more with third party debt; and
- assets that are used for intercompany leasing activities, unless these are used in an active leasing business or are financed for 90% or more with third party debt.

Free portfolio investments are low taxed if the income from these assets is not subject to tax at a rate of at least 10% (so-called bad assets). Assets which do not qualify as low taxed free portfolio investments are generally classified as ‘good assets’. The Asset test is a continuous test and the test is applied on a fair market value basis, whereby potential (hidden) goodwill on active business operations can be considered a “good asset” for purposes of this test.

Research and Development (R&D)

In the CITA certain tax incentives exist in order to promote R&D related activities in the Netherlands such as the ‘innovation box‘. Qualifying income from R&D activities is taxed at a lower rate than the regular rate of 25.8%. Furthermore, taxpayers can apply for the WBSO, a tax incentive regime offering compensation for a part of an entity’s R&D related wage costs and other related expenditures (as further described below).

Innovation box

The innovation box is a tax incentive aimed at stimulating R&D activities in the Netherlands. Income that can be allocated to the innovation box is taxed at a corporate tax rate of 9% instead of the regular corporate tax rate of 19 / 25.8%. Only benefits arising from 'qualifying' intangible assets are eligible for the application of the innovation box. In this respect, a distinction is made between 'small and 'large' taxpayers. Small taxpayers are subject to less stringent rules on what constitutes a qualifying intangible asset, these taxpayers have access to the innovation box if they have obtained the R&D statement required to apply the WBSO.

For large taxpayers, besides the R&D statement, an additional 'access ticket' is required. This can be:

(i) a patent;
(ii) an exclusive license;
(iii) a software program;
(iv) a plant breeder's right; or
(v) a pharmaceutical certification.

A taxpayer is considered small if the following conditions are met:

(i) the total amount of benefits arising from intangible assets in a year - and the four preceding years - is less than € 37.5M (on average € 7.5M per year); and
(ii) the net turnover in a year - and the four preceding years – of the taxpayer (together with group companies) is lower than € 250M (on average € 50M per year).

WBSO

WBSO is a tax incentive scheme offering compensation for a part of an entity's research and development (R&D) related wage costs and other related expenditures. The R&D wage tax deduction amounts to 32% of the first EUR 350,000 of wages and related costs and 16% of further qualifying

R&D costs. For start-ups, the tax deduction of the first EUR 350,000 of costs is 40%. The amount of the allowance is not capped. Taxpayers must request an R&D statement in order to apply the WBSO.

To find out whether an entity may be eligible for this incentive, it is recommended to engage a specialized subsidy advisor to review the activities performed (although the allowance is processed as a reduction of the wage tax to be paid, in essence it is a subsidy granted on the basis of meeting certain technical requirements).

Fiscal unity

The CITA provides for a consolidation regime called the fiscal unity (fiscale eenheid). If certain conditions are met, entities that are part of the same group can become members of a fiscal unity in order to file a consolidated tax return. Entities that are tax residents of the Netherlands can form a fiscal unity with subsidiaries in which a participation of at least 95% is held. The fiscal unity generally eliminates intercompany transactions between its members resulting in no realization of income on these transactions. The main advantages of the fiscal unity are:

(i) offsetting losses and profits among its members;
(ii) filing a single corporate tax return as the parent entity is solely responsible for filing the return;
(iii) the elimination of intercompany transactions.

The individual members of the fiscal unity are jointly and severally liable for any tax debts of the fiscal unity.

Object exemption

Income allocable to a permanent establishment ("PE") can be exempt from Dutch corporate income tax under the so-called object exemption. Under this exemption the income and expenses that should be allocated to the PE are excluded from the Dutch taxable base. The result attributable to the PE should be calculated in accordance with Dutch tax standards, but in local

functional currency. Translation results therefore remain included in the Dutch taxable base.

Dividend tax

Profit distributions made by Dutch entities are subject to Dutch dividend tax at a rate of 15%. The tax must be withheld by the distributing entity and remitted to the Dutch tax authorities. An exemption from Dutch dividend tax applies to profit distributions to EU companies or companies resident in a state with which the Netherlands has a tax treaty which includes a comprehensive dividend provision, provided that the company owns a participation which would qualify for the Dutch participation exemption in the Netherlands. However, based on Dutch anti-abuse rules, the Dutch dividend tax exemption may not be applied if one of the following rules applies:

(i) the recipient of the dividend is considered in his country of residence to be a resident of a non-EU state with which the Netherlands has not concluded a tax treaty which includes a comprehensive dividend provision;

(ii) the recipient of the dividend fulfils a comparable function as a qualifying Dutch (portfolio) investment fund;

(iii) the recipient of the dividend can be considered to be part of an 'abusive' structure, which is the case if the following conditions are met:

    a. the recipient of the dividend owns the shares in the Dutch company with the principal purpose (or one of the recipient's principle purposes being) to avoid Dutch dividend tax for another party (the 'Motive test'), and

    b. it concerns an artificial construction or a series of artificial constructions, whereby a construction can consist of multiple steps and is considered artificial when it can be concluded that it is not established on the basis of valid business reasons which reflect economic reality (the 'Artificiality test'); or

    the recipient of the dividend is not the beneficial owner of the income received from the Dutch company.

The Dutch dividend tax due (if any) may be reduced under the application of tax treaties to which the Netherlands is a party.

The Dutch Cooperative

Profit distributions made by a Dutch cooperative to its members are, as a general rule, not subject to Dutch dividend tax. However, if the cooperative qualifies as a so-called holding cooperative, 15% Dutch dividend tax is due when profits are distributed to ‘qualifying members’. A qualifying member is entitled to at least 5% of the annual profits of the cooperative or 5% of the liquidation proceeds.

A cooperative is deemed to be a holding cooperative if its activities consist for 70% or more of:

(i) owning shareholdings that qualify for the Dutch participation exemption (as mentioned above); or
(ii) related party financing activities.

Holding cooperatives and its qualifying members which are subject to Dutch dividend tax can be tax exempt or eligible for a lower tax rate under bilateral tax treaties.

Conditional Withholding Tax on Interest and Royalties

In principle, the Netherlands do not levy withholding tax on interest or royalty payments. As of 1 January 2021, however, the Netherlands introduced an interest and royalty withholding tax (2023 rate: 25.8%) in certain specific situations. Essentially, the Dutch interest and royalty withholding tax (“WHT”) has an anti-abuse character and should not adversely affect genuine business transactions between unrelated parties.

In short, the Dutch WHT is triggered in case of:

(i) payments to related companies that are located in a low-taxed jurisdiction (“LTJ”);
(ii) payments to certain related hybrid companies; and
(iii) abusive situations (e.g. an indirect payment to an LTJ or hybrid company via a conduit company).

An LTJ is a jurisdiction without a profit tax or with a statutory profit tax rate of less than 9% and/or a jurisdiction that is included in the EU list of non-cooperative jurisdictions. Ultimately by 1 October of each year, the Netherlands publishes the list of LTJs. This list applies in the following calendar year.

15.2 Individuals

As a general rule, an individual residing in the Netherlands is subject to tax over his/her worldwide income and wealth. An individual is deemed to be a resident of the Netherlands if the socio-economic centre of his/her life's interests factually lies in the Netherlands. An individual who qualifies as a Dutch resident taxpayer is eligible for certain deductions and tax credits.

An individual who does not live in the Netherlands is only subject to personal income tax on certain sources of income, for example benefits from a substantial shareholding, employment or real estate in the Netherlands.

The Box system

In the Dutch Personal Income Tax Act *(Wet op de inkomstenbelasting 2001)* a distinction is made between three types of income: 'Box 1', 'Box 2' and 'Box 3'. Each box has its own rules and tax rate and a different taxable base:

- Box 1 concerns income from employment, business income and income from miscellaneous activities. Box 1 income is subjected to personal income tax based on progressive tax brackets. Income up to EUR 73,031 is taxed at a rate of 36.93% (a portion of this taxation includes social security premiums) and income of EUR 73,031 and above is taxed at a rate of 49.50%.

  An individual's private residence in the Netherlands shall also be included in Box 1, as a result of which mortgage interest (if any) is tax deductible, provided that certain conditions are met.

- Box 2 concerns income (including capital gains) from substantial interests (i.e. participations of at least 5% in companies). Income from a substantial interest is subject to Dutch personal income tax at a rate of 26.90%.

- Box 3 concerns income from savings and (portfolio) investments, real estate (etc.) to the extent not categorized in Box 1 or Box 2. The asset base (taking into account a tax free threshold of EUR 57,000) in Box 3 is split in three categories (being savings, other investments and debts) which are deemed to generate a return of between 0.36% and 6.17%.

  The total yield calculated based on the above is taxed at a flat rate of 32%.

  As a result of recent Supreme Court case law, significant changes are expected as to the manner in which net wealth is taxed. These changes are, however, not expected to become effective before 2026.

The 30% facility

The 30% facility is a preferential Dutch tax regime aimed at expats, which may currently be applied for a maximum period of 5 years. Under the application of the 30% facility, the Dutch personal income taxation as laid out above can be reduced as follows:

- Box 1: 30% of the gross income from employment in Box 1 can be paid free from Dutch tax.

- Box 2: if the 30% facility is applied, the individual taxpayer can opt for ‘partial non-resident status’. In that case, Box 2 income is limited to income from substantial interests in Dutch companies and income from substantial interests in non-Dutch tax resident companies is not recognized as income for Dutch personal income tax purposes.

- Box 3: if the individual taxpayer opts for partial non-resident status,

Box 3 income is generally limited to income from Dutch real estate assets (or equivalent assets).

To qualify for the application of the 30% facility, the individual shall meet the following criteria:

- the individual must be hired from abroad or seconded to a domestic employer in the Netherlands. To meet this requirement, it is strongly recommended that the employment agreement is signed before the date of the individual's migration to the Netherlands (the effective date of the employment agreement may be a date after the migration date);
- the individual must be paid through a Dutch payroll, i.e. the salary of the individual must be subject to Dutch wage tax withholding. The Dutch employer is usually considered a withholding agent for Dutch wage tax purposes;
- the individual must have specific expertise, which is generally deemed to be the case only if the individual earns a gross annual salary of at least EUR 56,381 (i.e. EUR 39,467 taxable wage after the application of the 30% reduction); and
- the individual must have lived at a distance of more than 150 km from the Dutch border during more than two-thirds of the period of 24 months prior to starting the employment in the Netherlands.

To apply the 30% facility, a request needs to be timely filed with the Dutch tax authorities.

As from 1 January 2024, the 30% facility can no longer be applied insofar as the annual gross remuneration of an employee is higher than the newly introduced salary cap (for 2022: EUR 216,000). Part of the new rules is a grandfathering regime for employees to whom (in brief) the 30% facility already applied in December 2022. To those employees, the salary cap will only become applicable as from 1 January 2026 (up to and including 2025 they can apply the 30% facility to their entire remuneration).

15.3 Value-added tax (VAT)

To be viewed as a taxable person for VAT, a company must perform economic activities (supply of goods/services against remuneration). This can also be the supply of management services or the granting of interest-bearing loans.

Economic activities can consist of VAT taxable and VAT exempt activities whereby the supply of VAT exempt services in general does not give a right to deduct input VAT (i.e. VAT applied to products or services purchased). The granting of interest-bearing loans is a VAT exempt activity and in principle gives no right to deduct input VAT.

The mere holding of shares in a subsidiary (without performing economic activities to that subsidiary), is not considered an economic activity for VAT purposes. However, in case economic activities are performed to a subsidiary, also the holding of shares in that subsidiary can be considered an economic activity and, hence, such activities do not limit the recovery of input VAT. Below, the aforementioned types of subsidiaries are referred to as "passive subsidiaries" and "active subsidiaries", respectively.

VAT rates

The general VAT rate in the Netherlands is 21%. A reduced rate of 9% is applicable to (amongst others) food, (non-alcoholic) beverages, art, hairdresser, public transport and hotels. Furthermore, a 0% VAT rate applies to intra-community supplies and sea-going vessels. VAT exemptions are applicable to specific financial services, insurances, education, medical services and real estate.

VAT fiscal unity

Dutch VAT taxable persons that are financially, economically and organizationally closely linked to each other are together considered as one VAT taxable person, the VAT fiscal unity, if the following requirements are met:

- financial link: 50% or more of the shares in the members are directly or indirectly held or controlled by the same person;
- organizational link: the members are under the same management. This primarily concerns the composition of the management board;
- economical link: the members of the VAT fiscal unity must have the same client base, perform complementary activities or a member must mainly (for more than 50%) perform transactions on behalf of another member of the VAT fiscal unity.

If the foregoing requirements are met, there is a VAT fiscal unity by virtue of the law. The members of the VAT fiscal unity can file separate VAT returns or jointly file one VAT return together with the other members of the VAT fiscal unity. Activities between members of the VAT fiscal unity are outside of scope for VAT and therefore no VAT is due in respect of such activities.

The right to deduct input VAT is calculated on the basis of the outgoing activities of the VAT fiscal unity as a whole. Exempt activities between members of the VAT fiscal unity therefore have no negative influence on the right to deduct input VAT.

The members of the VAT fiscal unity become jointly and severally liable for the VAT due by (members of) the VAT fiscal unity. This joint and several liability continues until the moment when the Dutch tax authorities are notified of the termination of the VAT fiscal unity.

VAT recovery

With respect to the right to deduct input VAT, a distinction should be made between (a) directly attributable costs and (b) general costs.

(a) Directly attributable costs

Directly attributable costs are costs which are directly attributable to certain activities. Entities are entitled to (fully) deduct input VAT on costs to the extent these costs are directly related to VAT taxable output or directly related to the provision of interest-bearing loans to non-EU parties.

On the other hand, VAT on costs directly attributable to income not giving a right to deduct input VAT (e.g. interest-bearing loans to EU parties) is not deductible at all.

(b) General costs

Apart from the directly attributable costs, there are also general costs, which are not directly (and fully) attributable to the provision of VAT taxable or VAT exempt activities. These can for example consist of holding and organizational costs of the entity. The VAT on these general costs becomes partially deductible (the so called pro rata). The pro rata is calculated on an annual basis and expressed as a percentage rounded up to the next whole number (thus 48.2% will be rounded up to 49%). The pro rata is calculated as follows:

$$\frac{\textit{VAT taxable turnover+VAT exempt turnover with recovery right}}{\textit{Total turnover (including financial income)}} \times 100\%$$

In the view of the Dutch tax authorities the pro rata will be further reduced by the so-called pre pro rata if apart from economic activities, there are also non-economic activities, like the mere holding of shares in a subsidiary. There is no fixed method to calculate the pre pro rata, but the ratio between active subsidiaries and passive subsidiaries is relevant.

15.4 Real estate transfer tax

Real estate transfer tax (“RETT”) is due on the acquisition of Dutch property, including the acquisition of beneficial ownership. The tax due is calculated on the higher of (i) the purchase price of the property and (ii) the market value of the property.

As of 1 January 2023 two different tax rates and an exemption can apply:

- a 2% rate applies to individuals having the intention to live themselves in a property for a longer period; and
- a 10.4% rate (this was 8%) applies to the acquisition of real estate

(including in certain situations shares in a Dutch real estate entity, rights to real estate (beneficial ownership) and certain certificates entitling the holder to benefits derived from said real estate); and

- no RETT is due for home buyers between the ages of 18 and 35 who are buying property with a value not exceeding EUR 440,000. This exemption can be used only once.

If the same real estate is sold again within a six month period to another person or entity, the RETT is due on the basis of the new purchase price minus the initial purchase price.

Furthermore, under certain conditions the acquisition of real estate within the group is exempt from RETT.

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