KPMG

Investment in the Netherlands

2016

This automatically updated iPad app prepared by KPMG Audit, KPMG Meijburg & Co Tax Lawyers, KPMG Advisory, and Eversheds Lawyers helps answering many audit, tax and legal questions asked by business executives when they consider establishing or have already decided to establish a presence in the Netherlands.

Foreword

In this dynamic world, with its vast socio-economic changes, substantial regional economic disparities, and shifting economic power base, companies and investors are looking at the best destinations for their investments to obtain maximum yields, access new markets, manage the supply chain, diversify risks, obtain knowledge, or save costs. An active player in this increasingly dynamic environment, the Netherlands remains a top destination for many businesses, large and small, that are looking for a stable and predictable environment from which to run their European regional operations.

This booklet has been prepared by KPMG specialists, in collaboration with Eversheds, to help answer many questions asked by business executives when they explore or have already decided to establish a presence in the Netherlands.

We have endeavoured to make this a comprehensive publication, combining an accessible description of the regulatory, tax and legal environment with an objective overview of the unique selling points of the Netherlands as an investment location. Due to the broad scope of the topics reviewed, the information contained in this booklet is intended only as an introduction.
We would advise anyone contemplating a business investment in the Netherlands to seek guidance from professional advisors. They can provide the detailed information you need to make a sound business investment decision.

The KPMG practice in the Netherlands has an extensive and high-quality track record in providing services related to investments by foreign-based companies. Moreover, KPMG has considerable experience in helping foreign multinationals set up business hubs and explaining the country's open and transparent working environment. We also have substantial experience and contacts with the respective national, regional and municipal investment agencies, which in turn can provide you with additional information.

Albert Röell,
KPMG NV

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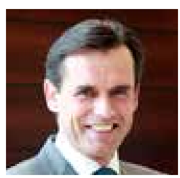

Fourteenth edition, May 2016

Foreword from the Netherlands Foreign Investment Agency

Over many years, the Netherlands Foreign Investment Agency (NFIA) has assisted thousands of companies and organizations from around the globe to set-up, or expand, their operations in the Netherlands. As an operational unit of the Ministry of Economic Affairs, our task is to provide practical guidance and assistance throughout the entire trajectory – from first contact, to first stone laid, or ribbon cut.

Under the label 'Invest in Holland', we collaborate closely with an extensive network of regional economic development agencies and several major cities. Our role is to facilitate international expansion for organizations seeking a dynamic, efficient and stable location within Europe from which to operate. By providing direct access to a broad network of business partners, including KPMG, and government bodies, the NFIA helps join the dots in what can often be a challenging process, helping companies navigate the complexity of such a move.

Foreign investors make a valuable contribution to our thriving economy, as they bring not only jobs and investment, but also knowledge and international networks. This not only helps growth, but broadens horizons. In return, the Netherlands, with its receptive and business-focused government, provides a reliable and stable jurisdiction and a trusted and secure environment in which to operate.

Our physical location at the very heart of Europe, with unparalleled access to the rest of the world via the Port of Rotterdam and Amsterdam Schiphol airport, makes us a truly world-class destination and an attractive location for employees. Our superior physical and digital infrastructure and ready access to a skilled multi-lingual workforce makes us a prime base for the establishment of global or European headquarters and our strong, high-quality business services sector completes the picture.

We actively support this KPMG initiative to provide foreign-based organizations with a convincing argument as to why they should 'Invest in Holland'.

Jeroen Nijland, *Commissioner*
Netherlands Foreign Investment Agency

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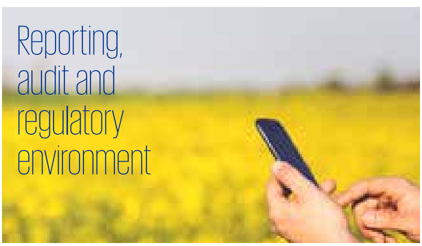
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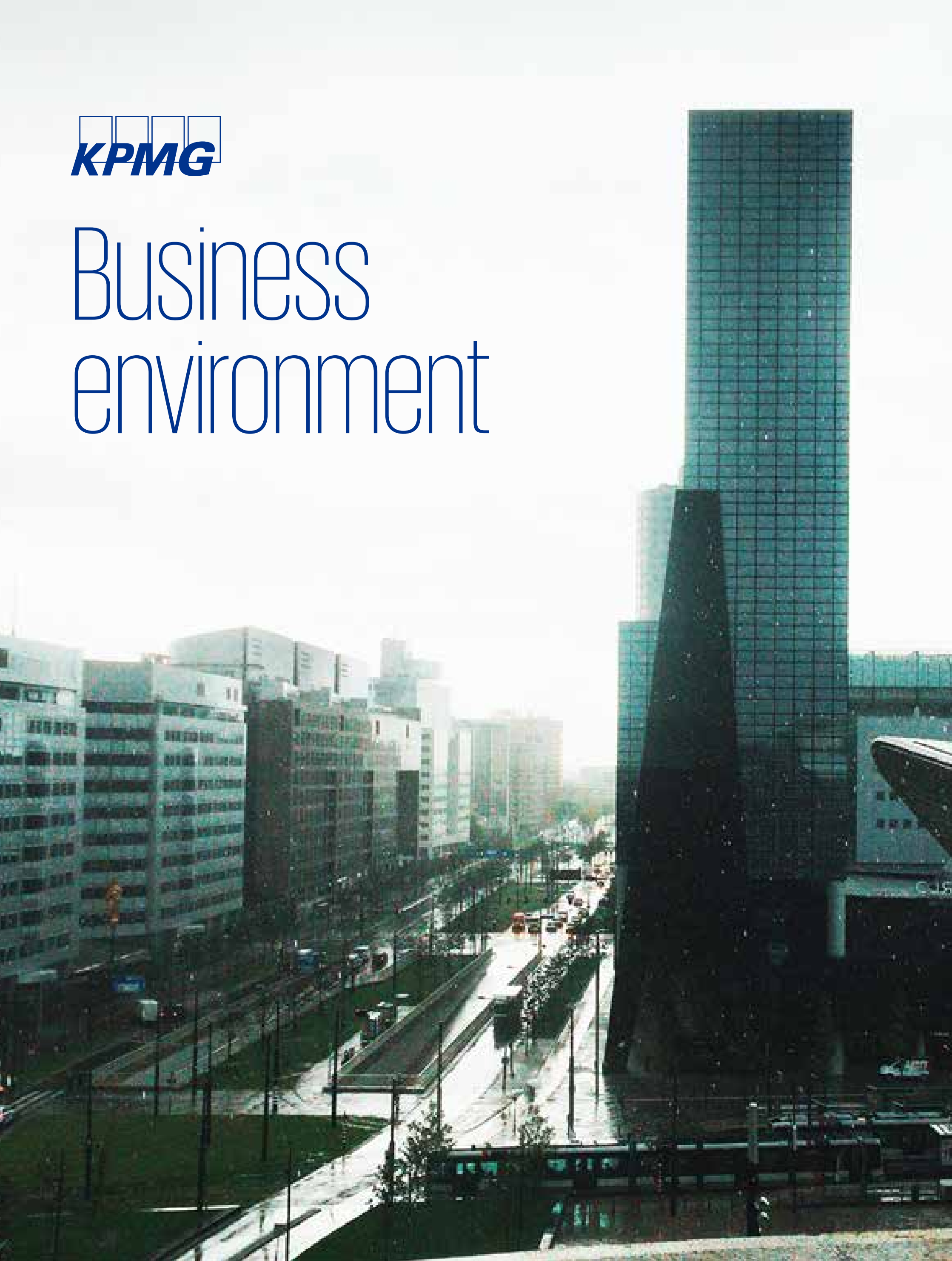

1.1 Facts and figures

The Netherlands is a constitutional hereditary monarchy governed by a parliamentary system. The sovereign is King Willem-Alexander, who succeeded his mother Queen Beatrix in 2013. King Willem-Alexander's eldest daughter Princess Amalia is heir to the throne.

Executive power lies with the Cabinet, led by the Prime Minister. The legislative authority lies with a two-chamber parliament. The constitutional function of the First Chamber of Parliament is to review and act on legislation already passed by the Second Chamber, which is the sole source of legislative proposals. The Second Chamber is a political body, democratically elected every four years on the basis of proportional representation. Membership of the Cabinet reflects the political majority in the Second Chamber; the Cabinet is accountable to Parliament. Every Dutch government since the 19th century has been a multi-party coalition.

The judicial system consists of a Supreme Court, Courts of Justice for Appeals, and two types of lower court. The legal system is based mainly on codified law, with civil codes stemming from ancient Roman law. The Sovereign, on behalf of the Government, appoints judges.

Area

41,543 sq km (water: 7,650 sq km; land: 33,893 sq km)
Major urban areas – population (2015)
Amsterdam (capital) - population 1.091 million
Rotterdam - population 993,000
The Hague (seat of government) - population 650,000

Climate

Temperate; marine; cool summers and mild winters

Natural resources

Natural gas, petroleum and arable land

Population (July 2015 est.)

16,947,904

Age structure (2015 est.)
0 - 24 years: 28.9%
25 - 64 years: 53.1%
65 years and over: 18.0%

Currency

Euro (EUR)

Transportation infrastructure (2014)

Roadways: 138,641 km
Railways: 3,223 km
Waterways: 6,237 km

Main economic indicators for the Netherlands 2013-2016

	2013a	2014a	2015f	2016f
	Annual percentage changes			
GDP (economic growth, %)	-0.5	1.0	2.0	2.4
Capital formation (including changes in stock, %)	-5.3	2.7	6.6	5.6
Unemployment rate (% of labour force)	7.3	7.4	6.9	6.7
Contractual wages (market sector, %)	1.2	1.0	1.3	1.4
Harmonised index of consumer prices (%)	2.6	0.3	0.5	1.1
Export of goods and services (%)	2.1	4.0	3.7	5.1
Import of goods and services (%)	0.9	4.0	4.1	5.7
Relevant world trade volume goods and services (%)	2.2	3.9	2.8	5.4

Source: CPB August 2015

a=actual

f=forecast

1.2 Business climate

The Netherlands as an attractive investment location

The Netherlands offers a stable economy, a reliable and equitable tax regime, a sophisticated, internationally oriented infrastructure, and a society and culture of openness – both to outsiders and to new ideas. The same openness applies to foreign investments. In addition, the Dutch economy is noted for its stable industrial relations, a productive and well-educated workforce and excellent IT connectivity. The country plays an important role as a European transportation hub. Companies from high growth markets are rapidly increasing their presence in the Netherlands. In 2015, 93 investment projects came from Asia, followed by 75 from North America and 30 from Europe.

Many leading corporations operate in the Netherlands

Because of its attractive investment climate, many leading corporations have chosen the Netherlands as the location of their European headquarters, distribution operations, marketing & sales offices, customer care centres, and/or assembly/repair activities. More than 5000 foreign-based companies operate in the Netherlands. The country is home to both Dutch and foreign-based multinationals: 13 Dutch multinationals were listed in the Fortune Global 500 in 2015 (including Shell, Unilever, Royal Ahold, ING, Royal Philips, and Heineken).

European headquarters in the Netherlands

The Netherlands has solidly established itself as a leading site for European headquarters. Besides the supportive corporate tax structure and an excellent physical and telecommunication infrastructure, the country's strategic location forms a gateway to Europe. More than 400 North American companies – from small to Fortune 500 leaders – have established their European headquarters in the Netherlands. Companies originating from Asia also favour the Netherlands for this purpose, as more than 300 Asian companies have established European headquarters here.

The Netherlands as a financial center

The Netherlands is known for its high-quality financial and business services sector, and the country is home to some of the world's largest pension funds. Globally, the Dutch financial sector is one of the best in the fields of retirement management and financial logistics and as a trading venue. The Netherlands has developed substantial knowledge on climate and (financial) sustainability, and holds a prominent position in international rankings.

Strong sectors

A number of key industry sectors of interest to foreign companies have a particularly strong presence in the Netherlands, offering opportunities for growth and innovation. The country has an excellent creative sector. In addition to its renowned logistics sector (see 6.1.4 "Top-quality logistics"), the Netherlands has an outstanding reputation in other key areas, including water management, high technology, food, flowers and chemicals. The business services sector and parts of the sustainable energy sector of (wind energy and biomass) are also strong.

Global competitiveness

In the Global Competitiveness Report of the World Economic Forum (WEF), the Netherlands climbed from eighth place in the Global Competitiveness Index 2014-2015) to fifth in the 2015 – 2016 Report The rankings are calculated from both publicly available data and an Executive Opinion Survey, a comprehensive annual survey conducted by the WEF together with a network of leading research institutes and business organisations in the countries covered by the report. This latest report is being released at a time when the global economy continues to be characterised by significant uncertainty. In this context it is important to note that the Netherlands is characterised by a stable business environment.

Dutch businesses are highly sophisticated (ranked fifth) and the Netherlands' excellent educational system (ranked third in the higher education and training categories) and excellent infrastructure, especially goods market (ranked third), are highly supportive of business activity. The country is also highly innovative: INSEADS Global Innovation Index 2015 ranks the Netherlands fourth worldwide The OECD Skills Outlook (2015), which evaluates the skills of adults in 24 countries, ranks the Dutch workforce third for reading skills, and fourth for numerical abilities.

The latest global business environment rankings for 2014-2018 published by the Economist Intelligence Unit (EIU) places the Netherlands in 16th position worldwide (out of 82 countries) (in 2009-2013 it was ranked 12th) and in 8th position regionally (out of 18 countries).[1]

As you will read in more detail in this booklet, there are many good reasons to invest in the Netherlands.

- The Netherlands' central geographical position offers a strategic location to serve markets within Europe, the Middle East and Africa.
- The country's pro-business climate creates a gateway to Europe that helps international companies succeed throughout the continent.
- The Netherlands is considered to have the second best logistics performance in the world (Logistics Performance Index, World Bank, 2014).
- The Dutch application of the concept of supply chain management is extremely well developed.
- The Netherlands has an excellent technology infrastructure, with a fully digital advanced fibre-optic network and Europe's largest internet hub.
- The Dutch tax system has a number of features that may be beneficial for internal tax planning.
- The Netherlands is home to one of the most highly educated, flexible and motivated workforces in Europe.

Last but not least, the Netherlands has a high standard of living, even though it is less expensive to live here than in most Western European countries.

1 Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey and the United Kingdom.

1.3 Tax climate

The Dutch tax system creates an attractive tax climate, which has made the Netherlands a prime location for US and Asia-based multinationals to establish their European holding companies.

A major attraction of the Dutch tax system is the participation exemption. All benefits related to a qualifying shareholding (generally, holdings of 5 percent or more), including dividends and capital gains (and losses), are fully exempt from Dutch corporate income tax. Liquidation losses arising from Dutch and foreign subsidiaries are fully deductible, subject to anti-avoidance provisions. Another attraction is the absence of withholding tax on interest, royalties and branch profits. The country has entered into a comprehensive network of tax treaties that significantly reduce withholding taxes on dividend, interest and royalty income received from other countries. No capital or stamp studies are levied in the Netherlands, and a holding company based here has access to fiscal and other benefits arising from the country's membership of the European Union (EU). Most of the country's tax treaties reduce the 15 percent domestic withholding tax on dividends to zero (or 5 percent). The tax treaty with the United States provides for a 0% dividend withholding tax rate. No dividend withholding tax applies to distributions made by cooperative associations, except in abusive situations.

The 2016 corporate income tax rates are 20 percent on profits up to EUR 200,000 and 25 percent on the excess. These rates also apply to capital gains. Dutch profits and losses effectively can be consolidated for tax purposes by forming a fiscal unity between a Dutch holding company and its Dutch subsidiaries.

The Dutch tax system has a flexible approach to losses, which generally can be carried forward for nine years and back for one year. Under a special "Innovation Box" regime, companies can elect to have qualifying profits from patents and research and development (R&D) taxed at the favourable effective corporate income tax rate of 5 percent (instead of 20-25 percent).

The Netherlands has a special tax regime for expatriates, the "30 percent ruling", which provides a substantial income tax exemption of 30 percent for up to 96 months, provided that the employee has been recruited or assigned from abroad and has specific expertise scarce in the Dutch labour market. This ruling is viewed as compensation for the extra costs involved in living abroad.

Another important feature is the Dutch ruling practice under which the Dutch tax authorities and the taxpayer can enter into binding agreements, in advance, regarding the tax consequences of various cross-border arrangements, such as corporate restructurings or investments. The tax authorities have a unit dedicated to providing advice to foreign investors, and members of this unit are authorised to agree on rulings related to investments in the Netherlands (aanspreekpunt buitenlandse betrekkingen).

Other organisations that can provide assistance when investing in the Netherlands include:

- The Netherlands Foreign Investment Agency, an operational unit of the Dutch Ministry of Economic Affairs, whose primary focus is to assist overseas businesses in setting up or expanding operations in the Netherlands (www.investinholland.nl)
- Netherlands Centre of Trade Relations (www.handelsbevordering.nl)
- Bilateral Chambers of Commerce

Starting or acquiring a business in the Netherlands

2.1 Starting a business

Dutch regulations encourage inward investment and start-ups, ease transition, stimulate commerce, and show no bias against firms having a home base outside of the Netherlands. On the contrary, the Dutch are proactively sensitive to the special needs of foreign firms and expatriate workers.

Setting up a business in the Netherlands is quite straightforward. Under Dutch law, a foreign individual or company may operate in the Netherlands through an incorporated or unincorporated entity or a branch (i.e. a subsidiary, partnership or branch). All individuals engaged in commercial business and all legal entities have to register their businesses with the Trade Registry *(Handelsregister)* at the local Chamber of Commerce *(Kamer van Koophandel)*.

A number of facilities offer comprehensive start-up services, such as office space, conference rooms, and multilingual administrative and secretarial services. Generally, flexible arrangements can be made to suit individual needs.

2.1.1 Legal forms

Principal business forms

Most foreign companies establish a legal entity upon or after starting operations in the Netherlands. The most common form of such entities is a private company with limited liability *(besloten vennootschap met beperkte aansprakelijkheid* – BV) or a limited liability company *(naamloze vennootschap* – NV). Another common legal entity in the Netherlands, which is growing more popular, is the cooperative *(coöperatie)*.

BV and NV

Both the BV and the NV are legal entities and have capital stock divided into shares. The laws regulating the BV are largely based upon rules governing the NV. References in this booklet to the BV include the NV, unless otherwise stated.

The shares of a BV are not freely transferable, which makes this type of company generally preferred as the vehicle for privately-held companies. Generally, the shares in an NV are freely transferable.

Many substantial companies in the Netherlands have adopted the BV form (unlike in other European Member States, such as the United Kingdom, where the closed company form is available only to small and medium-sized companies).

Branch

A branch is not a separate legal entity. A branch is a permanent establishment of a company from which business operations are carried out. As a result, a company that establishes a branch in the Netherlands is liable for claims incurred as a result of the branch's actions.

Other legal forms of business entities

Other common forms of business are:

- sole proprietorship *(eenmanszaak);*
- general partnership *(vennootschap onder firma – VOF);*
- private partnership *(maatschap);*
- limited partnership *(commanditaire vennootschap – CV).*

None of these forms is a legal entity for legal purposes, and so they cannot hold property in their own name.

All business forms must have a trade name and be registered with the Trade Registry of the Chamber of Commerce.

Sole proprietorship *(eenmanszaak)*

This is an unincorporated business with one owner. Consequently no partnership agreement is needed. The owner has unlimited liability for all debts, and there is no difference between the owner's private and business debts.

General partnership *(vennootschap onder firma – VOF)*

A general partnership is based on an agreement between two or more partners, which can be individuals or legal entities. The purpose of the general partnership is to obtain common benefits for the partners by carrying on a business *(uitoefenen van een bedrijf)* under a common name. A general partnership can contract in its own name, and it can sue and be sued. However, it cannot hold property in its own name since it is not a legal entity. Property is held by the partners jointly or by one or more of the partners on account of the partnership.

The partners are jointly and severally liable for all of the partnership's obligations. The general partnership has its own estate, which is separate from the estate of the partners, to the extent that creditors of the general partnership have precedence over creditors of the partner as an individual.

Private partnership *(maatschap)*

A private partnership is incorporated by an agreement between two or more persons who agree to transfer certain assets into a common property in order to share the benefits from the private partnership. A private partnership is most frequently used by professionals such as architects, accountants, consultants and lawyers. A notable difference between a private and a general partnership is that a private partnership can only be used for practicing a profession, whereas a general partnership is used for operating a business.

Two types of private partnerships can be recognised:
- public private partnership *(openbare maatschap);*
- silent private partnership *(stille maatschap).*

If the public partnership operates under one name, the public partnership is considered to be a public private partnership. If the partnership does not operate under one name, the public partnership is considered to be a silent private partnership.

The public private partnership has its own equity, which is separate from the private equity of the partners. Unlike a general partnership, the partners of a public private partnership are jointly liable in equal shares.

Limited partnership *(commanditaire vennootschap – CV)*

A limited partnership under Dutch law is a partnership for the purpose of a durable cooperation between one or more managing partners *(beherend vennoten)* whose liability is unlimited, and one or more limited partners *(commanditaire or stille vennoten)* whose liability is in principle limited to the amount of their equity contribution. The purpose of the limited partnership is to obtain common benefits for the partners by carrying on a business *(uitoefenen van een bedrijf)* under a common name. A limited partnership is not a separate legal entity distinct from its owners, although the limited partnership can sue and be sued and contract in its own name.

Notwithstanding a division of tasks and duties among the managing partners, each managing partner is severally liable for all public and private obligations of the limited partnership. Unlike the managing partner, the limited partners are only liable to third parties up to the amount of their capital contribution to the limited partnership. However, if a limited partner is involved in management (directly or by proxy) or if its name is (partly) used by the limited partnership, such a limited partner will become severally liable for all obligations of the partnership, even if third parties know of its status as a limited partner.

A retiring managing partner shall remain liable for those obligations of the limited partnership that have their origin in the period preceding retirement, provided that third parties shall only be bound thereto if the retirement has been filed with the Trade Registry. As stated above, a retiring limited partner shall only be liable up to the maximum amount of its contribution to the limited partnership and its commitment, if any, to contribute additional amounts to the limited partnership as agreed in the partnership agreement. The provisions in the partnerships agreement may allow for an indemnification of the retiring managing partner by the remaining partners, by the new partner, or by the combination of the two.

Cooperative *(coöperatie)*

The cooperative is an association incorporated as a cooperative by notarial deed executed before a Dutch civil-law notary.[1] At the time of incorporation, the cooperative must have at least two members, which can be legal entities or natural persons.

The cooperative's objective must be to provide certain material needs for its members under agreements, other than insurance agreements, concluded with them in the business it conducts or causes to be conducted to that end for its members' benefit.

The name of a cooperative must contain the word *"coöperatief"* or *"coöperatie."*

1 "Notary": a "notaris"; unlike the situation in common-law countries, a Dutch civil-law notary, being a public officer appointed by the Crown and holding a university law degree, has broader powers and duties than foreign notaries public (the closest comparison is the profession of a British "solicitor").

The members of the cooperative are generally not liable for the obligations of the cooperative during its existence. Where a cooperative is dissolved or declared bankrupt, the members (and members who ceased to be members within the previous year) are liable for any deficit on the basis provided for in the cooperative's articles of association. If no such basis is provided for each member in the articles of association, all will be equally liable. However, a cooperative's articles of association may (i) exclude or (ii) limit to a maximum, any liability of its members or former members to contribute to any deficit. In the first case, it must place the letters "UA" (Uitsluiting van Aansprakelijkheid – exclusion of liability) after its name. In the latter case, it must place the letters "BA" (*Beperkte Aansprakelijkheid* – limited liability) after its name. In all other cases, the letters "WA" (*Wettelijke Aansprakelijkheid* – statutory liability) must be placed after its name. Most cooperatives choose a system of excluded or limited liability. It is also possible to create different classes of members who are each liable to a different extent (or not at all). If the liability is not excluded under the UA, a copy of the register of members must be filed with the Trade Registry of the Chamber of Commerce. Any changes must be filed within one month of the end of each financial year.

The cooperative has no minimum capital requirements, and the capital does not have to be in euros. The profits may be distributed to its members. The cooperative's articles of association must provide for an entitlement to any liquidation balance.

The cooperative form is increasingly used for holding and financing companies, primarily because of its favourable tax treatment and corporate flexibility.

Societas Europea

As of October 2004, it is possible to incorporate a European public limited liability company or *Societas Europea* (SE) under Dutch law.

The SE is a legal entity, the capital stock of which is divided into shares. The SE is obliged to have its registered office and its management board in an EU Member State. If the SE's registered office and management board are in the Netherlands, the SE is governed by the laws regulating the NV.

Unlike the BV or NV, the SE:

- may relocate its registered office to another EU Member State with no requirement to liquidate the SE or incorporate a new legal entity
- is not governed by the law of a particular EU Member State and is therefore often used for joint ventures and holding companies
- may have a one-tier management board.

Foundation *(stichting)*

A foundation is a legal entity under Dutch law with two main characteristics:

1. It does not have any members or shareholders and is therefore governed solely by its board.
2. It is incorporated with the aim of realising a specific goal by using capital designated for that purpose. The goal or objective of a foundation is set out in its articles of association.

A foundation is incorporated by executing a notarial deed of incorporation before a Dutch civil-law notary.

Pursuant to mandatory law, a foundation may not make distributions to its incorporators or the members of its corporate bodies and it may only make distributions to other persons if such distributions are of an appropriate or social nature.

The foundation's management board may comprise individuals and legal entities. After incorporation, members are appointed by the board itself, unless stated otherwise in the articles of association. The foundation is represented by the entire management board or by board members acting individually.

Foundations are often used to create a separation between the legal ownership and the beneficial ownership of assets.

2.1.2 Legal characteristics branch and BV/NV

Branch

A branch is a business operation that is carried on in the Netherlands by a foreign entity directly, without setting up a separate Dutch entity. A branch is easier and less expensive to use than a Dutch entity. However, since a branch has no legal personality, the foreign entity operating the branch is fully liable for all of its obligations. Like the BV and the NV, a branch must be entered in the trade register of the Chamber of Commerce.

The following information and documents must be submitted to the trade register:

- trade name(s) of the branch
- description of the activities of the branch
- the branch's address, telephone number, fax number and, if applicable, email and website
- number of employees (part-time or full-time) in the branch
- details of the foreign company (name, registration number, name of the registering institution, date of registration)
- the amount of the issued capital of the foreign company (and whether this is divided into shares)
- personal details (full name, date and place of birth, address), original legal signature, and copy of passport of the branch's legal representative
- an original extract from the relevant trade register about the foreign company.

Reporting requirements for sole shareholder corporations

Where the shares of an NV or a BV are all owned by one individual or one corporate entity, or all form part of a marital community of property, the company must inform the Trade Register. The Trade Register must be notified of the name and residence of the shareholder within one week of the NV or the BV becoming aware of the fact that a single shareholder holds all its shares. The extract from the Trade Register will state that the company is a sole shareholder corporation and show the shareholder's details.

Private limited liability company (BV)

Share capital

A BV must have share capital that is divided into shares with a par value denominated in euros or another currency. There are no minimum share capital requirements for BVs. At least one share with voting rights must be held by a party other than the BV. Payment for shares can be in cash or in kind.

Payment in cash

The funds used to pay up the shares issued on incorporation must be paid into a Dutch bank account in the (still to be incorporated) company's name or into a bank account elsewhere within the European Union. It is generally more expedient to open an account in the Netherlands as Dutch banks allow accounts to be opened for companies not yet in existence.

Payment-in-kind

Payments-in-kind are contributions of property and/or other non-cash items. These payments are restricted to items that can be objectively appraised. If such payments take place upon incorporation of the BV, the founders must describe the contributed assets. The description must relate to the condition of the contributed assets at a date not earlier than six months before incorporation. Similar rules apply to payments-in-kind made after incorporation.

Shares

A BV may issue ordinary shares, which may be registered shares only. A BV may also issue priority shares, to which certain (usually voting) rights are allocated in the articles of association. Alternatively, the BV can issue preference shares, which entitle the shareholder to receive a fixed dividend that has preference over any dividend on ordinary shares.

Within a given type of share, the articles of association may also create different classes of shares (e.g. A, B and C shares) to which certain specific rights are allocated (e.g. upon liquidation, distribution of profits).

Voting rights are linked to the nominal value of the share. Different voting rights can be attached to different classes of shares, even if the nominal values of the various classes are equal. Moreover, it is possible to create non-voting shares and shares without any profit right. Non-voting shares must grant a profit right.

It is possible to effectively separate the voting power from the beneficial interest by using an administrative office, which is usually a special type of foundation.

The general meeting of shareholders of the BV ("General Meeting") has the power to authorise the issue of shares and to determine the issue price and other terms of issue, which may include payment on shares in a foreign currency. The General Meeting may transfer this power to another corporate body. The actual issue of shares requires a notarial deed to that effect, executed before a Dutch civil-law notary. When shares are purchased, the amount of their nominal value must be paid immediately. It may be agreed that the amount remain unpaid until the BV makes a call on the unpaid amounts on the shares.

The BV must keep a shareholders' register, which lists the names and addresses of all shareholders, the number of shares held, and the amount paid-up on each share. The BV must be notified of any transfer of shares. The shareholders' register must be kept up-to-date by the management board.

Share transfer restrictions do not have to be included in the articles of association. However, if a BV opts to do so, it can also include detailed rules for determining the share price. The articles of association may also include a lock-up clause prohibiting the transfer of shares for a specific period, as well as provisions imposing additional obligations on shareholders (e.g. the obligation to extend a loan to the BV or to supply products to it).

Shares in a BV may only be transferred by a deed of transfer executed before a Dutch civil-law notary.

Reporting requirements for sole shareholder corporations

Where the shares of an NV or BV are wholly-owned by one individual or one corporate entity, or if they are all part of marital community property, the company must inform the Trade Register. The Trade Register must be notified of the name and address of the shareholder within one week of the NV or the BV having become aware of the fact that all its shares are wholly owned by a single shareholder. The extract from the Trade Register will state that the company is a sole shareholder corporation and list the shareholder's details.

Management

The BV must have a management board. The articles of association of some BVs also may provide for a supervisory board.

Management board

The management board (which may consist of individuals and/or legal entities) is responsible for managing the BV and holds all necessary powers except those expressly attributed to the General Meeting and/or the supervisory board. The management board is an independent body that is not subordinate to the General Meeting or the supervisory board. The articles of association may stipulate that prior approval from these two bodies is required for certain actions. However, the articles of association may not give either body a general power of instruction or direction over the management board.

As an alternative to the two-tier management/supervisory board structure, Dutch law provides for a one-tier board structure comprising a single board with both executive and non-executive directors. The one-tier board structure is available for NV companies, BV companies and companies that are subject to the two-tier board regime (*structuurregime* – see below). In a one-tier board, the management board duties are divided between the executive and non-executive members. The executive members are responsible for the company's day-to-day management, while the non-executive members are responsible for the management performed by all the board members. The general state of affairs of the company is the responsibility of all board members (executive and non-executive).

The liability of management board members is described briefly below.

Supervisory board

The members of a supervisory board (who must be individuals) have collective powers and responsibilities. The supervisory board is not subordinate to the other corporate bodies of the BV. Its sole concern is the interests of the BV and its primary responsibility is to supervise and advise the management board. The management board must inform the supervisory board at least annually in writing of the BV's overall strategic policy, general and financial risks, and management and control system. Other duties may be provided for in the articles of association. Having a supervisory board is mandatory for large BVs (see below) but optional for other BVs.

General Meeting

At least one General Meeting should be held annually, during which the financial statements are approved. This meeting should take place within the first six months of the following financial year, unless this term has been extended by the General Meeting by no more than five months. Shareholders' resolutions are adopted by a majority of votes, unless the articles of association provide otherwise.

The General Meeting has the following powers:

- appointment and dismissal of the management board and the supervisory board (unless the BV is a large BV, in which case the management board is appointed by the supervisory board)
- approval of the financial statements
- approval of major amendments with respect to governance, including amendments to the articles of association, legal mergers and divisions, redemption of shares, dissolution, the sale of all or a substantial part of the corporate assets (of an NV), and the issue of new shares.

Management liability

A member of the management board can be held liable by the BV and by third parties. (The non-executive members of a one-tier board are part of the management board and thus subject to director's liability.)

Liability to the BV may arise from serious negligence in performing management duties. This is a collective liability, but a member of the management board can also be held individually liable with respect to specific assigned duties. The management board members can be discharged from their liability to the BV by passing an express shareholders' resolution barring statutory restrictions. Liability concerning third parties may occur in several forms.

As discussed in more detail below, members of the management board and other persons are personally liable for actions they perform on the BV's behalf before it has been incorporated and until these actions are affirmed by the BV after incorporation.

Management board members are also severally liable to third parties for legal acts performed after incorporation but preceding the BV's registration in the Trade Register. Members cannot be absolved of liability by ratification or affirmation.

Management board members are severally liable for non-payment of social security premiums, wage tax, national insurance and value-added taxes (VAT), unless they notify the relevant authorities of the company's financial difficulties without delay and any subsequent insolvency cannot be attributed to improper management. If the authorities are not notified in good time, the members of the management board will be held liable for non-payment unless they can prove that they were not personally responsible for failing to notify the authorities and that the insolvency cannot be attributed to mismanagement on their part.

In the event of the BV's bankruptcy, the management board members (or a person who has acted as such) will be severally liable for the deficit where the bankruptcy was caused by negligence or improper management in the preceding three years. An individual board member who proves that he or she is not responsible for the negligence or improper management will not be held liable.

In the event of a bankruptcy, the supervisory board may also be held liable for the deficit, where it can be proven that negligence by the supervisory board is an important factor in the bankruptcy.

Finally, Dutch law recognises that certain (tort) actions by management may call for a "piercing" of the corporate veil.

Public limited liability company (NV)

This section outlines the principal ways in which the NV differs from the BV.

Shares and share capital

The minimum issued and paid-up capital is EUR 45,000. Whereas a BV can only have registered shares, shares of an NV may be bearer shares and/or registered shares.

An NV cannot issue non-voting shares or shares without profit rights.

Payment in cash

At the time of incorporation, the notary must be provided with a statement from the bank confirming that the funds will be available to the NV upon incorporation at the bank in question or that the bank has received the required funds in an account in the name of the NV to be set up. This statement must not relate to a date more than five months prior to the date of incorporation.

Payment-in-kind

If such payments take place on the NV's incorporation, the founders must describe the contributed assets and an auditor must issue a statement that confirms that the value of the contributed assets is at least equal to the amount to be paid on the shares.

Two-tier management board

In a two-tier system, the company's management board is divided into two separate bodies: the executive board and the supervisory board. The two-tier system is mandatory for companies that qualify and have been registered with the Trade Register as "large" companies for three consecutive years. If a company, or a company controlled by it, has a works council *(Ondernemingsraad)*, it may voluntarily adopt the same corporate governance model as the large company.

Large NVs and BVs: special requirements

A company is considered a "large" NV or BV (structuurvennootschap), and thus subject to the two-tier board regime, if all of the following conditions are met:

- the company's issued share capital, reserves and retained earnings according to the balance sheet amount to at least EUR 16 million

- the company, or any company in which it has a controlling interest, has a legal obligation to install a works council
- the company, alone or together with a company (or companies) in which it has a controlling interest, normally has at least 100 employees in the Netherlands.

Unless an exemption applies, such a company is required to install a supervisory board *(Raad van Commissarissen)*, which is given specific powers that are not granted to the supervisory board of a smaller BV such as:
- appointment/dismissal of the management board
- approval of major amendments with respect to governance, including a proposal to amend the articles of association, a proposal to dissolve the company, the issue of new shares, and a proposal to increase the issued share capital.

A supervisory board is governed by the following rules:

- The supervisory board is required to draw up a profile indicating its size and composition, taking into account the nature of the company, its activities and the desired expertise and background of the supervisory board members. The profile must be discussed at the General Meeting and with the works council before adoption or amendment.
- The General Meeting will appoint the members of the supervisory board on the supervisory board's recommendation. The General Meeting may reject a recommendation, provided an absolute majority of the votes are cast, which must together represent at least one-third of the issued share capital. In such situations, the supervisory board may submit a new recommendation, whereas the General Meeting is not authorised to do so. The General Meeting will then be asked to vote on the new recommendation.
- The works council is entitled to make "strong" recommendations for up to one-third of the supervisory board directors. The supervisory board may only object to a recommendation if it expects the candidate to prove unsuitable and unable to fulfil the duties of a supervisory board director or if the appointment of the proposed candidate would cause the supervisory board to be improperly constituted. The supervisory board will then consult the works council and, if no agreement can be reached, ask the Enterprise Court at the Amsterdam Court of Appeal *(Ondernemingskamer)* to rule on the objection. If the Enterprise Court accepts the objection, the works council will be asked to make a new recommendation. If the objection is rejected, the supervisory board will appoint the nominated candidate.

The General Meeting may enforce the collective dismissal of the supervisory board by passing a no-confidence resolution in the board. This will require an absolute majority of the votes cast, which must together represent at least one-third of the issued share capital. The management board and the works council must be granted the opportunity to advise on the proposed resolution and the reasons for it at least 30 days before the General Meeting. If the works council has the right to express an opinion on the proposed resolution, the management board must communicate this opinion to the supervisory board and the General Meeting. The works council may explain its position at this General Meeting. If the resolution is passed by the General Meeting, the supervisory board will be dismissed immediately. The management board must then request the Enterprise Court to appoint one or more supervisory board directors for a temporary period. The Enterprise Court will determine what the implications of the appointment are and the date by which a new board must be established.

Under certain conditions, companies subject to the two-tier board structure regime can be fully or partially exempt from these requirements. The supervisory board of a company under a partially exempt two-tier board regime only has the power to approve certain specified decisions/actions of the management board and to appoint the supervisory board.

2.1.3 Incorporation and registration

Registration of a branch office

In order to register a branch office in the Netherlands, the Dutch-language version of the following forms must be filed with the Dutch Trade Register:

- form 6 (establishment in the Netherlands)
- form 11 (registration of directors, partners, etc.)
- form 13 (registration of the manager in charge of the establishment in the Netherlands).

Information to be provided on these forms includes:

- trade name(s) of the branch
- description of the activities of the branch

- number of employees (part-time or full-time) in the branch
- the branch's address, telephone number, fax number and, if applicable, email and website
- details of the foreign company (name, registration number, name of the registering institution, date of registration)
- the amount of the foreign company's issued capital (and whether this is divided into shares).

The directors of the foreign legal entity and the individuals who were given an explicit power of attorney to file an application for the registration may file the application with the Trade Register.

Documents

Together with the forms referred to above, the following additional documentation is required:

- a recent extract containing proof of the entity's registration in its country of origin; this proof should be obtained from a competent authority in the country of origin and it cannot be older than one month
- where the company address in the Netherlands differs from the Dutch address of the company's official representative, an office rental agreement or proof that the branch office is allowed to use this address
- a copy of the deed of incorporation and articles of association in force (initialled by the respective official and translated into Dutch, English, German or French)
- where the official representative is an individual, a notarised legal copy of a valid proof of identity (e.g. passport or European identity card)
- where the official representative is an individual, a notarised legal copy of proof that this individual can act on behalf of the (home country) company.

In certain cases, the Trade Register may request an apostille, certifying the authenticity of a foreign public deed.

Proof of identity

Official representatives who reside abroad and are authorised to represent the entity should send the following documents to the Trade Register in order to comply with the required proof of identity and to be able to file the necessary information with the Trade Register:

- an authenticated copy of a valid identity document
- an authenticated copy of a bank statement from their private bank account (not older than one month; on which the amounts can be blacked out) or an authenticated copy of an original extract from the civil register or any other register in which persons are registered by law (not older than one month).

Incorporation of a BV or NV

Incorporation occurs through the execution before a Dutch civil-law notary of a notarial deed of incorporation. That deed, which must be executed in Dutch, contains:

- the company's articles of association
- details on the shares issued at incorporation and on the founder(s)/ shareholder(s)
- the appointment of the first management board members and (as the case may be) supervisory directors
- the determination of the first financial period of the company.

After incorporation and before the BV starts its operations, the management board must register the BV with the Trade Registry at the Chamber of Commerce in the district where the company has its principal place of business. Without such a registration, the members of the management board are jointly and severally liable for the obligations of the BV.

While the BV is in the process of being incorporated (*BV in oprichting* – BV i.o.), it can be registered as such and business may be conducted on its behalf. Once the BV has been incorporated, it can retrospectively ratify all actions of the BV carried out before its incorporation. If the actions are not ratified or the BV is not incorporated, the persons responsible for these actions will be severally liable for damage suffered by third parties. A similar liability arises for these persons if the BV fails to fulfil its obligations under ratified actions and they knew that the BV would be unable to do so. Should the company become bankrupt within one year of incorporation, the burden of proof will be borne by the persons responsible.

Below we summarise some definitions of terms that may apply when incorporating a *"Besloten Vennootschap"* in the Netherlands.

Company name

The name of the company must include the letters "BV" or the definition *"Besloten Vennootschap met beperkte aansprakelijkheid"* to indicate its legal form. The name does not have to be in the Dutch language, but it must be written in Roman letters. Of course, the proposed name cannot already be in use by any other company in the Netherlands. The Trade Register of the Chamber of Commerce conducts name investigations and, as it can check three names simultaneously, submitting a proposal for three different names is recommended.

Trade name

Under Netherlands law, the company may conduct business under one or more trade names, which may be different from the company's official name (as described below). In that case, the trade name should not include "BV" or *"Besloten Vennootschap met beperkte aansprakelijkheid"*. A name investigation should be conducted for the trade name, and the trade name must be filed at the Commercial Register.

Objectives of the company

The objectives of the BV have to be defined and included in the draft articles of association. The description of the objectives may be very general but must at least include the BV's main activities.

Statutory seat

The location of the company's registered office in the Netherlands must be determined.

Financial year

The financial year of a BV must cover a 12-month period. Depending on fiscal and intra-group accounting policies, the first financial year may be shorter or longer than 12 months but no longer than 18 months.

Authorised capital

It is not mandatory to specify an authorised capital in the articles of association. This capital represents the maximum amount of capital that can be issued without amending the articles of association.

Issued and paid-up capital

There are no requirements for a minimum share capital for a BV. For newly incorporated NVs, the issued and paid-up capital must be at least EUR 45,000.

Number, type and par value of shares

The authorised capital of a standard BV is usually divided into a number of shares, each having equal par value. The par value of shares is expressed in euros or another currency. It is advisable to opt for a par value of EUR 100 or EUR 1000. Different classes of shares may be issued; in such cases, professional advice is required.

Payment on shares

Issued shares may be paid for in cash or in kind. If payment-in-kind has been arranged, the payment must be described in writing.

Managing director

A BV requires the appointment of at least one managing director, who is mentioned in the deed of incorporation. Both natural persons and legal entities are allowed to act as managing directors.

In addition to the appointment of a resident managing director, it is possible to appoint a (non-)resident managing director(s). It is advisable to seek professional advice under these circumstances due to possible tax complications.
Each managing director should be registered with the Trade Registry; it will be necessary to submit various personal details for each director.

Limited authority

Under Dutch law, each individual managing director has full authority to singularly represent the BV. Such authority may be restricted, for example, by incorporating a dual signature system. Restrictions must be included in the articles of association of the draft deed of incorporation.

Supervisory directors

One or more supervisory directors, who must be natural persons, may be appointed. For smaller companies, supervisory directors are usually not necessary.

Incorporators/future shareholders

The BV may be incorporated by either one or more future shareholders. If the BV only has one shareholder, the law requires that the name, address and other personal details of the sole shareholder be filed with the Trade Registry.

Notarial deed of incorporation

The company's actual incorporation is effected by the civil-law notary. When the civil-law notary is in possession of all necessary information and documentation, the deed of incorporation is executed.

Registration

When completing the incorporation procedures, the notary will request the founders and management to complete the registration forms on behalf of the Dutch Chamber of Commerce. After incorporation, the details should be filed with the local Chamber of Commerce for listing in the Commercial Register.

Most of these details will become public, allowing interested parties to examine the articles of association and to establish which directors are allowed to represent the company and the extent of their powers. Letters and orders should quote the company's Chamber of Commerce registration number.

It is important for the information filed with the Commercial Register to always reflect the current situation. Any changes to the articles of association, changes of directors, or changes in the powers of the company's authorised representatives should be communicated and filed with the Commercial Register.

Tax registration requirements

When you register with the Chamber of Commerce, this information is automatically transferred to the Dutch tax authorities and so registering with Dutch tax authorities is not necessary. In the exceptional case that it is not possible for a company to register at the Chamber of Commerce, the company must register with the Dutch tax authorities using a prescribed form.

The Dutch tax authorities estimate which taxes the company should deal with and formally notifies the company which taxes are applicable. For example, if the company is liable for VAT, the notification indicates how and when the VAT returns need to be completed. A company may also register as an employer for payroll tax purposes. This can take place simultaneously with the registration at the Chamber of Commerce. The notification should also contain data for the payroll taxes. If the company hires employees at a later date, a separate registration should be filed with the Dutch tax authorities.

The BV i.o. (under incorporation)

Under Dutch law, a BV which is in the process of being incorporated (BV i.o.; *"in oprichting"* = under incorporation) can already enter into transactions. When the incorporation has been completed, the management of a BV must ratify the transactions entered into prior to incorporation, lest the incorporator(s) remain severally liable for the commitments resulting from these transactions.

In view of the length of time it takes to incorporate a BV, operating in the form of a BV i.o. allows the company to commence activities without delay. To be able to operate as a BV i.o., a registration form and draft deed of incorporation must be filed with the Chamber of Commerce.

Time schedule

The time of the entire incorporation procedure depends on various factors. Collecting the required information and obtaining the legal documentation in the home country, which must be provided to the Dutch civil-law notary, can be time-consuming. However, the entire procedure can be performed within one month.

The name investigation carried out by the Trade Register may take approximately 10 days.

- The draft of a deed of incorporation can be drawn up by a civil-law notary within approximately one week.
- Processing a foreign party's identification requirements and opening a bank account in their name can take approximately two weeks.
- Preparing and executing the notarial deed of incorporation can be affected within a few days after the minimum capital has been deposited.

As with the registration of a branch office, proof of identity is also required when establishing a company in the Netherlands.

2.2 Acquiring a business

Any decision to invest in a business in the Netherlands is essentially a make or buy decision. In terms of establishing a business, this means setting up a business yourself (make) or acquiring an existing business (buy). An acquisition is a widely adopted and accepted means of "starting" a business in the Netherlands. Hundreds of businesses are bought and sold each year. According to a mergers and acquisitions intelligence service (mergermarket[2]), there were 440 mergers and acquisitions in the Netherlands in 2013 and 491 in 2012.
The average deal size in 2013 was higher than in 2012, driven by a number of very large deals, such as the delisting of DE Master Blenders 1753, the nationalisation of SNS Reaal and the acquisition of UNIT4 by Advent.

Many new companies were established in the period of rapid economic development in the 1950s and 1960s. Given the current age of the founders, many of them are likely to change hands in the near future, either within the family or through sales to third parties. Larger international corporations may consider selling all or part of their Dutch business due to changes in their core business strategy.

As in most Western countries, private equity firms are active in the Netherlands. By definition, they are usually temporary shareholders. The venture capital and private equity markets are well established in the Netherlands and private equity investors are prominent players in the merger and acquisition market.
The buying power of private equity firms has been affected by the credit crisis that arose in 2007 as less bank funding is available. In the mid-market segment (in which most Netherlands acquisitions are conducted), the impact was relatively limited and equity funding remained readily available. The total market saw fewer deals, but the percentage of deals completed by private equity buyers remained fairly stable.

If a company decides to enter the Dutch market through acquisition, thorough and careful planning is essential. Studies have shown that few acquisitions meet the acquirer's expectations. If not well planned and executed, an acquisition could prove to be risky.

2 www.mergermarket.com

2.2.1 Mergers, acquisitions and restructurings – legal aspects

Finding an appropriate acquisition target

Once the investing strategy is defined and it is decided that an acquisition could be an option, the initial step is typically to define the characteristics of an ideal acquisition candidate. Criteria would typically include:

- type of business
- size in terms of turnover and/or number of employees
- market position and prospective growth
- profitability
- potential to integrate and generate synergies with the acquirer's current business
- geographical location
- product quality and corporate image
- quality of management.

Once an acquisition profile has been defined, a search can be started. There are many avenues for conducting such a search. Information sources range from industry and trade organisations to databases on companies, industry reports and own networks. Many searches are also performed with the assistance of external advisors who can use their hands-on knowledge of the Dutch market to optimal effect for the potential acquirer. The sectors that experience more intense acquisition activity vary from year to year.

Although the Dutch corporate market is internationally oriented and open to business opportunities, deciding upon an appropriate approach is essential. The way a company could be approached may vary, for example, because of the shareholder structure. Typical parties to approach include shareholders, company management and the company's supervisory board. If the company is known to be for sale, the advisor handling the sale could be approached. An approach could be made anonymously through an advisor, depending on possible confidentiality requirements of the acquirer. Personal contacts of the acquirer or advisor could also prove useful. The approach can then be tailored to the acquirer's requirements, with careful consideration of the various options.

Once the party to approach has been decided, the next step is to formulate the approach. For example, an approach is often expressed as "an opportunity to explore possibilities to cooperate", rather than as a straightforward "we want to buy your company". The approach should be tailored to match the individual profile, depending upon the type of company and type of person. Family businesses are generally more sensitive in this regard than larger corporations and private equity or venture capital investors.

The transaction process

From a competitive perspective, transaction processes can range from a relatively informal one-on-one situation to a formal public auction. A one-on-one situation is most common if a prospective buyer actively approaches a possible target company. However, if a target company is actively for sale, the seller and its advisors will often try to maximise competitive tension by involving multiple interested parties in a carefully orchestrated process.

One-on-one transaction process

When an approach meets with a positive reaction, an exchange of information usually follows so both parties can better understand each other. Before information is exchanged, confidentiality agreements are customarily signed.

If both parties wish to proceed, negotiation of the possible transaction can start. The acquirer will have to form an opinion of the value of the business before starting negotiations. The seller may also communicate an asking price.

During these negotiations, the parties must adhere to the principle of pre-contractual good faith, which is a generally recognised principle in the Netherlands. In short, even before signing legal documents, the parties may have implicitly entered into a pre-contractual phase as a result of the negotiations and so the negotiations may not be terminated without good cause.

Negotiations typically culminate in a Letter of Intent, which describes the main points of agreement. A due diligence investigation is then conducted. With the help of specialists, the acquirer will carry out an in-depth investigation into relevant areas, such as the target's financial situation, commercial position, and contracts. The due diligence investigation will be followed by final price negotiations and drafting of contracts. The contracts, and especially the seller's representations and warranties to the buyer, are other major points of the negotiation. Before closing a transaction, certain steps will have to be taken depending on the size and kind of company and/or market. These could include:

- approval from the supervisory board;
- an opinion from the works council;
- approval from regulatory authorities.

Both the supervisory board and the works council, as well as the rules governing companies, are typical of the Dutch corporate environment.
Both stem from the Dutch belief that a company is more than just an instrument for the shareholders. In the Netherlands, a stakeholder approach is more customary than a straightforward shareholder approach. In corporate decisions, in addition to taking into account the position of shareholders, other stakeholders, such as employees, debt holders and customers, should be consulted.

The Netherlands has implemented the European Acquired Rights Directive, which provides certain protection to employees. For example, employees' rights automatically transfer from the transferor to the transferee in the event of a transfer of an economic entity retaining its identity (not consisting solely of an acquisition of shares of a company). Termination of employment due to the transfer is not possible. In companies with more than 50 employees, works councils must be informed of acquisitions and disposals that may involve redundancies. The applicable collective labour agreement may also impose a duty to consult the works council. Although the works council cannot veto an acquisition, its procedural right of advice in relation to redundancies can delay a transfer if the company and the works council cannot reach an agreement.

In the case of an acquisition and/or merger, the Dutch Merger Code (*SER-Fusiegedragsregels*) requires notification of and consultation with the applicable trade union(s) if a company's business in the Netherlands on average employs more than 50 people. This consultation should take place early in the negotiations between the parties involved in the acquisition. When the merger negotiations reach a stage where an agreement is expected to be imminent, the trade unions must be notified and the Merger Committee must be informed that such notification has occurred.

For more information on the works council, see 7.2.4 "Works Council". For information on the supervisory board, see 2.1.2 "Legal characteristics branch and BV/NV".

Auction-type transaction process

An invitation to an auction process can be received where an acquirer has actively shown interest in the target company or where the sellers and their advisors perceive a business fit between target and acquirer. A potential acquirer is typically requested to indicate interest in participating in the transaction process based on a review of an anonymous profile of the target company. After signing a confidentiality agreement, the acquirer will receive comprehensive information on the company and the process requirements.

The process can consist of multiple phases in which the sellers will furnish potential acquirers with an increasing level of information for their evaluation of the target company. Potential acquirers are requested to indicate or confirm their interest by means of offer letters in each phase. An evaluation of offers by the sellers and their advisors will narrow the selection of prospective buyers allowed into the next phase. The information to be provided throughout the various phases can consist of a pre-marketing presentation, an information memorandum, a vendor due diligence report, a management meeting, data room access, and a draft sale and purchase agreement.

The vendor due diligence report sets out the results of a due diligence investigation performed by a professional advisor hired by the sellers to accommodate the potential acquirers in their review of the target company. It enables multiple potential buyers to submit a well-informed offer without performing their own separate due diligence investigations. A (limited) confirmatory due diligence is typically allowed by one or a limited number of buyers who have submitted the most attractive offers.

Instead of negotiating a letter of intent, it is common in an auction process that the seller and the buyer directly negotiate the sale and purchase agreement. The seller will provide a draft sale and purchase agreement to potential buyers during one of the final phases of the process. Potential acquirers who are still in the process are requested to submit their binding offer including mark-up of the sale and purchase agreement and other relevant documentation. Based on the binding offers, final negotiations and conclusion of the deal with the acquirer will take place.

Merger procedure

Foreign investment in a Dutch company normally requires no government consent, but certain laws and regulatory rules may apply to mergers or acquisitions. Under Dutch law, the three most common forms of merger are:

- a stock merger: acquisition of stock *(aandelenfusie);*
- a business merger: acquisition of assets and liabilities *(bedrijfsfusie);*
- a statutory/legal merger: a merger in which one of the merging companies ceases to exist and the other company acquires its assets and liabilities by operation of law (onder algemene titel) or a merger in which a newly incorporated company acquires all assets and liabilities of the merging companies by operation of law and both companies cease to exist *(juridische fusie).*

In a stock merger, the shareholders of the target company either exchange their shares for those of the acquiring company or sell them to the acquiring company. The transfer of title to registered shares is made by a deed of transfer executed before a Dutch civil-law notary.

In a business merger, an enterprise is sold to the acquiring company for either cash or shares in the company. Such a transfer requires that all of the rules relating to the conveyance of property be met.

In a statutory/legal merger, shareholders generally exchange their shares in the target company for those of the other (acquiring) company (or a new company); the target company is then dissolved. A number of variations to this basic form of statutory/legal merger exist. These include a merger between a parent and a subsidiary and a triangular merger under which the consideration shares may be issued by a member of the acquiring company's group.

Under Dutch law, there is a short-form (simplified) procedure for legal mergers between wholly-owned subsidiaries and mergers in which a parent company absorbs a wholly-owned subsidiary. In these cases, certain requirements that aim to protect shareholders do not apply.

Participants in mergers must adhere to the requirements of the Dutch takeover and merger code *(SER Fusiegedragsregels)*, which protects the interests of shareholders and employees. They must also comply with the Works Councils

Act (*Wet op de Ondernemingsraden*), which protects the interests of employees (of both listed and unlisted companies subject to negotiations) and requires notification of mergers. In an international merger, the merger rules generally apply if the transaction involves Dutch interests and, for example, affects the employment conditions of Dutch personnel.

The Dutch Competition Authority must be notified in advance of mergers of large companies that qualify as a concentration within the meaning of the Dutch Competition Act.

The merger procedure for a statutory/legal merger may be divided into three phases:

1. Preparation phase
2. Announcement and opposition phase
3. Execution phase

1. Preparation phase

In the preparation phase, the management boards of the acquiring and disappearing companies jointly draw up a merger proposal, which must include certain mandatory items according to the Netherlands Civil Code. This merger proposal should be drafted in close cooperation with a civil-law notary.

The merger proposal must be signed by all members of the management board of the merging companies. If a signature is lacking, the omission and the reasons for it must be explicitly stated.

The management boards of the merging companies also jointly draw up the explanatory notes to the merger proposal. These notes set forth the reasons for the merger, the expected consequences for its activities, and comments from legal, economic and social points of view.

If the last financial year of one of the merging companies, for which financial statements have been adopted, ended more than six months previously, then interim financial statements have to be prepared regarding the situation as per a moment not earlier than the first day of the third month before the month in which the merger proposal is filed. These interim financial statements must be prepared in accordance with the same (accounting) principles that were used in the above-mentioned financial statements.

2. Announcement and opposition phase

Once the merger proposal has been executed and all ancillary documents have been gathered, the merger proposal is filed with the Trade Register of the Chamber of Commerce. Also included in this filing are the three most recently adopted financial statements (with auditor's reports), the annual reports of both the merging companies, and any interim financial statements (see above).

These documents, as well as the explanatory notes to the merger proposal, the advice of the Works Council (if any) and other documents (such as financial statements and annual reports that do not need to be filed with the Trade Register), must be made available at the office of the merging companies for inspection by the shareholders, by holders of rights the law confers on depository receipts issued with the cooperation of the company and by persons with special rights towards the company, such as a right to profits or to the subscription for shares. The documents must remain available for inspection until the date of the merger and, at the office of the acquiring company, for six months after the merger.

After these filings have taken place, an announcement must be made in a daily distributed national newspaper that the relevant documents have been filed with the Trade Register of the Chamber of Commerce and with the office of the merging companies. The announcement must note the Trade Register(s) and the address of the office of the merging companies where these documents are available for inspection.

For one month after this announcement has been published, creditors of the merging companies may file a notice of opposition with the competent District Court(s) where the merging companies have their official seat.
In the opposition phase, the drafts for the merger documentation required for the execution phase will be prepared.

3. Execution phase

At the end of the one-month opposition period, the Trade Register(s) of the Chamber of Commerce will be requested by the civil-law notary to confirm that the merger proposal has been available for inspection with the Trade Register(s) for at least one month after the announcement. The registrar of the competent District Court(s) will be requested to confirm that no notice of opposition against the merger has been filed by creditors.

If a notice of opposition has been filed in time, an arrangement with such an opposing creditor will have to be agreed. If after the opposition phase no notice of opposition has been filed or if an instituted opposition has been lifted, the resolutions to effect the merger may be taken. According to Section 2:317(3) of the Netherlands Civil Code, such resolutions may be taken in the same manner as resolutions to amend the articles of association, provided that the articles of association of the merging companies do not state otherwise.

The management board of the acquiring company can only resolve to enter into the merger if the management board's intention to resolve to enter into the merger has been mentioned in the announcement.
If resolutions to amend the articles of association have to be taken in a General Meeting according to the articles of association, minutes of such General Meeting must be prepared in the form of a notarial deed of proceedings *(proces-verbaal)*.

Once decision to proceed with the merger has been finalised, the merger may be effected by means of a notarial deed to which both merging companies are party. The merger takes effect as of the day after the deed of merger's execution date. If applicable, the notarial declaration of amendment of the name (in case the disappearing company owns real estate or registered vessels or aircraft) will also be executed.

Finally, the deed of merger has to be filed with the Trade Register(s) within eight days after its execution. The deed of merger also must be filed with the Land Registry if the disappearing company was the owner of real estate or a registered vessel or aircraft, which, as a consequence of the merger, was acquired by acquiring company under a universal title of succession.

Cross-border legal mergers

As of 2008, the Dutch legislator has introduced the cross-border merger as a regulated possibility. Provisions in Dutch law describe the procedure for a cross-border merger within the EU applicable to a limited liability company, a private company with limited liability, or a European cooperative company or SE having its corporate seat in the Netherlands. As far as a Dutch legal entity is involved, the prescribed procedure for a merger must be followed in the Netherlands.

Divisions and demergers/split-offs

Legislation on divisions and demergers/split-offs has been in force since 1998. Basically, it entails the absorption of the whole or a distinct part of the business of a company by one or more other corporations through the exchange of shares. There are two different methods for splitting up a business: the division *(zuivere splitsing)* and the spin-off *(afsplitsing)* – both of which are referred to in this booklet as demergers. A division generally results in a company's business being divided between two or more acquiring companies and the transferor company ceasing to exist. A spin-off involves a transfer of all or part of a company's business (that company continues to exist) to one or more (new or existing) companies.

Demerger procedure

The demerger procedure is essentially equivalent to the merger procedure.

2.2.2 Mergers, acquisitions and restructurings – tax aspects

General principles

The sale or other transfer of assets by a Dutch resident company (or non-resident company holding the assets through a Dutch permanent establishment) will in general trigger a charge of Dutch corporate income tax on any resulting gains (taxable at normal corporate tax rates). Taxable gain is measured as the difference between the tax basis in the asset and the transfer price (assuming the latter reflects arm's length conditions). Although this also applies, in principle, in the case of merger-type transactions, domestic law generally provides for tax relief, subject to certain conditions. In the absence of such relief, the tax authorities may adjust taxable gains to reflect arm's length terms and conditions. Where shares are transferred, no corporate income tax is due provided the participation exemption conditions (see 5.1.3 "Special regimes") are satisfied. Reorganisations involving asset transfers within a fiscal unity are generally tax neutral, although tax consequences can arise when, for example, one of the companies involved in the transfer ceases to be a member of the fiscal unity (see 5.1.3 "Special regimes").

In merger-type transactions, relief generally takes the form of a deferral, whereby the original tax basis is maintained or carried over to new assets.

For direct tax purposes, relief is available for four types of transaction, as described below:

1. Stock mergers
2. Business mergers
3. Legal/statutory mergers
4. Divisions/demergers

For more details regarding the legal aspects, see 2.2.1 "Mergers, acquisitions and restructurings – legal aspects". Certain relief may be available in similar situations for real estate transfer tax purposes.

Stock mergers *(aandelenfusie)*

A share or "stock" merger essentially involves an exchange of shares in the target company for shares in the acquiring company. The relief consists of an exemption from tax for the transferor and a transfer of the transferor's existing tax basis in the target shares to the consideration shares in the acquiring company. Any gain is thereby effectively deferred. The relief is generally limited to transactions involving the acquisition of shareholdings in Dutch or other EU-resident companies by Dutch or other EU acquiring companies, such that after the acquisition more than 50 percent of the voting rights are held. Acquisitions of non-EU shareholdings by a Dutch company are also covered, provided that after the acquisition more than 90 percent of the voting rights are held. A cash element of up to 10 percent of the nominal value of the shares issued under the share merger is permitted (the relief is then limited to the share element). Relief is not available where the transaction is substantially aimed at the avoidance or deferral of taxation. Confirmation from the tax authorities that relief will not be denied on these grounds may be requested before carrying out the transaction. Due to the broad scope of the participation exemption, the importance of the share merger facility for corporate taxpayers is limited.

Business mergers *(bedrijfsfusie)*

In a business merger, one company transfers a business or an independent part of a business to another company in exchange for new shares. The tax relief under a business merger consists of an exemption from tax for the transferor company and a transfer of the transferor's existing tax basis in the transferred assets to the acquiring company. Any gain is thus effectively deferred.

A small level of non-share consideration is permitted for the relief to apply. In principle, the relief is not restricted to resident companies or to companies incorporated under Dutch law. The relief is available automatically or, in some cases, only subject to certain conditions being satisfied. The latter are based on published standard conditions, designed to protect the Netherlands' future right to tax. These typically cover matters such as the transfer of tax-free reserves and the offsetting of tax losses. Where these conditions apply, an advance agreement should be concluded with the tax authorities confirming the application of the relief. Pre-merger tax losses of the transferor generally may not be transferred to the acquiring company. Post-merger losses of the acquiring company may not be carried back against profits of the transferor company. An exception to this rule is made where a Dutch permanent establishment is transferred by way of a business merger and the transferor company is no longer subject to Dutch tax after the merger. In such cases, a request may be submitted to carry the losses forward or back to other taxation years, subject to the losses being streamed against the profits from the assets that generated them. There is also an anti-avoidance provision for business mergers as well as the possibility of obtaining confirmation that the provision is not applicable.

Legal/statutory mergers *(juridische fusie)*

In a legal/statutory merger, shareholders generally exchange their shares in the target (disappearing) company for those of another (surviving) company that acquires the target company's entire assets and liabilities; the target company is then dissolved. A number of variations exist, including, for example, a merger between a parent and a subsidiary or a triangular merger under which the consideration shares may be issued by a member of the acquiring company's group.

The main tax relief under a legal/statutory merger consists of an exemption from tax for the transferor (disappearing) company and a transfer of the transferor's existing tax basis in the transferred assets (and liabilities), as well as fiscal reserves to the acquiring (surviving) company. Any gain is thereby effectively deferred. Cross-border mergers between Dutch and other EU companies are permitted as required by EU law. In principle, the relief also applies to such cross-border mergers. As in the case of business mergers, relief is available either automatically or, in certain circumstances, only if specific conditions are met. Again, where these conditions could apply, an advance agreement should be obtained confirming the application of the relief. Subject to certain conditions, pre-merger losses of the transferor company may be transferred to the acquiring company and post-merger losses carried back against profits of the transferor company. In addition, anti-avoidance rules and the possibility of advance clearance apply.

Division *(splitsing)* and demerger/split-off *(afsplitsing)*

These transactions basically entail the absorption of the whole or a distinct part of the business of a company by one or more other companies in exchange for shares. There are two different types of transaction involved: the division *(zuivere splitsing)* and the demerger/split-off *(afsplitsing)*. A division generally results in a company's business being divided between two or more acquiring companies and the transferor company ceasing to exist. A split-off involves a transfer of all or part of a company's business (that company continuing to exist) to one or more (new or existing) companies. Conditions for obtaining the relief and the treatment of losses following a division or demerger/split-off, as well as the anti-avoidance provisions, are broadly the same as for legal/statutory mergers (although a carryover of losses is not available in the case of a demerger/split-off).

Tax aspects of financing mergers and acquisitions

Interest incurred to finance a merger or acquisition generally is deductible for corporate income tax purposes. Various rules may restrict the deduction, depending on the circumstances. In particular, see 5.1.3 "Special regimes Participation exemption" and 5.1.8 "Specific anti-avoidance rules". The costs of acquiring or disposing of a shareholding covered by the participation exemption are not tax-deductible.

2.3 Financing

2.3.1 Acquisition financing

It is worthwhile to start considering financing options and structures early in the acquisition process, preferably assisted by an independent debt advisor. Before the credit crisis, there was considerable liquidity in the capital markets. Most banks were willing to finance acquisition transactions and realising the debt financing was generally regarded as the final piece of the transaction puzzle. During and after the economic crisis, banks have become stricter in the area of risk management, credit providers have become more sceptical, and excess leverage multiples have, for the time being, disappeared from the marketplace. As a result of limited bank appetite, alternative financing instruments (including private placements) are being investigated. Nevertheless, with excellent preparation, a strong business plan and good timing, it is possible to secure required financing with attractive terms.

The Dutch banking sector is dominated by a small number of relatively large banks. The acquisition target may have a long-standing relationship with one or more of them. It makes sense to start the search for financing with these banks, as they will be familiar with the target's creditworthiness and should have a view on the relevant market's future outlook. Depending on the size of the transaction, requests for financing will be dealt with at local branch level or by the bank's specialised acquisition finance department. The size and riskiness of the transaction and the key characteristics of the market segment are important in considering bilateral debt, a club deal or syndicated debt. The lending market is generally affected by movements in the equity and public debt markets.

In determining their willingness to provide financing, banks will normally place considerable importance on the current status of the target (including its asset base), the business plan of the acquirer (including future cash flows), and the transaction's structure. In the case of a public limited liability company (NV) Dutch law restricts the use of assets being acquired as collateral for financing the acquisition (financial assistance rules, Section 2:98c Netherlands Civil Code), depending on the companies' free distributable reserves. Given the relative lack of collateral (only the shares of the new company), banks tend to focus on the ability of the new company to service its debt. Higher-leveraged transactions will normally include subordinated debt instruments to be provided by the vendor, lead arranger of the senior debt, or specialised mezzanine providers. However, since the credit crisis, there is minimal appetite for mezzanine financing as pricing increased to the low range of new internal rate of return levels required by equity providers. The closing of the financing will normally take place at the same time as the closing of the equity transaction.

2.3.2 Initial Public Offering

If a company has a need for capital, an Initial Public Offering (IPO) may be considered. With current technologies, the world may be the market, but every stock exchange will have different advantages and disadvantages for different companies.

A common and advantageous IPO structure is to establish a Dutch NV holding company with a listing of the NV shares at NYSE Euronext Amsterdam or elsewhere in Europe or the United States.

The following characteristics make the Netherlands an advantageous location for IPOs.

- The Dutch infrastructure includes international lawyers, English-speaking service providers, a developed capital market and banks.
- The country is an EU Member State and so the EU Prospectus Directive applies.
- The AFM (The Netherlands Authority for Financial Markets) accepts reports in English and is considered easily accessible.
- The markets of NYSE Euronext cater to companies of all sizes, making it both transparent and flexible for listing all types of securities.

Advantages of a Dutch NV are as follows:

- The corporate format has been used for decades for listing purposes.
- Various classes of shares (ordinary, preferred) can be accommodated as required.
- An NV structure can be set up quickly (with proper preparation).
- A BV can be converted into an NV without adverse tax consequences.
- Substance requirements to ensure the NV's Dutch tax residency are easily manageable.

Various tax advantages – related to dividends, tax treaties, income tax, withholding tax – are highlighted throughout this booklet.

The listing process

An IPO presents challenges of varying difficulty and may include the following steps:

- preparing a robust and credible business plan
- improving standards of corporate governance
- preparing a financial track record
- appointing a listing agent
- coordinating various legal and financial advisors and investment bankers
- preparing and verifying the prospectus in line with the EU Prospectus Directive requirements or in accordance with US regulations
- agreeing on an appropriate capital structure
- preparing for a due diligence review
- marketing road shows to institutions
- applying for listing and regulatory approvals from NYSE Euronext and AFM

Ongoing obligations

Companies listed on NYSE Euronext have to fulfil certain obligations within set time periods, such as preparing and publishing an audited annual report and financial statements, a half-year report (which may be unaudited) and, in certain circumstances, quarterly turnover figures. The company must disclose all price-sensitive information relating to the company and its operations or its financial instruments to the market as promptly as possible and within a specific framework.

2.4 Intellectual property rights

When doing business in the Netherlands, the management of a company may be confronted with various issues concerning the protection and exploitation of its intellectual property, raising questions such as the following.

- Can a competitor simply copy our manufacturing process or launch a product or service with almost the same name or trademark as ours? How can we prevent them from doing that?
- How do we establish and maintain ownership of our intellectual property rights and protect the investment we have made in our company's interests?
- How can we best exploit our intellectual property rights?

When preparing for mergers and acquisitions in the Netherlands, research into intellectual property rights is often not given a high enough priority. It is prudent to pay sufficient attention to intellectual property rights when performing a due diligence investigation.

"Intellectual property rights" is a widely used term for a basket of different rights related to one's intangible assets. Generally, a distinction can be made between rights that are vested only through proper application and registration (with some exceptions) and rights that are vested by the asset's creation or use. Patents, trademarks, model and design rights and plant breeder's and topography rights generally belong to the first category. The second category includes copyright, neighbouring, trade name and database rights. There is a further class of "related rights" that are not intellectual property rights in the traditional sense but still represents transferable value to a company, such as domain names, commercial portrait rights, (telecommunications) "name numbers", know-how and trade secrets.

Dutch law is not the only law relevant to the legal protection of intellectual property rights in the Netherlands; these rights may also be protected under European and international law, and contractually, for example, in the case of non-disclosure agreements.

Below we outline the Dutch law relating to patents, brand (trade name and trademark) protection and copyright protection. We also discuss issues related to domain names.

2.4.1 Patents

A patent *(octrooi)* protects the new technical solutions in a product or production process. A patent grants to its holder the exclusive right to exploit the patented innovation. Other parties need a licence to use the invention or the product embodying the invention. Normally, the licensee pays royalties to the licensor. Licences that are granted should be registered in the patent register so they can be invoked against third parties.

In the Netherlands, a patent application is filed with the Patent Centre in Rijswijk. It is also possible to file an international application with the World Intellectual Property Organisation (WIPO) or to file an application with the European Patent Office in Munich under the European patent application procedure.

If the patent holder's rights to the invention are violated e.g. by its use in a product, he or she has recourse to an injunction, the recall of the infringing products, compensation for damages and a statement of the profits of the infringer.

2.4.2 Brand protection (trade name, trademark and designs)

Before entering into business in the Netherlands, it is advisable for a company to investigate whether its chosen trade name already exists. A trade name can partly represent the goodwill value of the firm. Trade names in the Netherlands are protected by the Dutch Trade Names Act *(Handelsnaamwet)*. To obtain a property right to a trade name, the only legal requirement is the legal and consistent use of the trade name. Registration is not necessarily required in order to claim a trade name right.

A competitor can object to the use of a trade name if there is a similarity between the trade names of both companies and there is the likelihood that the public might be confused or misled into believing that one company's goods or services are in some way associated with the other company. To establish this, a Dutch court will take into account several other aspects, such as the location of the companies and the type of business they conduct.

Trademarks are different from trade names since they portray the uniqueness of products or services. A trademark can be obtained by filing an application with the Benelux Office for Intellectual Property *(Benelux Bureau voor de Intellectuele Eigendom;* BBIE) in The Hague, after which the trademark will be registered in the Benelux Trademark Register. As of the moment of registration, protection is granted to the trademark holder. Similar proceedings exist for obtaining an international trademark registration with the World Intellectual Property Organisation (WIPO) in Geneva and a European trademark registration with the Office for Harmonisation in the Internal Market (OHIM).

The exclusive right of the trademark holder means that no other party may exploit or use the mark without the trademark holder's consent. Generally, the trademark holder can prohibit the use of a mark that is similar to the protected trademark if there is a likelihood of confusion among the public. A trademark holder may also claim damages, the recall of the infringing products, a statement of profits, and destruction of the infringing goods. Licences that are granted should be registered (including any restrictions and special conditions) in the relevant register so they can be invoked against third parties.

2.4.3 Copyright protection

Copyright law in the Netherlands applies automatically when producing a literary, artistic or scientific work that clearly bears the creator's intellectual creative hallmark. No formalities are involved in obtaining copyright protection. Two requirements must be met before copyright protection can be obtained:

1. The work must embody the individual intellectual creation of the creator, i.e. it embodies the free creative choices of the creator.
2. An idea alone is not copyrightable; only the actual expression, the concrete modelling of the idea into a work, is eligible for copyright.

The copyright owner (usually the creator, its assignee or employer) has the exclusive right to produce copies of the work and to publish the work, as such or in a modified format, notwithstanding any statutory restrictions to that right. In addition, the creator's independent translations and modifications of a work and compilations of works or a part thereof enjoy copyright protection, notwithstanding the copyrights vested in the original work.

The copyright owner has legal recourse to claim damages and prohibit the violation of his or her copyright. The copyright owner may claim an injunction, damages, the recall of the infringing products, a statement of the profits that were realised by the infringer through the illegal actions. He or she may also claim or request the destruction or disablement of the infringing works or the products and materials through which infringing works were realised. Once copyrighted copies thereof have lawfully been released to the market by the copyright owner, or once this has been done with his or her permission, the rights of the copyright owner with regard to these copies will be exhausted. This means that a lawful acquirer or holder of these copies may use or exploit them without the copyright owner having any recourse.

2.4.4 Related intellectual property rights

The final category that starting enterprises should especially consider when setting up their business is that of related intellectual property rights, which include domain name rights. In the Netherlands, domain names may be obtained by filing an application with the appropriate authority (the SIDN). If a domain name contains a trademark or a trade name of another company, it might form an infringement. It is therefore advisable to conduct a trademark and trade name investigation before applying for a domain name registration.

Incentives

3.1 Grants and incentives

This chapter looks at the incentives available to companies that are considering establishing or expanding their operations in the Netherlands. First we provide a general overview of the incentives available, the authorities that provide them, and the application procedures. We then discuss specific incentives in more detail.

3.1.1 Incentives available to domestic and foreign firms

The Dutch government has introduced a "top sector" policy, which aims to ensure the Netherlands excels in nine sectors:

1. High-tech material and systems
2. Agri-food
3. Water
4. Energy
5. Horticulture and propagation materials
6. Chemicals
7. Creative industries
8. Logistics
9. Life sciences and health.

This approach is intended to encourage a solid exchange between businesses, knowledge institutes and the government: the so-called "golden triangle". The initiative is based on the premise that businesses, rather than government, have better knowledge of the needs of these specific sectors.

As part of this initiative, businesses and scientists have been given a larger role in making their own proposals and action plans. Further, "Top consortia for Knowledge and Innovation" (TKI), consisting of scientists and entrepreneurs, have been established to explore new ways of bringing innovative products and services to market. Companies can apply to participate in TKIs and can benefit from this grant through their participation.

The grant is about 25% of the research investment made by the company.

Attracting the headquarters of international companies is also important to the Netherlands. Much effort is made to recruit foreign investment, with the emphasis being on attracting highly strategic foreign investments in the top sectors. The Netherland's goal is to become one of the top five European countries for attracting the headquarters of international companies and to at least maintain its current position as one of the top ten places of business for the headquarters of companies on the Global 500 list in 2020. The new policy means providing less subsidies in exchange for lower taxes, fewer and simpler regulations, increased access to business financing, better use of knowledge by industry, and to better align taxation, education and diplomacy with the needs of businesses.

Authorities have attempted to base financial support on the specific economic needs of particular geographical regions, in addition to more generally available grants.

Both domestic and foreign firms in the Netherlands may be eligible for grants from the Dutch government, local authorities and the EU.

The most important areas for which incentives are available are:

- establishing or expanding a business
- activities concerning technology and R&D
- energy and environmentally friendly measures
- human resources projects
- export activities.

Within these areas, incentives vary. Some incentives are generally applicable, some apply to specific target groups, and some involve demands on the results that should be delivered. Generally, companies that are engaged in any activity concerning the above areas can apply for at least one or two grants.

A financial incentive can either be granted on a "first-come, first-served" basis until the available budget is exhausted or by a tender procedure, where only the applications that are considered to be the best receive a grant. In the first case, applications must comply with the minimum demands described in the grant guidelines; as long as they do, and budget is still available, the grant will be awarded. Where the tender procedure is used, companies can only apply during a fixed application period. The applications are then evaluated and ranked, and the incentive budget is spent in accordance with this ranking, until the budget is exhausted.

Many grants available in the Netherlands specifically target small and medium-sized businesses (SMEs). Some grants are available only to firms considered to be SMEs, while others offer financial support to all businesses, but more support to SMEs or start-ups.

Although efforts have been made to simplify the Dutch incentive regime, companies are advised to consult all subsidy-granting bodies to see which subsidies are available. However, these bodies often lack an exhaustive overview of applicable programmes, making referrals unreliable. As of 2014, the institutions that provide national grants and incentives have merged into one organisation – the Netherlands Enterprise Agency *(Rijksdienst voor Ondernemend Nederland;* RVO). This agency should make information about Dutch grants and incentives more easily accessible to businesses in the Netherlands.

"Golden rules" for obtaining grants and incentives

The following factors should be considered when applying for pursuing Dutch grants and incentives.

- Grants and incentives generally only finance a percentage of eligible project costs. Percentages may vary between 10 percent and 85 percent depending on the grant scheme and the nature of the project.
- Incentives generally apply only to project plans that have not yet started.
- Costs generally cannot be subsidised retroactively.
- Therefore applications must be submitted before any investment decisions are made.
- Applications usually must be accompanied by a detailed project plan and budget.
- All grants and incentives are subject to administrative obligations during the project execution (these may vary from tracking hours spent to maintaining completely separate administrative records).

It is advisable to investigate this administrative burden before applying for any specific grant.

Incentives versus EU competition law

State aid policy is an important part of EU competition policy. Monitoring State aid is necessary in order to maintain a level playing field for all undertakings active in the Single European Market, irrespective of the Member State in which they are established, and to avoid Member States getting locked into a contest where they try to outdo each other to attract investment.

It is a common misperception that European competition law does not allow governmental financial support to companies in Europe. The EU Treaty does prohibit any aid granted by a Member State or through state resources that distorts or threatens to distort competition by favouring certain firms or the production of certain goods insofar as this affects trade between Member States. However, a number of exceptions are allowed. The European Commission (EC) has the exclusive power to declare state aid compatible with the Treaty, provided it meets clearly defined objectives of common interest and does not distort intra-EU competition and trade to an extent contrary to the common interest.

The EC may approve grants or incentives from Member States for certain goals, for example, related to R&D or the environment. If so, the grant scheme is regarded as compliant with European competition law. Most Dutch grant schemes at the national level have been assessed and approved by the European government, but this is not always the case for grants from local governments. In such cases, the "de minimis" policy applies. Introduced by the EC in 1992, this policy is designed to benefit SMEs. It states that government support for any company is not considered state aid if the enterprise receives less than EUR 200,000 over a three-year period. Subsidies below this amount do not require prior notification to the EC.

3.1.2 Examples of Dutch and European grants and incentives

Dutch incentives

The Dutch government offers various types of financial support, including grants and tax incentives, credits, guarantees, subordinated loans and participations. Companies must apply for incentives before any official commitment related to the investment is made. The principal ministries that provide grants for businesses in the Netherlands include the Ministry of Economic Affairs,

Agriculture and Innovation *(Ministerie van Economische Zaken Landbouw & Innovatie)* and the Ministry of Infrastructure and Environment *(Ministerie van Infrastructuur & Milieu)*. Most ministries have delegated executive responsibility for their incentive programmes to specialist agencies.
The most important agency is the Netherlands Enterprise Agency *(Rijksdienst voor Ondernemend Nederland; RVO)*, which mostly deals with innovation and environmental incentives, as well as incentives for international business and cooperation. In addition to processing applications, these agencies actively provide information on the incentives they administer.
The Dutch government has announced a number of policy priorities for the next few years. The most important ones for businesses are:

- creating an innovative, competitive and enterprising economy
- creating a sustainable environment
- playing an active role at the international and European level

Some of the incentive programmes that have been set up to support these priorities are described below.

Creating an innovative, competitive and enterprising economy

Innovation, knowledge and entrepreneurship are considered to be important for stimulating the economy and addressing social issues. A wide range of programmes designed to support innovation and research have been established. One of the largest incentives budgets is reserved for an innovation incentive granted under the Research and Development (Promotion) Act *(Wet bevordering speur- en ontwikkelingswerk* – WBSO) (described under "Research and innovation incentives" below).

Some of these programmes focus specifically on international innovation; others focus on cooperation with academic or research institutions. The Dutch government also offers regional support to both economically weak and economically strong regions. Some incentives target industry sectors that are considered to be important to the Dutch knowledge economy. Support schemes are also increasingly common for sectors that are considered to be of national importance, i.e. the nine sectors referred to above.

Creating a sustainable environment

Incentives are available to support the development and purchase of products or services that are environmentally friendly or that save energy.

Playing an active role at the international and European level

Most support provided in this area concerns either European or global cooperation projects or development aid. Grants are provided to businesses in the Netherlands that cooperate with foreign companies or knowledge institutes. The Dutch government also has a policy of offering development aid by supporting Dutch businesses cooperating with, and investing in, businesses in emerging markets (in accordance with OECD rules).

Local incentives

Incentives offered by provincial and municipal authorities in the Netherlands are mainly designed to stimulate the local economy. Incentives are provided for innovation projects, for establishing or expanding businesses in particular regions, and for job creation. It is also always advisable for companies to approach local authorities when embarking on activities that positively affect the environment or cultural infrastructure.

European incentives

Businesses established in the Netherlands can also profit from European grants. The EU's policy priorities in this respect are creating solidarity and cohesion in the EU countries and stimulating European innovation.

Creating solidarity and cohesion

In order to create a unified and fair internal market, the EU supports European cooperation in areas such as education, research and the development of certain sectors. For example, companies operating in border regions that engage in cross-border cooperation may be eligible for support. Another group of incentives is designed to reduce social inequalities within the EU, for example, by stimulating economic activities in poorer or economically weaker regions, such as rural areas. Activities that improve the employability of individuals and that concern non-discrimination and social inclusion are also eligible for support.

Stimulating European innovation

In order to stimulate European innovation, emphasis is put on collaborative European research. A number of research areas are supported, including R&D activities concerning the environment and energy solutions and technological research in a number of fields, such as food, agriculture and health. Some of these research areas are supported for strategic reasons; for example, incentives are provided for ICT research because of the strong international competition in this sector.

Various services have been set up in each Member State to provide information on European incentives for technological innovation and scientific research (Horizon 2020; see below). In the Netherlands, this is the responsibility of the RVO. Most European incentives function in the context of framework programmes, which are usually set up for consecutive six-year periods.

3.1.3 Selected key incentive programmes in the Netherlands

Some of the most important incentive programmes available in the Netherlands are described below. The incentives are described in order of availability, ranging from those that are generally available to those that are available only to specific projects or that require strict criteria to be met.

Regional incentives

The European Regional Development Fund (ERDF)

The ERDF focuses on reducing the gap between the levels of development of Europe's regions and the extent to which less-favoured ones are lagging behind. For more developed EU regions, such as the Netherlands, the focus is on strengthening regional competitiveness and increasing employment.

In the Netherlands and other developed EU regions, for the period 2014-2020 at least 80 percent of the EFRD funds will be divided among three key areas:

1. Regional employment – creating and maintaining jobs through sustainable investments.
2. Regional infrastructure – constructing and maintaining transport and communication networks.
3. Regional SMEs – stimulating the establishment and development of SMEs in the region.

Interreg IV

The Interreg programme, financed by the ERDF, supports cross-border and international cooperation within certain geographical regions. Specific project themes are supported in each region.
The fifth Interreg programme runs from 2014 to 2020, and consists of three strands: strand A concerns cross-border cooperation, strand B concerns transnational cooperation, and strand C concerns inter-regional cooperation.

Businesses in the Netherlands can benefit mainly from strands A and B. In Interreg VA, businesses in the regions bordering Germany and Belgium are encouraged to cooperate with neighbouring regions in those countries. The main themes of the fifth Interreg programme are capitalising innovation, a shift towards a low-carbon economy, and eco-innovation and the efficient use of resources. Two geographical regions addressed under Interreg include parts of the Netherlands: the North Sea Region (including Dutch regions bordering the North Sea and North-western Europe (including all but the most northern Dutch provinces). Companies should be aware that projects in the Interreg programme must have a certain scope and scale, and they can only participate as part of a consortium.

Research and innovation incentives

Innovation Promotion for SMEs in the top sectors

To stimulate R&D and innovation, specifically from SMEs in the nine top sectors mentioned above, the Dutch government has made a budget of EUR 55 million available in 2016. SMEs can apply for a grant from this budget for R&D-related activities, such as innovation vouchers, feasibility studies and R&D cooperation projects. Applications can be submitted after a call for a proposal has been published.

WBSO – Research and Development (Promotion) Act

Incentives provided under the Research and Development (Promotion) Act *(Wet bevordering speur- en ontwikkelingswerk; WBSO)* are intended to stimulate the R&D activities of Dutch companies. The incentive is essentially a payroll tax ruling for employees involved in R&D, thereby reducing payroll tax for the employer. Costs and expenditures related to WBSO projects can also benefit from a payroll tax reduction. This reduction is based on a fixed amount per hour or the real costs and expenditure.

The development of products, production processes and/or software, undertaken by employees within the EU, is eligible for the WBSO reduction. For more information about the WBSO and other business and investment tax incentives, see under 3.2 Tax incentives.

Horizon 2020

This EU framework programme is intended to stimulate European research in order to further develop the European knowledge economy and society. Horizon 2020 began on 1 January 2014 and applications can be submitted after the publication of a call. The programme is divided into three objectives:

1. Excellent science
2. Competitive industries
3. Better society.

In promoting excellent science, Horizon 2020 aims to raise the level of excellence of Europe's science base and ensure a steady stream of world-class research to secure Europe's long-term competitiveness. These goals are being pursued by supporting the best ideas, developing talent within Europe, providing researchers with access to priority research infrastructure and making Europe an attractive location for the world's best researchers.

In promoting competitive industries, Horizon 2020 aims to make Europe a more attractive location for investment in research and innovation by promoting activities where businesses set the agenda. It will make major investments in key industrial technologies maximise the growth potential of European companies by providing them with adequate levels of financing, and help innovative SMEs to grow into the world's leading companies.

In promoting a better society, Horizon 2020 reflects the priorities of the Europe 2020 strategy and addresses the major concerns shared by citizens not only in Europe but also worldwide. A challenge-based approach will bring together resources and knowledge across different fields, technologies and disciplines, including the social sciences and humanities. This approach will cover activities from research to market with a new focus on innovation-related activities, such as pilot testing, demonstration, test-beds and support for public procurement and market uptake. The approach also includes establishing links with the activities of the European Innovation Partnerships (EIP).

Applications can be submitted after the publication of a call. In general, large consortia (10 to 20 partners) consisting of companies and knowledge institutions in Europe (based in at least three, but preferably more European countries) that cooperate on innovative research and development projects may be eligible for a grant from Horizon 2020. Applicants must realise that applying for a Horizon 2020 grant can be a lengthy process and the administrative obligations may be time consuming.

Energy and environment incentives

Investment allowances and free depreciation

The Netherlands offers tax incentives to stimulate purchases of non-customary new environmentally friendly or energy-saving equipment. Lists of assets that qualify for these tax incentives are published annually. Manufacturers can apply to have their new energy-saving or environmentally friendly equipment listed, providing a unique selling point for their products. The lists are revised annually by adding new products and removing products that have become successful and thus "customary."

With the Energy Investment Allowance (*Energie-Investeringsaftrek*; EIA) and the Environment Investment Allowance (*Milieu-Investeringsaftrek*; MIA), companies can deduct a proportion of their investments in such assets when computing taxable profits. Under the "free depreciation of environment investments" regulations (*willekeurige afschrijving milieu-investeringen*; VAMIL), companies can freely depreciate their environmentally friendly equipment. Assets qualifying for VAMIL must be new to the Netherlands and must not include energy assets. See also under 3.2 Tax incentives.

Grant for sustainable energy (SDE, *Subsidieregeling Duurzame Energie)*

The SDE grant offers financial aid for electricity, heat or biogas that is produced sustainably, for example from solar energy, biomass, wind or geothermal energy. Projects ranging from relatively small scale solar panels to large scale windmills at sea may be eligible for funding. The amount of funding depends on various factors, including the exact technical nature and scale of the project and the energy produced.

Incentives for human resources

Subsidy scheme for Education in a Professional Environment *(Subsidieregeling Praktijkleren)*

Starting in 2014, this subsidy scheme provides financial support to any employer that employs students at different educational levels. The support is aimed at reducing the cost of the on-the-job coaching and supervision of such employees and amounts to a maximum of EUR 2,700 per student-employee. The employer must apply for a subsidy for each student and each training programme that meets the criteria. Eligible programmes are vocational education at all levels (from VMBO to HBO). With regard to vocational training at the HBO level, only technical or agricultural programmes are eligible. Employers are obliged to keep records of the type of programmes and the on-the-job training and support given to the student by the company. Companies that provide employment to PhD students may also apply for this subsidy.

European Social Fund

The European Social Fund supports employment and helps people enhance their education and skills in order to improve their job prospects. Eligible activities include providing education to the unemployed and providing employment to the disabled. Companies cannot apply directly to this programme; they need to approach the education fund for their sector or the municipality in which they operate (depending on their activities). The EU funds this programme via the national authorities of the EU Member States, which can set up their own programmes. National governments have some freedom in how the money is spent, so the Fund's implementation may differ among Member States.

In the Netherlands, support is provided for projects that aim to improve regional and/or inter-sectoral labour mobility, stimulate a healthy, safe and vigorous working environment and/or improve social innovation, sustainable entrepreneurship and employability. Applications may be submitted after a call for proposals has been published, usually once or twice a year.

Incentives for foreign investments

Dutch Good Growth Fund (DGGF)

Starting in 2014, the Dutch government has renewed its grants and incentives for foreign investments in developing countries. The DGGF is a new fund with different instruments and a total budget of EUR 150 million in 2016. One of the instruments provides loans to companies to enable them to invest in these countries.

Grant programme for doing business in developing countries

For Dutch companies wishing to expand their business to new and emerging markets, financial assistance (up to a maximum of EUR 200,000) can be obtained the Dutch government. This grant is available to companies that wish to export their products or services to new countries, but are experiencing substantial obstacles in doing so. The grant is aimed, for example, at helping companies to conduct a feasibility study of the new market before investing, or to demonstrate their products or services to potential customers in new foreign markets.

3.2 Tax incentives

The Netherlands has traditionally provided favourable tax conditions for international businesses seeking to expand or start up new activities. This is still the case today, despite international pressure on countries to refrain from harmful tax competition. In response, the Netherlands has introduced a number of tax reforms that now provide a modern, stable tax environment in line with international norms. An overview of the tax incentives currently in place is presented below.

3.2.1 Investment deduction

Investments in certain types of assets can qualify for a special deduction in calculating taxable profits. This deduction is in addition to the normal depreciation claimed and is calculated as a percentage of the qualifying expenditure. The relief falls broadly into the following three categories:

Small-scale investment deduction

This deduction is available for investments in business assets of EUR 2,300 up to EUR 11,242 per calendar year. The deduction is 28 percent for investments of EUR 2,300 up to EUR 56,024. The maximum deduction is EUR 15,687 for investments of EUR 56,024 up to EUR 103,748 after which the deduction gradually decreases to nil until the invested amount reaches EUR 311,242.

Energy investment allowance (EIA)

This deduction is available for investments in qualifying new energy-saving assets. The total maximum investment qualifying for relief is EUR 120 million. The relief amounts to 58 percent of the investment if it exceeds EUR 2,500 per calendar year.

Environmental investment allowance (MIA)

This deduction is available for investments in qualifying new assets that contribute to the protection of the environment. The relief provided is 36 percent, 27 percent, or 13.5 percent, depending upon the type of asset and whether the investment exceeds EUR 2,500 per calendar year. This relief is not available to the extent that the energy investment allowance has been claimed for the same investment.

3.2.2 Other incentives

VAMIL

Investment in certain environmentally friendly assets can qualify for free depreciation. of up to 75 percent *(Vrije Afschrijving Milieu-investeringen;* "VAMIL")..

Research and Development (*Promotion*) Act (*WBSO)*

Employers engaged in certain R&D activities are entitled to a payroll tax reduction (WBSO). The reduction amounts to 32 percent (40 percent for start-ups) of the relevant payroll costs relating to R&D (R&D payroll costs, but also other R&D costs and R&D investment expenditures), up to a maximum of EUR 350,000, and 16 percent for any excess. For activities to qualify for the WBSO, a certificate (*S&O-verklaring*) must have been issued by the Netherlands Enterprise Agency (*Rijksdienst voor Ondernemend Nederland*). Applications for certificates must be filed before the R&D project commences.

Before 2016, only R&D payroll costs qualified for the WBSO payroll reduction. As from 2016, other costs and investment expenditure associated with R&D are eligible for the WBSO payroll tax reduction. There are two options for calculating the reduction that can be attributed to these other costs and expenditure: (1) fixed, or (2) real costs and expenditure.

The fixed reduction is based on a fixed amount of EUR 10 for the first 1,800 R&D hours, and EUR 4 per hour thereafter. No separate administration is needed of the other R&D-costs and expenditure. For the real costs and expenditure option all the costs and expenditure per R&D project may be eligible. A comprehensive administration per project is needed to subsequently clarify the costs and expenditure. The eligible costs and expenditure are added to the eligible R&D payroll costs (R&D hours x average R&D wage rate) to calculate the total amount of the WBSO payroll tax reduction.

Special regime for income from patents – the Innovation Box

To stimulate R&D activity in the Netherlands, a special elective regime known as the Innovation Box" (formerly the Patents Box) is available for income from self-produced qualifying intangible assets. Under this regime, qualifying income is taxed at an effective rate of 5 percent, which is achieved by way of an 80 percent reduction of the income derived from the qualifying assets.

Broadly speaking, intangible assets will qualify for the regime if they are patented or derived from R&D activities that benefit from the R&D incentive regime referred to as WBSO (see above). The Innovation Box may also apply to certain software, production methods, product development or improvement, for example. It does not apply to marketing intangibles such as trademarks and logos. Subject to certain conditions, assets that are partially derived from outsourced R&D may also qualify.

The Innovation Box regime covers all income attributable to qualifying assets, including capital gains. In the case of patents, the regime covers not only licensing income but also income derived from the sale of products or services based upon the innovations. The election is made per asset, but, once elected, all assets and related income are pooled.

As of 2013, it is also possible to fix the income attributable to qualifying assets at 25 percent of profits, up to an annual maximum of EUR 25,000, although this is subject to certain conditions. The Innovation Box also applies to profits derived from the use of an intangible asset from the year the patent is requested to the year in which the patent is granted. The election does not have to be made until the tax return is filed. Once made, an election cannot be revoked.

There is no cap to the income that can benefit from this regime, but it generally only covers income in excess of related development costs in the pool. Losses in respect of assets covered by the innovation box are also effectively deductible against corporate income at the regular tax rate. As a result of new European Union rules and policies, the Dutch rules for access to the Innovation Box and for the computation of the in scope profits are likely to be changed and the new rules will take effect no later than 1 January 2017. In all likelihood, taxpayers using the Innovation Box as at 30 June 2016 for certain assets will be allowed to benefit from the existing Innovation Box regime until 30 June 2021 at the latest with respect to those assets. The existing Innovation Box regime is likely to remain open to new entrants until 30 June 2016.

Tonnage tax regime

The Netherlands has a tonnage tax regime that can be applied by companies with qualifying maritime shipping income.

Reporting, audit and regulatory environment

4.1 Financial reporting

Legislation for financial reporting is set out in Part 9, Book 2 of the Netherlands Civil Code, which is based on the EU Accounting Directives. The Dutch Accounting Standards Board (*Raad voor de Jaarverslaggeving* – DASB) publishes Dutch Accounting Standards (DAS), which are largely in line with International Financial Reporting Standards (IFRS) The DAS can be considered as a further elaboration on and interpretation of the statutory provisions of Part 9, Book 2 of the Netherlands Civil Code. The DAS do not have the status of legislation, but are to be considered as financial reporting principles.

As of 1 November 2015, various aspects of the statutory requirements for annual financial reporting, as set out in Part 9, Book 2 of the Netherlands Civil Code and several related Decrees, have changed. This revision follows from the implementation into Dutch law of the new EU Accounting Directive (Directive 2013/34/EU), which has replaced the 4th and 7th Council Directives. The related changes have been incorporated into Part 9 via the Accounting Directive Implementation Act. Several related Decrees have also been adjusted. The revised statutory provisions are effective for financial years starting on or after 1 January 2016; earlier application is permitted. This chapter describes the statutory provisions that are applicable as of the 2016 financial year.
In accordance with Part 9, Book 2 of the Netherlands Civil Code, private limited liability companies (*besloten vennootschappen met beperkte aansprakelijkheid* – BV) and public limited liability companies (*naamloze vennootschappen* – NV) must generally prepare annual financial statements, an annual management report and Other information. The requirements extend to cooperative associations, partnerships where all partners who are fully liable to creditors for the debts have the legal status of capital companies under foreign law, and certain "commercial" foundations and associations. Special rules apply to insurance and banking companies.

Modification or exemptions from the requirements apply in some cases; see "Exemptions within the financial reporting rules" below.

IFRS

As of the financial year 2005, the EU IFRS Regulation has required listed companies to prepare their consolidated financial statements in accordance with the IFRS standards and interpretations as endorsed by the EU (EU IFRS).

In order to achieve greater transparency and comparability in financial statements in the EU, the Dutch legislation also allows EU IFRS to be used for the company financial statements of listed companies. Unlisted companies are allowed to draw up their consolidated and company financial statements in accordance with EU IFRS.

The legislation also provides companies with the option to apply Part 9, Book 2 of the Netherlands Civil Code in company financial statements, while applying the measurement principles that the company uses in its consolidated EU IFRS financial statements. With this option, companies can report the same equity and result in their company financial statements as in their consolidated financial statements (which is traditionally standard practice in the Netherlands).
The four possible combinations are summarised in the following table.

	Consolidated financial statements	Company financial statements
1[1]	Part 9, Book 2 (and DAS)	Part 9, Book 2 (and DAS)
2	EU IFRS	Part 9, Book 2 (and DAS)
3[2]	EU IFRS	Part 9, Book 2 (and DAS), including application of the measurement principles used in the consolidated financial statements
4	EU IFRS	EU IFRS

1 This combination is not allowed for listed companies.
2 This combination is only available for companies that prepare consolidated financial statements.

Even if a company chooses EU IFRS for its consolidated and company financial statements (combination 4), some requirements of Part 9 of Book 2 of the Netherlands Civil Code still need to be applied. These requirements concern items for which EU IFRS contains no or limited rules, such as the management report, legal reserves, directors' remuneration, auditors' fees, the audit of the financial statements, and Other information.

Financial report

Financial statements

In accordance with Part 9 of Book 2 of the Netherlands Civil Code, financial statements consist of:

- company financial statements, comprising:
  - the balance sheet
  - the profit and loss account (income statement)
  - notes to the financial statements

- consolidated financial statements, comprising:
  - the consolidated balance sheet
  - the consolidated profit and loss account (consolidated income statement)
  - notes to the consolidated financial statements.

Although not required by law, the DASB requires medium-sized and large entities to include a cash flow statement. Officially, the cash flow statement forms part of the notes to the financial statements; in practice, this statement is usually presented as a primary statement within the financial statements. This presentation is also recommended by the DASB.

In addition, although not required by law, the DASB requires large entities to include a statement of comprehensive income if they prepare consolidated financial statements. The DASB recommends presenting this statement as a primary statement within the consolidated financial statements, but alternative ways of presentation are allowed.

The financial reporting rules set requirements for the content, analysis, classification, presentation, recognition and measurement of items in the financial statements. Furthermore, the rules require that financial statements and disclosures in notes to the financial statements should be sufficient to enable a reasonable opinion to be formed about a company's financial position and results and, within limits, its liquidity and solvency. The company's equity, assets and liabilities must be reflected in the balance sheet and the result for the year in the profit and loss account (together with its notes) in a fair, clear and consistent manner.

The law and the DAS contain certain exemptions from the accounting rules for medium-sized, small and micro entities, discussed hereafter.

Management report

The annual management report must be consistent with the financial statements. At a minimum, the company must include information about:

- the company's business objectives, its core and its other activities, legal structure, internal organisation and staffing levels and important elements of pursued policy;
- financial information, including the company's financial position at the balance sheet date;
- developments and performance during the year and cash flows and financing requirements;
- the significant risks and uncertainties confronting the company and how these risks and uncertainties are being managed, including the level of risk appetite,
- measures implemented to manage risks and uncertainties and risks and uncertainties that have had a significant impact on the financial year;
- financial and non-financial performance indicators;
- environmental and personnel-related information;
- for "open" NVs, the policy for remunerating directors and supervisory board members and the manner in which this policy was implemented in the year under review;
- objectives and policy of risk management regarding the use of financial instruments;
- actual price risks, credit risks, liquidity risks, and cash flow risks;
- policy regarding the hedging of risks related to significant classes of transactions;
- R&D activities;
- information regarding the social aspects of operating the business;
- information concerning the application of specific codes of conduct;
- expectations about future business, such as intended investments, financing, number of staff, R&D and circumstances on which the development of turnover and profitability depend.

Small and micro entities are exempted from drawing up a management report (see below). For public interest entities, additional requirements apply regarding the information to be presented in the management report (on corporate governance).

Other information
This includes information on the provisions in the articles of association relating to the appropriation of profit and the auditor's report.

Public filing
The statutory management board of an NV or BV must prepare the financial statements within a period of five months after the balance sheet date. In exceptional circumstances, this period can be extended for an additional five months by resolution of the shareholders meeting. For other legal entities to which Part 9, Book 2 of the Netherlands Civil Code applies, these periods are six months and four months respectively. There is no legal obligation to inform the Chamber of Commerce or creditors about a decision for extension taken by the shareholders meeting.

The company must file a copy of its financial statements and the auditor's report with the Trade Register (*Handelsregister*) of the Netherlands Chamber of Commerce within two months after preparation or (if earlier) within eight days of their adoption by the general meeting of shareholders. The financial statements to be filed must be prepared in Dutch, French, German or English. The relevant law explicitly cites a 12-month deadline for filing (and not 12 months plus 8 days) after year-end close.

Exemptions within the financial reporting rules

Exemptions for medium-sized, small and micro entities

Criteria for medium-sized, small and micro entities
The law exempts medium-sized, small and micro entities, for example, from certain requirements relating to the preparation, the management report, the Other information, the auditor's report, and publication. Moreover, the DASB grants certain exemptions for medium-sized, small and micro entities from the full DAS. Small and micro groups do not have to draw up consolidated accounts (see below).

The criteria that determine the size category of companies – at least two of which must be met – for financial years starting on or after 1 January 2016 are, to be applied on a consolidated basis (where different, the criteria applicable for previous financial years are listed as well):

	Micro	Small (if not micro)	Medium-sized (if not micro or small)
Total consolidated value of assets (based on historical costs)	≤ EUR 350,000	≤ EUR 6.0 million (was: ≤ EUR 4.4 million)	≤ EUR 20.0 million (was: ≤ EUR 17.5 million)
Net turnover	≤ EUR 700,000	≤ EUR 12.0 million (was: ≤ EUR 8.8 million)	≤ EUR 40.0 million (was: ≤ EUR 35.0 million)
Average number of employees	< 10	< 50	< 250

Entities that do not fit into these categories are considered to be large entities.

Small and micro entities are allowed (but not required) to follow the fiscal rules in their Part 9, Book 2 financial statements, so that the preparation of one set of financial statements will be sufficient for both statutory and fiscal purposes. The option to apply fiscal rules relates to recognition and measurement principles only. Presentation and disclosure principles must still be in accordance with Part 9, Book 2 and the DAS.

Preparation and publication exemptions for medium-sized, small and micro entities

The following table outlines *preparation* requirements for each category:

	Micro	Small	Medium-sized
Balance sheet	Simplified form	Simplified form	Required
Profit and loss account	Simplified form	Simplified form	Simplified form
Notes to the financial statements	Not required	Simplified form	Simplified form
Management report	Not required	Not required	Simplified form
Other information	Not required	Not required	Required

The following table outlines *publication* requirements for each category:

	Micro	Small	Medium-sized
Balance sheet	Simplified form	Simplified form	Required
Profit and loss account	Not required	Not required	Simplified form
Notes to the financial statements	Not required	Simplified form	Simplified form
Management report	Not required	Not required	Simplified form
Other information	Not required	Not required	Simplified form

No exemptions in this respect apply to large companies.

Exemption for guaranteed group companies and exemptions to draw up consolidated accounts

Exemption for guaranteed group companies (Section 2:403 Netherlands Civil Code)

Guaranteed group companies do not have to prepare financial statements. These companies may confine themselves to drawing up a limited company balance sheet, which does not have to be publicly filed or comply with the provisions of Part 9, Book 2 of the Netherlands Civil Code, provided all of the following seven conditions are met:

a. the balance sheet of the guaranteed group company shows at least the aggregate of the fixed assets, the aggregate of the current assets and the amount of the shareholders' equity, the provisions and the liabilities and the income statement shows at least the result on ordinary activities and the balance of any other income and expenses, in all instances after taxation;
b. after the commencement of the financial year and before the adoption of the financial statements, the shareholders of the guaranteed group company have declared in writing their agreement to deviate from the provisions;
c. the financial information of the guaranteed group company has been consolidated by another legal person or partnership in consolidated financial statements to which, pursuant to the applicable law, the EU IFRS Regulation, the EU Accounting Directive or one of the two Directives of the Council of the EC on the financial statements and consolidated financial statements of banks and other financial institutions or of insurance companies apply;
d. the consolidated financial statements, if not prepared in the Dutch language or translated into Dutch, must have been prepared or translated into French, German or English;
e. the auditor's report and the annual report have been prepared or translated into the same language as the consolidated financial statements;
f. the legal person or partnership referred to in subparagraph c has declared in writing that it assumes joint and several liability for any obligations arising from the legal acts of the guaranteed group company; and
g. the declarations referred to in paragraphs b and f have been filed for deposit at the office of the Netherlands Trade Register and the documents or translations referred to in paragraphs d and e have been deposited within six months of the balance sheet date or within one month after a permitted later publication.

Cumulating the exemptions for guaranteed group companies (Section 2:403) and consolidation of sub-groups (Section 2:408) (see below) is not possible. Public-interest entities are not allowed to apply the exemption of Section 2:403.

Exemption for consolidation of sub-groups (Section 2:408 Netherlands Civil Code)

A legal entity that is considered to be the head of part of a group is exempt from preparing consolidated financial statements if the following conditions are met:

- The company has not been notified in writing of an objection to this within six months after the start of its financial year by at least one-tenth of its members or from the holders of at least one-tenth of the issued capital.
- The financial information about the company and its group companies is included in the consolidated financial statements of a larger entity.
- The above-mentioned consolidated financial statements and the management report have been prepared in accordance with the requirements of the EU Accounting Directive or, if these requirements need not be observed, in an equivalent manner. IFRS and EU IFRS are considered as "equivalent" to the EU Accounting Directive.
- The consolidated financial statements, the auditor's report and the management report, insofar as they have not been prepared in or translated into Dutch, have been prepared in or translated into French, German or English and are all in the same language. Within six months after each balance sheet date, or within one month after a permitted later filing date, the documents or translations referred to above have been lodged at the offices of the Netherlands Trade Register.
- The exemption is in most cases being used by, although formally not limited to, intermediate holding companies.

The company must disclose the application of the exemption for consolidation of sub-groups (art. 2:408) in its company financial statements.

If the exemption is used, associates, joint ventures and subsidiaries may be valued at historical cost (instead of net asset value) in the company financial statements of the intermediate holding company.

Cumulating the exemptions for guaranteed group companies (Section. 2:403) (see above) and consolidation of sub-groups (Section 2:408) is not possible.

Listed entities are not allowed to apply the exemption regarding Section 2:408.

Exemption for small and micro groups (Section 2:407 Netherlands Civil Code)

Exemption from the obligation to prepare consolidated financial statements is also available if, upon consolidation, the company qualifies as a "micro" or "small" entity providing it is not a public-interest entity by itself and it has no public-interest entities within its consolidation scope. In addition, the company must have received no objections to non-consolidation from the general meeting. To determine whether the group remains within the limit for a "small" or "micro" legal entity, its figures will have to be assessed on a consolidated basis (see above).

If small or micro entities decide to prepare consolidated financial statements voluntarily, the balance sheet and profit and loss account may be simplified. A small or micro entity cannot apply the exemption from consolidation if it has accepted joint and several liability under the guaranteed group companies regime (Section 2:403). Medium-sized companies are not exempt from consolidation. They are, however, exempt from some of the disclosure requirements, and so they may select specific formats for the profit and loss account.

4.2 Audit

Auditing requirements

An independent audit by either an approved (registered or certified) auditor *(registeraccountant (RA)* or *accountant-administratieconsulent (AA))* or an organisation of qualified accountants is required.

The auditor examines whether the financial statements provide such a view as enables a sound judgment to be formed on the assets and liabilities and results of the company and, insofar as the nature of financial statements permit, of its solvency and liquidity.

The auditor also ascertains whether:

- the financial statements satisfy the requirements set by and pursuant to the law
- the management report has been prepared in accordance with Part 9, Book 2 and is consistent with the financial statements
- the management report, in the light of auditor's knowledge and understanding of the company and its environment obtained in the course of the audit, contains material errors; and
- the Other information has been added.

The general meeting is empowered to give instructions for the audit of the financial statements. If no such instructions are given by that meeting, the supervisory board or, in its absence or if it fails to give such instructions, the management is empowered to do so.

The instructions may be withdrawn at any time by the general meeting and by the person who gave the instructions. Instructions given by the management may be withdrawn by the supervisory board. Withdrawal of the instructions may only be made for well-founded reasons, which must not include any difference of opinion on reporting methods or audit activities. The general meeting must hear the auditor, if requested by the latter, in respect of the withdrawal of their instructions or an intention to do so which has been communicated to the auditor. The management and the auditor must notify the Netherlands Authority for Financial Markets *(Stichting Autoriteit Financiële Markten)* without delay of the withdrawal of the instructions by the company or the intermediate termination thereof by the auditor stating their conclusive justification therefore.

The auditor reports on the audit to the supervisory board and the management and mentions any findings in respect of the reliability and continuity of the automated data processing.

The auditor presents the outcome of the audit in a report indicating whether the financial statements give a true and fair view. The auditor may issue separate reports for the company financial statements and for the consolidated financial statements. The auditor's report can be issued as:

- an unqualified report
- a report with a qualified opinion
- an adverse report
- a report with a disclaimer of opinion.

Financial statements may not be adopted if the constituent body empowered to do so (normally the general meeting) has been unable to take cognisance of the auditor's report, which should have been appended to the financial statements, unless a legitimate reason for the absence of the report is given in the Other information.

Small and micro groups (Section 2:396 Netherlands Civil Code)
Small and micro entities are exempt from the audit requirements.

Guaranteed group companies (Section 2:403 Netherlands Civil Code)
Guaranteed group companies are exempt from the audit requirements.

4.3 Tax reporting

4.3.1 General

The tax system in the Netherlands distinguishes between two different methods of levying taxes. Under the first method, tax is levied by assessment. A (yearly) detailed tax return provides the Dutch tax authorities with the information they need to impose a correct assessment. The tax inspector assesses the taxpayer's taxable income using the tax return as the main source of information. If no tax return is filed, the tax inspector may impose an ex officio assessment. Tax is due when an assessment is imposed and must be paid within certain time limits. The right to impose a tax assessment is time-barred three years after the moment the tax liability has arisen. The extension period granted for filing a tax return is added to this three-year period. The tax inspector may impose an additional assessment within five years after the moment the tax liability has arisen (which will be similarly extended with the extension period granted for filing the tax return). The authority to impose an additional assessment is limited to certain situations, in particular, where new facts and circumstances have been discovered, a recognisable mistake has been made in the regular assessment, or the taxpayer acted in bad faith. No new fact or circumstance is deemed to exist if the tax inspector knew or should have known the facts that give rise to the additional assessment. For income derived from or assets held abroad, this five-year period may be extended to 12 years. Corporate and personal income taxes and inheritance and gift taxes are examples of "assessment taxes". For inheritance and gift taxes, different periods for imposing additional assessments apply.

Under the second method, taxes are levied through tax returns by way of self-assessment. The taxpayer submits a tax return and tax payment at the same time. The tax is due periodically at the same time the filing of the returns is due. The tax return for these taxes is not very detailed and does not provide much information. The Dutch tax authorities has to launch an investigation in order to assess whether the correct amount of taxes has been paid. Payroll taxpayers and VAT taxpayers are obliged to correct mistakes in previous tax returns, up until five years after the year in which the mistake was made. Additional assessments may be imposed after an investigation or a correction made by the taxpayer. Corrections may also lead to tax refunds. Additional assessments can be imposed for five years after the tax year in question. Payroll taxes, VAT and withholding taxes are examples of such taxes.

4.3.2 Corporate income tax

Taxpayers will receive an invitation to file a corporate income tax return after the end of the company's tax year. Corporate income tax returns should be filed electronically before 1 June of the year following the end of the company's tax year, assuming this follows the calendar year. An extension may be granted upon request. Meijburg & Co has concluded a deferral arrangement with the Dutch tax authorities regarding the filing of clients' tax returns. This means that a general extension of eleven months will be granted for filing the tax return. Taxpayers who did not receive an invitation to file a corporate tax return are obliged required to request one from the tax authorities within six months after the end of the company's tax year , but only if corporate income tax is payable. Failure to make such a request is an offense, for which a default penalty with a maximum of EUR 5,278 will be imposed, but this is usually reduced to EUR 2,639.

A corporate income tax return should be filed by the extension deadline. The taxpayer may receive a reminder and will in any event receive a formal notice to file a tax return within ten days if the tax return has not been filed on time. If the corporate income tax return is filed too late, i.e. after the deadline on the formal notice to file has expired, default penalties will be imposed. The standard default penalty for the late filing of a corporate income tax return is EUR 2,639. A maximum penalty of EUR 5,278 may be imposed in exceptional circumstances, for instance if the company files its tax returns too late on a regular basis. A final assessment will be imposed after the return has been filed. This assessment is often preceded by one or more provisional assessments, which are usually imposed during the current tax year based on estimated taxable profits. Tax imposed under a provisional assessment may be paid in instalments spread over the remaining months of the year. Immediate payment entitles the company to a tax reduction. The final corporate income tax payment is due within six weeks of the date of the final assessment.

Interest is due when a final or a provisional assessment is imposed for an amount payable after a six-month period following the tax year has passed. As per 1 April 2014, the rate for interest on tax due is set at the statutory interest rate for commercial transactions and is at least 8%.
Interest on tax due can be avoided by filing the tax return before the first day of the fourth month of the year following the tax year or by paying the tax due by way of provisional assessments requested before the first day of the fifth month of the year following the tax year. Only where the tax assessment is imposed in line with the tax return or request for a provisional assessment will no interest be due.

If no return is filed, an ex officio assessment, based on estimated taxable income, may be imposed. In this case, the burden of proof shifts to the taxpayer. A default penalty up to a maximum of EUR 5,278 will also be imposed for not filing the tax return. This penalty is usually reduced to EUR 2,639. In exceptional circumstances the maximum penalty may be imposed. Separate penalties may be imposed for deliberately filing an incorrect return.

4.3.3 Personal income tax

As a main rule, personal income tax returns should be filed by 1 April of the year following the tax year in question. Upon request, an extension to 1 September is usually granted. Meijburg & Co has concluded a deferral arrangement with the Dutch tax authorities regarding the filing of clients' personal income tax returns. This means that a general extension of eleven months will be granted for filing the tax return.

The tax year for individuals is the calendar year. An invitation to file a tax return is usually issued automatically if the income tax liability (after deductions) exceeds EUR 45. Otherwise, a tax return should be requested from the Dutch tax authorities within six months after the end of the year, but only if income tax is due. A tax return can also be voluntarily filed if the taxpayer expects a refund.

A personal income tax return should be filed by the extension deadline. The taxpayer may receive a reminder and will in any event receive a formal notice to file the tax return within ten days if the tax return has not been filed before the expiration of the deadline. A maximum penalty of EUR 5,278 may be imposed for late filing, i.e. after the deadline on the formal notice to file has expired. This penalty is usually reduced to EUR 369. The maximum penalty of EUR 5,278 may be imposed in exceptional circumstances, for instance if the taxpayer repeatedly files the tax returns too late. Separate penalties may be imposed for deliberately filing an incorrect return.

Personal income tax is due once an assessment has been issued (in preliminary or final form) and is then payable within six weeks. Interest on tax due is payable when a final or a provisional assessment is imposed for a payable amount, after a six-month period following the tax year has passed. The interest on tax due is set at the rate for non-commercial transactions, subject to a minimum of 4%. Interest on the assessment can be avoided by filing the tax return before 1 April of the year following the tax year or by paying the tax due by way of provisional assessments requested before 1 May of the year following the tax year. Only if the tax assessment is imposed in line with the tax return or request for the provisional assessment will no interest be due. Before or during a tax year, a taxpayer may apply for a provisional refund of payroll tax, for example, if a refund is expected as a result of deductible interest on a loan for a principal residence. If a timely application is made before a tax year commences, a refund will normally be paid during the tax year in twelve monthly instalments. If an application is made during the tax year, the instalments will be spread over the remaining months of the tax year.

The Dutch tax authorities may issue a provisional assessment for the current tax year, based on the last filed tax return, if it is expected that income tax will be due or refunded for that year. Provisional assessments for current tax years are payable within six weeks or in monthly instalments over the remaining months of the relevant tax year.

4.3.4 Value-added tax

A taxpayer must compute VAT due or reclaimable and file VAT returns electronically at a specified interval – monthly, quarterly or annually – depending on the amount of VAT due. VAT due should be paid to the tax authorities when the return is filed, which is one month after the closing of the aforementioned interval. A supply of goods or services in the Netherlands where the supplier is located outside the Netherlands may, in certain circumstances, result in the customer instead of the supplier being liable for the tax (“reverse charge”). In such cases, business customers generally may deduct the VAT as normal input VAT. In certain circumstances, a non-resident business that incurs input VAT in the Netherlands may obtain a refund by way of a special procedure that applies where the tax would have been deductible had the business been resident in the Netherlands.

4.3.5 Payroll taxes and social security

In the Netherlands, the payroll tax is an advance levy of the personal income tax. The employer of the employee is regarded as the withholding agent. For certain labour relationships, the principal will also be regarded as a withholding agent. The withholding agent residing in the Netherlands has the obligation to withhold the payroll tax on the taxable income and to remit it to the Dutch tax authorities, together with the social security contributions. Under certain circumstances, employers residing outside the Netherland are obliged to withhold Dutch payroll tax. For social security purposes, the employer residing outside the Netherlands is always obliged to withhold social security contributions when the employee is insured in the Netherlands.

The employer must register with the Dutch tax authorities before filing any tax returns. The payroll tax return must be filed electronically on a four-week or monthly basis within a period of four weeks or one month after the closing of the period. For example, the payroll tax return for January must be filed before 1 March; the remittance of the payroll taxes to the authorities should also take place before 1 March.

4.4 Regulatory aspects

4.4.1 Competition

The Dutch Competition Act

The Dutch Competition Act (DCA; *Mededingingswet – Mw*) came into force in 1998 and was substantively revised on 1 October 2007. Basically, Dutch competition law is based on three pillars: antitrust prohibition, prohibition of the abuse of a dominant position, and merger control. The territorial scope of the DCA extends to restrictive practices and the abuse of a dominant position that have an effect on the Dutch market. Consequently, these rules may also apply to the practices of undertakings established outside the Netherlands.

The Netherlands Authority for Consumers and Markets (*Autoriteit Consument en Markt - ACM*, previously the Netherlands Competition Authority, *Nederlandse Mededingingsautoriteit – NMa*) is empowered to initiate proceedings, terminate infringements and take administrative measures. ACM officials may conduct a search of offices and houses, with police assistance if necessary.

The penalties for formal infringement of the DCA, such as not cooperating or supplying incorrect data, are set at a maximum of EUR 450,000 or 1 percent of the turnover, whichever is greater. The penalty for material offences, such as infringement of the antitrust prohibition or failure to notify a concentration, is set at a maximum of EUR 450,000 or 10 percent of the turnover, whichever is greater. The ACM may impose a fine on a natural person who has given the instruction for the infringement or who has exercised de facto leadership regarding the infringement, to a maximum of EUR 450,000. This penalty may be imposed on the management board members or other company managers and employees, for example.

Anti-trust prohibition

Section 6 of the DCA prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices that have as their objective or effect the prevention, restriction or distortion of competition within the Dutch market, or a part thereof. Prohibited agreements include those concerning price fixing, rebates/discount fixing, market sharing/division, bid rigging, and resale price maintenance. Agreements that fall within the scope of this antitrust prohibition are legally null and void (unless their effect is not appreciable), with a few exceptions. Certain agreements can benefit from block exemptions granted by the European Commission (EC) and/or the ACM if strict conditions are met.

Abuse of dominant position

Pursuant to Section 24 of the DCA, abuse of a dominant position is prohibited. A dominant position is defined as a position of one or more undertakings that enables a party to prevent effective competition in the Dutch market or a part thereof, by giving them the power to behave, to an appreciable extent, independently from their competitors, suppliers, customers or end-users. Legal acts, either unilateral or multilateral, causing an abuse of dominant position, are null and void according to Section 3:40 of the Netherlands Civil

Code. Such abuse may, in particular, arise when:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions
- limiting production, markets or technical development to the prejudice of consumers
- applying different conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage
- making the conclusion of contracts subject to the acceptance by other parties of supplementary obligations that, by their nature or according to the commercial usage, have no connection with the subject of the contracts.

In practice, examples of abuse may include predatory pricing, excessive pricing, tying/bundling, refusing supply or access, and other discriminatory or exclusive behaviour.

Merger control

Section 34 of the DCA prohibits the implementation of a concentration (without ACM authorisation) that does not meet the turnover thresholds of the EC but does meet the turnover thresholds set out in the DCA. In order to assess whether the ACM must be notified about a transaction, two questions have to be answered:

- Does the transaction between the parties qualify as a concentration?
- If so (as the EC thresholds are not met), does the concentration meet the turnover thresholds of the DCA?

A concentration is considered to exist where a change of control on a lasting basis results from:

- the merger of two or more previously mutually independent undertakings
- the acquisition of direct or indirect control by:
- one or more natural persons who are legal entities that already control at least one undertaking, or
- one or more undertakings of all or parts of one or more other undertakings through the acquisition of a participating interest in the capital or assets, pursuant to an agreement, or by any other means
- the creation of qualifying joint ventures.

Only a definitive change of control qualifies as a concentration. Control could be constituted by rights, contracts or any other means, either separately or in combination, and taking account of the considerations of fact or law involved.

Pursuant to Section 29 of the DCA, currently the following turnover thresholds have to be met:

- the combined worldwide turnover of the undertakings concerned must exceed EUR 113,450,000, and
- at least two of the undertakings concerned must have realised a turnover of at least EUR 30 million in the Netherlands.

In its review of a notified concentration, the ACM verifies whether a concentration would significantly impede effective competition in the market or in a substantial part of it, particularly due to the creation or strengthening of a dominant position.

The ACM has four weeks to conduct its initial review of a transaction (first phase), within which period it is required to announce whether a licence is needed for the transaction to be permitted. The concentration may not be completed within this four-week period. The four-week period may be paused until any requested information is received by the ACM. If the ACM fails to issue a decision within four weeks, no licence is required and the concentration may be implemented and completed.

If a licence is required for a transaction to be permitted, the companies concerned are required to officially apply for a licence and a new timeframe of 13 weeks commences (second phase), within which the ACM must issue a decision as to whether the concentration will be granted a licence. This period may be paused until any requested information is received by the ACM and the concentration may not be completed within the licence phase. If the ACM fails to issue a licence decision within 13 weeks, the concentration may be implemented and completed.

Currently, the notification (first phase) fee is EUR 15,000 and the licence application (second phase) fee is EUR 30,000.

Where the parties to a transaction that qualifies as a concentration fail to notify the transaction to the ACM or if the transaction is closed pending authorisation, then they are in infringement of Section 34 of the DCA. If the ACM discovers this failure, whether by itself or as a result of a complaint, the ACM is entitled to impose a fine of up to EUR 450,000 or 10 percent of the turnover, whichever is greater, together with incremental penalty payments until notification. In practice this means that the parties continue to be under an obligation to (retroactively) notify the transaction to the ACM. If the ACM does not clear the transaction, a failure to notify could lead to a void transaction, which could mean that the concentration and all consequences following from it (including subsequent acquisitions by the merged entity) will need to be reversed. If the ACM identifies a competition problem, it can also impose remedies on the parties, including the forced disposal of the target business. Fines may also be imposed for supplying incorrect or incomplete information.

4.4.2 Financial

Dutch Financial Regulatory and Securities Law

Banks and other financial institutions operating in the Netherlands are subject to various EU regulations. The main Dutch financial regulations are contained in the Dutch Financial Supervision Act (FSA; *Wet op het financieel toezicht – Wft*). The FSA does not contain the Dutch legislation on the supervision of trust offices (*Wet toezicht trust kantoren*) and audit firms (*Wet toezicht accountants organisaties*). Due to the enormous expansion of EU financial law, local financial regulators are becoming less involved and supranational regulators, such as the European Central Bank and the European Securities and Markets Authority, are becoming more involved in the supervision of EU financial markets.

As a result of new European legislation, such as the Credit Requirements Directive, the Credit Requirements Regulation, the Payment Services Directive II and the Markets in Financial Instruments Directive (MiFID II), further amendments to Dutch financial law and regulations will take effect in the near future.

General aspects of the Financial Supervision Act

The FSA is the result of the restructuring of the regulatory regime for Dutch financial markets. In the past, the markets were regulated by means of sector-specific legislation. The FSA was intended to make the regulation of financial markets more purposeful and market-oriented. The influence of the EU is apparent in the FSA.

Supervision is divided into prudential supervision and market conduct supervision. Prudential supervision focuses on the financial aspects of the parties active in the financial markets. Market conduct supervision is focused on an orderly and transparent financial market, the relationship between parties in the financial markets, and the treatment of customers. Prudential supervision under the FSA is conducted by the Dutch Central Bank (*De Nederlandsche Bank-DCB*), while the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten – AFM*) supervises market conduct.

The FSA regulates the supervision of banks, investment schemes, financial advisors, insurance companies, management companies, investment firms, intermediaries, custodians, clearing institutions, electronic money institutions, financial services providers, security issuers, foreign and domestic portfolio managers intending to start a business in the Netherlands, and others. The FSA also deals with the offering of securities and prospectus approval, disclosure of major shareholdings, market abuse and public offers.

Banking

Under the FSA, a bank is defined as any company that obtains "repayable funds" outside a closed circle (*besloten kring*) of (legal) persons, not being a professional market party, and provides loans in the conduct of its business for its own account.

A company that intends to act as a bank in the Netherlands must obtain a licence under the FSA, provided no exemptions are applicable or specific dispensation has been granted to the bank by the DCB. Licensed institutions, such as investment funds and banks, qualify as professional market parties under the FSA. Any banking activities conducted by a bank with such parties are outside the scope of the FSA.

The same applies to all offers by a bank within a closed circle. A closed circle implies that all the parties involved are aware of the financial situation of the party acting as a bank, and a closed circle formally exists between persons or companies belonging to a group. The group is objectively limited. The criteria for access are determined in advance, to ensure that access is not easy. Finally, a legal relationship between the bank and the parties providing the funds exists when attracting the funds.

In the Netherlands, it is forbidden to operate as a bank or to use the designation 'bank' without a licence issued by the DCB. Banks with a licence issued by a regulatory authority of an EU Member State, that intending to act as such in the Netherlands through a branch office, are exempted from the obligation to apply for a DCB licence. Such banks may rely on the licence of their home state pursuant to a so-called European passport. The DCB must be notified in advance.

Primary and secondary offerings of securities: prospectus requirements

In the Netherlands, no securities may be offered to the public or be admitted for trading on a regulated market situated or operating in the Netherlands, unless an AFM-approved prospectus has been made publicly available.

Investment institutions and securities issuers ("Issuing Companies") existing under the laws of an EU Member State may offer their securities within the EU if a prospectus, approved by their home state regulator, is made publicly available.

On 11 December 2010, an EU Directive to amend the Prospectus Directive was published in the Official Journal of the EU. Among other things, the amendments modify requirements related to:

- thresholds, exemptions and exceptions
- requirements for summaries of prospectuses
- disclosures
- the EU passporting of prospectuses

In the Netherlands, the amended Prospectus Directive was implemented through amendment of the FSA, among other regulations.

The AFM is the authority responsible for supervising Issuing Companies based in the Netherlands. Even if securities issued by them are not to be offered in the Netherlands, the AFM must approve the related prospectuses.

The FSA provides several grounds for exemption from the Prospectus Directive. These exemptions may apply to prospectuses regarding:

- offerings of securities with a consideration below EUR 2.5 million on an annual basis (EUR 5 million in some other EU member states)
- offerings to qualified investors only

- offerings to fewer than 150 persons who are not qualified investors
- offerings that concern securities with a minimum consideration per investor or a minimum denomination per security of EUR 100,000.

Even though no prospectus is required, the Issuing Company may be obliged to produce a general information memorandum that includes information on the assets, financial position and the (financial) forecast of the company, as well as information in relation to the rights attached to the shares. In addition, where an Issuing Company relies on certain exemption, all offering documents need to include a so-called "health warning" to alert potential investors that no supervision applies.

Issuing Companies and related service providers (mostly investment firms, securities intermediaries and portfolio managers) are required to have a licence to offer or render such services in or from the Netherlands. To obtain a licence, such parties must pass certain financial, administrative, organisational, reliability and solidity tests. The requirements that Issuing Companies and related service providers have to fulfil are elaborate, and the AFM closely monitors these institutions for compliance.

It is sufficient for companies based in the EU having a licence to offer their services in another Member State to notify the AFM. Services may be offered in the Netherlands through a branch or on a cross-border basis, although several additional Dutch rules will apply.

Listing and delisting

If a company has a capital need, an IPO on the Amsterdam Stock Exchange may be considered. The Amsterdam Stock Exchange is part of NYSE Euronext, which was created by the merger of the former stock exchanges in Amsterdam, Brussels, Lisbon and Paris, and later New York. Euronext divides the market into three segments: small caps (market capitalisation of less than EUR 150 million), mid caps (between EUR 150 million and EUR 1 billion) and large caps (more than EUR 1 billion).

Euronext Amsterdam operates two regulated markets, Euronext Amsterdam Cash Market and Euronext Amsterdam Derivative Market.

There are a number of good reasons for listing on Euronext Amsterdam. It is a well-regulated and highly regarded stock exchange in one of the world's leading financial centres. It is a well-developed international market that provides issuers with access to local and overseas funds, and it operates within a stable tax climate, enabling long-term tax planning.

Securities exchanges, such as Euronext Amsterdam, must have a licence to operate as such in the Netherlands. These licences are granted by the Ministry of Finance, and the market is regulated by the FSA.

Euronext Amsterdam accepts listings of shares, depositary receipts and debt instruments for companies and most other financial instruments, including funds, exchange-traded funds (ETFs), warrants and certificates.

The key steps for a company wanting to obtain a listing on Euronext Amsterdam generally are as follows:

- admission request
- appointment of a listing agent, who acts as a sponsor for the issuer and who is authorised by Euronext Amsterdam to perform certain tasks
- entry into a listing agreement by and between Euronext Amsterdam and the issuer, co-signed by the listing agent
- production of financial statements, generally in accordance with IFRS as adopted by EU or with the accounting standards of the issuer's country
- listing application and regulatory approvals of documents in line with the EU Prospectus Directive requirements (through the listing agent); approval must be obtained from Euronext Amsterdam and the AFM

Generally, the main listing requirements for shares are:

- a minimum of 25 percent of the shares must be distributed to the public
- a three-year record is required
- the issuer must have published or filed audited annual financial statements or pro forma accounts, consolidated where applicable, for the preceding three financial years

Among other things, companies listed on Euronext Amsterdam have to fulfil the obligation to prepare and publish an audited annual report and financial statements, a half-year report (which may be unaudited) and, in certain cases, quarterly turnover figures, all within set time periods. The company must also disclose all price- sensitive information relating to the company and its operations or its financial instruments to the market as promptly as possible and within a specific framework.

Market abuse

The EU's Market Abuse Directive has been fully implemented in the Netherlands as a part of the FSA. The AFM, together with the Public Prosecution Service (*Openbaar Ministerie*), is responsible for enforcing the Market Abuse Directive. Transactions in or from the Netherlands involving listed securities (either in the Netherlands or in a regulated market in another Member State) or similar instruments while having inside information about the issuing (listed) company are not allowed. Inside information is information about a company that has not been published and, if published, can be expected to significantly influence the price of the issued securities (or linked financial instruments), regardless of whether the price goes up or down. Issuers must maintain and regularly update insider lists. Manipulating any regulated market worldwide on which securities are traded that is also admitted to a regulated market in the Netherlands is forbidden.

Takeover bids: public offer

Dutch public takeover laws and regulations (FSA and Public Takeover Decree FSA) apply where a Dutch listed issuing company (or a foreign issuing company admitted to the Amsterdam Stock Exchange) is the target of a public takeover attempt. The AFM is the Dutch supervisor responsible for supervision of public takeovers. A public takeover may only be made after an offer document, approved by the AFM, has been made publicly available prior to the actual bid. Other requirements, such as certainty of funds and disclosure rules, must be met.

Various types of takeovers can be effected. Under certain circumstances, a mandatory bid must be made. Currently such a bid must be made where a shareholder of the issuing company acquires effective control (30 percent or more of the voting rights (individually or acting in concert)). In a competing bid, a second bidder will make a public offer after the announcement of a first bid. Sometimes the second offer is made by a party at the request of the target company itself. In addition to a friendly takeover (with cooperation and/or support of the target company (or its board)), a hostile takeover can take place.

In this case, the target company may put in place protection mechanisms (anti- takeover measures) in order to avoid a hostile takeover, such as the use of a preference share foundation.

In order to ensure that, after a successful takeover, the acquiring party has the opportunity to acquire all issued shares under specific conditions, the bidder has a squeeze-out right, which allows the bidder to squeeze out minority shareholders. Under specific conditions, minority shareholders are given a sell-out right, allowing them to demand the bidder to acquire their shares. The squeeze-out and sell-out rights can both be invoked in the event that the bidder successfully acquired at least 95 percent of the issued capital of the target company, provided that this 95 percent represents at least 95 percent of the voting rights of the target company (other requirements may also apply).

Disclosure of major shareholdings

The rules for the disclosure of voting rights, major holdings and capital interest in certain companies ("Disclosure Rules") are included in Section 5.3 of the FSA. The aim of the Disclosure Rules is to increase the transparency of major holdings and capital interests in Dutch issuing institutions. The supervision of the compliance with the Disclosure Rules is mainly delegated to the AFM.

The Disclosure Rules only relate to public limited liability companies (*naamloze vennootschappen – NV*) that are incorporated under the laws of the Netherlands having shares (or depositary receipts) listed at a regulated market in the Netherlands, another EU member State or an European Economic Area (EEA) State, and to legal entities that are incorporated under the laws of a non-EU Member State and whose shares (or depositary receipts) are listed on a regulated market in the Netherlands.

The Disclosure Rules require all parties that acquire or dispose of shares (or depositary receipts) to disclose this to the AFM, if their holding in the capital and/or voting rights reaches, exceeds or falls below a certain threshold. A change in the company's issued capital can also create an obligation to disclose. Current thresholds for this purpose are: 3%, 5%, 10%, 15%, 20%, 25%, 30%, 40%, 50%, 60%, 75% and 95%. The Disclosure Rules apply mutatis mutandis to the acquisition or the loss of short positions. Notifications under the Disclosure Rules will be made to the AFM.

The Issuing Company itself must inform the AFM without delay of the total of any change in its share capital of 1 percent or more. It must also periodically inform the AFM of the total of changes in its share capital on other grounds. It must notify the AFM without delay of any change in its voting rights not ensuing from a change in its share capital, and periodically inform the AFM of any further changes in its voting rights. Finally, the Issuing Company must immediately notify the AFM if a member of its management board or supervisory board resigns or is dismissed. Such members also have a separate obligation to inform the AFM upon disposal of shares and voting rights held in an Issuing Company or its subsidiaries.

Investment companies or funds

With the implementation of the AIFMD in July 2013, a distinction has been made in the FSA between alternative investment funds (AIFs) and undertakings for collective investment in transferable securities (UCITS).

AIFM

Since the introduction of the AIFMD, a licence requirement applies to managers of AIFs, for example, private equity, hedge, infrastructure, property, share and bond funds. The initial one-year grace period ended on 22 July 2014. After that date, managers of AIFs were prohibited from offering or managing units in AIFs without a licence from the AFM.

In order to be granted a licence, certain requirements must be met. These relate to:

- the competence of certain individuals (directors, supervisors, etc.)
- the trustworthiness of certain individuals active within the investment firm
- the adoption of a policy relating to the integrity of business conduct
- a minimum number of individuals for determining the day-to-day policy and the location of activities (in the Netherlands)
- control structure
- organisation of business
- adequate measures to protect the clients’ interests and prevent conflicts of interest
- minimum capital requirements
- solvency requirements
- the appointment of a depository (mandatory)
- rules regarding the trading process and the settlement of transactions under a multilateral trading facility (if applicable)

No licence requirement applies to AIFMs that:

- either directly or indirectly, through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage the portfolios of AIFs whose total assets under management, including any assets acquired through use of leverage, do not exceed a threshold of EUR 100 million; or
- either directly or indirectly, through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage the portfolios of AIFs whose total assets under management do not exceed a threshold of EUR 500 million if the portfolios of AIFs consist of AIFs that are unleveraged and have no redemption rights exercisable during a period of five years following the date of initial investment in each AIF;

provided, in each case, that (c) the units offered in the AIF managed by it:

- are offered to less than 150 persons;
- the units offered can be acquired for a minimum amount of EUR 100,000 per participant; or
- the nominal value of each unit amounts to EUR 100,000 or more.

The requirements mentioned under (c) do not apply if the units are offered to professional market parties only.

An investment firm that has been granted a licence by a financial regulator in another EU Member State may commence its business in or to the Netherlands after completing certain notification requirements.

UCITS

A similar licence requirement applies to the offering of units in or the management of UCITS, although no similar exemptions apply. However, UCITS management companies, incorporated and duly licensed as such in an EU Member State, may offer their participation rights in the Netherlands subject to notification to the AFM, either cross-border or through a Dutch branch. The AFM maintains a special register of these UCITS. Investment funds that are not EU-based UCITS, but that have their seat in a country where adequate supervision is exercised (currently, but subject to change: Guernsey, Ireland, Jersey, Luxembourg and the United States of America), and which intend to offer their participation rights in the Netherlands, are obliged to first inform the AFM and then provide the AFM in due course with a "certificate of supervised status" issued by the regulator of the "adequate supervision country". The AFM may reject such an application if either the contemplated offering or the related distribution scheme is not in accordance with the applicable Dutch provisions. The AFM maintains a register of these "adequately supervised" collective investment schemes.

Investment firms

With the entry into force of the FSA and the implementation of the MiFID, the "investment firm" was introduced in Dutch legislation. Pursuant to the FSA, it is prohibited to provide investment services (*verlenen van beleggingsdiensten*) or perform investment activities (*verrichten van een beleggingsactiviteit*) in the Netherlands without having a licence granted by the AFM (or by another EU financial regulator via the passport regime).

The FSA defines providing an investment services as:

- receiving and transmitting orders from clients in relation to financial instruments
- executing orders in relation to financial instruments for the account of those clients
- managing individual portfolios
- rendering advice on financial instruments
- underwriting or placing financial instruments at their initial offering with a placement guarantee
- placing financial instruments at their offering without a placement guarantee

The performance of investment activities is defined under the FSA as dealing for one's own account or operating a multilateral trading facility (*multilateral handelsfaciliteit*).

Under the FSA, investment services and investment activities are rendered by investment firms (*beleggingsondernemingen*). If it is not exempted or excepted, an investment firm should apply for a licence with the AFM. In order to be granted with a licence, certain requirements must be met. These relate to:

- the competence of certain individuals (directors, supervisors, etc.)

- the trustworthiness of certain individuals active within the investment firm
- the adoption of a policy relating to the integrity of business conduct
- a minimum number of individuals for determining the day-to-day policy and the location of activities (in the Netherlands)
- control structure
- organisation of business
- adequate measures to protect the clients' interests and prevent conflicts of interest
- minimum capital requirements
- solvency requirements
- rules regarding the trading process and the settlement of transactions under a multilateral trading facility (if applicable)

An investment firm that has been granted a licence by a financial regulator in another EU Member State may commence its business in or to the Netherlands after completing certain notification requirements.

A proposal for MiFID II has recently been circulated so amendments, such as the introduction of an organised trading facility, are expected to take effect in the near future.

Approval and supervision of decision-makers within supervised companies or entities

Under the FSA, the DCB is responsible for granting declarations of no objection *(verklaringen van geen bezwaar)* with regard to qualifying shareholdings in banks, management companies of UCITS, insurance companies and investment companies. Since the supervision of qualifying shareholding is primarily based on prudential factors, the AFM plays no role in the procedure regarding the grant of declarations of no objection.

The provisions regarding the supervision of qualifying shareholding in an electronic money institution will be set out separately. Only qualifying shareholdings of 20 percent or more will be under the supervision of the DCB, whereas, for the above entities, thresholds starting at 10 percent will apply. Under certain conditions, the Dutch Ministry of Finance is exclusively authorised to grant declarations of no objection regarding the qualifying shareholdings.

Suitability and trustworthiness of decision makers and co-decision makers

Decision makers, co-decision makers and members of the supervisory board of certain regulated institutions need to be verified in terms of suitability and trustworthiness. The verification is conducted by both DCB and AFM. New suitability requirements (*Wet introductie geschiktheid*) were implemented in a Policy Rule *(Beleidsregel geschiktheid*) that entered into force as of July 2012. This Policy clarifies the criteria based on which suitability of decision makers, co-decision makers and supervisory board members is determined. The Policy introduces various levels of verification that depend primarily on the applicable supervision.

Clearing institutions

One of the most important updates to the FSA was the introduction of the supervision of clearing institutions or clearing members. The function of a clearing member is mostly fulfilled by credit institutions and securities institutions, which generally combine their clearing member activities with other activities. Only a few institutions are exclusively active as a clearing member. In the past, clearing institutions were monitored by Euronext Amsterdam. Under the updated FSA, their supervision has been transferred to the DCB.

If the clearing member operates as a credit institution, there is no need to apply for further authorisation. If the clearing member operates as a securities institution that is provided with an AFM authorisation, the clearing member must also acquire a DCB authorisation (prudential supervision). A clearing member that does not operate as a credit institution or securities institution must obtain a DCB licence in accordance with the FSA.

Foreign clearing members are not allowed to operate as clearing members in the Netherlands without DCB authorisation. The FSA includes a mutual recognition procedure for clearing members that have their statutory seat in a country that is approved by the Dutch Ministry of Finance. Such a clearing member does not have to obtain a DCB licence.

OTC Derivatives legislation (EMIR)

Since the introduction of EMIR, the clearing and settlement of over the counter derivatives (OTC derivatives) must be cleared by a central counterparty (CCP). CCPs are subject to a licence requirement, for which ESMA acts as the supervising authority. Only clearing members (usually banks) have access to

CCPs. Users of OTC derivatives must be linked up with a clearing member in order to be able to clear their transactions.

The central clearing requirement does not apply to OTC derivatives that are traded within a group, provided that the parties involved are fully consolidated and have adequate risk control procedures in place. Another exemption applies to pension funds, which will not have to comply with the central clearing requirement until August 2015.

In addition to the central clearing requirement, EMIR has introduced reporting requirements which took effect in February 2014. As a result, financial and non-financial counterparties must ensure that details of any OTC derivatives contracts and exchange traded derivative contracts concluded, as well as any modifications or terminations thereof, must be reported to a trade repository. The responsibility to report applies to both counterparties, but parties can delegate this obligation to a third party or arrange for one of the counterparties to report on behalf of both parties.

The reporting requirement applies to derivative contracts outstanding on 15 August 2014 or entered into on or after that date. However, a 15-month or five-year grace period applies, depending on whether the derivative contract was still outstanding on 12 February 2014.

4.4.3 Corporate governance

Large NVs and BVs: special requirements

A company is considered to be a "large NV or BV" (*structuurvennootschap*), and thus subject to the "structure regime" (*structuurregime*), if all of the following conditions are met.

- The company's issued share capital, reserves and the retained earnings according to the balance sheet amount to at least EUR 16 million.
- The company, or any other company in which it has a controlling interest, has a legal obligation to install a works council.

The company, alone or together with a company (or companies) in which it has a controlling interest, normally has at least 100 employees in the Netherlands.

Unless an exemption applies, such a company is required to install a supervisory board (*Raad van Commissarissen*), which has specific powers that are not granted to supervisory boards of smaller BVs. These powers involve:

- appointment/dismissal of the management board
- approval of major amendments with respect to governance, including a proposal to amend the articles of association, a proposal to dissolve the company, the issuance of new shares, and a proposal to increase the issued share capital

In addition, such a supervisory board is governed by the following rules.

The supervisory board must prepare a profile indicating its size and composition, taking into account the nature of the company, its activities and the desired expertise and backgrounds of the supervisory board directors. The profile must be discussed at the General Meeting and with the works council before adoption or amendment.

The General Meeting will appoint the members of the supervisory board on the recommendation of the supervisory board. The General Meeting may reject a recommendation, subject to an absolute majority of the votes cast, which together represent at least one-third of the issued share capital. In such situations, the supervisory board may submit a new recommendation, whereas the General Meeting will not be authorised to do so. The General Meeting will then be asked to vote on the new recommendation.

The works council has the right to make “strong” recommendations for up to one-third of the total number of supervisory board directors. The supervisory board may only object to a recommendation if it expects the candidate to prove unsuitable and unable to fulfil the duties of a supervisory board director or if appointment of the proposed candidate would cause the supervisory board to be improperly constituted. The supervisory board will then consult the works council and, if no agreement can be reached, ask the Enterprise Section of the Amsterdam Court of Appeal (*Ondernemingskamer*) to rule on the objection. If the Enterprise Section accepts the objection, the works council will be asked to make a new recommendation. If the objection is rejected, the supervisory board will appoint the nominated candidate.

The General Meeting may enforce the collective dismissal of the supervisory board by passing a resolution of non-confidence in the board. This will require an absolute majority of the votes cast, which together represent at least one-third of the issued share capital. The management board and the works council must have a chance to advise on the proposed resolution and the reasons for it at least 30 days before the General Meeting. If the works council has the right to express a view on the proposed resolution, this view must be communicated to the supervisory board and the General Meeting by the management board. The works council may explain its view at this General Meeting. If the resolution is passed by the General Meeting, the supervisory board will be dismissed immediately. The management board must then request the Enterprise Section of the Amsterdam Court of Appeal to appoint one or more supervisory board directors for a temporary period. The Enterprise Section will determine the consequences of the appointment and the date by which a new board must be established.

Under certain conditions, companies subject to the structure regime can be fully or partially exempt from these requirements. A supervisory board of a company under a partially exempt structure regime has powers only in approving certain specified decisions/actions of the management board and in appointing the supervisory board.

Sarbanes-Oxley Act

The US Sarbanes-Oxley Act, which came into force in 2002, is the most substantial item in federal legislation concerning corporate governance for listed companies in the United States. A key element of the Act is the duty to have a board of directors of which a majority is independent. As far as the committees that deal with remuneration, selection and appointment are concerned, all members have to be independent. Dutch companies that have a listing in the United States must comply with the Act.

Code of Conduct

Following the introduction of the Sarbanes-Oxley Act, the Dutch Corporate Governance Code entered into force on 1 January 2004. The Code marks a step toward the restoration of public confidence in the integrity and transparency in the conduct of affairs within Dutch listed companies. Publicly listed companies may depart from the Code, but they must explain and account for this to their Dutch shareholders.

The Code clarifies the management board's responsibility to control risks connected with the company's objectives and its strategy for achieving them. The Code sets out the structure of the remuneration package for management board members and the procedures to be followed when granting the different remuneration components. The Code also sets out recommendations for increasing the transparency of current or proposed remuneration policies of the supervisory board.

Other provisions of the Code aim to strengthen and clarify the role of the supervisory board members in exercising supervision. The position of the General Meeting, which must be able to function as a correction mechanism where management and supervision fail, is also strengthened. Shareholders are encouraged to make greater use of their rights by utilising current technological developments and distance voting. The Code also addresses external financial reporting.

On 10 December 2008, the Corporate Governance Code Monitoring Committee presented an updated version of the Code. The main amendments are in the areas of risk management, executive pay, shareholder responsibility, diversity in the composition of the supervisory board and corporate social responsibility. A new principle requires shareholders to act in accordance with the standards of reasonableness and fairness in relation to the company, its bodies and other shareholders.

Dutch Personal Data Protection Act

The Dutch Personal Data Protection Act (*Wet bescherming persoonsgegevens* – Wbp), enacted in 2001, is based on the European Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data (95/46/EC). The Directive has been adopted across EU Member States by local legislation. All member states therefore have similar but not identical approaches to data protection. This approach is also in place in other countries in the EEA, including Norway.

Scope

The Wbp applies to the fully or partly automated processing of personal data and the non-automated processing of personal data entered into a file or intended to be entered therein. Since a file is defined as any structured set of personal data that is accessible according to specific criteria, the Wbp may, for example, also apply to manual dossiers (provided they meet the criteria of a "structured set" and "accessible according to specific criteria").

Definitions

The Wbp covers any kind of processing of personal data, which is defined as any information relating to an identified or identifiable natural person. Any data relating to this category of natural persons are considered as "personal data". "Processing" is broadly defined to include just about any action with respect to the personal data.

The legal entity that controls the processing of personal data (the "controller") is responsible for compliance with the law. The controller is defined as the natural person, legal person, administrative body or any other entity that, alone or in conjunction with others, determines the purposes of and means for data processing. Usually, an employer is qualified as the controller in respect of the processing of its employees' personal data; a vendor that processes personal data of its clients also qualifies. The person whose data are being processed is referred to as the "data subject".

A company may hire persons or organisations to carry out the data processing for the company, for purposes determined by the company. Parties that process personal data for the data controller are defined as "data processors". The processing of personal data by a data processor must be governed by an agreement or another legal act whereby an obligation is created between the processor and the data controller.

Purpose specification principle

Under the Wbp, personal data may only be collected for specific, explicitly defined and legitimate purposes. Whether or not the purposes of data processing qualify as "legitimate purposes" depends on the circumstances of the case.

Grounds for legitimate data processing

In addition to the requirement that personal data may only be processed for (in short) legitimate purposes, the data controller must base the data processing on one of *a limited number of possible grounds* for legitimate data processing specified in the Wbp. These grounds include:

- unambiguous consent of the data subject
- the processing is necessary in order to perform a contract to which the data subject is a party, or for actions to be carried out at the request of the data subject and that are necessary for the conclusion of a contract
- the processing is necessary to comply with a legal obligation to which the data controller is subject
- the processing is necessary to protect the vital interests of the data subject
- the processing is necessary for the performance of a public law duty by an administrative body or by the administrative body to which the data are provided
- the processing is necessary to serve the legitimate interests of the controller or the recipient of the information, except where those legitimate interests are overridden by fundamental rights and freedoms of the data subject, in particular, the right to protection of individual privacy.

Further processing

Further processing of personal data (i.e. processing for purposes other than those for which the data were collected) is only allowed if it is not incompatible with the purpose for which the data have been collected originally. The criteria that should be taken into account for the assessment of whether further processing is allowed include the relationship between the purpose of the intended data processing and the purpose for which the data have been collected; the nature of the data; the consequences of the intended processing for the data subject; the manner in which the data have been obtained; and the extent to which appropriate guarantees have been put in place with respect to the data subject.

Storage of personal data

All personal data collected may be stored only for as long as it is necessary for achieving the purpose for which the data were collected and subsequently processed. Companies should develop clear, written policies for retention (and deletion) of personal data per category of data and institute mechanisms to insure that the personal data will in fact be deleted in accordance with this policy.

Security

The data controller is obligated to implement appropriate technical and organisational measures to secure personal data against loss and against any form of unlawful processing. The level of security measures required should strike a balance between the state-of-the-art in providing security and the costs of these measures against the risks involved in a particular type of processing and the nature of the data to be processed.

Prohibition on processing of "sensitive data"

The Wbp prohibits the processing of "special personal data", which is usually referred to as sensitive data. Special personal data is defined as data concerning a person's religion or philosophy of life, race, political persuasions, health, trade union membership, criminal behaviour and unlawful or objectionable conduct connected with a ban imposed with regard to such conduct.

For each of these categories of special data, there is a specific regulation in the Wbp. The ban on processing a specific type of special personal data is lifted where the requirements in the specific regulation are met. For example, health data may be processed by an employer only if "this is necessary for: 1. the proper implementation of the provisions of law, pension regulations or collective agreements which create rights dependent on the state of health of the data subjects, or; 2. the reintegration of or support for workers or persons entitled to benefit in connection with sickness or work incapacity (Section 21 Wbp).

As a rule, health data may only be processed by persons subject to an obligation of confidentiality by virtue of office, profession or legal provision or under an agreement.

In addition to the specific regulations for each type of special data, there is a general regulation that lifts the ban on the processing of special personal data, for example, where the data have manifestly been made public by the data subject or in case of express consent of the data subject.

Rights of data subjects

Under the Wbp, the data subject has the right to be informed about its personal data that is being processed by the data controller. The data controller is under an obligation to actively inform the data subject, unless the data subject is already acquainted with the information. Where personal data are obtained from a data subject directly, the data subject must be informed beforehand of the identity of the data controller, the purposes for which the data are intended to be processed, and more detailed information "if such is necessary in order to guarantee with respect to the data subject that the processing is carried out in a proper and careful manner" (Section 33 Wbp). If the data are not obtained directly from the data subject, the data controller must inform the data subject of the information referred to above when the data is recorded or, where the data controller intends to supply the data to a third party, at the latest on the first occasion that the data are so supplied.

Apart from the right to be informed about the data processing, the data subject has the right to request a full and clear summary of the data that are being processed and request the correction, erasure or blockage of data that is incorrect or the processing of which is not in compliance with the Wbp. The data subject has the right to protest against processing of personal data entirely due to special personal circumstances if such processing by the company would be based on the ground that processing is necessary to serve the legitimate interests of the company or a third party to which the data are supplied.

Rules on transfer of data to "third countries"

Under the Wbp, there are special rules for a "transfer" of personal data to countries outside the EU.[1] If a company transfers personal data, for example, to the United States, the rules for data transfer will be fully applicable.
Transfer is understood as "bringing personal data to someone's notice".
For example, if a company maintains a human resources or client relationship management database and would have data available for all its establishments worldwide, or would locate the database outside the EU, this would also constitute "data transfer."

A controller may only transfer personal data to a country outside the EU if such country guarantees an adequate level of protection. For each specific transfer, the controller will have to assess the level of protection in the given case. For example, the United States is considered not to provide adequate protection. However, an exception is made for companies in the United States that have adhered to the safe harbour principles. "Safe harbourites" are considered

1 Since the Data Protection Directive also binds the countries of the EEA, transfers can also take place to these countries.

to guarantee an adequate level of protection. The EC has determined that Switzerland, Canada and Hungary do guarantee an adequate level of protection.

If there is no adequate level of protection in the country that "imports" the data, the controller will have to assess whether it is possible to make use of one of the (exhaustively enumerated) exceptions under the Wbp. These exemptions must be interpreted in a restrictive and strict way (which follows from the word "necessary", which appears in the wording of most of the exceptions).

Consideration of the notification requirement and exceptions

Under the Wbp, the data controller is obligated to provide notification of the fully or partly automated processing of personal data to the Dutch Data Protection Authority ("*College bescherming persoonsgegevens*" – CBP), before the processing starts, unless the exemption from the notification requirement applies (see 2.1.3 "Registration/application requirements"). Alternatively, the processing may be notified to an official data protection official that has been established by the data controller. Failure to comply with the notification requirement can be punished by a fine of up to EUR 4500 and is alternatively punishable as an "offense" (Sections 66 and 75 Wbp).

Business taxation

The Netherlands, like many countries, subjects business profits either to personal income tax (*inkomstenbelasting)* or corporate income tax (*vennootschaps-belasting*), depending on the legal form of the business entity involved. Although many rules are common to both taxes (e.g. in principle those regarding the computation of taxable profits), there are also important differences (e.g. regarding rates). Unless otherwise indicated, the rates and amounts used in this booklet are for 2015.

No local taxes are levied on business income in the Netherlands. Withholding tax generally is only levied on dividends and not on interest or royalties.
Generally, dividend withholding tax does not apply to profit distributions made by cooperative associations. Dutch companies can benefit from the EU Directives, in particular those regarding withholding taxes and mergers. There is no withholding tax on profit distributions by a Dutch branch of a foreign company to its foreign head office. While corporate shareholders are, in principle, subject to tax on dividend income, an important exemption applies, known as the participation exemption *(deelnemingsvrijstelling*), where certain conditions are met. Capital gains may also be exempted under the participation exemption.
The Netherlands has an extensive network of tax treaties for relieving double taxation and a modern system for obtaining advance rulings, in particular on transfer pricing questions. The Dutch tax administration is generally regarded as both competent and positive towards foreign investors.

There is no tax on capital contributions to companies or other taxes on corporate capital. In line with other EU countries, the Netherlands imposes a value-added tax as well as a number of other indirect taxes (such as excise taxes and taxes on real estate transactions).

A major corporate income tax reform in 2007 brought significant taxpayer benefits, including substantial reductions in corporate income tax and dividend withholding tax rates, special tax relief for income from patented intangible assets, and modifications to the participation exemption. In 2010, further modifications were made to the participation exemption, resulting in a more liberal participation exemption regime.

5.1 Corporate tax

5.1.1 General system and rates

Scope of tax

Dutch corporate income tax can be levied on companies as well as certain other types of entity. These include companies incorporated under Dutch law (*besloten vennootschappen* – BV and *naamloze vennootschappen – NV*), and other specified entities, such as "open limited partnerships" (*open commanditaire vennootschappen – open CV*), cooperative associations, and certain types of mutual fund. Foreign business entities, in particular companies, can also be subject to Dutch corporate income tax, as explained below.
An open limited partnership is, broadly speaking, a limited partnership whose partner interests are freely transferable. Ordinary partnerships are, in principle, not subject to corporate income tax; instead, tax is levied on the partners, according to whether they are companies or individuals.

The question as to whether and to what extent profits are subject to Dutch corporate income tax depends on where the entity resides. Resident companies are liable to tax on their worldwide profits. Non-resident companies are liable only in respect of specified types of Dutch source income, including profits from a business carried out in the Netherlands through a Dutch permanent establishment (branch) and income from real estate located in the Netherlands. The domestic right to tax income of residents and non-residents may be limited, or the tax mitigated, by applicable tax treaties or domestic double tax relief rules (including, for instance, an exemption for foreign branch profits), as described below.

Certain entities are specifically exempted from corporate income tax. These include qualifying pension funds and charitable institutions. Certain other entities are subject to corporate income tax only on their business profits. These include certain state-owned enterprises as well as certain types of association (*vereniging*). Special regimes can apply to investment funds (see 5.1.3 "Special regimes").

Residence

Generally, a company is considered to be resident in the Netherlands if it is incorporated under Dutch law (i.e. a BV or NV). Companies incorporated under foreign law are considered resident if their effective management is located in the Netherlands. Corporate residence based on effective management depends on individual facts and circumstances, and no single criterion can be applied. Factors considered relevant by the courts have included the residence of the directors, the location of shareholder meetings, and the location of the assets and bookkeeping. A company incorporated under Dutch law but having its effective management outside the Netherlands will still be treated as a resident company under Dutch law, subject to certain exceptions. However, the Netherlands may still be prevented from taxing such companies on their worldwide profits under an applicable tax treaty.

Rates

The headline rate of corporate income tax is 25 percent levied on taxable profits (including capital gains) in excess of EUR 200,000. The rate applicable to the first EUR 200,000 of taxable profits is 20 percent. A zero rate applies to qualifying (non-exempt) investment funds (*fiscale beleggingsinstellingen*).

5.1.2 General computation

Time periods and principles

Companies are liable to corporate income tax on their annual taxable profits after deductions and available loss relief. Profits are attributed to each taxable period (generally a period of 12 months that need not be a calendar year) according to the principle of "sound business practice" (*goed koopmans- gebruik*). Taxable profits are calculated by comparing the equity at year-end with the equity at the beginning of the year in the balance sheet for tax purposes.

The meaning of "sound business practice" has been interpreted by the courts and generally follows accepted accounting principles. An important element of sound business practice is the prudence principle. Under this principle, unrealised losses may be recognised while unrealised profits may be deferred.
However, if "hedge accounting" principles have to be applied for tax purposes, then they may take priority over the application of the prudence principle. Subject to this principle and any other specific tax rules, profit calculation is initially based on the financial statements. Basically the same rules for calculating taxable profits apply to residents and non-residents, although, for non-residents, the income statement is used as the starting point.

Profits are calculated in euros; a functional currency may be used, although this must be requested and approved and specific conditions apply.

Depreciation

Business assets with a limited useful life must be capitalised and depreciated over their expected useful life. For tangible and intangible assets, all systems of depreciation are permitted, provided that the system used is in accordance with the rules of sound business practice (i.e. broadly following accounting depreciation) and that it is consistently applied. The most common system is the straight-line or declining-balance system.

Few guidelines exist, for example, for depreciation periods; the general rule is that depreciation covers the useful life of the asset. Certain minimum depreciation periods are prescribed by law: business assets other than goodwill may not be depreciated at more than 20 percent of their cost per annum; for goodwill the maximum depreciation allowed is 10 percent. Although assets generally may not be depreciated to below their expected residual value, a floor applies to real estate, which is based on the value of the property as determined by the local municipality (the “WOZ value”). Investment properties may be depreciated to the WOZ value, while properties used for business purposes may be depreciated to half that value.

If the going concern value is below book value, a downward valuation adjustment may be made under certain conditions.

Generally, the development costs for intangible assets may be deducted from profits in the year the costs are incurred, as may the acquisition or development costs of assets with a “minimal” value (EUR 450 or less).

Investment in certain business assets can qualify for “free” depreciation. Assets eligible for this regime fall into two main categories:

- qualifying environmentally friendly assets (“VAMIL” investments) with free depreciation up to 75 percent
- other designated types of business assets (currently including certain sea vessels).

Inventory/work-in-progress

Inventory is normally valued at the lower of cost or market value. The Dutch Supreme Court has ruled that "cost" for these purposes includes directly related expenditure, such as raw materials and production wages, but does not include the stable part of the overhead expenses. When valuing inventory, the effects of inflation can be eliminated, to a certain extent, by use of the last in, first out (LIFO) method or a special method known as the base stock system. These methods are permitted only when the inventory consists of similar goods, and certain conditions must be met. Work-in-progress must be valued on the basis of that part of the consideration that can be apportioned to it, in a similar way to that applied under IFRS rules.

Expenses

The main rule is that all expenses incurred for the purposes of carrying on a business are deductible when calculating taxable profits.

Non-deductible expenses include:

- Dutch corporate income tax and, if a double taxation relief provision applies or the income is exempt from Dutch tax, foreign taxes on income or profits
- boats used for business entertainment, such as customer receptions
- certain fines and penalties imposed under Dutch or European law (including tax penalties and traffic fines).

Also non-deductible is 0.4 percent of the total wage bill, with a minimum amount of EUR 4,500. Alternatively, 26.5 percent of certain expenses are non-deductible:

- food and drink
- business entertainment
- conferences, staff excursions, and similar activities.

Corporate income tax deductions for equity-settled awards such as shares, stock options, warrants, restricted shares, and restricted share units generally are not applicable in the Netherlands. The costs associated with cash settled awards can be deducted at the moment of payment, provided the employee is not obliged to convert the cash payment into company shares. Stock appreciation rights are not deductible when granted to employees with an annual salary of EUR 556,000 or more.

The development costs for in-house developed intangible assets may be deducted in the year the development costs are incurred.
A number of other, primarily anti-avoidance, provisions specifically restrict the deduction of certain expenses, including interest.

Provisions/Reserves

Tax-deductible provisions may be set up to cover future contingencies and relate to the year in question. Examples include guarantees and costs associated with an environmental clean-up.

A tax-deductible provision for bad and doubtful debts may be taken into account in accordance with the principle of sound business practice. The law also provides for a number of specific tax-deductible reserves. These include a reserve designed to spread costs over the years to which the costs relate ("equalisation reserve"). A reserve may also be set up to cover the replacement of business assets ("reinvestment reserve"). This works by placing the gain on the sale of business assets, or compensation for loss or damage, in a reserve and deducting it from the acquisition cost of the new assets. The book value of the new assets cannot be less than that of the old assets. The reserve effectively defers tax on any gains and reduces the depreciable basis of the new assets. Replacement must, in principle, take place in the year of disposal or within the next three years and may even precede disposal in certain circumstances. If this condition is not met, the reserve is released and included in taxable income. Special conditions apply to non-depreciable assets and assets that are normally depreciated over a period of at least ten years.

5.1.3 Transfer pricing

Arm's length principle

The arm's length principle is explicitly incorporated into Dutch tax law (Section 8b, Corporate Income Tax Act). The Netherlands seeks to adhere to the OECD transfer pricing guidelines. The detailed working of the principle is set out in transfer pricing regulations that illustrate and, in some places, expand on the OECD transfer pricing guidelines. These rules provide that taxable profits from domestic or cross-border transactions between affiliated parties may be adjusted to conform to profits that would have been realised between independent parties. An adjustment of profits may lead to secondary adjustments, such as deemed dividend or capital contribution characterisation. Where a deemed dividend results, dividend withholding tax may apply.

Documentation requirements

The taxpayer is required to maintain and make available documentation that demonstrates how the transfer prices were set and whether the prices conform to the arm's length principle. The choice of method for setting transfer prices lies with the taxpayer as long as it can be justified that an appropriate method has been applied.

Assuming the taxpayer complies with the applicable documentation requirements, the burden of proof generally lies with the tax authorities to demonstrate that the prices charged are not at arm's length. If such documentation is not available, the burden of proof may reverse. While the choice of method is up to the taxpayer, it may be prudent for documentation purposes to carry out a benchmarking study or studies based on a functional analysis of the taxpayer and a comparison with independent third parties under similar circumstances. For APA procedures, such additional studies may be required.

On 15 September 2015 the Dutch government announced that a new section on additional transfer pricing documentation requirements would be added to the Dutch Corporate Income Tax Act. Essentially, this means that the Netherlands will incorporate the proposed guidance of BEPS Action 13 documentation requirements following the Master File and Local File concept for multinational enterprises that have a consolidated group turnover of EUR 50 million or more. The proposed changes are expected to be incorporated into the Dutch Corporate Income Tax Act as of 1 January 2016. Group members of a multinational enterprise that have an annual consolidated group turnover exceeding EUR 750 million will be legally obliged to provide a country-by-country report in addition to a master and a local file.

Specific rules for affiliated party payables and receivables

The arm's length principle and documentation requirements typically apply to group loans, and particularly to their terms and conditions. However, in the case of receivables from or payables to affiliated companies in the course of normal trading transactions and when a receivable or payable is outstanding for a normal period of thirty to ninety days and the balance of the current account changes on a regular basis, interest income or expense does not have to be reported. Interest deductibility may be limited in the case of certain loans between related parties where no interest is paid or where the interest is significantly less than an arm's length rate (see 5.1.8 "Other interest deduction rules").

Transfer pricing ruling system

The Netherlands has a centralised, efficient and transparent system for obtaining an Advance Tax Ruling ("ATR") and/or an Advance Pricing Agreement ("APA").

The former system of "standard" tax rulings has been replaced by a more flexible, tailor-made system, in line with international norms, which includes the use of benchmarking studies. Taxpayers that wish to have advance certainty regarding their transfer pricing may apply for an APA. APAs may be unilateral, bilateral or multilateral, and they are governed by detailed procedural regulations. Special rules apply for group financing and licensing arrangements (see 5.1.3 "Special regimes").

APA requests must be addressed to the competent tax inspector, who will submit the request to the Dutch tax authorities' APA/ATR team for a binding ruling. The APA/ATR team and the taxpayer must then agree on a case management plan, which sets out key elements of the procedure, including its expected duration. Before filing the request, a "pre-filing meeting" can take place with the APA/ATR team. This advance discussion allows the taxpayer and the APA/ATR team to agree on what information is required and what elements are relevant to the APA request.

For foreign investors with little or no presence in the Netherlands, there is a special process through which APAs may be arranged ("International Investors Desk"). This process is designed for substantial investments of EUR 4.5 million or more that will generate employment in the Netherlands.

5.1.4 Thin capitalisation

The thin capitalisation rules have been abolished for financial years commencing on or after 1 January 2013.

5.1.5 Loss treatment

A loss realised on a business asset will be deductible when calculating the taxable profit.

An important exception concerns losses realised on the disposal of shareholdings to which the participation exemption applies.

Unless otherwise restricted, losses incurred by a company in a particular tax year may be carried back against profits of the preceding year and carried forward for nine years. For the tax years 2009, 2010 and 2011, an optional extended carry-back period of three years was available. Specific conditions apply to the extended carryback regime including a restriction of the carryforward period to six years.

Specific restrictions apply to carry-overs of losses realised by holding and group finance companies.

Under the fiscal unity regime, losses may be set-off throughout the group, subject to certain conditions, in particular, regarding losses incurred before or after joining the fiscal unity.

Change in a company's ownership

Loss carry-overs may be restricted if there has been a change in the company's ownership of at least 30 percent. Losses incurred before such a significant change of control takes place may not, in principle, be set off against profits relating to the period after the change or against profits from following years. The same applies in respect of the set-off of losses incurred after the major change in the shareholders against profits relating to the period before the change.

Exceptions to this anti-abuse measure apply, for example, if the company is not involved in passive investment and has not ceased or significantly reduced its activities, or if a change in ownership only represents an expansion of an existing holding of one-third or more of the shares.

5.1.6 Controlled foreign companies

The Netherlands does not have specific rules on controlled foreign companies. However, shareholdings of 25% or more in entities that are held as an investment should be valued at their market value if:

- the entity does not satisfy a minimum tax test; and
- at least 90% of the entity's assets consist of low-taxed non-business related investments.

The minimum tax test is essentially the same as the test applied in relation to the participation exemption. It is considered to be met if the entity in which the interest is held is subject to a profits tax that leads to a "real" tax charge when judged by Dutch standards (generally, a minimum of 10% effective taxation). The expression "low-taxed non-business related investments" is interpreted essentially in the same way as in relation to the participation exemption. The revaluations (upward or downward) are not covered by the participation exemption and are therefore taxable or deductible, respectively. The participation credit that applies to income and gains from shareholdings that do not satisfy the participation exemption also applies to such revaluations.

5.1.7 Anti-avoidance rules

General anti-avoidance rule

There is a general anti-avoidance rule known as the fraus legis (abuse of law) principle. This principle has been developed in the case law. The *fraus legis* principle applies if two cumulative conditions are fulfilled. First, tax avoidance must be the decisive factor. Secondly, the transaction should conflict with the intention behind the tax law.

Specific anti-avoidance rules

Debt versus equity and hybrid loans

Generally, where a loan is recognised for civil law purposes, it will also be treated as a loan for tax purposes and the interest will be deductible accordingly, subject to the rules restricting interest deductions. The Dutch courts have developed the following three exceptions to this general rule, which apply where:

1. the loan is a sham
2. it is clear from the outset that the loan will not be repaid in full, or
3. the loan gives the holder an effective interest in the business of the borrower

In these cases the loan qualifies as equity for tax purposes.
Loans in the third category (also known as "participating loans") have been the subject of a number of court decisions from which it can be concluded that such a loan will exist where:

- the return on the loan is almost entirely contingent on profits

- the loan has no maturity (or a maturity in excess of 50 years) and is only repayable on liquidation, bankruptcy or suspension of payments under a creditors' arrangement, and
- the loan is subordinated to all ordinary creditors.

There are no exceptions to the general rule if the opposite applies, i.e. capital regarded as such from a civil law perspective, is also regarded as capital for tax purposes.

Non-business-motivated loans

A loan between affiliated parties can be either business motivated or non-business motivated. On non-business motivated loans, often no repayment schedule, security, etc. is agreed. Any loss suffered on such receivables cannot, in principle, be taken into account in the profit calculation for tax purposes. The business motivation of a loan, or the absence thereof, generally also affects the level of interest.

To determine whether a loan is non-business motivated, the Supreme Court applies the 'arm's length criterion', focusing, in particular, on the interest paid on the loan. The question that needs to be answered is what would have been the fixed interest rate that a non-affiliated party would have charged on the loan, given the other loan components (such as size, security, and the term of the loan) and circumstances (such as the loss-making position of the debtor).

If the interest rate agreed on by the parties is not at arm's length, but can be changed to a fixed interest rate that a non-affiliated party would have charged on a loan with similar conditions under similar circumstances, then the loan is business motivated. In that case, only the interest would have to be adjusted for tax purposes.

If no fixed interest rate can be determined under which an independent third party would have been prepared to grant a similar loan, the loan is non-business motivated. According to the Supreme Court, the interest rate on a non-business motivated loan should be determined at the interest rate that an affiliated company would have to pay for a third party loan granted under similar conditions and with the parent company acting as guarantor.

Tainted transaction loans

Interest – including costs and currency exchange results – on 'tainted' related party debt is non-deductible by virtue of Section 10a of the Corporate Income Tax Act 1969 (CITA). This rule aims to prevent abusive base eroding practices and is therefore also referred to as the 'anti-base erosion' rule. In 2012, the Dutch Supreme Court ruled that this Section also applies to "negative costs", such as positive currency exchange results. This means that currency gains on tainted related party debt will, in fact, be exempt from tax.

For the purposes of Section 10a CITA, tainted related party debt is present where the related party debt is incurred in relation to one of the following transactions:

- a dividend distribution or capital repayment to a related party by the taxpayer or a related party subject to corporate income tax in the Netherlands;
- a capital contribution to a related party by the taxpayer or a related party subject to (corporate) income tax in the Netherlands;
- an acquisition of shares in a company by the taxpayer or a related party subject to (corporate) income tax in the Netherlands if the acquired company is related to the taxpayer after the acquisition. In principle, this provision can affect share acquisitions within a group or from third parties;

Under these rules, the interest will generally not be disallowed if the taxpayer company can make a prima facie case that:

- both the loan and related transaction are primarily business-driven ("business consideration test"), or
- the interest is taxed in the creditor's hands at an effective rate (calculated according to Dutch standards) of 10 percent or more ("minimum tax test") (unless the tax authorities make a prima facie case that either the loan or the related transaction was not primarily driven by business considerations).

The minimum tax test is not met if losses are set-off or similar relief is carried forward from previous years. The same applies to current or anticipated losses and relief if the tax authorities make a prima facie case that the loan was obtained with a view to utilising such losses or relief. In certain back-to-back situations, the minimum tax test must be satisfied at the level of the indirect creditor, that is, the creditor's creditor.

The business consideration test mentioned above, as regards the loan element, is in principle met if the debt owed to the related party was in turn borrowed from an unrelated third party, provided the 'internal' and third party loan can be regarded as 'parallel loans'. This should be the case if the loans' terms and conditions, and particularly their repayment schedule, interest and maturity, are essentially identical.

Other interest deduction rules

A statutory limitation that is of particular importance applies to loans with no maturity date or a maturity date of more than 10 years that have been concluded between related parties and for which no interest is paid, or where the interest is significantly less than an arm's length rate. In such cases, the deemed or actual interest on the loan cannot be deducted, nor can the changes in the loan's value. In the absence of such a rule, a deductible arm's length interest payment would normally be deemed to have been paid.

Participation interest

The deduction limitation for participation interest aims to limit, for tax purposes, the deduction of excessive interest expenses and other financing expenses relating to the financing of participations (hereafter: excessive participation interest). The excessive participation interest is the interest deemed to be related to the participation debt. A participation debt is present to the extent that the acquisition price of the participations exceeds the equity for tax purposes. The amount of excess participation interest is equal to the interest and costs, multiplied by a fraction made up of the average participation debt, divided by the average loans at the beginning and end of the financial year. However, the first EUR 750,000 of excessive participation interest is always deductible.

To avoid impeding businesses in expanding their business activities, the acquisition price of a participation will not be taken into account when determining the amount of the participation debt in case of the expansion of the group's operating activities, if the expansion took place within a certain period ("the qualifying expansion").

This exception does not apply to certain situations that are considered inappropriate, such as:

- where the same interest is deducted twice
- in the case of certain hybrid financing structures that involve a double interest
- deduction without sufficient taxation (subject to one exception)
- where financing was entered into in order to access the interest deduction.

Transitional rules

The deduction limitation applies to financial years commencing on or after 1 January 2013. Transitional rules provide for an optional fixed amount for the purposes of the qualifying expansion exemption: the taxpayer may disregard 90 percent of the acquisition price without having to prove that operating activities have expanded, if the participation was acquired or expanded, or equity was contributed to the participation during a financial year commencing before or on 1 January 2006. The taxpayer must prove that the participations to which the 90-percent-rule has been applied do not involve inappropriate situations.

Set-off (active group financing)

The participation interest measure also contains a concession for active group financing activities. Under this concession, the test for determining whether there is a participation debt and non-deductible participation interest does not take into account loans or their related interest and costs to the extent the loans relate to receivables held by the taxpayer in respect of the active group financing activities.

Reorganisation and fiscal unity

Special rules apply to reorganisations and fiscal unities. These rules also aim to resolve the conflict that arises with the deduction limitation for acquisition holding companies.

Limitation of excessive interest deductions for acquisition holding companies

The deduction limitation for interest relating to acquisitions applies to acquisitions and expansions of an interest that are debt-financed and for which the acquirer and the target enter into a fiscal unity for corporate income tax purposes. This provision also covers interest on financing obtained from third parties. Transitional rules may apply if a fiscal unity between the acquirer and the target company was formed before 15 November 2011.

The Deputy Minister of Finance has issued an Implementation Decree, which aims to resolve the conflict between this deduction limitation and the deduction limitation for excessive participation interest.

Main features

Acquisition interest is deductible up to the amount of the acquirer's own profit before the deduction of the acquisition interest ("own profit"). When determining the "own profit", neither the profit of the target company joining the fiscal unity nor the profits exempted under the source exemption for permanent establishments will be taken into account. If the acquisition interest exceeds the own profit but the excess amount is less than EUR 1 million (franchise), then the interest will still be fully deductible.

If the acquisition interest exceeds the positive own profit and the excess amount is more than the EUR 1 million franchise, then an amount equal to the franchise increased by the positive own profit is deductible, with any excess being non-deductible. However, the acquisition interest is still fully deductible if there is no excess acquisition interest ("financing escape"). The excess acquisition interest is the interest due on the excessive part of the acquisition debt. This part equals the amount of the acquisition debt that exceeds a specific part of the acquisition price: 60 percent in the year in which the acquisition was included in the fiscal unity, 55 percent in the following year and so on, until a percentage of 25 is reached. In the case of an excessive part of the acquisition debt and thus excess acquisition interest, the non-deductible interest will be set at the lower of:

- acquisition interest less positive own profit minus EUR 1 million
- the amount of the excess of acquisition interest.

Carry-forward

Acquisition interest that is non-deductible in any year will be carried forward to the following year, where it will again be assessed to determine whether it falls under the interest deduction limitation. In respect of the interest carried forward, the EUR 1 million franchise and the financing escape are not taken into account again.

5.1.8 Double taxation

Qualifying participations

Tax relief for double taxation as regards qualifying foreign (and domestic) shareholdings is provided by means of a domestic exemption in the Corporate Income Tax Act. Under this exemption, dividends received from and capital gains on such shareholdings are exempt from tax. However, in the case of low-taxed passive participations a switch-over to a credit system might apply.

Other (permanent establishments, interest etc.)

Tax relief for double taxation as regards qualifying foreign permanent establishments and real estate is also provided by means of a domestic exemption in the Corporate Income Tax Act. Under this source exemption the allocable profits and losses will be excluded from the taxable profit.

Double tax relief for resident taxpayers may also be provided by way of a tax treaty or, in some circumstances, under the domestic rules of the 'unilateral decree'. Tax treaties usually follow the OECD standard model. Relief again generally takes the form of an exemption for foreign permanent establishment (branch) profits and real estate income or gains. However, in the case of low-taxed passive permanent establishments a switch-over to a credit system might apply either under tax treaties or the unilateral decree.

Treaties also provide for a credit for foreign withholding taxes on foreign passive income such as interest, royalties and dividends not covered by the participation exemption. The credit is generally limited to the lower of the actual foreign tax payable and the Dutch tax attributable to the income concerned ('ordinary credit') whereby the overall method rather than a country-by-country method is applied. The unilateral decree also provides for a credit for foreign withholding taxes. This credit is similar to that under treaties, except that it is limited to income derived from listed developing countries and, in the case of dividends, it cannot exceed 15%. Excess foreign tax credits may be carried forward without limit, provided the tax authorities have certified the amount. Although a credit for foreign withholding taxes under treaties or the unilateral decree is, in general, restricted to residents, certain non-residents (in particular those resident in the EU or a treaty country) have been granted this right by way of concession, where the income is attributable to a Dutch permanent establishment.

If there is no applicable tax treaty or EU tax directive, and the unilateral decree does not apply and the income is not exempt from Dutch taxation. Relief for foreign taxes may be available under domestic law by way of a deduction in computing taxable profits. However, in certain circumstances, the tax authorities may seek to deny double taxation relief under anti-dividend stripping rules. Broadly speaking, these rules apply where foreign dividends that would normally have been received by one party (e.g. a foreign company) are diverted to a third party (e.g. a Dutch company) as part of a series of transactions, while the economic benefit of the dividends accrues to the first party, which also retains an interest in the underlying shares. Similar rules apply in the context of crediting, refunding or reducing Dutch withholding tax on dividends.

Finally, full or partial reductions of foreign withholding taxes are often provided for in the tax treaties to which the Netherlands is a party and pursuant to the EU Parent-Subsidiary and Interest and Royalties Directives.

Source exemption

As of 1 January 2012, the former regime for dealing with results from permanent establishments has been amended. Under the former regime, the loss suffered by a foreign permanent establishment could be immediately set-off against the taxable profit, while profit generated by a permanent establishment resulted in an exemption for the corporate income tax payable on the worldwide profit. Foreign losses deducted in a preceding year reduced the foreign profits eligible for exemption in subsequent years.

The former regime has been replaced by a source exemption. The foreign permanent establishment's assets and debts will remain part of the taxpayer's balance sheet for tax purposes, but the profit or loss allocable to the permanent establishment will be eliminated from the taxable profit, as is the case, for example, when applying the participation exemption. The most important practical consequence of the new regime is that, unlike the former regime, losses suffered by foreign permanent establishments will no longer be deductible in the Netherlands. The same is true for interest paid on financing relating to a foreign permanent establishment. There is, however, an exception: if the foreign activities cease and these activities had, on balance, incurred a loss then this cessation loss can, in principle, be deducted. This measure is accompanied by various anti-abuse supporting measures, comparable to those applying to the liquidation loss rules for participations.

Recapture measures may apply where a taxpayer or an affiliated entity develops new activities within a specified period after the cessation of the activities in the country in question. Different provisions apply for passive permanent establishments. Transitional measures apply for unrelieved or recaptured foreign results as at 31 December 2011.

5.2 Withholding tax

5.2.1 Dividends

Dividend payments by Dutch companies generally are subject to a 15% withholding tax under domestic law. The tax is also applicable to other similar payments, such as certain share repurchases and liquidation distributions, as well as interest paid on hybrid loans.

Dividend withholding tax does not apply to transfers of profits earned by Dutch branches of foreign companies. Dividend withholding tax generally does not apply to a cooperative association either, unless one of its main objectives is to avoid Dutch dividend withholding tax or foreign tax. If this is the case, distributions by a cooperative to its members will be subject to dividend withholding tax where the member's cooperative membership rights do not form part of its business assets. If they do, distributions will only be subject to dividend withholding tax where the cooperative holds shares or similar rights in a Dutch-resident company and then only to the extent of pre-existing reserves in that company at the time the cooperative acquired the shares.

The shareholders of Dutch companies are taxed on the gross dividend (or similar payment). For Dutch shareholders, the dividend withholding tax is, in principle, creditable against the corporate income tax payable. Considering the tariff and profit calculation for corporate income tax purposes, this means they are effectively taxed on 25% of the net base (i.e. after deduction of certain costs relating to the dividend payments). For foreign shareholders, the dividend withholding tax is, in principle, a final levy, although the tax might be creditable in their state of residence by virtue of domestic law or a tax treaty. However, if the dividend withholding tax for a foreign shareholder is higher than the effective taxation for a Dutch shareholder in a similar position, there are EU law-based arguments for deducting certain costs relating to the dividend payments.

Exemptions and refunds

In certain cases, domestic law provides for an exemption from withholding tax or grants the right to a refund. An exemption is granted to corporate shareholders (including non-residents holding interests through a Dutch permanent establishment) if the participation exemption or participation credit is applicable or if the payment is made within a fiscal unity. Shareholders resident in an EU Member State (or qualifying Member State of the EEA), are also entitled to the exemption, subject to a number of conditions, in particular that the participation exemption or participation credit would be applicable if the foreign share- holder was resident in the Netherlands. As a result, the dividend withholding tax exemption is broader than the EU Parent-Subsidiary Directive, for example the 10% minimum shareholding required under the Directive is reduced under the domestic rules to a 5% minimum. An exemption is also provided for listed companies, subject to a number of conditions, regarding repurchase of their own shares. Furthermore, withholding tax may be partly or fully reduced under applicable tax treaties.
Dividend withholding tax withheld from shareholders that are exempt resident entities (such as pension funds) can be reclaimed. This treatment also applies to entities resident in another EU/EEA Member State that are exempt in their country of residence and would also be exempt if resident in the Netherlands. This right to a refund is extended to portfolio shareholders in other (non-EU/EEA) specified countries, provided the country has a treaty with the Netherlands that contains an information exchange provision. Shareholders that are not liable to Dutch tax on their dividend income, for example because of the participation exemption, may also claim a refund of Dutch withholding tax if the exemption was not applied.

The tax authorities may seek to deny the right to a reduction or exemption from Dutch dividend withholding tax in certain cases under anti-dividend stripping rules. For example, the rules might be applied on the sale of Dutch shares by a non-Dutch company (which has no right to a dividend withholding tax reduction) to a Dutch intermediary (which can claim dividend withholding tax relief), while the original shareholder retains the right to repurchase the shares after the dividend has been paid.

On-paid foreign dividends relief

In certain circumstances, the amount of withholding tax on outgoing dividends may be reduced through a credit for foreign dividend withholding tax imposed on incoming dividends that are redistributed within two years. The relief (generally 3% of dividends paid) is available for foreign withholding tax (which must be at least 5%) that is withheld on incoming dividends from a treaty country distributed on a 25% or higher shareholding that is covered by the participation exemption. Similar relief applies to qualifying Dutch resident investment funds (fiscale beleggingsinstellingen), subject to different conditions and limitations. This relief allows these funds to credit Dutch dividend withholding tax and foreign withholding tax on dividends and interest against Dutch dividend withholding tax on redistribution of the income. In July 2015, the Supreme Court ruled that, by virtue of EU law, this relief does not have to be granted to investment funds resident in other EU countries. However, at present there are still cases pending before the Supreme Court, in which taxpayers have put forward arguments that were not been discussed in the above case.

5.2.2 Interest, royalties and services

The Netherlands does not impose withholding tax on interest, royalties or services.

5.3 Value-added tax

5.3.1 General system and rates

General

Value-added tax (VAT) (Omzetbelasting – BTW) is levied on the net invoice price charged by a business for the supply of goods and services within the Netherlands. VAT is also levied on the intra-EU acquisition of goods and on goods imported into the Netherlands. The tax is designed to be borne by the ultimate consumer of the goods. The general principle is that the VAT paid by a business to its suppliers ("input VAT") can be offset against the VAT it charges to its customers ("output VAT"). The net amount of VAT either retained or paid out is then remitted to or recovered from the tax authorities.

Rates, collection, reporting and payment

The standard VAT rate is 21 percent. A reduced rate of 6 percent applies to a number of goods and services, most of which are basic necessities. A zero rate applies to exports and to intra-EC supplies.

For more information about reporting and payment, see 4.3.4 "Tax reporting - Value-added tax".

Exemptions

Certain supplies of goods and services are exempt from VAT, although they generally are subject to another indirect tax (see 5.4 "Other taxes"). The supply of real estate (e.g. sale or rental) is generally exempt; in limited circumstances, parties may opt to tax the supply. In addition, the supply of services of a social or cultural nature, medical services, educational services, insurance, financing and most banking services may also be exempt. The input VAT relating to exempt supplies is not recoverable (unless a financing/banking/insurance service is rendered to a non- EU client).

5.3.2 Taxpayer and registration

A "taxpayer" for Dutch VAT purposes is any person or entity conducting a business (or profession) in an independent capacity (*ondernemer*). This definition also covers permanent establishments of foreign companies.

Dutch taxpayers that are financially, economically and organisationally integrated with other Dutch taxpayers may be treated as a single taxable unit, that is, a fiscal unity. Note that this concept of fiscal unity differs from that described above in the context of corporate income tax.

5.3.3 Taxable transactions

Four types of transaction may be liable to VAT:

- supplies of goods and services in the Netherlands by a taxpayer in the course of its business
- intra-EU acquisitions of goods in the Netherlands by taxpayers in the course of their business or by public bodies that do not carry on a business
- intra-EU acquisitions of new means of transportation by any person in the Netherlands
- import of goods from outside the EU by any person.

The place where the physical transaction takes place does not necessarily determine whether a supply or acquisition is considered to be made in the Netherlands. In the case of goods, the determination generally depends on the place of shipment or, if none, the place where the goods are actually supplied. In the case of services, the place of supply to businesses generally is the place where the customer is established; for supplies to consumers, the place of supply is where the supplier is located. Other rules may apply, depending on the nature of the services and the VAT status of the customer.

5.4 Other taxes

5.4.1 Transfer taxes/stamp duties

Real estate transfer tax *(overdrachtsbelasting)* is levied on the acquisition of real estate located within the Netherlands as well as the acquisition of rights in or to such property (including economic ownership). The tax applies at a rate of 6 percent (2 percent on homes) of the property's fair market value (or, if higher, the sales price) and is payable by the transferee. A disposal of shares of an legal entity having 50 percent or more assets consisting of Dutch real estate, whereby the acquirer together with related parties obtains an interest of one-third or more in the entity, may also be taxable. The acquisition of an interest in a fund (not a legal entity) may be taxable. However the acquisition of an interest in a fund (not a legal entity) as referred to in Section 1:1 Financial Supervision Act (*Wet op het financieel toezicht – Wft*) may only be taxable if the acquirer, together with related parties, obtains an interest of one-third or more in the fund. Certain exemptions are available, particularly with respect to mergers and other reorganisations or transfers between related companies.

5.4.2 Real estate tax

Real estate taxes (*onroerendezaakbelastingen*) are levied by municipalities. Part of the tax is payable by the owner of the property and part by the user. The tax is based on the value of the property as established by the local municipality, known as the "WOZ" value. The rate varies according to the municipality in which the real estate is located.

5.4.3 Excise duties

Excise duties (*accijns*) are payable on tobacco products, alcoholic beverages (beer, wine, spirits), ethanol and mineral oil, including biodiesel, denatured ethanol and other fuels used for transportation or heating purposes. Excise duties are included in the retail price of the goods, and they are not generally creditable or refundable.

5.4.4 Tax on energy

Tax on energy is levied on natural gas and electricity. Energy tax is collected by the supplier, which pays it to the Dutch Tax and Customs Administration (*Belastingdienst)*.

5.4.5 Insurance tax

Insurance tax (*assurantiebelasting*) is charged on payments under insurance contracts covering risks located in the Netherlands. The law exempts certain types of insurance contracts, including life insurance, health insurance, transport insurance and export credit insurance. The insurance tax rate is 21 percent of the net premium.

5.4.6 Bank tax

The bank tax is a new national tax, entered into force on 1 October 2012. The bank tax applies to entities (including certain banking branches) authorised to operate as banks in the Netherlands. The tax will be levied on the balance sheet total, less relevant liabilities, reported in the separate or consolidated annual financial statements for financial reporting purposes. Relevant liabilities for these purposes include regulatory capital, deposits covered by deposit guarantee schemes, and insurance business related liabilities. A tax-free allowance ("efficiency exemption") of EUR 20 billion applies.

The tax applies at a split rate as follows:

- 0.044 percent on the portion of the taxable amount relating to short-term debt
- 0.022 percent on the portion of the taxable amount relating to long-term debt.

Short-term debt is defined as debts with a term of less than one year, while long-term debt has a term of more than one year. These tax rates are multiplied by a factor of 1.1 if the variable remuneration of at least one of the taxpayer's directors amounts to more than 25 percent of that director's fixed remuneration.

KPMG

Logistical services & customs

6.1 Introduction

The Netherlands is strategically located and perfectly positioned to serve the pan-European market and beyond. The country lies between major sea and airports on the one hand and key commercial and industrial centres in Europe on the other. Its long-standing tradition of international trade has led to an extensive logistics support framework, consisting of logistics service providers, specialised banking services, and terminal facilities. The country is home to an internationally-oriented business community and a flexible, productive and highly educated labour force. The Netherlands has a pro-business government that fosters a favourable operating environment through business-friendly policies on customs procedures and taxation. Other important factors in making the Netherlands so popular are its advanced infrastructure, with an excellent international airport, a dense network of motorways and railways, an inland waterway network, and an outstanding logistics industry.

6.1.1 Central location and easy access

Located between the main Western European markets of Germany, France and the United Kingdom, the Netherlands provides access to regional commercial and industrial centres, such as London, Paris, Brussels, Antwerp, Frankfurt, Hamburg and even Munich (by rail), as well as Germany's Ruhr Valley.
Despite the Netherlands' small population and surface area, a combination of factors has allowed the Netherlands to excel as a trading nation and secure its position as a central gateway to Europe for many goods. The value and volume of the Netherlands' international trade is similar to that of Germany, the UK and France.

6.1.2 The gateway to Europe

The Netherlands has three ports in close proximity to one another: two major seaports in Rotterdam and Amsterdam and one major international airport in Amsterdam.

The Port of Rotterdam is one of the Netherlands' greatest assets. It is the world's fifth largest port, handling more than 441 million metric tons of cargo in 2012. Each year, 34,000 ships from all over the world and 100,000 inland vessels arrive in Rotterdam. It is a logistics centre where multinational companies can serve their European markets from a central point in the northwest of the continent. Rotterdam is also Europe's leading container port, handling almost 12 million twenty-foot equivalent units (TEU) in 2012.

The Port of Amsterdam ranks fourth in Europe in terms of total trans-shipment tonnage. It is also the largest in the world for a number of industries, such as the cocoa industry, and the largest petroleum port in Europe. Together, Amsterdam's airport and seaport make for Europe's largest combination of its kind.

Amsterdam Airport Schiphol is Europe's third-largest air cargo hub, handling more than 1.5 million tons a year. It is connected by an extensive network of roads, railways and waterways to all locations within the Netherlands, as well as to all major European cities and transportation hubs. Its reputation as a top-ranking air cargo centre is derived from its excellent cargo links with more than 100 European routes and all major US and Eastern Asian destinations.[1]

6.1.3 Extensive infrastructure

In addition to serving as a major point of entry into the European market, the Netherlands offers fast and reliable connections to the rest of Europe. Its flat countryside and excellent river connections have been built into a dense, highly efficient and well-maintained infrastructure of roads, railways, inland waterways and pipelines. This infrastructure provides companies with good shipping opportunities, short transportation lead times, and competitive pricing from the seaports, airports, and distribution centres in the Netherlands to all the main destinations in Europe.

6.1.4 Top-quality logistics

The Dutch logistics industry has centuries of experience. The expertise of Dutch firms is of a very high quality, having been stimulated by both government and industry. The array of service providers is extensive, ranging from small operators to giant organisations offering all kinds of services. In addition to warehousing, pick-and-pack and transportation, major logistics enterprises provide many other services such as tax handling, re-labelling, invoicing and repair. The Netherlands is one of the best locations in Europe from which to penetrate markets throughout Europe, the Middle East, Africa and beyond.

For the foreseeable future, the country will continue to attract foreign investors eager to take advantage of all the attributes that make for efficient international

1 Source: fact sheets Schiphol

logistics – a central location, a well-developed infrastructure, top-quality logistics, a good business climate, and a supportive government. The fact that about 75 percent of all the European Distribution Centre operations of foreign investors in the Netherlands are outsourced to local logistics service providers is proof of the industry's high quality.

6.2 Customs planning in the Netherlands

For many years, a large number of companies engaged in international trade have regarded payment of import duties and the cost of compliance with customs law and regulations as expenses for which there was little or no possibility to plan. Even today, many companies see customs duties, anti-dumping duties, Common Agricultural Policy levies and excise duties as unavoidable logistics costs. Ever-increasing competition in the international marketplace and further EU expansion will result in more companies entering its markets and having to manage their customs obligations. This increased exposure highlights the significant cost that customs duties can represent when doing business in the EU.

As noted, the Netherlands is one of the major gateways to Europe, with the Port of Rotterdam and Amsterdam Airport Schiphol representing two of the most important distribution points for goods entering Europe. In 2011 alone, Dutch customs dealt with more than 15 million import and export declarations.[2]

The Dutch tax system has a number of business-friendly features that facilitate the establishment of European logistics centres in the Netherlands. When importing goods into the Netherlands that are bound for other European destinations, companies that store those goods can benefit from the deferral of payment of the related customs duties (and VAT). Such storage is possible for an unlimited period of time, whether in a bonded warehouse with a fixed location for storage or in a virtual bonded warehouse. The customs duties only need to be paid when the goods actually enter into free circulation within the EU. The concept of a virtual bonded warehouse separates the physical entry of products from their related financial transactions, thereby improving the ease of transportation throughout the continent. The option of postponing customs duties delivers a significant cash flow advantage.

2 Source: Administration report Dutch Revenue 2011

The Netherlands makes full use of all the possibilities provided by European customs legislation in order to maximise the free flow of goods. The country has introduced numerous simplifications to customs procedures. For example, the country has streamlined the validation of documents and replaced many of the complex rules and bureaucracy surrounding customs checks with administrative controls, which benefit import, export and transit trade. The Dutch customs authorities have a reputation for being cooperative, innovative, and exceptionally efficient in carrying out their responsibility to facilitate the free flow of goods. They have incorporated computerised clearance procedures and advanced inspection systems into almost all of their activities, eliminating costly delays and reducing lead times.

6.2.1 Customs warehousing

Introduction

Customs warehousing is one of the most useful of the Netherlands' various relief procedures. It allows goods subject to import duty to be stored in customs warehouses without duty or VAT being due until the goods are removed from the warehouse. A range of minor handling operations may be carried out on the goods while they are in the warehouse. When the goods are moved, they must be entered for import, and duty and VAT become due. Alternatively, the goods may be entered for export, removed to another warehouse under the EU suspension arrangement for transport (NCTS), or transferred to another customs regime such as inward processing relief (IPR), described below. The warehouse regime in the Netherlands is very flexible because procedures have been brought into line with international trade requirements.

There are two types of customs warehouse. The "old-fashioned" simple warehouse, known as a public warehouse, is run by a proprietor who lets space to users. The more common type, known as a private warehouse, is essentially an importer's own private, bonded premises. Running a private warehouse or paying rent to a proprietor represent additional costs, but when they are offset against the delayed payment of customs duties and VAT normally due on importation, considerable cash flow advantages can be achieved. Double duty payment for goods imported for free circulation in the EU but re-exported to a country outside the EU is avoided, and duties only become due in the country of destination. The payment of a considerable amount of duties may be deferred, generating interest and cash flow benefits.

It is also possible to outsource the entire operation to specialised service providers in the Netherlands.

Applicable EU law

Within the EU, the types of bonded warehouses vary from those that are physically controlled by customs to virtual warehouses, which are almost completely administratively controlled by them. The choice between the various warehouses depends on the desired flexibility, the frequency of movements of goods in and out of the bonded warehouse, the available buildings and administrative systems, and the degree of automation of the administrative processes, customs procedures and declarations. It is not necessary to own a storage location for a bonded warehouse; it is possible to use the bonded warehouse of a service provider.

It is even possible to realise cross-border customs warehouses under a single European authorisation. If a company has several warehousing facilities in more than one EU country, they can be linked together into a single bonded warehouse system under one licence. This offers the advantage that all the customs declarations can be filed in the location of the centralised administration. Arrangements regarding items such as customs valuations and classification of goods can be made with the customs authority governing that location. Transporting goods from one bonded warehouse to another under the same licence can be done without customs documents.

Advantages of customs bonded warehousing in the Netherlands

Due to the Netherlands' economic role as "the Mainport of Europe", as it is often called, the Dutch customs authorities have gained extensive experience with logistics processes over many years. Many flexible distribution schemes have been established, especially for European Distribution Centres. Many bonded warehouse facilities in the Netherlands are able to operate 24 hours a day, 365 days of the year. Customs control is mostly administrative. Declarations for import for free circulation or for other customs arrangements are submitted electronically and physical checks are minimised. The logistics process can be managed continuously, also in cases where a distribution facility has been designated as a customs bonded warehouse.

In a bonded warehouse, simple activities may be carried out, such as labelling, re-packaging, replacing components to make an article "country-specific", and simple assembly, such as building a radio into a car. More substantial activities in relation to goods not yet imported for free circulation may also be carried out, provided an additional authorisation for Inward Processing Relief (IPR) or Processing under Customs Control (PCC) is obtained. (Both authorisations are described in more detail hereafter.)

A bonded warehouse authorisation can be extended, with an authorisation under a simplified procedure, to receive and ship products in and out of the warehouse without any customs interference. This maximises flexibility for the owner or the service provider while minimizing customs control, which is tailored to specific situations. If certain conditions are met, the warehouse owner or service provider can file an electronic import declaration once a month instead of per shipment from the facility, which can provide additional cash flow and interest benefits.

Conclusions

Storing non-EU goods in a customs bonded warehouse facility during the distribution process enables the owner of the goods to avoid unnecessary duty payments and maximise their deferral. The Dutch customs authorities have implemented the EU customs bonded warehouse system in such a way that maximum benefits can be gained without affecting logistic processes. The interference of Dutch customs is minimal because the flow of goods and import duty payments are checked by periodic administrative control.

As mentioned above, the customs warehouse also acts as a starting point for other customs arrangements.

6.2.2 Processing under customs control, inward and outward processing relief

Introduction

Under the Union Customs Code (UCC), the new EU customs legislation that enters into force on 1 May 2016, the special customs relief procedures Processing under Customs Control (PCC) and Inward Processing Relief (IPR), are combined in a single licence. Under this licence, goods imported from countries outside the EU may be used for a manufacturing process. They are exempted from import duty and certain commercial policy measures if the end products of the manufacturing process (processed products) are exported outside the EU. However under the new arrangement, re-export is no longer mandatory. The processed product may, on the request of the declarant, be declared for free circulation based on the tariff classification, customs value, quantity, nature and origin of the imported goods before manufacturing. As a default, the amount of customs duty will be determined on the basis of the rules for calculation of duty of the processed goods. The first duty calculation is the calculation that was used for goods processed under IPR. The latter calculation is the calculation that was used under the former PCC licence. A draw-back system that was available for IPR under the former legislation has been abolished.

What kind of savings can the PCC part of this licence offer?

If you pay duty on your imported materials and use them to manufacture a finished product that would be "zero-rated", the duty on your imported materials would effectively be eliminated. This is often the case in the pharmaceutical, medical and information technology industries, but we also see examples in the chemical industry and other industries. Consider the following example:

Imported materials	value for customs	EUR 10 million
	duty rate	5 percent
	customs duty	EUR 500,000
Finished product	value for PCC purposes	EUR 20 million
	duty rate	0 percent
	customs duty under PCC	EUR 0
In this example, PCC produces a saving of EUR 500,000 in duty.		

Alternatively, where the finished product is not zero-rated, PCC could still offer a benefit, for example, where the duty rate and the value of the finished product are low enough. Assume that, in the example above, the duty rate on the finished product was 1 percent:

Finished product	value for PCC purposes	EUR 20 million
	duty rate	1 percent
	customs duty under PCC	EUR 200,000
In this example, a saving of EUR 300,000 in duty results.		

Clearly, the savings are greatest when the finished product is zero-rated for customs duty.

Conditions and preconditions

In order to be able to use a processing authorisation and benefit from the IPR or PCC duty calculation system, a number of conditions must be fulfilled, including the following.

- the authorisation is normally only available for natural or legal persons established in the EU. The applicant must be the person who carries out the process or arranges for it to be carried out.
- An authorisation from customs is required.
- The goods must be able to be processed. It must not be economically profitable to bring the processed goods back into the state where they were located before processing.
- The economic conditions must be fulfilled, meaning that the vital interests of EU producers will not be adversely affected by the authorisation.

6.2.3 Outward processing relief (OPR)

Despite its name, OPR is not the exact opposite of IPR. Under customs regulations, outward processing means that goods that are in free circulation in the EU are exported, processed or repaired outside the EU and re-imported into the EU as end-products. Outward processing relief can be claimed on the import of the end-products, or on the import of the repaired products for the "exported part" of these imported goods. OPR is only a partial exemption for the products that were exported from the EU at an earlier stage. However, in the case of re-importation of repaired goods, a full exemption may apply. Depending on how OPR is applied, it may even lead to more savings than initially expected. As with IPR, an authorisation has to be obtained from the customs authorities before OPR is used.

6.2.4 End-use relief

End-use is a customs procedure whereby goods entered for free circulation in the EU may be given a favourable tariff treatment or relief at a reduced or zero rate of duty on the condition they are put to a prescribed use. This procedure is designed to facilitate trade and ease of movement of goods within the EU. In order to obtain end-use relief, the importer must be the holder of an authorisation. The goods must be put to a prescribed use within a certain period of time. The importer must keep records on the goods and their treatment. If the goods are not put to the prescribed end-use, duty will be payable.

6.2.5 Customs valuation

Customs value: general

Some customs duties are specific, with a fixed sum per unit. For example, champagne with HS code 2204 10 11 00 is dutiable with a customs duty of EUR 32 per hectolitre. Most customs duties are "ad valorem", however, which means that they apply as a percentage of the value of the goods concerned. For this reason, the rules establishing the correct customs value are extremely important.

Under the General Agreement on Tariffs and Trade (GATT), the starting point for establishing the customs value upon importation is the transaction value. The GATT rules are implemented in the Community Customs Code, and so they are uniform within the EU. For more than 90 percent of the imports into the EU, the customs value can be based on the transaction value, which is the price actually paid for the goods by the importer.

The various customs valuation methods are:

- transaction value of the imported goods
- transaction value of identical goods
- transaction value of similar goods

- deductive method (resale price minus EU elements)
- cost price plus profit method.

These methods must be used in a fixed sequence. Only when a method has been tried and failed can the next method be applied. However, the importer may exchange the application of the deductive method for the cost-plus method.

As explained above, the invoice value is the basis for establishing the transaction value in most situations. The transaction value is the total of all payments made for the imported goods by the buyer to the seller, or to a third party on the seller's behalf.

Invoice prices frequently need upward or downward adjustments to take certain costs into account. These costs may include:

- royalties
- licence fees
- R&D costs
- assistance provided by the buyer to the seller for the manufacturing of the product
- costs of freight and insurance in order to arrive at a CIF-EU border delivery condition.

Deductions from the transaction value include freight and insurance costs relating to transport inside the country of importation. Other costs may also be excluded from the customs value provided these can be distinguished from the price paid for the goods. This creates an opportunity to remove non-dutiable items from the transaction value and charge them separately. Such items include finance costs, installation costs and buying commissions.

All these various cost elements must be distinguished from the sales price, and other specific conditions have to be met. The transaction price therefore warrants close examination in order to identify any items that can be excluded, thereby reducing the customs value.

In a series of transactions relating to the same goods, the question arises as to which transaction value can be used for customs valuation purposes. An important duty-saving opportunity under the Community Customs Code (the old legislation) was known as the "First Sale for Export" scheme, described below.

First Sale for Export

Under EU customs valuation regulations, any transaction in a chain of transactions that relates to the imported products can be used for customs valuation purposes, provided it was concluded before importation and it concerns a sale for export to the EU. The customs value can be based on any transaction prior to importation if certain conditions are met. When imported goods are subject to a number of transactions, the customs value can be established on the lowest possible basis.

For example, a Japanese company sells a certain product for JPY 500 each to a buyer in India who is selling the products to a buyer in the EU. The buyer in India supplies these products for JPY 1,000 to the European buyer. The goods are shipped from Japan directly to the European distribution centre. Most companies would value the goods for import purposes at JPY 1,000. Given a duty rate of 10 percent, this results in duty per imported product of JPY 100. Under the first sale for export scheme, the Japanese/Indian invoice establishes a customs value of JPY 500, resulting in duty of JPY 50 per product – a saving of 50 percent.

Where a Japanese manufacturer sells directly to an EU importer, there is only one transaction value available. In many cases, however, manufacturing and sales and marketing operate as separate divisions. In such circumstances, it can be worthwhile to set up these divisions as separate legal entities, thereby creating a sale between the manufacturing company and the sales and marketing company, both established in Japan in this case. If properly structured, this sale could be used as a basis for the customs value upon import.

However, please note that the new customs legislation could have a significant impact on the First Sale for Export principle. The proposed changes eliminate the First Sale for Export principle and requires importers to declare the price paid on the last sale for import. Although the legislation may be modified before its 1 May 2016 implementation date, international companies importing into the EU should consider drawing up a mitigation plan to avoid a dramatic increase in their customs duties.

Within the Netherlands, it is possible to obtain advance rulings from the tax and customs authorities. Such rulings provide advance certainty about the acceptability of a certain scenario. This certainty is especially important when the scenario is set up by creating a first sale by splitting the existing company into two separate legal entities, such as a manufacturing company and a sales and marketing company. The transaction between these two companies is then used for customs purposes. This structure can provide considerable savings in duties; it also ensures that a conflict with corporate income tax planning is avoided. For corporate income tax purposes, a transaction between related companies must be priced at arm's length. If there is uncertainty about what such arm's length prices are, obtaining advance certainty from the tax authorities removes the risk of disputes arising.

EU First Sale for Export scheme abolished

Please note that the First Sale for Export scheme as described above has been abolished under the Union Customs Code, although the legislation contains a 'sunset clause' for using existing first sales which are laid down in contracts until 1 January 2018. To avoid the immediate consequences of the abolition of the First Sale for Export concept, the European Commission has introduced a transition rule – the 'sunset clause' – in Article 347 of the Implementing Regulation. The sunset clause states that:

1. The transaction value of the goods may be determined on the basis of a sale occurring before the sale referred to in Article 128(1) of this Regulation where the person on whose behalf the declaration is lodged is bound by a contract concluded prior to the entry into force of this Regulation.
2. This Article shall apply until 31 December 2017.

This sunset clause cannot be regarded as a general waiver for the use of the First Sale for Export scheme until 31 December 2017. There must be an agreement in place and this agreement must be concluded prior to the entry into force of the Implementing Regulation, which is expected to be on 17 January 2016 (entry into force is the 20th day following the date of publication). The agreement must bind the person on whose behalf the declaration is filed; this is the economic operator. Consequently, economic operators that continue to use the First Sale for Export scheme after 1 May 2016 without having binding agreements in place before 17 January 2016, may subsequently face significant retroactive assessments.

Royalty
The Union Customs Code contains a provision which effectively states that all trademark royalty payments are subject to customs duties.

Conclusions
The legislation concerning royalties will affect duty payments for companies that pay royalties on goods that are imported into the EU. The First Sale for Export scheme has been abolished under the UCC. Savings can still be realised by lowering the customs value on import. Careful customs planning, including royalty payments, is required because liabilities may arise when the regulations are applied incorrectly. When no transaction value is available, the customs value has to be determined based on one of the other valuation methods that are used within the EU, which are applied in a specific order.

6.3 Value-added tax
VAT upon import becomes due at the moment the goods are imported for free circulation in the EU. As a general rule, VAT must be paid at the time the import declaration is filed. The Netherlands has implemented a deferred payment scheme for VAT upon import, under the "Article 23 import licence." Under the Dutch VAT system, the actual payment of VAT due upon import can be completely avoided. The import VAT has to be accounted for in the VAT return as VAT due. This VAT amount can be deducted as input VAT in the same return, provided the company has a full right to recover input VAT. Since the same amount is first accounted for as due and deducted at the same time as input VAT, there is no actual payment of VAT, resulting in cash flow and interest benefits.

Only Dutch companies or foreign companies with a fixed establishment in the Netherlands can use this beneficial Dutch deferment scheme. However, by appointing a fiscal representative for VAT purposes, foreign companies without a fixed establishment in the Netherlands may opt to use the deferred payment scheme with respect to the VAT on imports. In most cases, the fiscal representative will deal with all VAT formalities.

Fiscal representatives for VAT purposes in the Netherlands may have either a general or limited licence. A fiscal representative with a general licence acts on behalf of its principal regarding all supplies of all goods and services in the

Netherlands, intra-Community transactions and imports. The limited representative can only act on behalf of a foreign customer for the VAT formalities and payments with respect to the import and subsequent supply of goods after the importation and the intra-EC acquisition of certain designated goods (e.g. excise goods). The foreign company itself does not have to register for VAT in the Netherlands if it appoints a limited fiscal representative. Whether a company should appoint a fiscal representative with a general or a limited licence depends on the facts and circumstances.

6.4 Anti-dumping or countervailing duties

The liberalisation of international trade and the elimination of import tariffs has led to the increased use of other instruments to protect domestic markets. Anti-dumping measures have proven to be particularly effective in protecting domestic producers. As it is relatively easy to initiate an anti-dumping or anti-subsidy procedure, the number of such European procedures has increased over time. The EC can initiate these procedures in response to a complaint from a European producer.

Under current EU legislation, dumping exists if goods are sold at a lower price in the EU market than in the market in the country of origin/export. If this dumping is seen as damaging local industry, the EU will take corrective measures.

Companies accused of dumping may defend their interests during an EU anti-dumping or anti-subsidy investigation. This requires a proactive approach and full cooperation with the procedure. Non-participation will automatically lead to the highest duty.

Companies currently paying anti-dumping or countervailing duties are advised to investigate whether these duties can be minimised or prevented. The regulations allow for the procedure to be re-opened or for the application of planning scenarios.

6.5 Authorised economic operator

6.5.1 Introduction

The fight against terrorism has had a significant effect on international trade. Following the US Customs Trade Partnership Against Terrorism (C-TPAT) initiative, the EU introduced a customs and/or security and safety authorisation for companies, known as the "Authorised Economic Operator "(AEO) certificate. The relevant rules have already been incorporated into the Community Customs Code and are expanded in the UCC. For a number of customs procedures and for a waiver of (bank) guarantees in certain customs procedures, an AEO authorisation for customs simplifications is mandatory.

Companies that are part of an international supply chain can improve their position by obtaining AEO authorisation. In determining whether a company qualifies, the Dutch customs authorities will primarily focus on the risks that are not sufficiently covered by measures taken by the company itself. To employ this method, the Dutch customs authorities must form an accurate view of a company, its activities, and the measures it has taken to limit the risks inherent in tax and non-tax processes, including those in the supply chain.

6.5.2 Authorisation for security and safety and/or customs simplifications

Although the AEO regulation's initial objective was "security and safety", the EU now applies it more broadly. Companies based in the EU have to be authorised for AEO Customs Simplifications in order to be authorised for "Simplified Procedures" under the UCC. The demand for an authorisation for "Safety and Security" will arise not only from the company's international trade contacts but also from the need to protect the logistic processes from unexpected and often unneeded interference by the customs authorities.

6.5.3 Requirements for an AEO authorisation

In order to qualify for an AEO authorisation, a company must satisfy a number of requirements, including:

- An appropriate record of compliance with customs requirements. The applicant, those in charge of the applicant company or exercising control over its management, the applicant's legal representatives in customs matters, and those responsible in the applicant company for customs matters must not have committed any serious infringement of customs rules over the last three years.

- A satisfactory system for managing commercial and, where appropriate, transportation records, which allow appropriate customs controls. The customs authorities wish to have in-depth insight into the company records.
- Where appropriate, proven financial solvency. The customs authorities will also examine a company's financial solvency.
- Where applicable, appropriate security and safety standards. The company must be able to demonstrate that appropriate security and safety standards are in use.

Where applicable, the company must have practical competence of or professional qualifications directly related to the activity carried out (i.e. knowledge of customs legislation and the procedures applying to the company's customs activities.

6.5.4 Authorisation for an entire supply chain

AEO authorisation concerns the entire international supply chain, from the manufacturing of goods to their delivery to the end-users, including, where relevant, import and export. All efforts to secure the supply chain should provide better protection and enhance more consistent logistical company processes, leading to a smoother flow of goods.

The various companies in the supply chain depend on the security procedures of their business partners to secure the goods in their custody and to maintain their AEO status. By having an AEO security and safety authorisation, companies across the entire international supply chain can demonstrate to other companies that they run their business operations and supply their goods in a safe, secure, and reliable manner. However, a chain is only as strong as its weakest link. As such, the expectation is that the international supply chain will safeguard security and safety itself, and so every party within the supply chain will ensure that the following party is also certified.

6.5.5 Advantages of authorisation

One significant advantage of AEO authorisation is that the company will be allowed to use simplified customs procedures in the EU Member State in which it is headquartered and in all EU Member States in which it uses customs procedures.

An advantage of having a security and safety authorisation is that it will lower the company's score in terms of the risk-analysis assessment, reducing physical customs controls, and sometimes expediting customs processing. Should the customs authorities decide to physically inspect a certified company's goods, the inspection will be given priority. In specific situations, the company may ask the customs authorities to perform the audit (e.g. unpack the container) at the company's premises. As such, this certificate will provide the company with a reliability qualification and perhaps even a quality label. Authorisation will then improve the company's international standing.

Although an AEO authorisation is valid indefinitely, the Dutch customs authorities will regularly check whether all requirements are still being satisfied. Continuous monitoring should be part of the conditions of the authorisation. The customs authorities retain the right to deny, suspend or revoke an AEO authorisation, subject to certain conditions.

It is crucial that companies intending to invest in the Netherlands do not delay applying for an AEO authorisation. Compiling a proper recognition file is time-consuming and labour- intensive. An external and independent audit could prove to be extremely useful in this respect. Further, the AEO authorisation procedure may be combined with the application for the necessary customs licences, saving time and effort and creating goodwill with customs authorities.

KPMG

Immigration, employment & personal tax

7.1 Immigration

The active working population in the Netherlands is approximately 7.5 million. Dutch workers are generally well-educated, internationally-oriented, multi-lingual, adaptive and productive. As a result of social security reform and deregulation, the labour market has become increasingly flexible. This flexibility is balanced by a well-organised social welfare system.

This flexibility has enabled the temporary employment sector to rapidly expand. At the beginning of the 21st century, one-third of the Dutch labour force enjoyed a flexible work schedule, far more than in the rest of the industrialised world.

The much-admired Dutch economic structure, or "polder model", was developed over two decades in the latter part of the 20th century, as the Dutch government struggled to tame the country's excessively generous social welfare system. The key to this model is the widely-supported agreement between employers, trade unions and the Dutch government to strive for wage restraint.

The model has been criticised for not encouraging the unemployed to return to work. Since the beginning of the 21st century, however, the conditions for entitlement to social security benefits have been tightened, in an attempt to stimulate labour participation. Although Dutch unemployment increased as a result of the global economic crisis, it is nevertheless moderate in an international context.

The service sector is the largest sector of the Dutch economy. The sector's share of employment has increased sharply over the past few decades.

For many years now, the education level of the working population has steadily risen, as has the level of skills required to fill job vacancies. Nearly 25 percent of the workforce has a college or university education (with higher percentages in major urban areas). English is the universal second language, and many workers are fluent in three or four languages.

The Netherlands' Gross Domestic Product (GDP) per capita in 2011 was EUR 40,300.

7.2 Employment regulations

7.2.1 Introduction

Employment relations in the Netherlands are mostly regulated by the Netherlands Civil Code (*Burgerlijk Wetboek*). The basic principle of the employment provisions of the Civil Code is the protection of the "weakest party", i.e. the employee. In addition to the Civil Code, labour laws are contained in several other regulations and legislation, including the Works Councils Act and the Working Conditions Act. As a result of European unification, Dutch regulations are increasingly influenced by European treaties, EU directives/regulations, and case law of the Court of Justice of the European Union.

7.2.2 Collective labour agreements

Employment relations are also influenced by collective labour agreements (CAOs). These agreements are negotiated between representatives of the employers and the employees, and they aim to provide consistent employment conditions within specific sectors. Trade unions and employer/employee organisations can thus negotiate minimum wages and basic employment rights at a national level. Collective labour agreements can be negotiated for an entire sector, or they may be limited to a single company. The Minister of Social Affairs and Employment can impose the application of a collective labour agreement on an entire sector or industry by declaring a collective labour agreement to be generally binding to all employers covered by that collective labour agreement.

Any provision in an individual employment contract that restricts the employee's rights under an applicable collective labour agreement is null and void. In such cases, the provisions of the collective labour agreement prevail.

Different sectors have their own collective labour agreements. In fact, there are more than 1,000 collective labour agreements in force in the Netherlands and over 80 percent of the working population is covered by a collective labour agreement.

7.2.3 Trade unions

Although the influence of trade unions in the Netherlands is waning, unions are still well-organised in the manufacturing industry and the semi-public sector or privatised sectors. The most important trade unions are the Christian

Trade Union Federation (*Christelijk Nationaal Vakverbond – CNV*) and the Federation of Dutch Trade Unions *(Federatie Nederlandse Vakbeweging – FNV*). The main employers' association is the Confederation of Netherlands Industry and Employers (VNO-NCW).

7.2.4 Works council

In the Netherlands, a Works Council Act (*Wet op de ondernemingsraden*; WOR) governs workers' participation in the management of business enterprises employing more than 10 employees. The WOR distinguishes two categories of companies:

- companies with 50 or more employees
- companies with 10 to 50 employees.

50 or more employees: Works Council *(ondernemingsraad)*

The WOR requires every business with 50 or more employees to set up a Works Council. Failure to do so means that every interested party (such as employees and trade unions) may take legal action to ensure that the business fulfils this obligation. Such a petition should be filed with the courts. There is no administrative or criminal law penalty imposed for not setting up a Works Council.

Sometimes the question arises as to what actually constitutes a "business" within the meaning of the WOR. It should be noted that one company may well operate a number of businesses at various locations. Also, a number of companies can be deemed to form one business due to the fact that their activities are interrelated.

Similarly, a group of companies may have the obligation to set up several Works Councils, including one or more central or group Works Councils. Furthermore, a multinational group of companies may be obliged to establish a European Works Council (see below).

The Works Council is an independent body of employees elected by their peers, with its own by-laws. The Works Council may appoint committees and engage experts. It can use certain facilities of the business, such as conference rooms, copying machines and telephones. Meetings are held during working hours as much as possible. Works council members may interrupt their work for internal consultation, training and education for a specified number of hours, to be determined in consultation with the business owner. Works Council members have an obligation of secrecy and enjoy special job protection (i.e. no dismissal unless the court rules that the dismissal is unrelated to their work on the Works Council and will terminate the employment contract as described under 7.2.8 "Terms of employment").

The Works Council meets with the management board at least six times a year. At two of those meetings, the general state of affairs of the company and the management of the company is discussed.

The Works Council has a number of general rights, such as the right of initiative and the right of general and special information, and some special powers, such as the right to be consulted (the advice function) and the right of consent (the approval function).

Duty to seek Works Council advice

The company has to seek the advice of the Works Council on certain major economic decisions, such as decisions to transfer control of all or a part of the company, to terminate some or all operations of the company, or to make a major investment on behalf of the company. If the Work Council gives a negative advice but the company nevertheless proceeds with its plans, the plans may not be implemented during a one-month period commencing on the day the Works Council was informed of the company's decision. The Works Council has the right to appeal to a special Division of the Court of Appeal in Amsterdam.

Duty to seek Works Council approval

In respect of certain internal social decisions, the business owner requires the approval of the works council; failing such approval, the decision is void. Disputes on these issues are settled before the competent court. Examples of such internal social decisions are decisions to lay down, amend or withdraw a pension insurance scheme, an arrangement on working hours or holidays, and a pay or job assessment system.

10 to 50 employees: an employee representative body

A business employing between 10 and 50 staff may establish an employee representative body (*personeelsvertegenwoordiging;* PVT). The business must do so if a majority of the employees request this. If there are fewer than 10 employees, the employer may establish a PVT electively.

The PVT has fewer powers than a Works Council, for example, the PVT has the right to render advice in respect of proposed major resolutions that affect at least one-quarter of the employees. Unlike the Works Council, the PVT has no right to appeal company decisions that ignore the negative advice given by the PVT. The right to consent exists in respect of arrangements concerning working hours, working conditions and sickness absenteeism.

The elective PVT (where there are fewer than 10 employees) only has the right to consent in respect of arrangements concerning working hours.

Group Works Council / Central Works Council

In larger companies with various branches or subsidiaries in the Netherlands, a Group Works Council or Central Works Council may have to be established.

European Works Council

EC Directive 94/45 (the "Directive") obliges Member States (with the exception of the United Kingdom) to enact legislation providing for the institution of Works Councils for community-scale undertakings in order to improve the right to information and to consultation of the employees working in the undertaking. The Directive applies to:

- community-scale undertakings with more than 1,000 employees
- groups of undertakings with an aggregate workforce of more than 1,000 employees, provided at least 150 staff are employed in each of at least two EU Member States.

The obligation to create the conditions and means necessary for establishing a European Works Council (EWC) is incumbent on the management of the undertaking (company) that can exercise a dominant influence over the other undertakings (companies) concerned. According to the Directive, the EWC will be a vehicle for the exchange of information and consultation between the Controlling Undertaking's management (the "Central Management") and the workers employed in the Member States.

In the Netherlands, the Act implementing the Directive entered into force on 5 February 1997 (Act on the European Works Councils ("ECW ACT"); *Wet op de Europese ondernemingsraden*). The EWC Act provides for setting up EWCs or for the institution of "a system of information and consultation of workers".

The rights of an EWC are less extensive than and different from those of a Dutch Works Council.

7.2.5 Employment contracts

Dutch employment contracts are generally comparable to the European norm, although some industries have collective labour agreements. An employment contract may be agreed upon for an indefinite or fixed term.

Form

An employment contract does not have to be in writing or in any particular form. It can be agreed orally. An employment contract exists whenever the following conditions are met:

- the employee has an obligation to perform the work in person
- the employer has an obligation to pay wages
- the employer exercises a form of authority over the employee.

The employer is obliged to provide the employee with the following specific information in writing:

- name and domicile of the employer and employee
- place of employment
- duties of employee
- date of commencement of employment
- whether the employment contract is temporary
- if the employment contract is for a fixed term, the duration of the contract
- number of days holiday
- the notice period for both parties
- salary and payment schedule
- the usual working hours per day or per week
- whether or not the employee will participate in a pension plan
- whether a collective labour agreement applies

- the provision of certain specific information if the employee will be working outside the Netherlands for longer than one month.

A written employment contract is preferable as evidence of the terms of employment. Furthermore, certain provisions must be embodied in a written contract signed by both parties or they will be void. The most important examples of these are trial period (see 7.2.6 "Trial period") and non-competition clauses (see 7.2.8 "Terms of employment").

Employment contract for a fixed tern

An employment contract can be agreed for an indefinite or fixed term. A fixed-term employment contract will terminate automatically at the end of the agreed term.

As of 1 January 2015 an employer who has entered into a fixed-term employment contract of at least six months is obliged to inform the employee at least one month prior to the end of the fixed term (i) whether or not the contract will be renewed, and in the case of renewal (ii) on what terms. An employer who fails to do so, is obliged to pay the employee one month's salary. If the employer does provide this information, but provides it too late, the monthly salary is pro-rated accordingly.

The compensation payment (described above) also applies if the employer intends to extend a fixed-term contract but fails to notify the employee within one month of the expiration of the original term. However, in practice, it is highly unlikely that an employee who remains employed will claim the one month's salary.

Before the changes to Dutch employment law took effect on 1 January 2015, employers were not formally obliged to contact employees in this way, but it was nonetheless common practice for them to inform employees in a timely manner whether or not the fixed-term employment contract would be extended

If a fixed-term employment contract is continued tacitly, it will be deemed to be renewed under the same terms and conditions and for the same period of time (subject to a maximum of one year) unless the contract itself states otherwise. Such renewals are considered separate contracts.

Parties are free to enter into a chain of consecutive fixed-term employment contracts. However, two conditions apply:

- The aggregate duration of the consecutive employment contracts (*schakels* – "links" in the chain of contracts) may not exceed two years (interruptions of not more than six months are included). For example, if the parties enter into an employment contract for a term of two years and this is followed by another one-year contract, the aggregate duration of the consecutive fixed-term employment contracts will amount to four years. In this case, the employment contract turns into a contract of indefinite duration starting from the moment the period of two years has lapsed.
- The number of consecutive employment contracts must be fewer than four. If the number of consecutive links exceeds three, with no interruptions of more than six months in between the links, the fourth employment contract will be considered to be of indefinite duration. For example, if four employment contracts for six-month terms are entered into consecutively, the last of these will be deemed to be an employment contract of indefinite duration.

An employment contract for an indefinite term requires formal termination (see 7.2.8 "Terms of employment").

As an exception, an employment contract for the fixed term of two years or longer may be extended only once by another employment contract for not more than three months, where the latter contract follows immediately upon the former. This extended fixed-term employment contract ends by operation of law.

Note that the chain is not considered to be broken upon a change of employer if the employers can be reasonably considered as each other's successors in respect of the work performed. This situation may occur where the employee started out doing temporary work and later entered into a fixed-term contract with the hirer *(inlener)*. The contract for temporary employment is the first link in the chain, and the fixed-term employment contract the second.

7.2.6 Trial period

Under the Netherlands Civil Code, as of 1 January 2015 a fixed-term employment contract of less than six months may not be subject to a trial period.

Notwithstanding the above restriction, the parties to an employment contract, whether for a fixed or indefinite period, may agree a trial period. The trial period must be the same for both parties, and both parties must agree on the trial period in writing. The length of a trial period depends on the term of the employment contract.

- For contracts for two years or more (including indefinite duration), the trial period cannot exceed two months.
- For contracts of up to two years, the trial period cannot exceed one month.
- For fixed-term contracts that do not coincide with calendar dates (e.g. for the duration of a project or to replace a sick employee), the trial period cannot exceed one month.

A longer trial period is null and void.

During a trial period, either party may terminate the employment contract without notice, with the termination taking immediate effect.

7.2.7 Flexible employment

On-call employment contracts

Although fixed-term employment contracts are usually based on a fixed number of working hours, in some sectors, working hours need to be adjusted due to fluctuations in workload. Dutch legislation offers the possibility of entering into "on-call" or "zero hours" employment contracts (*oproep- contracten or nul uren contracten*). These employment contracts are based on the principle that the employee is only paid for the actual hours worked; the employee is not entitled to a specific number of hours, but only a certain minimum. In this way, the employer can manage the workload more cost efficiently.

These contracts are subject to regulations in order to provide some degree of protection to the employee. Firstly, Dutch employment law stipulates that "on-call" workers are always paid for three hours if they are scheduled to work but actually work fewer hours – or not at all – due to circumstances within the employer's sphere of risk. Secondly, "on-call" workers may claim employment for and payment of their average working hours over the preceding three months if they worked regularly during these three months. During the first six months of employment, parties can exclude the claim to such "average" hours.

In practice, the first protective measure – paying three hours for every call – is fairly acceptable for employers. Employers often take the edge off the second employment condition based on average hours worked – by using a large number of on-call workers and thus ensuring that any given employee works regularly for a certain number of hours for three consecutive months.

Flexible employment options under Dutch law

The provisions relating to fixed-term employment contracts and on-call employment contracts are examples of the various options available under Dutch law that allow employers to swiftly adjust the employment in their company to respond to any changes. On-call employment contracts may satisfy the needs of employers to adjust the working hours to workload fluctuations.

Employing a large number of on-call employees may lead to extra costs for the employer. Most employers with businesses that depend on flexible employment (e.g. call centres, customer service centres) establish themselves in parts of the Netherlands where the rate of unemployment is higher than in other parts and employment is relatively cheap.

Another example of the various flexible employment options under Dutch legislation is the trial period. Combined with the possibility of entering into a number of successive fixed-term employment contracts (as discussed above), such a trial period can offer employers a reasonable amount of flexibility. For example, an employer could enter into an employment contract for a fixed term of seven months with a one-month trial period. The employment contract may be terminated during this trial period for any reason and without formalities (although discrimination of any kind is forbidden). The same applies as soon as the seven-month period expires; in principle, the employment contract ends automatically, subject to the notification requirement. After that, the employment contract may be extended twice (subject to the conditions described above).

7.2.8 Terms of employment

Wages

The Netherlands imposes a statutory minimum wage for employees aged 23 or over. There is also a minimum wage for employees aged between 15 and 22, the level of which varies according to age. The minimum wage is indexed and may be adjusted twice a year on 1 January and 1 July. As of 1 January 2016, the statutory minimum wage for employees aged 23 or over is EUR 1,524.60 gross per month, excluding 8 percent holiday allowance.

Holidays and holiday allowance

All full-time employees are entitled to a minimum holiday of four working weeks (20 working days) each year. These statutory days are in addition to public holidays, of which there are normally seven each year; no extra day is automatically given should a public holiday fall on a weekend. Employees generally receive more than the statutory minimum holidays; 25 days holiday are customary.

The employer is obliged to pay all employees a holiday allowance of 8 percent of an employee's gross annual salary. By law, the salary over which holiday allowance is payable is capped at three times the minimum wage, but it is common to award 8 percent over the actual salary if that is higher. The holiday allowance is usually paid out once a year in May, but it is possible to make an employee's salary inclusive of the holiday allowance if the employee earns more than three times the minimum wage, provided this arrangement is agreed in writing. For irregular jobs, such as young people employed by supermarkets, an all-in hourly pay can be agreed.

Non-competition clauses

A clause restricting the employee's freedom to choose employment elsewhere after the termination of his or her employment contract – referred to as a non-competition clause – is only valid and binding if, firstly, the employee is at least 18 years old and the agreement is entered into by means of a written contract signed by both parties. As of 1 January 2015, a non-competition clause can only be agreed for employment contracts for an indefinite period. While a non-competition clause can be included in a fixed-term employment contract it will only be valid and binding if a written statement (referred to in the Netherlands as a "motivation") is included in the employment contract. The motivation must set out the employer's justification for the clause, based on substantial business interests. The motivation must be related to the circumstances existing when the fixed-term contract was entered into as well as at its termination, if the employer invokes the non-competition clause.

Non-competition clauses with a term of one year are fairly common. The geographical area is often confined to the Netherlands, but depends largely on the nature of the employer's business and the employee's role.

Employers are advised to reconfirm or renew the non-competition clause if and when an employee is promoted to a significantly different position. Without such renewal, the clause might be declared void if it has become more burdensome on the employee as a result of the change in position. A non-competition clause may be modified or terminated by a court on the grounds that, given the employer's interests protected under such a clause and the duration of the employment, the employee is unreasonably restricted in accepting another job commensurate with their abilities, experience, etc.

Confidentiality

Dutch law provides for some confidentiality of the employer's business information and prohibits employees from systematically approaching the employer's customers after the employee's contract has been terminated. However, it is prudent to specifically provide for this in an employment contract.

Under the changes that took effect on 1 January 2015, such protection of business relations (also referred to as a non-solicitation clause), is now subject to the same rules as those applying to the non-competition clause in fixed-term contracts, in that a motivation, justifying its inclusion in the employment contract, is required (see paragraph above).

Sickness

Where employees are prevented from performing their work due to sickness, the law requires the employer to continue to pay 70 percent of the employee's salary (up to a maximum salary of EUR 202,17 gross per day) for two years. During the first year of sickness, the minimum wage must at least be paid. Contractual provisions providing for higher payments during the first year of sickness (e.g. 100 percent of the actual salary) are customary. We usually advise employers not to offer more than 70 percent during weeks 53-104.

Generally, dismissal while on sick leave is not allowed except where the employee has been sick for two consecutive years or in the event of "urgent reasons" as described below.

Health insurance

Under the Healthcare Insurance Act (*Zorgverzekeringswet*) employers are obliged to pay a statutory income-related contribution for healthcare insurance of 6.75 percent of an employee's income. The income on which the contribution for healthcare insurance is calculated is subject to a maximum of EUR 52,763 for 2016.

Pension plans

In addition to the statutory basic pension under the General Old Age Pensions Act (AOW), described below, there are various additional pension plans.
Some branches have a mandatory pension fund. Otherwise, there is no legal obligation to provide additional pension arrangements, but most employers that are not included in such a mandatory fund offer their employees a supplementary pension plan. These schemes provide not only for old age pensions but also for survivors' benefits and for long-term disability.
The employment contract must stipulate whether the employee will be participating in a pension plan and describe several of the plan's key features.
If an individual employee in a certain category of employees is entitled to participate in a pension plan, all the other employees in the same category must be given the same opportunity.

Working conditions

By comparison with international worker protection standards, the Dutch regulations are of a high standard. In light of an action plan by the Dutch government ("Simplifying Social Affairs and Employment Regulation"), it is expected that these regulations will be simplified to bring them more in line with international worker protection standards and to strengthen the Netherlands' position in the international labour market.

Under Dutch law, the employer is responsible for organizing work in such a way that it protects the safety, health and well-being of the employees in accordance with legal standards and criteria. All employers are required to avail themselves of the professional assistance of a certified occupational health service (*Arbo-dienst)* for the purposes of implementing a significant part of the applicable health and safety measures (e.g. the occupational health medical examination). Under some circumstances, staff of the employer may provide this assistance, providing they are certified to do so.

Working Conditions Act

The Working Conditions Act covers both the private and public sectors. The Act itself forms a framework for a more detailed Decree (*Arbo-besluit*). The Act not only lays down the employer's responsibilities; it also defines the roles of the Minister, the Works Councils, Health and Safety specialists, and the employees themselves. All companies must list and assess the risks within their own working environment and are required to report those results in writing. The more detailed *Arbo-besluit*, which is based on European directives, sets out health and safety issues. Companies are required to conduct a risk analysis and are responsible for supervising employees on sick leave. To ensure that employers comply with these rules, the Labour Inspectorate conducts on-site inspections, for example, in the event of a reported violation of the provisions of the Act and/or the Decree and in the event an occupational accident has occurred. The Labour Inspectorate can order the employer to observe specific regulations.

Working hours

There is a trend in the Netherlands towards more flexible working hours and working patterns, resulting in a variety of part-time jobs. This trend is important to companies because it makes it easier for employers to align the number of employees with the work to be performed. Recently, a bill became law that allows employees to request more flexible work schedules from their employer (i.e. the way their working hours are spread over the day) as long as there is no severe negative impact on the employer's business.

Many companies also use temporary workers, on-call workers and part-time employees, who must be treated on the same basis as full-time employees. The Dutch government wants to drastically reduce the number of rules governing maximum working hours and night work. The separate rules for overtime are under review and are expected to be repealed.

Termination

It is a widely-held belief that it is difficult for an employer to terminate an employment contract in the Netherlands. Although it is true that employee rights are well-protected under Dutch law, an employment contract may be terminated for a variety of reasons. However, it is up to the employer to justify dismissal on objective grounds.

If the employment contract mentions no specific period or in the situation described above regarding consecutive employment contracts, the employment contract is for an indefinite period of time and will not end automatically. As of 1 July 2015 Dutch dismissal law was significantly amended.

As of 1 July 2015, an employer can no longer choose between the following two existing dismissal options for unilateral termination: (i) requesting permission from the governmental body UWV to give notice of termination or (ii) requesting the sub-district court to terminate the employment contract.

Whether an employer must obtain permission from the UWV to give notice or must initiate proceedings before the court to have the employment contract terminated, is dependent on the reason for dismissal. Dismissals for economic, organisational and/or technical reasons and dismissals relating to long-term illness are dealt with by the UWV or by a dismissal commission appointed in a collective bargaining agreement. If there are other grounds for dismissal, the employer must initiate court proceedings to terminate the employment contract.

If there are two dismissal grounds, as a result of which permission to terminate the employment contract would be required from both the UWV and the court, the employer is allowed to choose which dismissal option it prefers, in accordance with the relevant dismissal ground.

Notice periods

Once permission has been given to terminate the employment contract, the minimum notice period must be observed.

Period of notice to be observed by the employer

The period of notice to be observed by the employer is one month for the first five years of service, which is extended by one month, up to a maximum of four months, for each subsequent five years of service. The period of notice may be extended further by written agreement and may be reduced by a collective labour agreement.

Period of notice to be observed by the employee

The period of notice to be observed by the employee is one month. Any deviation from this may be agreed in writing. In this case, the period of notice to be observed by the employer must be at least twice the employee's period of notice, which may not exceed six months.

Reduction of the period of notice to be observed by employer

To compensate for the time involved with the UWV dismissal procedure, the employer may reduce the term of notice by the duration of the procedure, provided that at least one month remains. This requirement may be disregarded to the detriment of the employee by a collective labour agreement.

The notice period starts on the day agreed or the day determined by custom, which is usually the last day of the period of the salary payment.

Retirement termination

As of 1 July 2015 the Netherlands Civil Code expressly provides for the possibility of an employment contract to be terminated by notice without prior permission having been obtained from the UWV or without requiring rescission of the contract by the court.

Permission from the UWV

An employer wishing to terminate an indefinite employment contract for business/economic reasons or in the event that an employee has been sick for more than 104 weeks must first obtain permission from the UWV before serving the notice of termination.
This legal requirement is intended to allow the UWV to prevent unreasonable or socially unjustifiable dismissals.
According to the applicable rules, the UWV approval process will take five weeks. However, in practice, this process usually takes about 6-8 weeks for cases where the reasons for termination are clear, just as it did under the former,

pre-2015 procedure. If the reason for termination is difficult to substantiate, the UWV will probably refuse to grant permission for the dismissal.
The decision of the UWV cannot be appealed. However, if the UWV declines permission for dismissal, the employer may bring an action in court, seeking to dissolve the contract on the basis set out below.
Conversely, if the UWV grants permission to the employer, the employer must issue the notice of termination within four weeks of the permission having been granted, describing in writing the reasons for the termination. In principle, the employer must also take into account the applicable notice period (see above) when giving notice of termination. However, if the UWV grants permission, the time between the date on which the UWV receives the request from the employer and the date on which the permission is granted can be deducted from the applicable notice period provided a notice period of at least one month remains.

Rescission by the court

An employer wishing to terminate an indefinite employment contract for reasons related to the employee's conduct or performance can ask the court to rescind the employment contract. Proceedings before the court can generally be completed within a relatively short period of time (as a rule it takes six to eight weeks between the filing of the petition and the judgment being issued).
The court must assess (i) whether the employer has reasonable grounds for termination, based on a list of reasonable grounds included in the Netherlands Civil Code, and (ii) whether, as an alternative to dismissal, it is possible or appropriate for the employer to place the employee in a suitable position within a reasonable period of time, if necessary with training.
Court proceedings start with a written request, on receipt of which the court will set a date for a hearing. Usually the hearing will be held within six weeks. The employee has the opportunity to respond to the request in writing and/or during the hearing. If the court finds grounds to terminate the employment contract, it will terminated at a date decided by the court. In principle, the court must take into account the applicable notice period.
Providing the termination is not a result of seriously culpable acts or omission on the part of the employer, the court can decide to reduce the applicable notice period by the period between the date on which the request for termination is received by the court and the date of the court's decision. However, at least one month of the notice period must remain. Conversely, if the termination is a result of seriously culpable acts or omission by the employee, the court is free to ignore the applicable notice period.

Appeal and cassation

The changes under the new Dutch dismissal rules enable both the employer and the employee to appeal a decision by the court regarding the termination of an employment contract. Generally such appeals take place before the Court of Appeal. The judgments by the Court of Appeal can, in turn, be appealed before the Supreme Court, which has the power to overturn an appellate decision. Before the 2015 changes, this was only possible in a limited number of cases. If the appeal is successful, the employee may claim reinstatement. However, given the fact that an appeal is generally a lengthy process (over a year), only employees who have not found alternative employment are expected to claim reinstatement. Instead, most will opt for financial compensation.

Dismissal without UWV consent or rescission by the court

Termination of an employment contract without the approval of the UWV or rescission by the court is null and void, unless the termination is:

1. by mutual consent/notice with consent
2. for urgent reasons (instant dismissal)
3. during the trial period
4. a result of a fixed-term employment contract
5. in respect of the employment of a management board member as defined in the company's articles of association.

These five exceptions are discussed below.

1. Termination by mutual consent is always possible. It is advisable to confirm such terminations in writing; if disputed, the employer must produce clear evidence of the mutual consent.

   As a result of the changes to Dutch employment law effective as of 1 July 2015, a new method of termination has been introduced: notification of termination by the employer with the employee's consent. It is not expected that employers and employees will often take advantage of this manner of termination, as it does not seem to give the parties substantial benefits over other methods. For example, termination by mutual consent (see above) gives the employer and the employee the opportunity to lay down in a settlement agreement arrangements on several issues that affect the termination of the employment contract.

As of 1 July 2015 employees are entitled to withdraw their consent to the termination or the terms of the settlement agreement within a period of two weeks. If the employer fails to notify the employee of this right, the two-week period is extended to three weeks.

2. Urgent reasons (*dringende redenen*) for the employer to dismiss an employee involve acts or circumstances that cause a situation where the employer cannot reasonably be expected to continue the employment contract any longer. Termination must take place immediately after such a situation occurs and the reasons justifying the dismissal must all be communicated to the employee at the same time, preferably confirmed in a letter sent immediately by registered mail to the employee. The Netherlands Civil Code lists a number of examples of situations where the employer may be justified in taking this course of action e.g. theft. Please note, however, that the courts tend to be reluctant to accept such instant dismissals. If the employee is not to blame for the urgent reason, the employee could also be entitled to transitional compensation (see below).

4. It is possible for the parties to an employment contract to agree a trial period (as discussed above). During a trial period, either party can terminate the contract without notice; such termination can take immediate effect and with no further obligations on either party.

5. The termination of fixed-term employment contracts is discussed above.

6. A managing director is deemed to have such a special position within the structure of the company that government interference is considered inappropriate. A member of the management board cannot be dismissed at will; certain procedural rules apply.

Transitional Compensation

As of 1 July 2015, the Sub-district Court formula (the "Formula") that was previously used by the courts to calculate severance payments in rescission cases, no longer applies. It has been replaced by 'transitional compensation',. which applies where the employment has lasted 24 months or more (whether as an indefinite term or fixed-term contract). Transitional compensation is intended to enable employees to improve their employability and to mitigate the consequences of a dismissal.

Transitional compensation is based on the employee's years of service:

- 1/6 of the monthly salary for each six months of employment during the first 10 years of service; or
- 1/4 of the monthly salary for each six months of employment longer than 10 years.

For the purposes of transitional compensation, salary consists of the employee's monthly base salary, including the 8% statutory holiday allowance and any other fixed emoluments (such as a fixed overtime allowance), a thirteenth-month payment and 1/12 of the average bonus payments received over the last 3-5 years.

Only complete six-month periods will be taken into account for the calculation of transitional compensation. For example, employment of six months and 1 day will not be rounded up to one year and, in the case of employment of four years and five months, the five-month period will not be taken into account.

Transitional compensation is capped at the higher of (i) EUR 75,000 gross or (ii) one year's gross annual salary.
Given their more vulnerable position in the labour market, until 1 January 2020 employees aged over 50 and with at least 10 years of service will be entitled to higher transitional compensation. For years of service undertaken after the age of 50, employees will be entitled to one month's salary per year of service. An exception applies to those employed by small employers with fewer than 25 employees.
The employer is allowed to deduct certain costs from the transitional compensation if those costs are incurred for the purpose of aiding employability (such as the provision of outplacement support and training).

or if the employer grants a longer period of notice to the employee than is required. This right of deduction does not extend to fees related to training or education associated with the employee's current position.
Collective labour agreements can deviate from the transitional compensation ruled if the employees involved are entitled to equivalent compensation.

In principle, transitional compensation must be paid on all terminations instigated by the employer or non-renewals of employment contracts, where employment has lasted for at least 24 months, unless:

- the dismissal is the result of serious, culpable acts or omissions by the employee;
- the employee is younger than 18 years and works fewer than 12 hours per week;
- the employment agreement ends because the employee reaches the pensionable age;
- the employer has been granted a moratorium, has been declared bankrupt or is involved in debt restructuring.

Furthermore, transitional compensation is not payable where the employment is terminated by mutual consent, which is to be distinguished from circumstances where the employee consents, in writing, to dismissal. In the event of a termination by mutual consent, parties are expected to agree the terms and conditions of termination and no statutory severance payment will be payable. Inevitably, however, employees will not easily agree to a termination if the employer does not offer a severance payment that is at least equivalent to the amount of transitional compensation the employee would have otherwise received.

Additional compensation

Following the amendments in 2015, employees are also able to claim additional compensation, to be determined by the court, if dismissal arises due to serious, culpable acts or omissions by the employer. This additional compensation will be paid on top of the transitional compensation and is not subject to a maximum amount. The amount of this severance payment will be determined by the court based on all circumstances of the case. According to the Explanatory Notes accompanying the current legislation, payment of additional compensation should only occur in exceptional circumstances.

Formula

Even though the 2015 changes are intended to entirely replace the Formula with transitional compensation, it is anticipated that, in the context of negotiating amicable settlements, the parties will continue to use the Formula as a benchmark for some time.
Under the Formula, the severance payment is calculated by multiplying the years of service (rounded up) (A-factor) by the employee's gross monthly salary, including 8% holiday allowance, a thirteenth-month allowance and average bonus and/or profit sharing over the past 3-5 years (B-factor) and by a correction factor (C-factor).

The years of service for the relevant employee (the A-factor) are calculated according to age:

- up to the age of 35, each year of service counts for 0.5;
- from the age of 35 up to the age of 45, each year of service counts for 1;
- from the age of 45 up to the age of 55, each year of service counts for 1.5; and
- from age 55 and beyond, each year of service counts for 2.

In practice, the C-factor fluctuated between 0 and 2. It was generally accepted in the legal professional literature and case law that for dismissals based on business/economic reasons, without any exceptional financial circumstances, a C-factor of 1 was reasonable. A C-factor equivalent to 1 also applied if each party was equally to blame for the situation.

Settlement agreement

Generally, the employer will try to reach agreement with an employee on the amount of compensation to be paid before filing a petition to the court.

7.3 Personal income tax

7.3.1 General system

General principles

Personal income tax is levied in accordance with the Personal Income Tax Act 2001. Personal income tax can be defined as a direct tax levied on the income of individuals. The ultimate amount of personal income tax owed is made up of taxes falling under the following three categories, referred to as "boxes":

Box 1 – tax on taxable income derived from living and working in the Netherlands
Box 2 – tax on taxable income derived from a substantial interest
Box 3 – tax on taxable income derived from savings and investment.

Independence of boxes

The three boxes operate independently from each other. This means that taxable income is computed according to the rules applicable to each relevant box. Separate tax rates apply for each box. Losses from one box cannot, in principle, be offset against income from another. The total tax payable is the sum of the tax payable in each box.

Tax credits

The total tax payable from all boxes may be reduced by various tax credits. The amounts vary according to personal circumstances, for example, marital status and age. The general tax credit ranges from EUR 2,242 to 0 (for income of EUR 66,670 and above, the general tax credit is EUR 0), depending on the taxable income derived from living and working in the Netherlands. These credits cannot be refunded and are usually only available to residents. The employment tax credit amounts ranges from EUR 3,103 to EUR 0 (for income of EUR 111,590 and above, the employment tax credit is EUR 0).

Withholding taxes

Employment income and dividends may also be subject to withholding tax. These taxes are referred to as payroll tax *(loonbelasting)* and dividend withholding tax (*dividendbelasting*), respectively (see 5.2 "Withholding tax" and 7.4 "Social security and payroll taxes" for details). They may be credited against the final income tax liability or refunded, depending on individual circumstances.

Income tax is levied on the individual who has been determined as being subject to income tax (see below).

7.3.2 Taxable persons

Resident and non-resident taxpayer

Individuals are subject to Dutch income tax as either resident or non-resident taxpayers of the Netherlands. Resident taxpayers are subject to tax on income in all three boxes, while non-residents are only subject to tax on Dutch-sourced income in the respective three boxes, for example, income from Dutch employment or income from Dutch real estate.
Certain non-residents can elect to be taxed on the same basis as resident taxpayers under some circumstances; see 7.3.4 "Non-residents".

Expatriates living in the Netherlands can elect to be taxed as non-residents in respect of their investment income; see 7.6 "Expatriate taxation".

Residence status

There is no decisive test for the residence status of individuals. Residence is determined according to the facts of each case. The main criterion is whether there are "durable personal ties" with the Netherlands. In this regard, the term "durable" need not mean permanent; the closeness of the tie is more important. The Dutch courts have developed a number of factors that may be taken into account. These include the nature and length of the stay in the Netherlands, whether or not the individual is accompanied by their family, and other aspects of the individual's centre of economic and social interests. The maintenance of a house may be an important factor in determining residence. A person's place of origin (domicile) or nationality, although relevant for these purposes, is less important.

Worldwide income

Dutch residents are subject to income tax on their worldwide taxable income. As previously mentioned, taxable income is divided into three boxes and consists of the net income (or gain) that is attributable to a specific box, less any applicable personal deductions; see 7.3.3 "Personal deductions" below. Once it has been decided who is subject to income tax, the next question that arises is what the tax base should be. The tax base refers to what is being taxed. As previously mentioned, each box has its own tax base, which also applies to foreign taxpayers.

Fiscal partner

Married couples are not taxed jointly. However, where two persons are deemed "fiscal partners", certain items may be freely allocated between them for tax purposes. These items include qualifying loan interest on the principal residence, income from a substantial shareholding and allowable personal deductions. The Box 3 tax base can also be allocated between partners.

As of 2011, a new general tax definition of "partner" applies. In 2010, unmarried cohabitants could still elect to be considered tax partners. This option has been eliminated, partly as a result of the pre-completed tax returns. Cohabitants that are registered at the same address will automatically become partners if they meet one or more of the following conditions:

1. They have a child together.
2. One partner acknowledges the child of the other.
3. A minor child of at least one of the partners is registered as living at the same address.
4. They jointly own a home.
5. They share a pension plan.
6. They have signed a cohabitation contract before a civil law notary.
7. They were partners in the preceding calendar year.

If both partners have been admitted to a nursing care home, they cannot remain one another's tax partner if they only qualify as partners according to condition 3. Moreover, a person can only have one partner. The definition of partner in the Gift and Inheritance Tax Act does not completely correspond to this general definition of partner; additional requirements apply. For example, unmarried cohabitants must both have reached the age of majority in order to qualify as partners for the Gift and Inheritance Tax Act. As of 2012, they must also include a mutual care clause in their cohabitation contract signed before a civil law notary. This requirement does not apply to cohabitants who have resided longer than five years at the same home address. Under the Gift and Inheritance Tax Act, parents and children do not qualify as partners, unless one of them receives voluntary home care.

7.3.3 Income source

Income is only subject to income tax if its source is regarded as taxable. The income sources are described below.

Box 1 – Living and working

Box 1 taxes income from living and working in the Netherlands. The sources of this income can be:

1. business income
2. employment income
3. income from other activities
4. income in the form of periodic payments
5. income (positive and negative) from the principal residence.

These income sources are discussed below.

1. Business income

Business income is income from a trade or business as well as income derived from independently provided services (e.g. by doctors, lawyers and other advisors). Income derived as a limited partner in a partnership is generally taxed as business income, although certain computational restrictions apply (e.g. regarding the self-employment allowance; see below).

The general provisions applying to individuals in respect of determining annual profits from a trade or business do not substantively differ from the provisions applying to companies (see chapter 5 "Business taxation"). However, in computing total taxable income for individuals conducting a trade or business, the following additional deductions or allowances may be claimed:

- contributions to a pension plan (generally, 9.8 percent of profits up to a maximum of EUR 8,774)
- a deduction for qualifying R&D-related activities (see 3.2.2 "Other incentives")
- an allowance for self-employed persons (as of 2012, a fixed amount of EUR 7,280 applies)
- an allowance for fiscal partners who provide unpaid assistance in the business of the other partner
- an allowance for start-up situations for individuals receiving occupational disability benefits

- an allowance for business cessations
- a general allowance equal to 14 percent of profits after deduction of the above allowances.

These allowances generally require a minimum number of hours to be worked in the business concerned.

Profits are taxable, whether or not the activities are conducted in the Netherlands. Relief from double taxation may be granted if profits are derived through a foreign permanent establishment (see 5.1.9 "Double taxation").

2. Employment income

This includes all employment income, such as wages, salaries, sickness payments, certain social security payments, pensions, directors' remuneration, benefits in kind, tips and other benefits received from third parties.

Salary

Employment income (including the use of a company car) is generally subject to payroll tax. Payroll tax is normally credited in determining the final income tax liability or refunded (see 7.4.5 "Payroll taxes and healthcare"). Generally, social security and welfare payments are also subject to payroll tax.

Employment expenses are non-deductible, except for a limited deduction for commuting by public transport if the distance is more than 10 km.
The maximum deduction is EUR 2,066, which is granted if the distance is more than 80 km.

Directors' remuneration

Remuneration received by managing directors and supervisory directors of companies located in the Netherlands is, in most cases, subject to income tax, even if they are non-resident and perform their activities outside the Netherlands. The company paying the remuneration must withhold payroll tax and social security contributions as a pre-levy on income tax.

Benefits-in-kind

Within certain limits and subject to certain conditions, employment-related provisions and reimbursements of certain employment expenses may be made on a tax-free basis. The deemed taxable benefit for the private use of a company car is set at a minimum of 25 percent of the catalogue value (15, 21 percent for qualifying fuel-efficient cars, 4 percent for zero-emission cars), unless the private travel is less than 500 km per year, in which case there is no taxable benefit. If the employer provides employees with living accommodation, then the taxable value of the living accommodation is the rental value, that is, the amount of rent that a third person would pay for the accommodation. However, the maximum taxable value is capped at 18 percent of the annual employment income if this involves employer-provided accommodation.

Stock options

Generally, stock options can only be taxed on the date on which they are disposed of or exercised. Payroll tax, income tax and social security contributions are due on the date the benefit was realised.

Work-related costs rules

As of 1 January 2011, the work-related costs rules took effect, extensively changing the rules for tax-exempt provisions, reimbursements and items made available to employees. Under the work-related costs rules, reimbursements and provisions, as well as items made available to employees, are regarded as part of the salary. In practice, however, no tax is due if the employer designates the benefit in question as being subject to a final levy, and the benefit is covered by the general exemption of 1.2 percent of the total salary for tax purposes, or is covered by a specific exemption. No tax is due when a benefit that the employer has designated as being subject to a final levy is valued at zero.

Pension income

Contributions by employers to qualifying employee pension plans are not subject to payroll tax or income tax. Contributions by employees to such schemes are tax-deductible if withheld by the employer. Conversely, pension benefits paid out under the scheme (upon reaching the retirement age) are taxable. Employees moving to the Netherlands may continue accruing their pension under their former, foreign pension plan subject to certain conditions. In the case of emigration from the Netherlands, a protective tax assessment may be issued in respect of accrued pension rights.

30-percent ruling

Certain employees coming to work in the Netherlands may be paid a tax-free allowance equal to 30 percent of their salary under a provision known as the "30-percent ruling", subject to various conditions. See 7.6 "Expatriate taxation".

Employment income earned by a resident individual is generally subject to income tax even if the work is not performed in the Netherlands. However, the tax may be mitigated by applicable double tax relief (see 7.3.4 'International aspects').

3. Income from other activities

Income that is not employment-related (such as freelance and consultancy income) is treated on a similar basis to business income. However, business income relief (such as the deduction for pension contributions) is generally not available. A taxpayer may file a request with the Dutch tax authorities to determine the tax status of their activities (i.e. as business income, employment income or income from other activities).

Also included in this category is income derived from loans made to a business run by a party related to the taxpayer or to a company in which the taxpayer (or a related party) has a "substantial shareholding" (defined under "Box 2" below).

This category also covers income from assets made available to such a company or business, including business premises, permits, patents, or even a life insurance contract concluded with the company. Gains on disposal of such assets are also included in Box 1 taxable income.

4. Income in the form of periodic payments

Income in this category includes alimony and income from annuities for which contributions have been deducted from taxable income in previous years.

5. Income (positive and negative) from the principal residence

Income from the principal residence is taken into account in Box 1. The most significant item in this category is interest on qualifying mortgage and other loans used to finance the principal residence. This is treated as negative income and tax deductible in Box 1. For a mortgage for a principal residence entered into on or after 1 January 2013, the related interest is only deductible if the mortgage is fully repaid within a maximum period of 360 months and the repayment is based at minimum on an annuity repayment scheme. In addition, interest in respect of a loan relating to a subsequent principal residence can only be deducted insofar as the purchase price of the new residence exceeds the difference between the sale proceeds and the loan on the former residence. For example, assume a new principal residence is purchased for EUR 300,000, while the old principal residence had a mortgage of EUR 75,000 and was sold for EUR 200,000. In this case, interest payments related to the new principal residence can only be deducted to the extent the new mortgage does not exceed EUR 300,000 – (EUR 200,000 – EUR 75,000) = EUR 175,000. As of 2014, the home mortgage interest deduction in the highest bracket of box 1 will be scaled back by 0.5% per year (for 2016: 50.5%).

The living comfort (*woongenot*) derived from the principal residence is a fixed percentage (*eigenwoningforfait*) of its valuation under the Valuation of Immovable Property Act (*Wet waardering onroerende zaken, WOZ*). The fixed percentage is arrived at as follows: a gross rental valuation is determined, from which a fixed percentage for costs, expenses and deprecation is deducted. The balance thereof, in combination with the residence's value, determines the fixed percentage (*eigenwoningforfait*) that can be claimed by the owner-occupier. The actual costs and expenses incurred, except financing costs, are not relevant. The annual living comfort in relation to the value of the principal residence is set as follows:

Value of residence more than	but less than	Annual fixed amount
-	EUR 12,500	Nil
EUR 12,500	EUR 25,000	0.30 percent of this value
EUR 25,000	EUR 50,000	0.45 percent of this value
EUR 50,000	EUR 75,000	0.60 percent of this value
EUR 75,000	EUR 1,050,000	0.75 percent of this value
EUR 1,050,000	-	EUR 7,875 increased by 2.35 percent of the value of the principal residence that does not exceed EUR 1,050,000

More than one private residence may be included in Box 1 in temporary situations (a maximum of four calendar years), for example, where renovations are carried out before moving into a new residence or where a new private residence is purchased before the old residence has been sold.
Income from other properties (including private residences) normally falls under Box 3 income.

Retirement annuity contributions

Retirement annuity contributions can only be deducted if the taxpayer can demonstrate a pension shortfall.

Personal deductions

Certain expenses can be deducted as personal expenses, for example, alimony, medical expenses, education expenses, or donations, subject to certain conditions. A fixed amount for expenses related to supporting children under 21 years of age may be deducted if certain conditions are met. These personal deductions are deductible first from Box 1, then Box 3 and finally Box 2. Any excess can be carried forward to future years. A typical example of taxable income computed for Box 1 is as follows:

Schematic overview Box 1	
Business income	+
Employment income	+
Income from other activities	+
Income in the form of periodic payments	+
Income (positive and negative) from the principal residence	+
(Sub-total)	
Retirement annuity contributions	-/-
(Sub-total)	
Personal deductions	-/-
Taxable income – Box 1	

Tax rates

Taxable income in Box 1 is taxed at the following progressive rates for individuals younger than the state pension age (for 2016, 65 years and six months):

Taxable income Box 1				
Bracket	*Taxable income*	*Income tax (percentage)*	*Social security[1] (percentage)*	*Total (percentage)*
1	up to EUR 19,922	8.40	28.15	36.55
2	EUR 19,922 – EUR 33,715	12.25	28.15	40.40
3	EUR 33,715 – EUR 66,421	40.40		40.40
4	More than EUR 66,421	52.00		52.00

1 Contributions in respect of the Old Age (Pensions) Act (Algemene Ouderdomswet), Surviving Dependants (Benefits) Act (Algemene *Nabestaandenwet) and General Long-term Care Act (Wet Langduige Zorg)..*

For individuals who have reached the state pension age, social security contributions are 10.25 percent in brackets 1 and 2 instead of 28.15 percent, (for that group the total rates are 18.65 percent and 22.5 percent, respectively). For individuals born before 1 January 1946, the upper limit of the second bracket is slightly higher: EUR 34,027 instead of EUR 33,715.

Social security contributions are generally payable by residents and by non-residents who are subject to payroll tax (see 7.4.5 "Payroll taxes and healthcare"), unless otherwise provided by international agreement or EU regulations. In addition to social security contributions, employee insurance contributions are payable, for example, in respect of unemployment.

Work bonus

As of 2013, a new personal income tax credit, the work bonus, is available. The work bonus applies to individuals whose employment income is more than EUR 17,139 but not more than EUR 33,326 and who have, at the beginning of the calendar year, reached the age of 62 but not yet reached the age of 64.

In 2016, the work bonus amounts to 57.763 percent of the employment income insofar as it exceeds EUR 17,139. The maximum work bonus is EUR 1,100. To the extent that the employment income exceeds EUR 23,852, the work bonus gradually decreases to nil for employment income of EUR 33,326.

Losses

A loss in Box 1 may only be carried back against Box 1 income in the three preceding years and carried forward against that income for the following nine years.

Box 2 – Substantial shareholding

Income and gains from a substantial shareholding are taxable in Box 2. A substantial shareholding exists when an individual (alone or together with a fiscal partner) owns, directly or indirectly, at least 5 percent of the issued share capital (or shares of one class) in a resident or non-resident company.

Stock options on at least 5 percent of the issued share capital (or shares of one class), or profit-sharing certificates for at least 5% percent of the annual profit or any liquidation payments, may also constitute a substantial shareholding.

Stock options on at least 5 percent of the issued share capital (or shares of one class), or profit-sharing certificates for at least 5 percent of the annual profit or any liquidation payments, may also constitute a substantial shareholding.

Generally, gains are computed by reference to the acquisition cost of the shares. Where a shareholder becomes a resident of the Netherlands, a step-up to market value may be applied in certain circumstances.

Tax rate

Taxable income in Box 2 is taxed at a flat rate of 25 percent.

Losses

A loss in Box 2 may be carried back against Box 2 income for the preceding year and carried forward against Box 2 income for the following nine years.

Where the taxpayer and his or her partner no longer hold a substantial shareholding, the taxpayer may request that a loss that has arisen in Box 2 be converted into a 25 percent credit that may be carried forward for up to nine years against tax due in respect of Box 1.

Box 3 – Savings and investment

Income from savings and investment is taxable in Box 3. Taxable income is based on a deemed return on capital, without regard to the actual income or expenses. This deemed return has been fixed at 4 percent of the net capital (assets less liabilities) on 1 January. The 4 percent is applied after deduction of an exempt amount (generally, EUR 24,437 per resident taxpayer).

Tax rate

The deemed income is taxed at 30 percent. This equates to a tax of 1.2 percent on net capital above the minimum exemption.

Assets and liabilities are generally taken into account at their market value. Assets and liabilities that have already been taken into account in Boxes 1 and 2 (such as the principal residence, any related qualifying loan, and shares that constitute a substantial shareholding) are not included in the net capital for Box 3. A number of items are exempt, such as works of art (unless they were acquired as an investment).
Investments in tax-approved green funds are tax exempt, up to a maximum of EUR 57,213.

Debt is taken into account to the extent that the combined value amounts to more than EUR 3,000 per taxpayer.

Losses

Losses cannot arise in Box 3.

7.3.4 International aspects

Non-residents

Taxable income

Non-resident individuals are subject to Dutch income tax on income derived from specific Dutch sources. This income is categorised according to the same “box” system applicable to resident taxpayers:

Box 1 – income from living and working in the Netherlands
Box 2 – income from a substantial shareholding in a Dutch resident company
Box 3 – income from specific types of Dutch-source savings and investment.

Box 1 – Income from living and working in the Netherlands

The most common types of income taxable in Box 1 for non-residents are:

- business income from a Dutch trade or business, carried on through a permanent establishment in the Netherlands
- employment income from working in the Netherlands
- income from other activities in the Netherlands
- pension or annuity income for which contributions have been deducted from Dutch taxable income
- income (positive and negative) from a residence in the Netherlands.

The income from other activities in the Netherlands includes income and gains derived from loans to and similar arrangements with a company in which the taxpayer (or certain related parties) has a substantial shareholding. This category also covers income and capital gains from assets made available to such a company, such as business premises.

The taxable income in Box 1 is taxed at the same rates as for resident taxpayers. Generally, non-resident taxpayers who are subject to payroll tax are also liable to social security contributions in tax brackets 1 and 2 at the same rates as resident taxpayers.

Box 2 – Income from a substantial shareholding in a Dutch resident company

Net income and gains from a substantial shareholding in a Dutch resident company are taxable in Box 2 at a flat rate of 25 percent. The income or gains are not taxable in Box 2 if the shareholding is held as a business asset.

Box 3 – Income from specified Dutch-source savings and investment

The assets attributed to this box in respect of non-resident taxpayers include:

- Dutch real estate
- certain rights directly or indirectly connected with Dutch real estate (e.g. benefits under trust-type arrangements)
- profit-sharing rights in Dutch resident companies that are not derived from securities or employment.

In determining the tax base for computing the deemed income under Box 3, liabilities may be deducted if they are related to the assets concerned.

The deemed return on the above assets (less liabilities) is 4 percent and the tax rate is 30 percent.

Taxable income

Net box income (including losses) is generally computed in the same way as for resident taxpayers. However, in computing total taxable income, non-residents are not entitled to the deduction for retirement annuity contributions, personal deductions (such as alimony) or the exempt amount in Box 3. The same generally applies for the personal tax credits. In certain cases, non-residents may be able to obtain these benefits under tax treaties or similar arrangements that specifically provide for this or contain an appropriate non-discrimination clause.

Individuals, who are resident of an EU or EEA Member State, Switzerland, or one of the BES islands, and who earn 90% or more of their income in the Netherlands will only be taxed on their Dutch income and are, in principle, entitled to the same deductions and tax credits as domestic taxpayers.

Except in the case of a substantial shareholding, dividend withholding tax is generally a final tax for non-residents, and it is neither creditable nor refundable (except under an applicable tax treaty). Payroll tax generally is creditable in computing the non-resident's income tax liability, or refundable, as appropriate.

The right to tax under domestic law may be restricted in certain circumstances by an applicable tax treaty.

Residents

Relief from double taxation

As in the case of resident companies, relief from double taxation for resident individual taxpayers may be provided by way of a tax treaty or, depending on the circumstances, under domestic rules (the "unilateral decree"). The rules applicable to companies described in Chapter 5 also generally apply to individuals. Certain additional rules are only relevant for individuals. For example, in computing the foreign tax credit in Box 1 or Box 2, the credit cannot exceed the Dutch tax in the box concerned that is attributable to the foreign income. In Box 3, the credit is limited to the total tax charged in that box. Where neither a treaty nor the unilateral decree applies, foreign tax may be deducted in computing taxable income in Box 1 or 2, as applicable.

Generally, income from foreign employment is exempt under treaties or the unilateral decree. This treatment is often referred to as "exemption with progression", since the foreign income, although exempt, is taken into account in determining the tax rate or rates applicable to the taxpayer's remaining income. In practice, this is achieved by including the foreign employment income in taxable income but then reducing the Dutch tax on this total income by the portion attributable to the foreign income. The formula for computing exemption relief under Box 1 is as follows:

Foreign Box 1 income/worldwide Box 1 income × Dutch tax (excluding social security contributions) on worldwide Box 1 income
The result of this computation is deducted from the Dutch tax on worldwide Box 1 income. The foreign tax on the foreign income in question may be more or less than the amount of this deduction from Dutch tax.

7.4 Social security and payroll taxes

7.4.1 Social security benefits

The Dutch social security system is elaborate and sometimes rather obscure due to the multiplicity of rules. Over the last decade, it became clear that the system has become too expensive, due to ageing of the population and rising unemployment and immigration. Consequently, the Dutch government drafted an action plan entitled, "Simplifying Social Affairs and Employment Regulations" (as referred to above). The intention of this plan was to simplify the rules and to bring them more in line with international standards, thereby strengthening the Netherlands' position on the international labour market.

The Dutch social security system has two applicable schemes:

1. a national insurance scheme covering all residents of the Netherlands
2. an insurance scheme for employed people only.

A summary of the social security system in the Netherlands and the applicable premiums is available in various languages from the Ministry for Social Affairs and Employment in The Hague. Generally, entering into an employment contract will lead to various compulsory insurance schemes under social security laws.

Entitlement to social security is not restricted to a minimum level of work. Any employee who works part-time is compulsorily insured regardless of the length of the working week and regardless of whether the employee or the employer resides and/or has its registered office outside the Netherlands.

As long as the work is performed in the Netherlands, the employment contract confers a right to insurance and a corresponding obligation to insure.

7.4.2 Disablement Benefits Act (WIA)

The employee insurance scheme provides for benefits in the event of disablement or unemployment. Employers and employees both pay social security premiums, which are based on the employee's gross annual salary and vary per sector. In 1996, the Disablement Benefits Act (WAO) was privatised, and the employer is now obliged to continue paying wages if an employee is on sick leave. As of January 2004, the employer is legally obliged to pay an employee on sick leave for 104 weeks.

If an employee continues to be disabled after this period, he or she may be entitled to disablement benefits under the WIA. This entitlement only exists if the degree of disablement of the employee is at least 35 percent. In the event of disablement of less than 35 percent, the employer and the employee must do everything to keep the employee at work.

Under the WIA, two different kinds of disablement benefits exist. The first one is the so-called "IVA"-benefit, awarded in the event of permanent disablement of at least 80 percent. The second, so-called "WGA-benefit", is awarded in an amount subject to the degree of disablement of the employee concerned.

7.4.3 Unemployment Benefits Act (WW)

The Dutch Unemployment Benefits Act provides for two types of benefits:

1. a wage-related unemployment benefit
2. a "short-term" benefit for a maximum period of three months.

To qualify for the wage-related unemployment benefit, an employee has to meet strict criteria concerning the number of weeks worked and his or her employment record. If an employee does not meet the employment record requirement, the employee is only eligible to the short-term benefit for a maximum period of three months. The total wage-related unemployment benefit can accrue to a maximum of 24 months (depending on the years of employment).

Benefits for the first two months of unemployment amount to 75 percent of the employee's last earned wage; after two months, the amount drops to 70 percent.

7.4.4 General Old Age Pensions Act (AOW)

As noted above, upon retirement, people in the Netherlands are entitled to a statutory basic pension under the General Old Age Pensions Act (AOW). This pension is based on the statutory minimum wage. In addition to this basic pension, there are various additional voluntary pension plans (described above). The state pension age is currently 65 years and six months. After 2021, this will increase on the basis of life expectancy.

Early retirement schemes (VUT) had become quite common since the 1980s; however, there has been a tendency during the past decade to cut down on these schemes due to rising costs. Early retirement schemes are no longer open to the vast majority of workers.

7.4.5 Payroll taxes and healthcare

A company may be liable for payroll tax *(loonheffingen*) in respect of remuneration paid to its employees. This tax is in effect a withholding tax that is creditable against the individual's income tax liability. The tax is due from resident companies, as well as non-resident companies that have, or are treated as having, a permanent establishment in the Netherlands. Except for company directors, the tax does not generally apply to non-resident employees whose duties are wholly carried on outside the Netherlands. Where such duties are partly carried on outside the Netherlands, the tax generally also does not apply, provided the income is taxed abroad. Certain compliance rules apply as of the first day of employment of a new employee.

A system of compulsory basic insurance for medical expenses applies in the Netherlands. Under this system, healthcare insurers offer basic insurance coverage for a standard premium. Depending on personal circumstances, including income level, individuals may be entitled to a state allowance in respect of this premium. In addition to the standard premium, an income-related premium may be payable based on a percentage of qualifying income, such as employment income, and limited to a maximum amount. The income-related premium is payable by the employer.

7.5 Pensions and insurance

The system for retirement provisions in the Netherlands consists of three pillars:

1. State retirement pension (first pillar)
2. Occupational pensions (second pillar)
3. Private pensions (third pillar)

1. State retirement pension (first pillar)

The state retirement pension (AOW) is funded as a pay-as-you-go scheme. Anyone who lives or works in the Netherlands is insured for the AOW. The AOW is accrued over 50 years. For each year that someone does not live in the Netherlands during this 50-year period, a discount of 2% applies. The AOW benefits used to start as of the month in which the rightful beneficiary turned 65, but the state pensionable age is rising rapidly, as attested to by the following overview:

Date of birth	AOW starts in	At the age of
Before 1 January 1948	2012	65 years
After 31 December 1947, but before 1 December 1948	2013	65 years + 1 month
After 30 November 1948, but before 1 November 1949	2014	65 years + 2
After 31 October 1949, but before 1 October 1950	2015	65 years + 3
After 30 September 1950, but before 1 July 1951	2016	65 years + 6
After 30 June 1950, but before 1 April 1952	2017	65 years + 9
After 31 March 1950, but before 1 January 1953	2018	66 years
After 31 December 1953, but before 1 September 1953	2019	66 years + 4
After 31 August 1953, but before 1 May 1954	2020	66 years + 8
After 30 April 1954, but before 1 January 1955	2021	67 years

With effect from 1 January 2022 the retirement age will be linked to life expectancy. On 1 January 2017 the decision will be made for the first time whether the retirement age should be increased by three months in 2021. The situation will subsequently be reassessed each year.
The Dutch state pension is a relatively modest basic provision. For a single person it amounts to 70 percent of the statutory minimum wage for a person aged 23 years or older, i.e. EUR 19,758.82 gross (In 2016 this results in a net disposable income of EUR 864.14 per month; EUR 1,075.56 after applying the available tax credit.)

Single person

	Monthly amount	
Dutch state pension	**with tax credit**	**without tax credit**
Gross *	EUR 1,138.15	EUR 1,138.15
Payroll tax and social security contributions	EUR 0.00	EUR 211.42
Healthcare Insurance Act contributions	EUR 62.59	EUR 62.59
Net	EUR 1,075.56	EUR 864.14

* The gross amount includes an amount of EUR 25.48 in statutory old age pension income support. The gross amount excludes vacation allowance. The gross monthly vacation allowance is EUR 71.56 and is paid in May.

Married or cohabiting partners

For married or cohabiting partners, it amounts to 50 percent (EUR 783.87 gross). This results in a net disposable income of EUR 594.76 and EUR 740.76 per person per month after applying the available tax credit.

	Monthly amount	
Dutch state pension	**with tax credit**	**without tax credit**
Gross *	EUR 783.87	EUR 783.87
Payroll tax and social security contributions	EUR 0.00	EUR 146.00
Healthcare Insurance Act contributions	EUR 43.11	EUR 43.11
Net	EUR 740.76	EUR 594.76

* The gross amount includes an amount of EUR 25.48 in statutory old age pension income support. The gross amount excludes vacation allowance. The gross monthly vacation allowance is EUR 71.56 and is paid in May.

2. Occupational pensions (second pillar)

Second pillar pensions are collectively funded pensions. Although there is no general mandatory occupational pension in the Netherlands, in certain cases employees who are subject to a collective labour agreement (CLA) are legally obliged to join a pension plan (usually with an industry-wide pension fund), and over 96% of Dutch workers are accruing a pension within the second pillar.

Types of pension providers

Under Dutch law, occupational pensions must be administered by either an insurance company, a pension fund, a Premium Pension Institution (PPI) or a General Pension Fund (*Algemeen Pensioenfonds*; APF). A company pension fund is tied to one employer or a conglomerate of companies, while an industry-wide pension fund carries out the pension plan for all workers in an industrial sector. An APF can be established as from 1 January 2016. It is expected that the first APF licences will be issued by De Nederlandsche Bank (the Dutch regulatory bank) in March 2016. An APF is not confined to a particular domain of employers or employees. An APF may administer one or more pension plans for one or more employers, but must ring-fence the assets of each group plan. The APF will be a substitute for the multi–pension fund.
Employers may also make a pension commitment to their employees by taking out pension insurance with an insurer or a PPI. A PPI is an institution for occupational retirement provision (IORP) that allows companies to pool their defined contribution pension plans on a cross-border basis. The PPI fits neatly within the framework of the IORP Directive. The PPI (Premium Pension Institution) can only administer defined contribution pension plans during their development phase and is not permitted to run any risks, including return, death and disability risk. A PPI can be established as from 1 January 2011.

Taxation

Pension contributions can be payable by the employer, or by both the employer and employee.
The government provides tax relief, up to certain maxima. These maxima depend on the type of pension plan: different conditions apply to a final pay plan, an average pay plan, and hybrid and defined benefit contributions. Within these schemes, old age pension, survivor's pension, orphan's pension, a disability benefit and other forms may have different pension bases.
In the Netherlands, tax rules applicable to pensions are usually very complicated. Pension contributions within the fiscal maximum range are tax deductible

for corporate tax systems and not taxed at the employee (reversal rule), contributions from employees are deductible form salaries for payroll tax purposes. Pension instalments are fully taxed.
Thus in the Netherlands, pension contributions and accruals to the fund are exempt, while payments made by the fund are taxed (EET-system).
A pension equal to 70% of the employee's final salary (including first pillar state pension payments) has traditionally been considered the norm.
However, in recent years, average pay plans have become more common, and a 70% pension has become relatively rare. The current national trend in the Netherlands is in favour of defined contribution systems (i.e. where the contributions but not the final pension are fixed) or more hybrid schemes.
The 'standard' retirement age for occupational pensions used to be 65 years. As from 2014, however, tax relief has been based on a pensionable age of 67 years.

Furthermore a maximum pensionable salary of EUR 101.519 is applicable (2016). Above this threshold it has been possible since 2015 to accrue net savings in the form of either net pension (second pillar) or net annuity (third pillar). The savings may be derived from the net salary or net income. The saved amount is exempted in box 3. The benefits are not taxed. The provisions of the Pensions Act apply to net pensions. The group of beneficiaries is more limited than is the case with net annuities (see Private pensions). Surrender is in principle not possible. A net pension cannot be inherited, while a net annuity can be. Both a 4% contributions scale and a 3% contributions scale can be used for net pensions.

Taxation of pension funds

Qualifying Dutch resident pension funds are exempt from Dutch corporate income tax. Such pension funds are eligible for a full refund of Dutch dividend withholding tax withheld on Dutch dividends received. The Netherlands has concluded various double tax treaties on the basis of which favourable withholding tax rates are available for Dutch pension funds investing in other countries (e.g. the United States, the United Kingdom, Japan and Switzerland). Dutch pension funds may also be eligible for various reduced withholding tax rates in EEA countries. These reductions are based on EU case law, which prescribes that non-resident pension funds (such as a Dutch pension fund) may not be discriminated against compared to resident pension funds.
Pension funds, like any other insurance company, are taxable persons for VAT purposes. The pension insurance services are exempt from Dutch VAT. As a result, any VAT incurred on services rendered to pension funds will generally not be

recoverable and will be a real cost. However, under certain conditions, a pension fund may be able to partly recover VAT incurred on the expenses attributable to its investment portfolio to the extent that this portfolio is invested in non-EU jurisdictions. There are various ways to calculate the pro rata recovery percentage.

Several exemptions may apply to services rendered to pension funds. Investment management services rendered to pension funds are subject to VAT unless the service concerns the management of special investment funds (e.g. funds for collective investments, being subject to special State supervision). Currently, pension funds may qualify as a special investment fund. According to the judgement rendered by the Court of Justice of the European Union in the ATP case, a pension fund qualifies as such if three conditions are fulfilled: i) the pension fund is funded by the persons to whom the retirement benefit is to be paid, ii) the pension fund invests on a risk-spreading basis and iii) the participants in the pension plan bear the investment risk. According to the Dutch Deputy Minister of Finance, management services rendered to certain PPIs are not subject to VAT. Global custody services rendered to Dutch pension funds are partly exempt from Dutch VAT.

Accounting

Pension accounting in the Netherlands follows DC plan accounting. Depending on the (actuarial) risks of the scheme, DB plan accounting may apply. Dutch accounting rules also allow companies to apply IFRS and US GAAP accounting principles. Given the specific characteristics of Dutch pension plans, close attention must be paid to risk-sharing and shared funding elements of the pension plans when accounting for such plans.

3. Private pensions (third pillar)

Workers can individually compensate a pension shortfall through an annuity. The individual contributions in the third pillar also qualify as a type of funded system. These retirement provisions can be funded by either an insurance company, or, since 2008, by a bank. The contributions to a life insurer or a bank, may - within limits - be deductible for income tax purposes (very complicated rules apply here as well). However, the future instalments of the annuity benefit will be fully taxed at a progressive tax rate.
Net savings in the third pillar (above a salary of EUR 101,519) can be realised by way of a net annuity. A net annuity can be inherited. Only a contributions scale based on an actuarial interest rate of 4% is possible.

7.6 Expatriates

Workers from EEA countries (i.e. EU, Norway, Iceland and Liechtenstein) do not need a special permit to work in the Netherlands. Non-EEA nationals need a work permit, as do Romanian and Bulgarian nationals despite their countries' EU membership. The prospective employee must first apply for a residence permit, and then the prospective employer must file a request with the UWV for a work permit.

7.6.1 General rules

The general rules of Dutch labour laws outlined above apply to employees with a Dutch employment contract and a Dutch employer. But do Dutch labour laws apply to people who work temporarily in the Netherlands and who normally work in another country?

The most important criterion for deciding whether Dutch labour laws apply is the length of the secondment. A short-term secondment lasts one to two years, with the official employer remaining the same. A medium-term secondment lasts two to five years, and a long-term secondment exceeds five years.

During secondment abroad, the employee continues to work under the authority of his or her own employer. In the case of a medium-term engagement abroad, it is customary for any family members also to be transferred abroad and for the employee concerned to be transferred to a different payroll. In addition, the seconded employee will continue to be employed by the original employer. With a long-term sojourn abroad, it becomes increasingly difficult to maintain the essential relationship with the former employer who seconded the employee. In these instances, the original employment contract will usually be terminated.

7.6.2 Applicable law and jurisdiction

Under Dutch law, for an expatriate employee, there is a choice as to the law that applies to the employment relationship. However, pursuant to international rules (the European Treaty of Contractual Obligations), a choice of law cannot deny the employee the protection that would have been enjoyed in the absence of such a choice of law. The applicable law by a lack of choice is the law of the country in which the employee actually carries out his or her duties, unless the employment is more closely connected to another country. The latter may be the case if the employee worked in the Netherlands only for a short time.

In addition, if the expatriate qualifies under the "30-percent tax regime", a strong argument would exist that Dutch employment law does not apply because this tax regime only applies to employees who work in the Netherlands temporarily. Irrespective of the applicable law, the expatriate will enjoy protection from dismissal if their employment and dismissal touch upon Dutch socio-economic interests – in short, if the employee has sufficient ties with the Netherlands to justify protection.
Factors in assessing such ties include whether the employee is likely to apply for a job in the Netherlands after dismissal, Dutch nationality or a valid work permit. Also, the employee's family situation and financial situation also play a role (e.g. whether he or she owns a house in the Netherlands). If there is doubt about the applicable law, the Dutch courts will likely apply the mandatory rules of Dutch law. Whether the issue falls under the jurisdiction of the Dutch court will primarily be determined by the applicable international treaties. If no such treaty is applicable, the Dutch competence rules decide whether the Dutch court is competent or not.

7.6.3 Employment conditions of expatriates

The employment conditions of an expatriate employee may differ from the employment conditions of other employees. Different methods can be used to determine what income the expatriate should be paid. One such method is the "local peer method" (also called the "going rate"), under which the employee receives the same salary as an employee in a similar position in the host country. According to the "balance sheet method" (or "home net method"), the purchasing power of the employee in the deploying country is taken as the criterion for the employee's new salary.

Apart from the employment conditions for regular employees, a supplementary agreement can be made in which the agreements of the deploying and the receiving employer are stipulated. For example, such an agreement may cover the possible renegotiation of the salary to compensate for loss of net income if the Dutch Ministry of Finance does not grant the 30-percent tax regime. Other stipulations that should be included in the agreement may involve expenses, tax advisor assistance and payment of travel expenses to the deploying country.

The employment conditions of employees who are seconded to a European country are further regulated by the Employment Conditions Cross-border Labour Act (*Wet Arbeidsvoorwaarden Grensoverschrijdende Arbeid – WAGA*).

The WAGA is based on the European directive 96/71 EC concerning cross-border secondment and regulates which provisions apply to the seconded employee. Every contracting state has its own implementation of this directive.
The mandatory provisions that have to be taken into account relate to:

- the maximum work period and minimum rest period
- the minimum paid annual holidays (for every employee working full-time at least 20 days per year during which the employee's salary is fully paid in the Netherlands)
- the statutory minimum wage and holiday allowance
- health, safety and hygiene measures in the working environment
- protective measures in respect of the terms and conditions of employment of pregnant or recently delivered employees and young employees
- equal treatment of male and female employees, as well as other provisions relating to non-discrimination of employees.

7.6.4 Expatriate taxation

Expatriate concession: 30-percent ruling

A special concession, known as the "30-percent ruling", is designed to attract certain foreign employees to work in the Netherlands. Under the concession, the employer can pay the employee a tax-free allowance of up to 30 percent of his or her total remuneration (including the allowance itself). This allowance is intended to cover the costs incurred as a result of coming to the Netherlands ("extra-territorial costs"), although no proof of such costs being incurred is required. Remuneration for these purposes includes incidental payments such as bonuses and option benefits, but not severance and pension payments.

Certain additional expenses can also be reimbursed tax-free. These include international school fees, relocation expenses and a moving allowance that is subject to a maximum amount. Under current policy, other expenses that qualify as extra-territorial costs cannot be reimbursed tax-free to individuals covered by the 30-percent ruling.

In addition to the tax-free allowance, an employee covered by the 30-percent ruling can elect to be treated as a non-resident for the purposes of taxing income in Boxes 2 and 3 (a "partial non-resident"). Broadly speaking, this means that only income from Dutch sources (i.e. that would be taxable in the hands of a non-resident) may be taxed in these two boxes. Employment income and

income from a principal residence will continue to be taxed in Box 1. This includes income from employment activities performed outside the Netherlands, unless covered by double tax relief. A special rule applies to US citizens and US green card employees who elect for partial non-resident status, under which they are only subject to tax on days worked in the Netherlands.
The following conditions apply for obtaining the 30-percent ruling.

- The employee (who may also be a Dutch national) must be recruited from abroad. Prior to their employment in the Netherlands, an employee must have resided more than 150 kilometres from the Dutch border for two-thirds of a 24-month period.
- The employer must be a Dutch payroll tax agent, that is, an employer liable for Dutch payroll tax.
- The employee must have specific expertise that is scarce or not available on the Dutch market.

A salary threshold applies to the final criteria. The taxable annual salary excluding application of the 30-percent ruling must be at least EUR 36,889. A lower salary threshold of EUR 28,041 per annum applies to employees under age 30 who hold a Masters degree. No salary threshold applies to academics.

The ruling is granted for a period of eight years and applies only as long as the criteria are met.

An application for the 30-percent ruling must be submitted within four months after the employee's arrival in the Netherlands if it is to apply as of the commencement of the employment.

Other expatriates: expenses and reimbursements

Certain extra-territorial costs may be reimbursed tax-free to expatriates who do not benefit from the 30-percent ruling. These costs include items such as the following:

- cost of living allowance (COLA)
- double housing costs
- home leave
- incremental costs in respect of school fees.

For individuals under the 30-percent ruling, relocation expenses and a moving allowance up to a certain limit can be reimbursed tax-free.

7.7 Gift and inheritance tax

As of 1 January 2010, amended inheritance tax legislation took effect. The main features of gift and inheritance tax are discussed below.

7.7.1 On what is gift and inheritance tax owed?

Inheritance and gift tax is levied in respect of the receipt of a gift or inheritance from an individual who, at the time of death or gift, is a resident of the Netherlands (including individuals under the 30-percent ruling). For these purposes, a Dutch national who dies or makes a gift within ten years of leaving the Netherlands is deemed to be resident in the Netherlands at the time of death or gift. In addition, any person who ceases to be a resident of the Netherlands and makes a gift within one year of ceasing residence is deemed to be resident in the Netherlands at the relevant time.

7.7.2 Who owes gift and inheritance tax?

Gift and inheritance tax must be paid by the heir, beneficiary or gift recipient at the time of acquisition or on the testator's death.

Tax rates

Tax rates			
Taxed acquisition	*Tax rate I: spouses/children*	*Tax rate Ia: grandchildren*	*Tax rate II: other acquirers*
0 - EUR 121,903	10.00 %	18.00 %	30.00 %
EUR 121,903 and higher	20.00 %	36.00%	40.00 %

Exemptions

Exemptions: inheritance tax	
Spouses /partners	EUR 636,180
Children and grandchildren	EUR 20,148
Parents	EUR 47,715
Other acquirers	EUR 2,122
Exemptions: gift tax	
Children	EUR 5,304
Children age 18-40 (one-off gift) or	EUR 25,449
Children age 18-40 (one-off gift) if gift is used to purchase a house or for education	EUR 53,016
Other acquirers	EUR 2,122

The exemption for gifts associated with an own home will be reintroduced. The exemption will be set at a maximum of EUR 100,000 from January 1, 2017. If use has previously been made of the increased exemption of EUR 53,016 (2016) in 2015 and 2016, this amount will be deducted from the EUR 100,000. The scheme will be extended because it no longer only applies to gifts made by parents to their children, but to every gift made to a person between the age of 18 and 40 years, provided the gift is used for the procurement or acquisition of an own home, improvements to or maintenance of the own home, buyout of ground rent or superficies or mortgage repayment.

The Netherlands has domestic law provisions for the avoidance of double taxation on gifts and inheritances. It has also concluded treaties with a number of countries covering these taxes.

Exit matters

8.1 Legal

Liquidation

The liquidation of a company consists of two stages. First the company has to be dissolved. Section 2:19 Netherlands Civil Code provides an exhaustive list of how a company can be dissolved. A legal entity can be dissolved by

(i) a resolution by the general meeting of shareholders;
(ii) (ii) an event that according to the legal entity's articles of association leads to the company's dissolution, and which is not a resolution nor an act aiming at its dissolution;
(iii) bankruptcy of the company;
(iv) a decision by the Chamber of Commerce as referred to in Section 2:19a Netherlands Civil Code[1]; and
(v) dissolution by a court in situations where the law provides for this, for example, where there are problems with the company's formation, the articles of association do not comply with statutory requirements, and the company does not meet the statutory definition of its legal form.

The discussion in this chapter focuses on dissolution on the basis of a shareholders' resolution. The resolution to dissolve the company does not mean that the company ceases to exist; it will continue to exist for the purposes liquidating its assets and liabilities. At this stage, "in liquidation" must be added to the company's name and appear on all outgoing company documents. The resolution will also dismiss the directors, appoint a liquidator and a custodian for the company's books and records.

The second stage is the winding up of the company's assets and liabilities. Upon dissolution other than in context of bankruptcy, the company's affairs must be wound up by a liquidator.

The Chamber of Commerce can decide to dissolve a company if
(i) the company has not paid the sum due for registration for at least one year;
(ii) none of the company's directors are registered with the Chamber of Commerce for at least one year;
(iii) no annual financial accounts of the company have been filed for at least one year; or
(iv) the company has not responded properly to a formal notice to file a tax declaration.

After the two stages have been completed, the company's books and records must be stored for a period of seven years with the appointed custodian.

The resolution to dissolve and liquidate, the completion of the liquidation procedure and details of the custodian must be registered with the Trade Register of the Chamber of Commerce.

The standard liquidation procedure, i.e. the dissolution and winding-up of the company, may be accelerated if, after the shareholders' resolution to dissolve has been adopted:

(i) the registration with the Trade Register of the Chamber of Commerce that the company is in liquidation has taken place, and
(ii) the debts of the company have been settled and the liquidator is willing to distribute the remaining assets of the company among the beneficiaries by way of a "distribution in advance". If at the time of the shareholders' resolution the company has no assets or liabilities, the winding up stage will not be necessary. This is referred to as a "turbo liquidation".

Bankruptcy

Dutch bankruptcy law is governed by the Dutch Bankruptcy Act. There are three different formal procedures under the Dutch Bankruptcy Act:

(i) bankruptcy
(ii) suspensions of payments
(iii) debt restructuring for private individuals under the Debt Management (Natural Persons) Act.

A company can be declared bankrupt by the competent District Court. Applications for bankruptcy can be filed by the company itself, a creditor or the public prosecutor.

The District Court will only declare the company bankrupt if the company has ceased to fulfil its financial obligations. In general, this is the case if various creditors (at least two) have difficulty collecting outstanding invoices (where at least one of the invoices is due and payable). If the application for bankruptcy is granted, the District Court will appoint one or more bankruptcy trustees.

In case of bankruptcy, the company's assets, including assets that have been acquired after the declaration of bankruptcy, are liquidated by the bankruptcy trustee to pay the company's creditors.

The creditors must file their claims with the court-appointed bankruptcy trustee. In principle, all creditors have an equal right to payment. However, there are two exemptions: (1) for creditors who hold a secured interest, i.e. creditors who hold a mortgage or right of pledge. They can claim the collateral as if the company was not bankrupt; and (2) for 'preferred creditors'. These creditors have a preferential right to payment upon the bankruptcy of the company before unsecured creditors.

The suspension of payment is a legal measure under which a company in financial difficulties can be restructured and continue its activities. The company is given temporary relief against claims by its creditors, in order to reorganise and therefore continue its business. However, the creditors' claims against the company will ultimately have to be settled. Suspension of payment does not result in dissolution of a company (unless the suspension of payment is later converted to bankruptcy).

Suspension of payment can only be granted by the court at the request of the company, not at the request of a creditor. There is no legal obligation for the company to request a suspension of payment.

There is also a 'pre-packaged insolvency procedure' ("pre-pack"). This is a procedure where a sale of all or a part of the company's business/assets is negotiated by the management of the company (assisted by an administrator appointed by the Court) with a purchaser before filing for bankruptcy. As soon as the company is declared bankrupt, the bankruptcy trustee will sell and transfer the business/assets to the purchaser on the basis of the pre-pack. The pre-pack procedure is still an informal procedure as it has not yet been included in the Dutch Bankruptcy Act.

Emigration of registered office

Dutch law provides for the possibility of emigration of the registered office, but this emigration and its consequences are part of an ongoing discussion in the Netherlands. The Netherlands adheres to the "incorporation principle", according to which a company's formation, organisational and dissolution are governed by the law under which the company is incorporated.

Some other countries follow the "actual place of business principle". Under this principle, a company is governed by the law of the country in which it has its actual place of business (i.e. the company's head office). The registered office is the place stated in the articles of association and is where the company's place of business is most likely situated.

Under Dutch law, the registered office of a company can differ from the actual place of business. According to Section 10:118 Netherlands Civil Code, a company that by virtue of its contract or instrument of incorporation has, at the time of its formation, its registered office or, failing that, the centre of its external operations in the country under whose laws it was incorporated, will be governed by the law of that country.

Where a company (legal person) emigrates its registered office to another country and both home and host country acknowledge the emigration, the continuation of the company is acknowledged under Dutch law (see Section 10:120 Netherlands Civil Code).

When the company's registered office is emigrated, the law of the host country regulates all the matters referred to in Section 10:119 Netherlands Civil Code, including the legal personality of the company, the internal affairs of the company, the authority of directors and supervisory directors and other authorised persons, and the liability of the company.

The company can also emigrate its statutory seat via a cross-border merger. A cross-border merger makes it possible for companies to transfer their registered offices from one country to another by amending their governing law. A company from the Netherlands may do this by setting up a subsidiary in the country where it wants to move its registered office to and then merging it into that subsidiary. Under Dutch law, the cross-border merger is possible pursuant to Sections 2:309ff and 2:333b ff Netherlands Civil Code.

On 31 January 2014, the draft bill on cross-border conversion capital companies was published. The draft bill includes a provision setting the terms for a cross-border conversion of not only ‘naamloze vennootschappen’ (‘NVs’) and ‘besloten vennootschappen’ (‘BVs’) into a foreign capital company and vice versa, but also the cross-border conversion of other legal entities. Dutch law does not yet contain extensive regulation on cross-border conversion (including the cross-border transfer of a registered office). The main objective of the draft bill is to protect the interests of creditors, minority shareholders and employees and to create a legal basis for the cross-border transfer of the statutory seat. The draft bill outlines the preconditions that must be met before a cross-border conversion can take place and contains procedural provisions. The cross-border conversion of a Dutch NV/BV into a capital company subject to EU/EEA-Member State (outbound) law is governed by Dutch law until conversion. Similarly, the conversion of an EU/EEA legal entity into a Dutch NV/BV (inbound) is primarily governed by the law of the country of departure.
The country of departure decides whether the legal entity may convert cross-border. It is not clear whether the draft bill will be approved and when it will be implemented into Dutch corporate law.

Finally, if a company wishes to emigrate its registered office outside the Netherlands, it can set up a company in the country of relocation, liquidate the Dutch company and transfer the Dutch company’s assets to the new company. However, this approach is time-consuming and would probably have unfavourable tax implications.

8.2 Financial reporting

The activities of a company can be terminated as a result of a (voluntary) liquidation or bankruptcy.

Liquidation

During the liquidation period, the words "in liquidation" must appear on all outgoing company documents. Dutch law is not clear on whether the company (i.e. its liquidators) must continue to prepare and publish financial statements during the liquidation period, but it is advisable to do so until the liquidation has been settled. In this case, it may be necessary to abandon the going-concern assumption when preparing the financial statements. Alternatively, the company in liquidation may request the Dutch Minister of Economic Affairs (through the Netherlands Enterprise Agency (Rijksdienst voor Ondernemend Nederland; RVO) to grant dispensation from preparing and Sections 2:101 and 2:210 Netherlands Civil Code).

Bankruptcy

Once bankruptcy has been declared, a bankruptcy trustee replaces the company's management. The bankruptcy trustee is not required to prepare financial statements for the company. Dutch law is not clear on whether the former management still has to prepare financial statements for the financial period(s) up to the date bankruptcy was declared, but this is probably not the case because management usually no longer has access to the company's accounts. To avoid uncertainty on this point, the management can request the Minister of Economic Affairs (through the RVO) to grant dispensation from preparing and publishing financial statements (Sections 2:101 and 2:210 Netherlands Civil Code).

Emigration

The business activities and/or the place of business of a company may be transferred abroad. As long as the company remains a Dutch legal entity, such a transfer will not affect the company's reporting requirements under Dutch law. If the transfer also involves the liquidation of the legal entity in the Netherlands, please refer to our earlier comments about liquidation and how it affects reporting requirements.

8.3 Taxation

8.3.1 Corporations

Liquidation

Liquidation means that the company ceases to exist. Once the liquidation is settled, there is no longer a corporate income tax liability. The company must prepare a final balance sheet for tax purposes at the time of liquidation, reporting its assets and liabilities at their fair market value. This ensures that all benefits not yet reported for tax purposes are included in the profit for the final financial year.

Any distribution in excess of the average paid-in capital (i.e. the liquidation distribution) is considered a dividend for dividend withholding tax purposes and subject to 15 percent withholding tax. Exemptions or applicable double tax treaties may reduce this withholding tax.

Bankruptcy

Bankruptcy is unlikely to result in a corporate income tax charge. Specific case law regarding liabilities must be taken into account. The company's directors must fulfil special reporting requirements to avoid personal liability, especially for wage tax and VAT.

Emigration and cross-border asset transfers

Exit tax may arise if the company relocates abroad.except to the extent that assets are retained by a Dutch permanent establishment.
Exit tax also applies on the transfer of assets to a foreign head office and on the closure of a permanent establishment. In both cases the exit tax is normally computed by reference to a deemed gain in respect of the assets transferred, including any untaxed gains and reserves and provisions. Exit tax is not usually payable on the transfer of assets from a Dutch head office to a foreign permanent establishment (although the untaxed gains and reserves will effectively be taxed in subsequent years due to a lower exemption applying to the profits of the permanent establishment).

Parties that are residents of an EU Member State or an European Economic Area Member State may not have to pay the full amount of exit tax in one go. The exit tax rules allow taxpayers to choose between immediate taxation, a deferral until subsequent realisation and payment in ten annual instalments. Unless the taxpayer opts for immediate taxation, interest will be payable on the deferred tax, and the tax authorities will require collateral. Under Dutch law, a bank guarantee will often be the preferred form of collateral. However, according to recent case law of the CJEU a requirement to provide a bank guarantee for exit tax may only be imposed on the basis of the individual actual risk of non-recovery of the tax. If the taxpayer opts for deferral until realisation it will also have to provide an annual balance sheet and income statement drawn up in accordance with Dutch tax law so the Dutch tax authorities can determine whether there has been a realisation.

8.3.2 Individuals

Where an individual ceases to be resident in the Netherlands, this may, in some cases, give rise to taxation. This is particularly relevant for accrued pension or annuity rights, rights under qualifying endowment or savings plans in respect of a principal residence, and certain substantial shareholdings. A protective assessment will be imposed upon emigration. Until 1 January 2016 this did not necessarily result in an immediate tax charge. The taxpayer could request a postponement of payment, and, in certain cases, postponement was automatic. Whether the taxpayer had to provide collateral for the tax to obtain postponement was dependent on the circumstances. In most cases, the assessment was lifted after 10 years, provided the taxpayer did not carry out a "tainted" transaction in the meantime. Typical examples of a tainted transaction include disposing of the shareholding concerned or commuting or pledging pension rights.

An immediate income tax charge could also arise when the assets of a business carried on by an individual in the Netherlands were transferred outside the Netherlands, and, at the same time or later, the taxpayer emigrated. Such a charge could also arise where a Dutch business carried on by a non-resident individual was closed down.

As of 1 January 2016, the regime of protective assessments on emigrating holders of substantial interests has been amended. As of this date the Dutch tax claim on the substantial interest is maintained and can also be collected, even if less than 90% of profit reserves are distributed. The amendment means that profit distributions after emigration will in all cases (therefore not only to just under 90%) be taxed or will lead to a (pro rata) withdrawal of the deferral of payment. Furthermore, the protective assessment will no longer be waived after 10 years purely for the reason that the period has expired; the protective assessment will remain outstanding indefinitely. To avoid anticipatory action, the measure has retroactive effect to 15 September 2015.

The old exit tax rules will continue to apply to protective assessments imposed on emigration that took place before 3:15 p.m. on 15 September 2015.

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