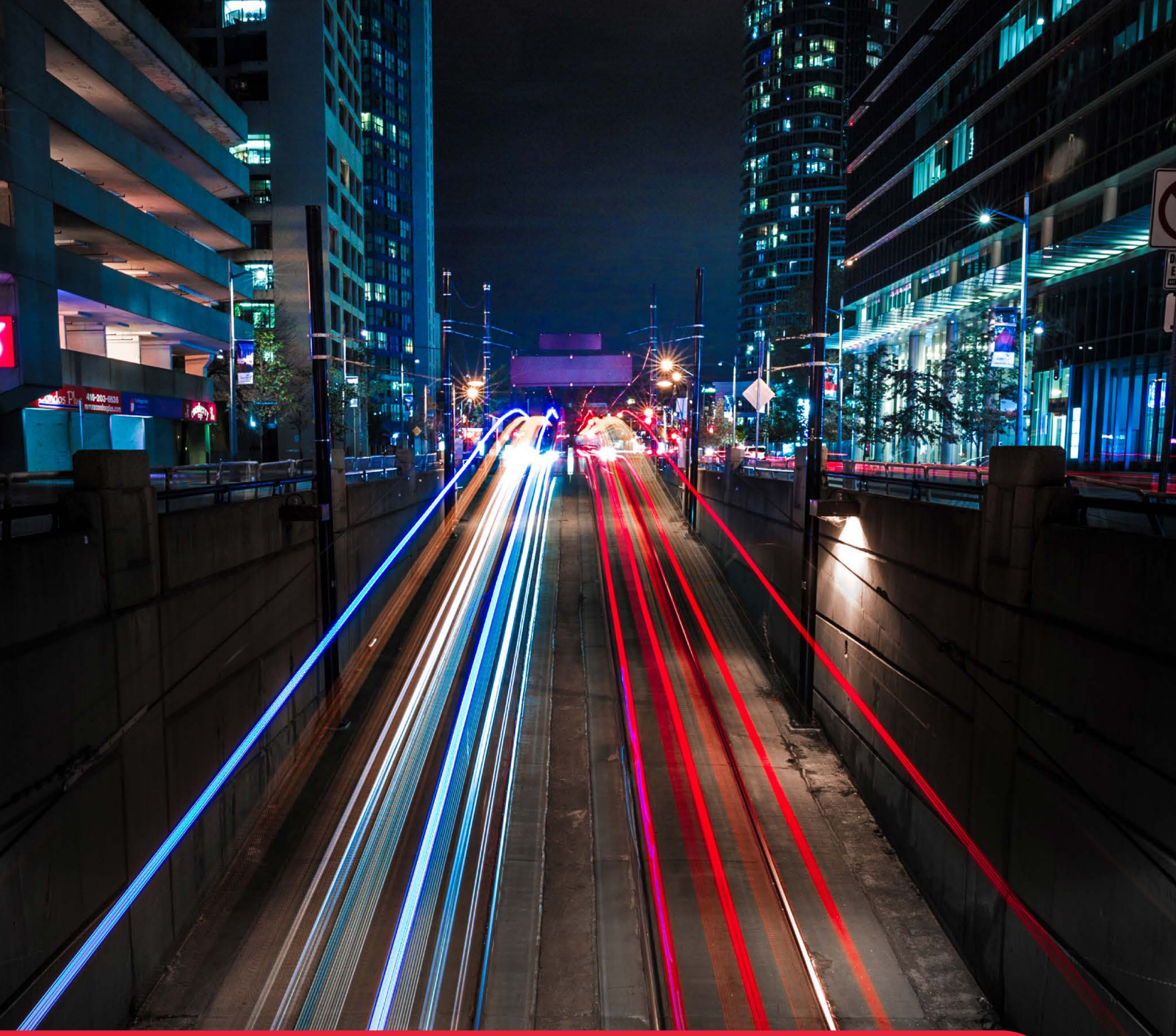

Guide: Doing business in the Netherlands

2024

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Introduction

With this guide we intend to provide an overview of the legal framework to do business in the Netherlands. We hope this guide will serve as a reference for lawyers and investors looking to understand the basic principles guiding the legal system of the Netherlands.

The content of this guide is based on the chapter about Doing business in the Netherlands that BUREN wrote for the Chambers and Partners guide 'Doing Business In...'.

The Chambers and Partners 'Doing Business In...' guide provides expert legal commentary on key issues for businesses with international interests. The guide covers the important developments in the most significant jurisdictions.

The experts for each jurisdiction that contributed to the Chambers and Partners guide have followed a common template. The structure of this template is preserved in this brochure, which allows readers to easily compare the rules applicable in other jurisdictions: **https://practiceguides.chambers.com/practicearea**

Should you want more information about doing business in the Netherlands? Please do not hesitate to contact us at **www.burenlegal.com**

1. Legal system

1.1 Legal System and Judicial Order

Like in many other EU countries, the legal system of the Netherlands is a civil law system. While legislation is the primary source of law, precedents developed in case law play an important role, as do the principles of reasonableness and fairness.

In addition to its own domestic legal system, the legal framework of the EU applies in the Netherlands.

Judicial System for Civil and Criminal Cases

Eleven district courts (*rechtbanken*) deal with civil and criminal cases, and there are four courts of appeal (*gerechtshoven*). For civil and criminal cases, the Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*) is the highest instance, but it can overturn judgments of the courts of appeal on limited and specific legal grounds only, without reviewing the facts of a case.

Ranking high in The World Bank's Rule of Law Index, the Dutch legal system is considered one of the most efficient civil law systems in the world. On average, legal proceedings in the Netherlands take 130 days. Urgent matters may be heard in summary proceedings, in which judgments are rendered in a timeframe of a few weeks or even a few days.

For certain areas of law, the Netherlands has established courts with specific expertise. The following courts are most relevant in an international business law context:

- the Netherlands Commercial Court, which allows parties to litigate in the English language entirely (from writ of summons to court hearing to judgment) in any international commercial dispute;
- the Enterprise Court (*Ondernemingskamer*) of the Amsterdam court of appeal, which has exclusive jurisdiction over certain matters relating to corporate law;
- the Maritime Court of the Rotterdam district court, which allows parties to litigate partly in English; and
- a chamber of the district court of The Hague, specialised in intellectual property law, which allows parties to litigate partly in English.

Judicial System for Administrative Cases

As in civil and criminal cases, district courts have jurisdiction in administrative cases, in principle, provided that the applicable complaints procedure with the respective administrative body has been completed first. There are a number of competent courts for appeals – which court has jurisdiction to handle the appeal depends on the type of case. Most appeals are heard by the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*), which in most cases is the highest court for matters of administrative law in the Netherlands. A final appeal to the Supreme Court is only possible in tax cases.

Unlike in other countries, judicial bodies in the Netherlands do not pass judgment on the constitutionality of legislation. Based on a recent decision in the Dutch parliament, the constitutionality of legislation will in the future be dealt with by a separate commission of the parliament.

2. Restrictions to foreign investments

2.1 Approval of Foreign Investments

Approval
The approval requirements in the Netherlands have always been rather limited. As a consequence of the EU FDI Screening Regulation (Regulation (EU) 2019/452), which entered into force in 2019 this changed. Certain sectors and industries are regulated regardless of the nationality or home state of the investor.

Electricity, Gas, Drinking Water and Telecommunications Act
The Electricity Act, the Gas Act and, since 1 October 2020, the Telecommunications Act require notification to the Dutch Ministry of Economic Affairs (and Climate Policy) of any change of control with respect to an electricity, gas or telecommunications company. This screening obligation applies to any change of control that leads to a change of "predominant control" in any of the above sector-specific (electricity, gas or telecommunications) companies, regardless of the identity of the investor. A transaction triggering a change of control may be prohibited or be subject to certain conditions for reasons of public safety or supply security. If parties fail to notify the Ministry, a transaction is voidable.

Drinking water companies are by law required to be directly or indirectly held by Dutch public persons.

Financial Supervisions Act
Certain changes of control in companies and institutions that are subject to the Financial Supervisions Act are to be reported to the Authority for Financial Markets (*Autoriteit Financiële Markten*) or the Dutch Central Bank (*De Nederlandsche Bank*).

Dutch implementation of screening mechanisms: Security Test Act
On 1 June 2023, the Investments, Mergers and Acquisitions Security Test Act (*Wet Veiligheidstoets investeringen, fusies en overnames*) (Security Test Act, also referred to as Vifo-Act) entered into force. The Security Test Act requires a change of control in certain Dutch companies to be notified to and approved by the Bureau for Investment Screening (*Bureau Toetsing Investeringen* – **BTI**). Companies that are active in the Netherlands in supplying vital infrastructure or undertakings, or that are active in sensitive technology, as well as companies the operate a business campuses, fall under the scope of the Security Test Act. The screening mechanism applies retroactively to investments made after 8 September 2020.

The term "control" refers to the ability to exercise decisive influence on a target company, either through shareholding or on a de facto basis once the investment has taken place. Thresholds apply depending on the type of target company involved. Upon receipt of the notification, the BTI will examine whether the transaction can lead to a risk to national security, particularly the continuity of vital processes, the prevention of undesirable strategic independencies and the integrity and exclusivity of knowledge and information.

In principle, the approval time is within eight weeks of receipt of the notification. If a formal assessment is required, the BTI has an additional eight weeks for further investigation. Each phase can be extended separately.

Pending BTI approval of the transaction, a standstill obligation applies to the parties involved.

Based on article 6(1) of the EU FDI Screening Regulation, the European Commission will have to be informed about the transaction and both the European Commission and other EU member states may ask questions about a transaction.

2.2 Procedure and Sanctions in the Event of Non-compliance
On the basis of current legislation, a transaction is voidable if parties to a foreign investment in the electricity, gas, or telecommunications sector fail to notify the Ministry.

Failure to comply with the notification obligations under the Security Test Act may lead to a direct suspension of all voting rights of the investor, pursuant to the transaction. The company will be obliged to make all efforts to co-operate.

Furthermore, the BTI may require the parties to make a certain notification within three months of the transaction becoming known. In the meantime, the rights of the investor will be suspended. The BTI may also impose an administrative fine, with the maximum being 10% of the turnover.

If the transaction has taken place without the approval of the BTI, the Security Test Act stipulates that the acquisition shall be declared null and void.

2.3 Commitments Required from Foreign Investors
Foreign investors are required to fulfil the notification requirements described in **2.1 Approval of Foreign Investments.**

2.4 Right to Appeal
This section is not applicable in the Netherlands.

3. Corporate vehicles

3.1 Most Common Forms of Legal Entities

The legal entities most commonly used in the Netherlands are private company with limited liability (*besloten vennootschap met beperkte aansprakelijkheid* – **BV**) or the public limited company (*naamloze vennootschap* – **NV**), both of which have legal personality, and the (limited or general) partnership (*personenvennootschap*), which is a contractual arrangement without legal personality.

BVs

The key characteristics of a BV are as follows:

- capital is divided into shares;
- privately owned (ie, with a closed circle of shareholders);
- no minimum capital is required; and
- different types of shares can be created, which makes it possible to vary with regard to (among others) voting rights and profit-sharing rights.

A BV is more flexible than an NV and is the most frequently used corporate entity form in the Netherlands. BVs are popular as holding companies in (international) group structures and as operational and financing companies, and are also considered suitable for structuring joint ventures.

NVs

The key characteristics of an NV are as follows:

- a minimum share capital of EUR 45,000;
- all shareholders have voting rights and profit rights;
- different types of shares are possible; and
- there are specific rules with regard to the proper functioning of the general meeting.

In general, an NV is subject to stricter capital and creditor protection rules than a BV. The NV is designed primarily as a public company, the shares of which can be listed on a stock exchange. Until 2019, an NV's capital could exist of individual bearer shares. Since, bearer shares can only be issued by way of a global certificate. Any (individual) bearer shares that were not converted into registered shares by 1 January 2020 are considered to have been converted by operation of law. Until 2 January 2026 shareholders of bearer certificates are entitled to acquire a replacement share in the form of a registered share from the respective company.

Partnerships

The two most common forms of Dutch partnerships are the general partnership (*vennootschap onder firma* – **VOF**), which is a partnership between two or more general partners, and the limited partnership (*commanditaire vennootschap* – **CV**), which is a partnership between one or more managing partners and one or more limited partners.

A Dutch partnership does not have legal personality.

3.2 Incorporation Process

The incorporation of a BV requires few formalities and can be carried out very quickly and easily.

BVs and NVs are incorporated by the execution of a notarial deed of incorporation (*akte van oprichting*) by a Dutch civil law notary (*notaris*). This deed of incorporation contains the initial articles of association and must be in the Dutch language. An English translation is commonly provided.

The incorporation of an NV requires a bank statement providing evidence of the payment of the minimum paid-up capital (if in cash) or a description of the contribution drawn up and signed by the incorporators, and an auditor's certificate attesting to such payment (if in kind).

The founders of an NV or a BV may be one or more individuals or legal entities, of any nationality and domiciled anywhere.

The Dutch civil law notary (*notaris*) is required by law to register persons who will have an interest of at least 25% in the newly incorporated company (the Ultimate Beneficial Owner(s) – **UBO**) with the UBO register.

A partnership under Dutch law is set up by the execution of a partnership agreement between one or more partners. The partnership agreement must

provide for a durable co-operation between the partners, and must be governed by Dutch law. The partners may be either individuals or legal entities.

A VOF must have at least two general partners, whereas a CV must have at least one managing partner and one limited (or "silent") partner. Each partner must contribute to the partnership.

3.3 Ongoing Reporting and Disclosure Obligations

Private companies must be registered with the trade register of the Dutch Chamber of Commerce within eight days of incorporation. The trade register holds publicly available information on companies, such as the names of the managing directors, supervisory directors and proxy holders (including the scope of their powers), if any, and the articles of association.

Amendments to the articles of association and certain amendments to the limited partnership agreement must be filed and registered with the trade register, as must certain changes in the company/partnership.

If all issued and outstanding shares in the company are held by one individual or legal entity, certain basic data regarding this sole shareholder must also be registered.

All companies and legal entities must register the ultimate beneficial owner(s) with the UBO register.

Companies must maintain accounting records and prepare financial statements. Additional accounting, auditing and publication requirements apply to small, medium, and large companies, based on certain thresholds.

Dutch law contains no special requirements for the contents of the annual accounts of partnerships, unless all managing partners are corporations incorporated under foreign law, in which case that partnership is subject to the Dutch financial reporting requirements.

3.4 Management Structures

Dutch corporate law provides that a Dutch company must have at least a management board consisting of managing directors, and a general meeting of shareholders. Dutch companies may also have a supervisory board, although this is not required for most Dutch companies. The management board is the executive body of the company, charged with the company's day-to-day management.

The management board may consist of just one managing director, who can be a natural person or a legal entity. There are no requirements regarding the nationality or the place of residence of managing directors (although this may be a highly relevant issue for tax purposes).

Dutch corporate law offers companies a choice between a one-tier board consisting of executive and non-executive directors, and a two-tier board consisting of a management (executive) board and a supervisory (non-executive) board. Large companies that meet certain statutory criteria must have a one-tier board (with non-executive directors) or a supervisory board with considerable powers (as prescribed by law).

As for partnerships, VOFs are, in principle, managed by and may be represented by all partners. CVs are managed by the managing partner(s) who is/are responsible for the day-to-day affairs of the CV.

3.5 Directors', Officers' and Shareholders' Liability

A distinction should be made between the internal and external liability of managing directors: internal liability exists towards the company, while external liability exists towards third parties, such as creditors of the company or the tax authorities.

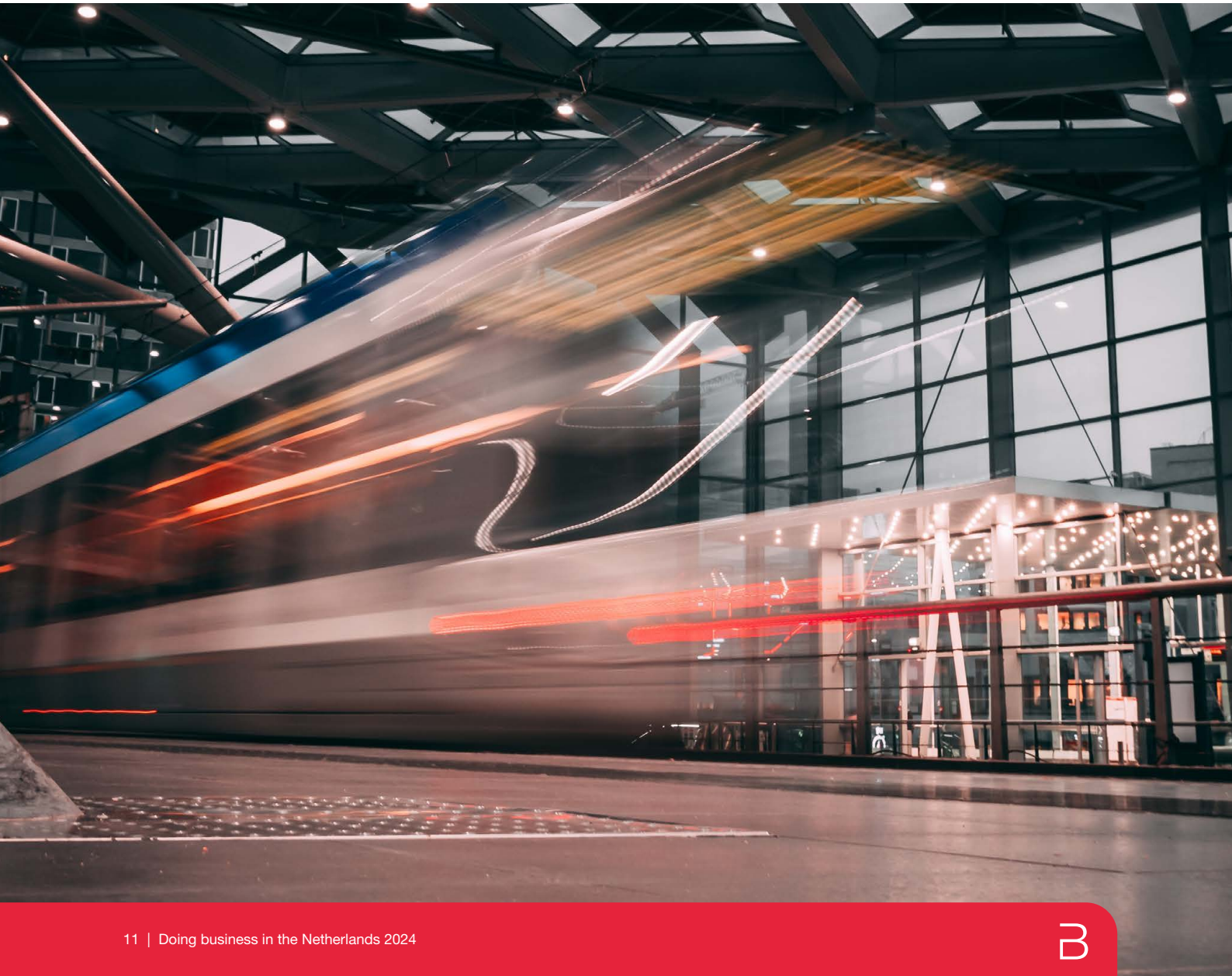
As a general rule, managing directors are jointly and severally liable for mismanagement only in cases of serious culpability (*ernstig verwijt*).

Mismanagement can consist of acting (or failing to act) in violation of the law or the articles of association, or acting in a clearly unreasonable way.

Managing directors who enter into a contract on behalf of a company while knowing (or having reason to know) that the company will not be able to fulfil its contractual obligations or will not have sufficient assets against which to take recourse may be held liable (externally) for any resulting damages. The burden of proof rests with the prejudiced creditor.

As a general rule, shareholders are not personally liable for acts performed in the name of the company, and are under no obligation to contribute to the losses of the company in excess of the amount to be paid on their shares. However, Dutch case law has recognised that there may be exceptional circumstances that allow the "corporate veil" to be lifted and shareholders to be held jointly liable for the company's debts and obligations.

Partners in VOFs are jointly and severally liable for all obligations of the partnership. The liability of general partners in a CV is unlimited, while the liability of limited partners is limited to the amount of their capital contributions, provided they have not performed any acts of management or representation of the partnership.



4. Employment Law

4.1 Nature of Applicable Regulations

The legal framework governing employment contracts is set out in the Dutch Civil Code (**DCC**). Additional terms and conditions may be agreed in an individual employment contract, provided they do not contradict the mandatory statutory provisions of the DCC. Furthermore, the legal relationship between an employer and employee may be governed by collective labour agreements between the trade unions and employers (or organisations of employers). Multiple other laws and regulations are also of influence – eg, the Equal Treatment Act.

In addition, case law provides an important series of precedents and principles, which often help to clarify ambiguous statutory or contractual provisions. The laws of the European Community and other international treaties and regulations form another important source of law.

4.2 Characteristics of Employment Contracts

Dutch employment law does not require employment contracts to be made in writing. Certain provisions, however, need to be in writing in order to be valid, such as non-competition clauses or probation period clauses.

No legal provision dictates the language in which employment contracts should be concluded; they do not necessarily have to be in Dutch, with international companies commonly offering employees employment contracts in English.

Employment contracts can be concluded for a definite period of time (fixed-term contracts) or an indefinite period of time (indefinite contracts). Consecutive fixed-term employment contracts, if extended, are automatically converted into indefinite contracts, once certain criteria are met. This applies if the number of consecutive contracts exceeds three, or if the aggregate term of the consecutive contracts exceeds 36 months.

4.3 Working Time

Under the Dutch Working Hours Act, employees are generally allowed to work a maximum of 12 hours per day and a maximum of 60 hours per week. Over a period of 16 consecutive weeks, employees may not work more than 48 hours per week on average. Over a period of four consecutive weeks, the weekly average may not be more than 55 hours.

Collective labour agreements or employee handbooks may contain provisions on the standard working hours in a company. Unlike many other countries, the Netherlands does not provide a national standard for overtime, which is usually agreed by individual employment contracts and collective agreements.

4.4 Termination of Employment Contracts

The dismissal of employees is governed by mandatory statutory dismissal provisions. The system differs substantially from most other EU countries.

Fixed-term contracts end by operation of law on the agreed end date.

Employers may terminate indefinite contracts by giving notice of termination. The most striking difference to other jurisdictions is that employers must, in principle, first apply for a dismissal permit from the governmental agency called UWV Werkbedrijf before they can give such notice, or they must request the court to terminate the contract. The manner of termination for employers is prescribed by law, depending on the reason for termination: termination for economic reasons or due to long-term incapacity for work must be effected through the UWV procedure, while dismissal on other grounds has to take place through termination by the court.

Unlike employers, employees do not require a permit from the UWV nor have to go to court to terminate their employment contract. The statutory notice period for employees is one month. The statutory notice period for employers is between one and four months, depending on the duration of the employment relationship.

Several dismissal prohibitions apply. For example, sick employees are protected against termination of employment during the first two years of their sickness and also pregnant employees benefit from dismissal protection.

Both fixed-term contracts and indefinite contracts can be terminated by mutual consent between the employer and the employee. Employers usually offer financial compensation, based on (at least) the "transition payment" (see below), and it is common to confirm the termination in a settlement agreement, by which the parties grant each other full and final discharge.

Indefinite contracts and fixed-term contracts longer than six months may include a probationary period during which each party may terminate the employment contract with immediate effect, without the prior permission of the UWV or the court.

Employment contracts may be terminated with immediate effect and without prior permission from the UWV or the court if there is an "urgent cause" to do so. The DCC provides a non-exhaustive list of acts that may qualify as an "urgent cause", such as fraud and theft.

Employers are required to make a "transition payment" to employees if one of the following applies:

- the employment contract is terminated by the employer by giving prior notice of termination;
- the court terminates the employment contract at the employer's request; or
- the employer decides not to renew the employment contract after the expiration of the agreed fixed term.

Transition payments are equal to one third of a monthly gross salary for every full year of employment, regardless of the employee's age or years of service and calculated pro rata, depending on the exact duration of employment. The payment never exceeds EUR 94,000 (as of 2024), or one annual salary for employees earning more than EUR 94,000. Only employees who are seriously culpable for termination are not entitled to a transition payment. If the court rules that an employer has demonstrated serious culpable behaviour towards an employee the court can grant the employee additional severance.

Employers who intend to dismiss at least 20 employees within a period of three months (in one region) are subject to the Collective Redundancy (Notification) Act. Under that legislation, employers must notify the UWV and the relevant trade unions of the intended dismissals, and must first discuss the proposed decision and its social consequences with these trade unions.

4.5 Employee Representations

Under the Dutch Works Council Act (**WCA**), companies employing at least 50 persons must establish a works council for the purpose of consultation with and representation of the employees. The employees elect the members of the works council directly from amongst themselves. The number of members depends on the number of employees within the company, and varies from a minimum of three to a maximum of 25.

The WCA provides a number of rights for the works council, including the right to advise on certain matters and the right of approval. Companies must request the prior advice of the works council on certain decisions (and their implementation) about significant business matters, such as the transfer of control over the company or any part thereof, the establishment, takeover or disposal of control over another company, or the termination of operations or a substantial part thereof. In addition, companies must request the prior approval of the works council in respect of certain decisions concerning the introduction, modification or repeal of "social" regulations within the enterprise, such as regulations on:

- pension schemes;
- profit-sharing or saving plans;
- working hours or leave; and
- salary or job classification systems.

Furthermore, trade unions often represent their members in discussions about a collective labour agreement and in collective dismissals.

5. Tax Law

5.1 Taxes Applicable to Employees/Employers

Taxes Paid by Employees

Personal income tax

Personal income tax is levied on Dutch tax residents (on income from various worldwide sources) and non-Dutch tax residents (on income from Dutch sources).

Personal income tax is levied on three different categories of income, referred to as "boxes":

- box 1 concerns income from work and home, and includes income from past and current employment, sole proprietorship, and an owner-occupied home;
- box 2 concerns taxable income from, in short, (share) interests of 5% or more in companies; and
- box 3 concerns income from savings and investments.

Wage tax is withheld by employers, and functions as a pre-tax to personal income tax (and employee social security contributions). Income from past and current employment (realised by Dutch and non-Dutch tax residents) is determined by the Dutch Wage Tax Act 1964. Except in certain specific cases (for instance, if the individual functions as a board member or supervisory board member of a Dutch company), individuals who work almost entirely outside the Netherlands are generally not considered "employees" for Dutch wage tax purposes.

Personal income tax for box 1 is levied at progressive rates on income, minus personal deductions and allowances.

In 2024, the applicable rates for non-retired persons are:

- 36.97% for income up to and including EUR 38,098 (9.32% excluding social security contributions levied from employees);
- 36.97% for income ranging between EUR 38,098 and EUR 75,518; and
- 49.50% for income exceeding EUR 75,518.

Starting in 2024 box 2 is levied at a progressive rate on income. In 2024, the applicable rates are:

- 24.50% for income up to and including EUR 67,000
- 33.00% for income exceeding EUR 67,000

In 2024 box 3 income tax is levied at a rate of 36% on three categories based on a deemed return on assets minus liabilities. The deemed return for 2024 will be announced in the start of the year 2025, except for the 'other assets' which is already known (deemed return: 6.04%).

The effective rates applied in the preliminary 2024 personal income tax assessments are:

- Bank balances (including savings) and cash: 0.3708% (flat rate of return of 1.03 * 36%)
- Other assets: 2.1744% (flat rate of return of 6.04 * 36%).
- Debt: -/- 0.8892% (flat rate of return of -/- 2.47 * 36%).

In 2024, the first EUR 57,000 (EUR 114,000 for taxpayers with a tax partner) of net box 3 assets are tax-exempt. Due to several rulings by the Dutch Supreme Court, it is envisaged to revise the box 3 system.

Subject to certain conditions, employees hired outside the Netherlands can apply for a ruling allowing employers to pay 30% of the wage tax-free for the first 20 months, including allowances. Per 1 January 2024, this scheme may be applied up to the maximum amount under the Standards for Remuneration Act (EUR 233,000 in 2024). Furthermore, the 30% facility will be scaled back to 20% after 20 months once the 30% facility will be applied from 1 January 2024 onwards. If an employee would start utilizing the facility on 1 January 2024, the facility will therefore be scaled back to 20% from 1 September 2025 onwards. The facility will be further scaled back to 10% again after 20 months. The limitations do not apply to applicants who already applied the 30% ruling before 1 January 2024.

Employee social security contributions
Individuals are subject to social security contributions levied on income up to and including EUR 38,098. The applicable rate is 27.65%.

Taxes Paid by Employers
Wage tax
Employers qualifying as "withholding agents" must withhold wage tax and social security contributions (levied at the level of employees) in respect of wages paid to employees for Dutch wage tax purposes.

Employer social security contributions
In summary, the rates of employer social security contributions in 2024 are as follows:

- general unemployment insurance (*Algemeen werkloosheidsfonds* – **AWF**) – 2.64% for contracted workers with an indefinite term and 7.64% for flex workers and temporary workers;
- occupational disability insurance (*Wet op de arbeidsongeschiktheidsverzekering* – **WAO** or *Wet werk en inkomen naar arbeidsvermogen* – **WIA**) – 7.54% for large employers and 6.18% for small employers;
- Health Insurance Act contribution (*Zorgverzekeringswet* – **ZVW**) – 6.57%;
- childcare allowance contribution (*Werkgeversbijdrage Kinderopvang*): 0.5%;
- government unemployment insurance (*Uitvoeringsfonds voor de overheid* – **UFO**) – 0.68%; and
- the Return to Work Fund (*Werkhervattingskas* – **Whk**) – 1.22% (approximate amount).

Only income up to and including EUR 71,628 is subject to the above contributions.

5.2 Taxes Applicable to Businesses

Corporate Income Tax
Dutch tax-resident companies (or companies deemed to be tax residents) are subject to Dutch corporate income tax based on their worldwide income.

Non-Dutch tax-resident companies are subject to corporate income tax from certain Dutch sources, including:

- Dutch permanent establishments or permanent representatives;
- shareholdings of at least 5% in Dutch companies that cannot pass certain anti-abuse tests; and
- other specific sources, including Dutch real estate, directorship services and the exploration of natural resources.

The Dutch corporate income tax rate in 2024 is 19% for taxable profits up to and including EUR 200,000, and 25.8% for taxable profits exceeding this amount.

Under the Dutch participation exemption, income (eg, dividends and capital gains) derived by Dutch resident corporate taxpayers from qualifying subsidiaries is exempt from Dutch corporate income tax.

In 2024, the term of the loss carry forward facility is an unlimited period. The carry back period is one year. Profits of up to EUR 1 million can be fully deducted under the application of the loss carry forward and backward facility. For profits exceeding EUR 1 million, only 50% of the profit can be reduced under these facilities.

Minimum Profit Tax

In line with EU regulation, the Netherlands has introduced a Minimum Profit Tax law: *Wet Minimumbelasting 2024*. The Minimum Profit Tax Act 2024 requires large multinational enterprises with an annual turnover exceeding EUR 750 million to be subject to (at least) 15% minimum corporate income tax due to the so-called OECD Pillar 2 project.

The Netherlands adopted the optional Qualified Domestic Minimum Top-Up Tax (**QDMTT**), which ensures that profits of low-taxed Dutch entities which are part of a Pillar Two group are first to be topped-up locally, thus preventing other group jurisdictions from taxing these undertaxed Dutch profits. It is expected that the QDMTT will be granted Safe Harbour status by the OECD.

Dividend Withholding Tax

Shareholders of Dutch tax-resident companies are generally subject to 15% Dutch dividend withholding tax in respect of dividends (and other payments treated as dividends) paid by Dutch tax-resident companies (or companies deemed to be tax- residents). In principle, distributing companies should withhold and pay any Dutch dividend withholding tax due.

An exemption applies to dividends distributed to corporate shareholders owning a share interest of at least 5% in the relevant distributing company if, in short, the corporate shareholder is a tax resident of the EU or a Dutch tax treaty jurisdiction, and is the beneficial owner of the dividend, provided it is not a hybrid transaction and certain other anti-abuse tests are met.

Application of the extensive Dutch tax treaty network may result in a reduction or refund of Dutch dividend withholding tax.

Conditional Withholding Tax

The Netherlands does not currently levy withholding tax on interest and royalty payments, with the exception of a specific levy in intra-group abusive situations.

In 2024, a conditional withholding tax at a rate of 25.8% is due on intra-group dividend, interest and royalty payments by Dutch resident companies to related entities residing in jurisdictions that are either on the blacklist issued by the Dutch Ministry of Finance (including low tax jurisdictions (less than 9%) and jurisdictions that are on the EU blacklist of non-co-operative jurisdictions) or in abusive situations.

VAT

The Netherlands levies Value Added Tax (**VAT**) on the supply of goods and services as part of the domestic implementation of the EU VAT Directive (Directive 2006/112/EC). The current Dutch VAT system, therefore, is comparable to the VAT systems of other EU Member States, although the Netherlands uses certain optional measures to facilitate trading.

Under Dutch VAT law, in principle any person or entity can qualify as an “entrepreneur” (taxable person) if they act independently and perform (preparatory acts to) economic activities on a continuing basis, whatever the purpose or result of those activities. Entrepreneurs acting as such are, in principle, required to file VAT returns and are entitled to a refund of (input) VAT charged, provided they are engaged in VAT taxable transactions within the territory of a Member State of the EU.

In the Netherlands, the following VAT rates applied to supplies of goods and services in 2023:

- general rate: 21%;
- reduced rate: 9%; and
- zero rate (0%).

Furthermore, entrepreneurs must meet certain administrative obligations when rendering VAT taxable or exempt transactions (eg, invoicing, keeping proper accounts, filing VAT returns, and EU sales listing reporting).

5.3 Available Tax Credits/Incentives

Innovation Box Regime
Dutch taxpayers can apply an "innovation box regime" to qualifying profits from certain self-developed intangible fixed assets.

Under the innovation box regime, profits are included in the tax base of a taxpayer only for the 9/25 part, resulting in an effective tax rate of 9%.

Qualifying profits are benefits from qualifying self-developed intangible fixed assets multiplied by a nexus ratio. The nexus ratio consists of 130% of the taxpayers' operating expenses and third-party outsourcing expenses incurred in relation to the creation of the relevant asset, divided by any expenses incurred in relation to the creation of the relevant assets, with a maximum of 100%.

For small taxpayers, qualifying assets are intangible fixed assets developed by research and development (R&D) activities for which a so-called R&D certificate was issued.

Taxpayers are considered small if their net group turnover is less than EUR 250 million in the respective financial year and the four preceding years combined, and the benefits derived from the intangible assets are less than EUR 37.5 million in the respective financial year and the four preceding financial years combined.

For large taxpayers, qualifying assets are intangible fixed assets developed by R&D activities falling within the scope of certain specific categories.

R&D Wage Tax Credit Regime
The R&D wage tax credit regime enables companies that engage in R&D activities to pay less wage tax and social security contributions than they withhold from their employees.

The amount of the reduction is limited to the total amount of wage costs and social security contributions. R&D costs may include both wages and other costs related to self-developed R&D.

In order to qualify for the R&D wage tax credit regime, companies have to apply for a permit from the Netherlands Enterprise Agency (RVO).

The granting of this permit is subject to the following conditions:

- the R&D activities (e.g., development of a product, production process, software or technical research) will be performed in-house by the applicant;
- the innovation is new to the organization of the applicant;
- the applicant seeks to solve technical difficulties of the development process;
- the R&D activities are performed within the EU; and
- the R&D permit is requested in advance.

In addition, the granting of the permit is subject to the available funding.

Business Incentives
The small-scale investment incentive provides for tax deductions for corporate income tax and personal income tax purposes in connection with the acquisition of one or more new qualifying business assets.

The investment incentive for environment-improving assets provides for tax deductions in connection with the acquisition of one or more new environment-improving assets. The deduction generally amounts to 40.0% of the amount of the investment, which should be included on a list published by the RVO, and requires the issuance of a notification from the RVO.

Under conditions similar to those of the investment incentive for environment-improving assets, it is possible to apply the random depreciation regime to environment-improving assets or energy-improving assets. Under this regime, taxpayers can randomly depreciate 75% of the investment made in the qualifying asset.

Some investments are excluded from the application of the above-mentioned incentives.

5.4 Tax Consolidation

Fiscal Unity for Dutch Corporate Income Tax Purposes
Companies that are part of a "fiscal unity" for Dutch corporate income tax purposes may file a consolidated tax return, and are taxed on a consolidated basis as if they were just one company. As a result, transactions between companies belonging to the fiscal unity are, in principle, ignored and not subject to taxation on profits or gains.

However, for purposes of certain anti-abuse rules (e.g., for the anti-base erosion rules included in article 10a of the Dutch Corporate Income Tax Act 1969), transactions between entities within a fiscal unity are considered.

The Dutch fiscal unity rules include other anti-abuse rules, which can be triggered by the formation or dissolution of a fiscal unity, for example. Companies belonging to the fiscal unity are jointly and severally liable for payments of corporate income tax over the period of the fiscal unity.

Parent companies and their subsidiaries can, upon request, form fiscal unities if a number of requirements are met, including the following:

- Ownership requirement – the parent company must hold the economic and legal ownership of at least 95% of the shares in the nominal paid-up capital of its subsidiary, which provides entitlement to at least 95% of the statutory voting rights in that subsidiary and to at least 95% of the profits, and represents at least 95% of the capital of the subsidiary.
- Residency requirement – the applying companies should be residents of the Netherlands for tax treaty purposes.

In addition to the above, a parent company can form a fiscal unity with an indirectly held subsidiary if both companies are tax residents of the Netherlands and the intermediate company (or companies) between the parent company and the indirectly held subsidiary resides in another EU or EEA Member State.

Furthermore, two Dutch tax-resident subsidiaries can form a fiscal unity if their joint parent resides in another EU or EEA Member State. A new tax consolidation system is currently under discussion.

Fiscal Unity for Dutch VAT Purposes
A VAT group can be created by two or more persons established within an EU Member State, who, while legally independent, are closely bound to each other by financial ties (i.e., more than 50% shareholding), organisational ties (i.e., central management), and economic ties (i.e., same or related activities or suppliers). A VAT group is treated as one VAT entrepreneur.

Transactions between the members of a VAT group are not subject to VAT. The right to deduct input VAT is based on the activities of the VAT group as a whole. The VAT group regime only applies if each member of the VAT group qualifies as a VAT entrepreneur.

5.5 Earning Stripping Rules and Other Limitations

The Dutch earning stripping rules limit the deduction of excessive interest expenses related to intra-group and third-party payables for Dutch corporate income tax purposes.

Under these rules, the starting point is to determine the Dutch taxpayers' so-called interest expense excess, which is the amount by which the Dutch taxpayers' tax-deductible interest expenses exceed their taxable interest income. The deductibility of the interest expense excess is limited to 20% of the taxpayers' EBITDA (carving out tax-exempt income) or a safe harbour threshold of EUR 1 million, whichever is higher. For real estate entities, these rules may change starting from 1 January 2025. Also, four political parties reached a provisional agreement to form a government in the Netherlands. This provisional agreement contains the coalition plans for the coming years. One of these plans is that the percentage will be increased to 25%, which is in line with the EU average.

Interest disallowed under the earnings stripping rule can be carried forward to later years without any time limitations.

Dutch corporate income tax law includes several other rules based on which deduction of interest may be denied, including the anti-tax base erosion rules – see **5.7 Anti-evasion Rules**.

5.6 Transfer Pricing

For Dutch tax purposes, transactions between affiliated entities must be performed under the same terms and conditions as would be agreed between non-affiliated entities under similar circumstances (the so-called "at arm's-length principle"). If the terms and conditions of an affiliated party transaction are not at arm's length, the transaction is taxed as if they had been.

For Dutch transfer pricing purposes, companies are considered to be affiliated if one entity participates (directly or indirectly) in the management, control or capital of another entity, or if the same person participates (directly or indirectly) in the management, control or capital of two entities.

Dutch taxpayers must have documentation available showing that the conditions of affiliated party transactions are at arm's length. In addition, multinationals with a consolidated group turnover of at least EUR 750 million in the preceding year are required to file country-by-country (**CbC**) reports containing detailed information on the transfer pricing policy and the allocation of assets and personnel within the group. CbC reports are exchanged automatically with the tax authorities of all countries in which the multinational group operates.

Furthermore, Dutch taxpayers that are part of a multinational group with a consolidated turnover of at least EUR 50 million in the preceding year must prepare both so-called "master files" and "local files".

In addition, rules apply based on which hybrid mismatches that arise under the application of the arm's-length principle are neutralised. Based on these rules, downwards fiscal profit adjustments, recognition of losses and value increases of assets acquired from affiliated parties (the value increases are also referred to as "informal capital contributions" or "deemed dividend distributions") under the application of the arm's-length principle will be denied if, in short, the taxpayer cannot reasonably prove that a corresponding upwards adjustment will be included in the tax base in the jurisdiction of the affiliated party.

5.7 Anti-evasion Rules

Dutch corporate income tax law includes various rules targeting tax evasion, such as limitation of interest deduction rules preventing tax base erosion, controlled foreign companies (CFC) legislation, exit taxation and the non-resident corporate income tax rules (see **5.2 Taxes Applicable to Businesses**).

Furthermore, there are various Dutch dividend withholding tax rules targeting tax evasion, such as anti-dividend stripping rules and certain other anti-abuse rules (see **5.2 Taxes Applicable to Businesses**). Finally, Dutch tax law includes an unwritten general anti-abuse rule (fraus legis). Some of these anti-evasion rules are listed below.

Limitation of Interest Deduction Rules – Anti-tax Base Erosion Rules

Under the Dutch anti-tax base erosion rules, the deduction of interest expenses (including currency results and other costs) is limited to related party loans that have been used to finance:

- profit distributions or repayments of capital to related parties;
- capital contributions to related parties; or
- the acquisition of certain share interests.

There are, however, exceptions under which the interest deduction limitation rule does not apply (e.g., if the loan and the transaction are based primarily on business reasons).

CFC Legislation

Under the CFC rules, undistributed "tainted" (passive) income derived from subsidiaries or permanent establishments that are tax resident in certain blacklisted jurisdictions (i.e., the jurisdictions referred to under **5.2 Taxes Applicable to Businesses: Conditional Withholding Tax**) is, in principle, annually included in the taxable basis of the Dutch taxpayer (subject to certain conditions). Only interests of 50% in direct or indirect subsidiaries or permanent establishments of Dutch taxpayers together with related companies are targeted.

Exit Taxation

If Dutch resident corporate taxpayers transfer their tax residencies to other jurisdictions or transfer assets to non-Dutch permanent establishments, the assets and liabilities must be stated at fair market value. Any gains (i.e., hidden reserves, goodwill and/or currency exchange gains) will, in principle, be subject to corporate income tax. Under certain conditions, it is possible to apply an extended payment deadline.

General Anti-abuse Rule (Fraus Legis)
Under the application of fraus legis, transactions can be eliminated for Dutch tax purposes or replaced by other transactions. Fraus legis can be applied if the Dutch tax authorities prove that the sole or predominant motive for a transaction is tax avoidance, and that the envisaged tax consequences of a transaction conflict with the purposes and rationale of the relevant law.

Anti-hybrid Rules
Dutch tax law includes anti-hybrid rules implementing the amended Anti-Tax Avoidance Directive (ATAD2). These rules include limitation of deduction rules under which hybrid mismatches between "associated enterprises", head offices and their permanent establishments or between two or more permanent establishments of an entity and mismatches under a so-called "structured arrangement" are neutralised. A hybrid mismatch is generally present if there is a double deduction of costs or a deduction of costs without inclusion of the corresponding benefit. These rules apply for the following hybrid mismatches.

- Hybrid entity mismatches: an entity is treated as non-transparent in one jurisdiction and transparent in another jurisdiction.
- Hybrid financial instruments: an instrument that includes debt and equity is treated as non-transparent in one jurisdiction and transparent in another jurisdiction.
- Hybrid financial transfers: an arrangement to transfer a financial instrument causes a hybrid mismatch.
- Imported hybrid mismatches: a hybrid mismatch situation between parties in non-EU jurisdictions is shifted to an EU Member State through the use of a non-hybrid instrument.
- Hybrid PEs: a permanent establishment is treated differently between jurisdictions as regards the presence or attribution of profit to business activities in the jurisdictions.
- Dual resident mismatch: a payment made by a dual resident company may be deductible in multiple jurisdictions.

transparent in the jurisdiction of incorporation or registration, and that are treated as non-transparent in the jurisdictions of their participants. Reverse hybrid entities are subject to corporate income tax in the Netherlands. Furthermore, a reverse hybrid entity may also be subject to dividend withholding tax and conditional withholding tax.

Taxpayers are required to have information in their administration substantiating whether or not any hybrid mismatch rules are met. If such information is not present, the tax inspector could request the provision of such documentation and the taxpayer would have the burden of proof that no hybrid situation would be present.

5.8 EU Mandatory Disclosure Directive (DAC6)

Under DAC6, taxpayers and intermediaries such as tax advisers, accountants, trust offices and (in certain cases) lawyers that design, promote or implement tax planning schemes are required to report potentially aggressive tax arrangements to the tax authorities.

The Dutch law refers to Annex IV of DAC6 for the definition of the reportable cross-border arrangements.

Since 1 January 2021, reportable arrangements should be reported within 30 days, starting the day after:

- the reportable arrangement is made available for implementation;
- the reportable arrangement is ready for implementation; or
- when the first step of the implementation is made, whichever occurs first.

An exception applies to "marketable arrangements", which should be reported every three months.

6. Competition Law

6.1 Merger Control Notification

Mergers can be subject to either EU or Dutch merger control rules. The rules in the Dutch Competition Act are based on and essentially resemble the EU competition rules.

The European Commission must be notified of any merger with an EU dimension prior to its implementation. If the Dutch notification thresholds are met, then companies must comply with the Dutch notification requirements.

In principle, the Commission only examines larger mergers with an EU dimension if the merging firms reach certain turnover thresholds. There are two alternative ways to reach turnover thresholds.

- The first alternative requires:
  a. a combined worldwide turnover of all the merging firms of more than EUR 5 billion; and
  b. an EU-wide turnover for each of at least two of the firms of more than EUR 250 million

- The second alternative requires:
  a. a worldwide turnover of all the merging firms of more than EUR 2.5 billion;
  b. a combined turnover of all the merging firms of more than EUR 100 million in each of at least three Member States;
  c. a turnover of more than EUR 25 million for each of at least two of the firms in each of those three Member States; and
  d. an EU-wide turnover of each of at least two firms of more than EUR 100 million.

In both alternatives, the EU dimension requirement is not met if each of the firms achieves more than two thirds of its EU-wide turnover within one and the same EU member States.

Mergers without an EU dimension are subject to Article 29 of the Dutch Competition Act, under which the Dutch Authority for Consumers and Markets (*Autoriteit Consument en Markt* – ACM) must be notified of a concentration if both the combined turnover of the firms involved is more than EUR 150 million in the calendar year before the concentration and at least two of the companies involved earned at least EUR 30 million in the Netherlands.

According to Article 27(1) of the Dutch Competition Act, the following types of transactions (concentrations) are subject to merger control:

- the merger of two or more previously independent companies; and
- the acquisition of direct or indirect control by:
  a. one or more natural persons or legal entities that already control one company; or
  b. one or more companies of the whole or parts of one or more other companies, through the acquisition of a participating interest in the capital or assets, under an agreement or by any other means.

Control is defined as the ability to exercise decisive influence on the activities of a company on the basis of factual or legal circumstances.

Long-term joint ventures performing all functions of an autonomous economic entity are seen as concentrations under Section 27(1)(b)(1) of the Dutch Competition Act.

Sector-specific thresholds apply to credit and financial institutions, and to concentrations in respect of healthcare companies.

The Dutch Competition Act is enforced by the ACM, which is an autonomous administrative authority that operates independently of the Ministry of Economic Affairs. The ACM is also the local competent authority for matters relating to Regulation (EC) 139/2004 on the control of concentrations between undertakings (the Merger Regulation).

6.2 Merger Control Procedure

Transactions meeting the thresholds of the Dutch Competition Act must be notified to the ACM. The intended transaction must be notified before its completion, and the concentration may not be effected before four weeks have passed after the notification (Article 34(1) of the Dutch Competition Act).

The ACM assesses concentrations in two phases. During Phase I, which starts with the notification, the ACM must decide within four weeks whether the transaction requires a licence. If no licence is required, the parties can execute the transaction.

If the ACM decides that a licence is required, the parties can apply for the licence at their own discretion and timing. However, the transaction cannot be completed without a licence. Phase 2 is initiated with the submission of a licence application, after which the ACM conducts a more in-depth analysis of the effects of the concentration. The ACM must decide on the application within 13 weeks, failing which the concentration is deemed approved. However, the Phase 2 procedure often takes more time, mainly due to stop-the-clock requests for additional information. If the ACM decides not to grant a licence, the applicants are not allowed to execute the transaction.

If the proposed concentration involves a healthcare company employing 50 or more healthcare providers, the companies involved must first notify the Dutch Healthcare Authority (*Nederlandse Zorgautoriteit* – NZa) of the intended transaction so that it can assess the possible effects of the concentration.

Two or more concentrations taking place between the same persons or undertakings within a period of two years shall be regarded as one concentration effected on the day of the last transaction.

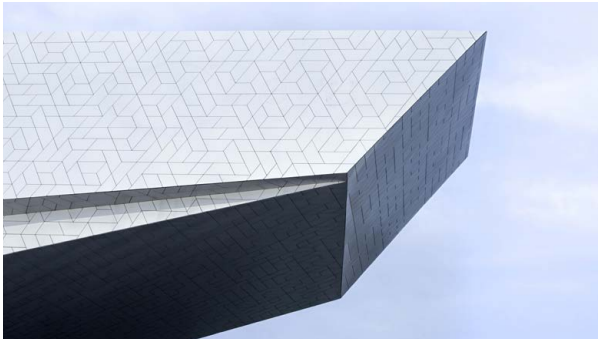
6.3 Cartels

The rules in the Dutch Competition Act governing anti-competitive agreements, decisions and concerted practices essentially resemble the EU rules. Agreements between companies, decisions by associations of companies and concerted practices that restrict competition or aim to do so are prohibited; this includes both horizontal and vertical restrictions of competition.

Under certain conditions, anti-competitive agreements are exempted from this prohibition. The respective national provisions again reproduce the conditions required under EU law. Exemptions include agreements that serve to improve the production of goods or promote technical progress while allowing consumers a fair share of the resulting benefit. The European Commission's block exemptions, such as the EU Vertical Agreements Block Exemption Regulation, apply mutatis mutandis. Agreements or concerted practices in violation of rules governing anti-competitive agreements and practices are, in principle, null and void.

A new Vertical Block Exemption Regulation 2022/720 (VBER) entered into effect on 1 June 2022, replacing Regulation 330/2010 which applied until 31 May 2022. The new VBER has narrowed the scope of certain safe harbours, especially for online intermediation services (platforms), with a specific focus on dual distribution and parity obligations, but also introduced new flexibility for both exclusive and selective distribution systems and online sales restrictions.

Also, on 1 July 2023 the horizontal block exemption regulations (BERs) on research and development (R&D) and specialisation agreements, as well as draft revised guidelines on horizontal cooperation entered into effect.



The cartel prohibition is enforced by the ACM, which can impose fines of up to EUR 900,000 or 10% of a company's worldwide group turnover in the past calendar year, whichever is higher. In addition, the amount of the fine can be multiplied by the number of years that the violation lasted, up to a maximum of four years. Therefore, for infringements that have lasted four years or more, the maximum fine can be as high as 40% of the undertaking's worldwide group turnover. In case of recidivism within five years, the maximum fine can be doubled and can therefore be as high as 80% of the undertaking's worldwide group turnover. The maximum fine that the ACM can impose on natural persons who have played a leading role in a cartel is EUR 900,000, which can be doubled if that person committed a similar violation in the preceding five years.

Under EU Council Regulation No 1/2003, the ACM is required to apply EU rules (ie, Article 101 of the TFEU) if an agreement or concerted practice can affect trade between Member States. Conduct allowed under EU rules cannot be prohibited under Dutch national law under such circumstances.

6.4 Abuse of Dominant Position

Under Article 24 of the Dutch Competition Act and Article 102 of the TFEU, companies that have a position of economic strength are prohibited from abusing that dominant position. Article 1(i) of the Dutch Competition Act defines a dominant position as a position in which one or more companies are able to prevent effective competition from being maintained on the Dutch market or part thereof, by giving them the power to behave to an appreciable extent independently of their competitors, their suppliers, their customers or end users. As a rule of thumb, a market share of less than 40% does not constitute a dominant position, but a rebuttable presumption of dominance exists above 50%.

Market shares are not decisive by themselves; other relevant factors may include the existence of intellectual property rights, the level of concentration of the market and barriers to entry. Abuse is not defined, and may consist of charging unreasonably high prices, refusing to supply, or charging extremely low prices ("predatory pricing") to force competitors out of the market.

7 Intellectual Property

7.1 Patents

Under Dutch patent law, technical inventions (defined as products or operating procedures in any technological field) are eligible for patent protection if they meet three material criteria.

- Novelty – the product or process may not have been made public anywhere in the world before the date of submitting the patent application, not even through the activities of the inventor themselves.
- Inventive step – the invention must not seem obvious to a professional.
- Industrial application – the invention must relate to a technically demonstrable functioning product or production process.

Patents can be applied for in the following ways:

- by filing a national application with the Netherlands Patent Office (*Octrooicentrum Nederland*);
- by filing a European application with the European Patent Office (EPO) designating the Netherlands as a country for which patent protection is desired (as one of more than 30 possible countries in the EU);
- by filing an application with the WIPO under the Patent Cooperation Treaty; or
- since 1 June 2023, by filing for a Unitary Patent.

On 1 June 2023 the EU regulations establishing the Unitary Patent system (No 1257/2012 and No 1260/2012) became applicable. On that date, 17 EU member states had ratified the UPC (Unified Patent Court Agreement) Agreement, ie Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, France, Germany, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovenia and Sweden. Additional EU member states are expected to ratify the UPC Agreement in the coming years, so that eventually Unitary Patents will make it possible to get patent protection in up to 25 EU Member States by submitting a single request to the EPO.

Once the EPO grants a European patent application, the applicant can choose between: (i) a European patent with chosen countries; or (ii) a Unitary Patent for the European countries that have ratified the UPC Agreement.

Through the UPC Agreement, a ruling can be obtained from a single authority regarding the validity or infringement of a Unitary Patent for all EU member states that ratified the UPC Agreement. The UPC (Unified Patent Court), has headquarters in Munich and Paris. In The Hague, there will be a local division at The Hague Hearing Centre. Companies can litigate European patent cases there in Dutch and English.

For a transitional period (initially of 7 years) for classic European patents the patentee can choose whether or not to use the UPC. If it is chosen not to use the UPC, then litigation will continue to go through the national courts. This is called “opting out” of the UPC.

Dutch patents and Unitary Patents are valid for a maximum of 20 years from the filing date, provided that the annual fees are paid. If certain requirements are met, the term of protection for medicinal and plant protection products can be extended by up to five years through a supplementary protection certificate.

Patent owners can prevent others from unlicensed use of the patented technology. In addition, patent owners can demand information, the disclosure of records, the destruction of infringing products and damages from infringers. Damages can be calculated on the basis of lost profits of the patent owner, a licence analogy or the profits of the infringer. Punitive damages cannot be claimed in the Netherlands.

The District Court of The Hague has a specialised patent division, and has exclusive jurisdiction in patent litigation regarding Dutch patents. It is possible to appeal judgments of The Hague District Court to the Appeal Court in The Hague, which will review the dispute in full and has specialised IP justices. Appeal judgments can be reviewed by the Supreme Court of the Netherlands, albeit only on issues of law, not fact.

7.2 Trade Marks

The Netherlands has three different systems for trade mark protection:

- the Benelux Convention on Intellectual Property (trade marks and designs);
- Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the EU trade mark; and
- the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (Madrid Protocol).

Trade marks can consist of any signs, particularly words, including proprietary names, or designs, letters, numerals, colours, the shape of goods or of the packaging of goods, or sounds, provided that such signs are capable of:

- distinguishing the goods or services of one business from those of other businesses; and
- being represented in the register in a manner that enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.

Benelux trade marks offer protection in Belgium, the Netherlands and Luxembourg, and may be applied for at the Benelux Office for Intellectual Property (BOIP). European trade marks that provide protection for all EU member states have to be applied for at the EU Intellectual Property Office (EUIPO).

Dutch trade marks are initially protected for ten years. Protection may be prolonged for an indefinite number of times upon the timely payment of the extension fees.

The unlicensed use of registered trade marks is forbidden, and taking “unfair advantage” of the reputation of trade marks also constitutes an infringement. To enjoy the exclusivity rights of trade marks, trade mark owners must put the trade marks to genuine use for the goods or services for which they have been registered within five years of filing. In the event of trade mark infringements, trade mark owners may claim injunctive relief, rendering of account, damages, product recall, and even destruction of the infringing goods.

Benelux trade marks are enforceable through the civil courts. Both Dutch district courts and courts of appeal have broad experience in IP issues.

The district court of The Hague (the EUTM court in the Netherlands) has a chamber of judges specialising in IP law, and has exclusive jurisdiction for litigation related to EU trade marks.

7.3 Industrial Design

As with trade mark protection, the Netherlands has three different systems for the protection of industrial design:

- the Benelux Convention on Intellectual Property (trade marks and designs);
- Regulation (EC) No 6/2002 of 12 December 2001 on Community Designs; and
- The Hague System for the International Registration of Industrial Designs.

The terms “design” or “drawing” relate to the appearance of products or parts of products. To claim a design right, the design must be novel and have an individual character.

Benelux designs offer protection in Belgium, the Netherlands, and Luxembourg, and may be applied for at the BOIP. European designs that provide protection for all EU member states have to be applied for at the EUIPO. The Hague System for the International Registration of Industrial Designs allows for the registration of designs in 70 contracting states by filing one single international application with the WIPO.

Design registrations are initially valid for five years from the date of filing and can be renewed in blocks of five years up to a maximum of 25 years.

Unregistered designs are protected against cop ying for a period of three years from the date on which the design was first made available to the public within the territory of the EU. After the expiry of these three years, protection cannot be extended.

In the case of design right infringements, the owners can claim injunctive relief, rendering of account, damages, product recall and even destruction of the infringing goods.

Benelux design protection is enforceable through civil courts. The district court of The Hague has a chamber of judges specialising in IP law, and has exclusive jurisdiction for litigation related to EU designs.

7.4 Copyright

The Dutch Copyright Act (*Auteurswet*) implements the harmonised standards set forth by EU copyright law. Many of the EU directives reflect EU member states' obligations under the Berne Convention and the Rome Convention, as well as the obligations of the EU and its member states under the World Trade Organisation "TRIPS" Agreement and the two 1996 World Intellectual Property Organisation (WIPO) Internet Treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty). The Copyright Act automatically protects the copyright of works of literature, science or art from the moment the work is created, on the condition that the work in question is an original work. The term "work" embraces many materials, such as books, brochures, films, photographs, musical works, works of visual art and geographical maps. Software is also protected under the Copyright Act. A work must be "the author's own intellectual creation" in order to qualify for copyright protection.

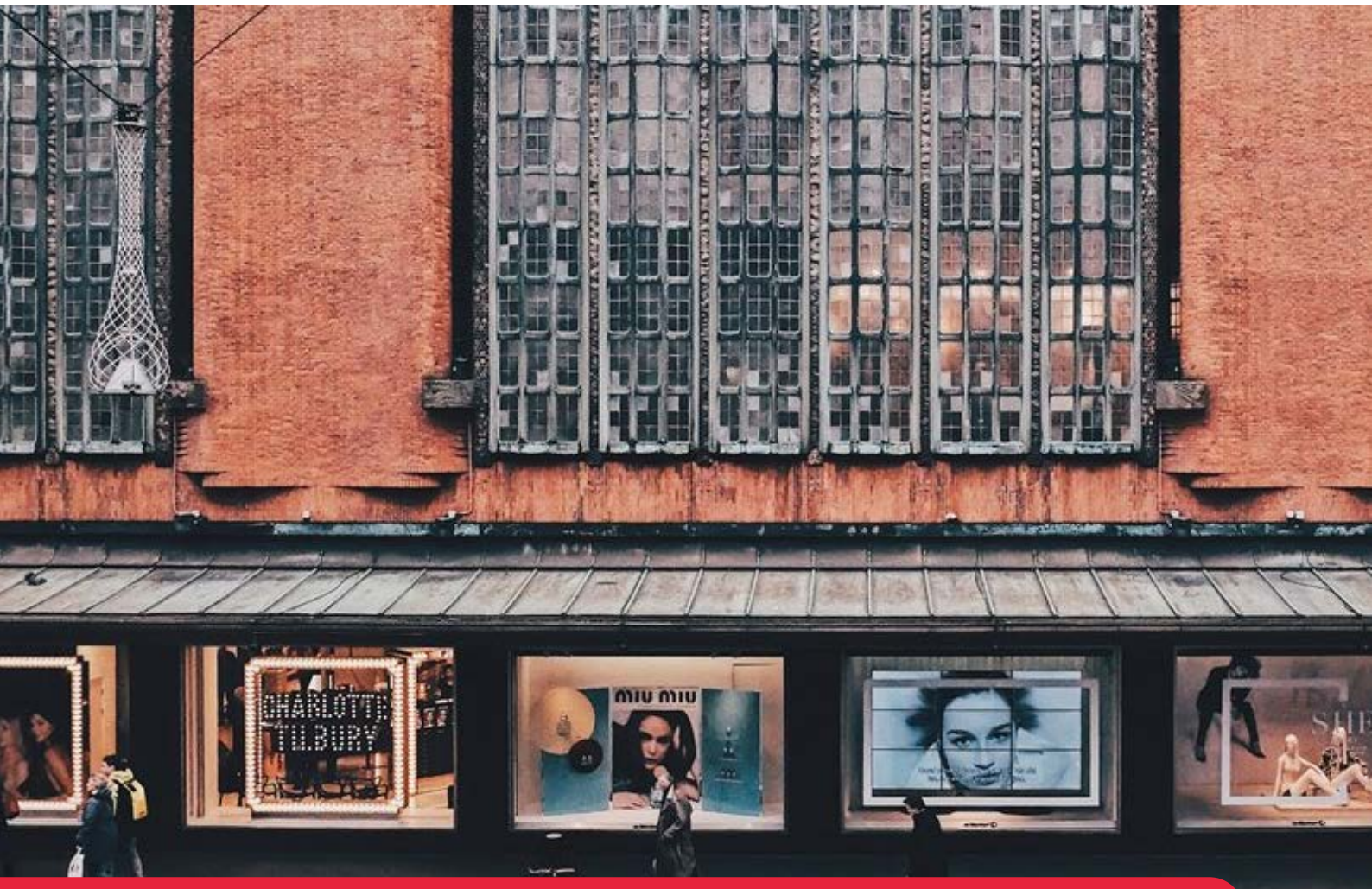
Upon the death of the author, the copyright automatically devolves to the heirs. Copyright ends 70 years after the death of the work's creator.

Copyright owners have the exclusive right to publish and copy the copyrighted works, including translations.

The Dutch Copyright Act stipulates that employers own the copyrights in works created by employees in the course of their employment.

Copyright owners have the right to take legal action against persons infringing their copyrights. Dutch civil law and Dutch copyright law provides, among other things, for the possibility of injunctions, full damages, the surrender of profits made on the infringement, to be accounted for by the infringing party, the transfer or destruction of infringing products, cost orders and withdrawal from the market, or the destruction of materials predominantly used for the manufacturing of the infringing products.

In addition to copyright, there are "neighbouring rights", which are also known as "related rights" and protect the work of performers, music and film producers, and broadcasting companies.



7.5 Others

Plant Breeders' Rights
Under EU Regulation (EC) No 2100/94 of 27 July 1994 on community plant variety rights and the Dutch 2005 Seeds and Planting Materials Act, plant breeders can invoke plant breeders' rights to protect new plant varieties. The Board for Plant Varieties (*Raad voor Plantenrassen*) is responsible for granting plant breeders' rights in the Netherlands.

Database Rights
Databases consisting of collections of ordered data can be protected by database rights under the Dutch Database Act.

Semiconductor Topography Rights
Semiconductor topography rights protect the design of electronic circuits on computer chips (also known as the topography of semiconductor products). These rights protect circuits designed to perform specific functions.

Trade Name Law
Trade name law protects the names under which enterprises operate. Trade names come into being automatically, as soon as enterprises start operating; owners do not have to register trade names in the commercial register. The protection of trade names is regulated in the Trade Names Act. Trade name law has been of growing importance recently due to the use of trade names in internet domain names.

Trade Secrets
The Dutch Trade Secrets Act (*Wet bescherming bedrijfsgeheimen*) implements the EU Trade Secrets Directive (Directive 2016/943/EU), which sets out rules for the protection of trade secrets.
Trade secrets refer to any information that:

- is not generally known or readily accessible to persons in the circles who normally deal with this type of information and is therefore of economic value;
- is subject to appropriate confidentiality measures by the lawful holder; and
- the holder has a legitimate interest in the confidentiality thereof.

An owner of trade secrets must enforce "appropriate measures" and establish the confidentiality of said trade secrets in order to ensure protection.

The Dutch Trade Secrets Act stipulates the actions allowed for discovering trade secrets: so-called reverse engineering is permissible, provided it does not violate contractual obligations or other mandatory statutory law.

In the case of infringements, trade secrets owners can demand the cessation or prohibition of the use or disclosure of the trade secret, and even product recalls regarding the infringing goods and/or their destruction, as well as damages.

8 Data Protection

8.1 Applicable Regulations

The main regulations applicable to personal data protection in the Netherlands are:

- Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (GDPR); and
- the Dutch GDPR Implementation Act (*Uitvoeringswet AVG*) of 16 May 2018.

The GDPR

The GDPR is a uniform and unitary data protection law applicable throughout the EU and EEA, and is directly applicable in the Netherlands. It allows EU member states to enact additional implementing provisions – eg, in relation to special categories of personal data as referred to in Article 9(1) of the GDPR, and providing for certain exemptions for scientific or historical research or statistical purposes, for authentication and security purposes, etc. The Netherlands has exercised this right by introducing the GDPR Implementation Act.

The GDPR defines "personal data" as any data that can be traced back to specific individuals (the data subjects), either directly or indirectly. Health data, genetic data, data about race or ethnicity, and other special categories of personal data, as well as personal data relating to criminal convictions and offences, enjoy additional protection.

The GDPR defines a controller as the party who determines the purpose and means of processing, and a processor as the party who processes personal data on behalf of a controller. Both controllers and processors are subject to the rules in the GDPR.

The GDPR stipulates that, in order to be able to demonstrate compliance, controllers must adopt internal policies and implement measures that satisfy the principles of data protection by design and data protection by default.

The processing of personal data (including disclosure to third parties) must be lawful, transparent and fair. It must be limited to specific purposes and to the data necessary for these purposes (data minimisation). Other principles are that the data must:

- be accurate;
- be kept secure; and
- not be stored for any longer than needed (storage limitation).

The GDPR also requires businesses to inform data subjects of how their data is used and to document their compliance with the GDPR. Data subjects have the right to access their personal data, to request corrections, and to have their data deleted (or restricted) under certain conditions.

Controllers and processors must designate data protection officers (DPO's) in the following circumstances:

- if they are public authorities;
- if their core activities consist of the regular and systematic monitoring of data subjects on a large scale; or
- if their core activities consist of processing sensitive personal data on a large scale (including processing information about criminal offences).

The ePrivacy Directive and the Dutch Cookie Act
Additional provisions regarding data protection and privacy in the context of telecommunications are set out in Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector EU (ePrivacy Directive) and in the Dutch Cookie Act.

The ePrivacy Directive has been implemented in the Dutch Telecommunications Act, which prohibits unsolicited communication by email (as well as faxes and automated communication systems) for commercial, non-commercial or charitable purposes, unless senders can demonstrate the recipient's prior consent.

Under the Cookie Act, informed consent is required for the use of cookies, unless the cookies are:

- needed to facilitate communication;
- strictly necessary for the service requested by users; or
- aimed at obtaining information about the quality and/or effectiveness of the services provided and have little or no impact on the users' personal lives.

These rules apply to both first-party cookies and third-party cookies.

8.2 Geographical Scope

Pursuant to Article 3(1), the GDPR applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the EEA, regardless of whether or not the processing takes place in the EEA. The term "establishment" extends to any real and effective activity – even a minimal one – exercised through stable arrangements in the EEA.

Businesses not established in the EEA will also be subject to the GDPR if they offer goods and services to individuals in the EEA, or if they monitor the behaviour of data subjects who are in the EEA. Non-EEA businesses that do this on a regular basis or in combination with certain high-risk activities will have to designate a representative in the EEA. Under these rules, websites directed at an EEA audience or tracking visitors from the EEA must comply with the GDPR.

No special requirements apply to data transfers from the Netherlands to other EEA countries. Transfers of personal data to countries outside the EEA, however, require – with just a few exceptions – either a decision of the European Commission that the destination country ensures an adequate level of protection (this is the case for the UK, Switzerland, Canada, Israel and Japan, for example), or appropriate safeguards to protect the data subjects' rights (such as the Commission's standard contractual clauses (SCCs) or binding corporate rules approved by a supervisory authority).

On 16 July 2020, the Court of Justice of the European Union (CJEU) issued its decision in Data Protection Commissioner v Facebook Ireland, Maximillian Schrems, commonly referred to as "Schrems II". The decision invalidated the EU-US Privacy Shield Framework, which was designed to provide companies on both sides of the Atlantic with a mechanism to comply with data protection requirements when transferring personal data from the European Union to the United States in support of transatlantic commerce.

On 10 July 2023, the European Commission adopted its adequacy decision for the EU-U.S. Data Privacy Framework. The decision concludes that the United States ensures an adequate level of protection – comparable to that of the European Union – for personal data transferred from the EU to US companies under the new framework. On the basis of the new adequacy decision, personal data can flow safely from the EU to US companies participating in the Framework, without having to put in place additional data protection safeguards.

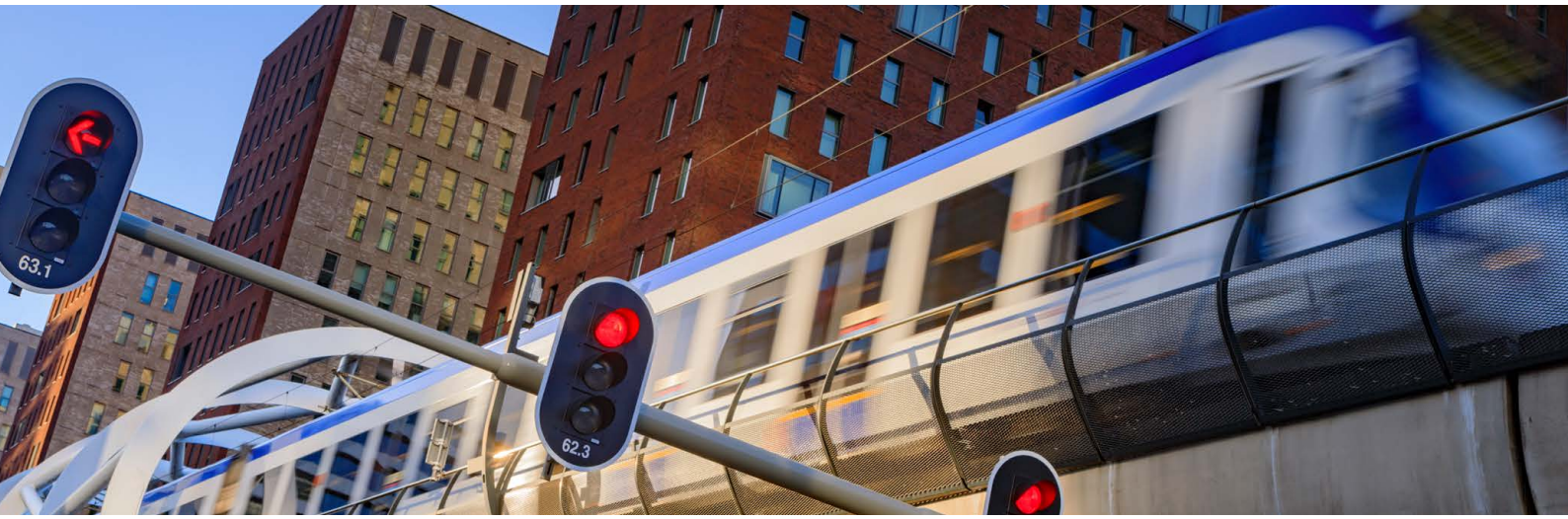
The adequacy decision followed the adoption of Executive Order on 'Enhancing Safeguards for United States Signals Intelligence Activities' by US President Biden on 7 October 2022 and a Regulation issued by the US Attorney General. The EU-U.S. Data Privacy Framework introduces new binding safeguards to address all the concerns raised by the European Court of Justice, including limiting access to EU data by US intelligence services to what is necessary and proportionate, and establishing a Data Protection Review Court (DPRC), to which EU individuals have access. The new framework introduces significant improvements compared to the mechanism that existed under

the Privacy Shield. For example, if the DPRC finds that data was collected in violation of the new safeguards, it will be able to order the deletion of the data. The new safeguards in the area of government access to data will complement the obligations that US companies importing data from EU will have to subscribe to.

US companies can join the EU-U.S. Data Privacy Framework by committing to comply with a detailed set of privacy obligations, for instance the requirement to delete personal data when it is no longer necessary for the purpose for which it was collected, and to ensure continuity of protection when personal data is shared with third parties.

The functioning of the EU-U.S. Data Privacy Framework is subject to periodic reviews, to be carried out by the European Commission, together with representatives of European data protection authorities and competent US authorities. The first review will take place within a year of the entry into force of the adequacy decision, in order to verify that all relevant elements have been fully implemented in the US legal framework and are functioning effectively in practice.

On 4 June 2021, the European Commission issued modernised the SCCs for data transfers from controllers or processors in the EU/EEA (or otherwise subject to the GDPR) to controllers or processors established outside the EU/EEA (and not subject to the GDPR). These modernised SCCs replace the three sets of SCCs that were adopted under the previous Data Protection Directive 95/46. Since 27 September 2021, it is no longer possible to conclude contracts incorporating these earlier sets of SCCs and on 27 December 2022.the grace period for using contracts incorporating these earlier sets of SCCs expired.



8.3 Role and Authority of the Data Protection Agency

The Dutch Data Protection Authority (*Autoriteit Persoonsgegevens*) was established by the GDPR Implementation Act as an independent supervisory authority, as referred to in Article 51(1) of the GDPR. The Authority is charged with supervising the processing of personal data in accordance with the provisions of the GDPR and the law.

The functions of the Dutch Data Protection Authority include:

- providing guidance to individuals and organisations in the form of information and advice;
- supporting organisations by offering practical tools;
- reviewing requests for prior consultations and licence applications for processing data relating to criminal convictions and offences; and
- promoting the creation of codes of conduct.

It has the power to investigate violations, to issue orders to stop violations and to impose fines of up to EUR 20 million or 4% of the worldwide annual turnover, whichever is higher.

9. Litigation

9.1 General characteristics of the Legal System

In most cases, parties need a lawyer admitted to the Dutch Bar to represent them in civil court. However, before the sub-district court it is possible for parties to argue their case without a lawyer. The sub-district court can be used for distinct subject matters and for claims up to EUR 25,000.

The basic rule is that Dutch courts have jurisdiction if the defendant is domiciled in the Netherlands. Dutch courts can also have jurisdiction if the parties have agreed to elect a Dutch court to judge any disputes arising from their legal relationship. Legal provisions about jurisdiction can be found in the EU Brussels I Recast Regulation and the Dutch Code of Civil Procedure (**DCCP**).

An attractive aspect typical of Dutch law is the possibility to levy a provisional attachment on the assets of a foreign party located in the Netherlands. In the absence of a forum choice made by the parties, a 'saisie foraine' gives the Dutch courts jurisdiction to resolve the dispute between the parties.

9.2 Initiating a lawsuit

In general, there are no procedural requirements for initiating a lawsuit in the Netherlands. Exceptions to this rule are the filing of a collective action (Section 3:305a of the Dutch Civil Code (**DCC**)) and cases of mismanagement brought before the Enterprise Court (Section 2:349 DCC).

It is important to note that claims are subject to strict limitation periods after which it is not possible to initiate a lawsuit. Unless otherwise provided, claims become time-barred after 20 years. However, in most cases claims become time-barred after 5 years or an even shorter time period. The right to claim specific performance of a contractual obligation and the right to claim damages become time-barred after 5 years. The right to claim under a sales contract becomes time-barred after only 2 years. Service of summons interrupts the aforementioned limitation periods.

In the Netherlands there are two main types of civil proceedings that can be initiated: the proceedings for ordinary civil suits initiated by summons and the less formal proceedings initiated by an application for suits on specific topics (e.g. employment, leases, family and certain corporate matters). The proceedings by summons is most used in the Netherlands. The content of the summons must meet strict requirements. It must describe the nature of the dispute, the relevant facts, the legal grounds on which the claim is based and the available evidence. Additionally, it must state and refute the arguments of the defendant. It is important that the claimant fully substantiates all the claims in the summons because there will not always be an opportunity to submit further written comments. A recovery writ can be used for the rectification of procedural errors in the summons which could lead to its nullification. This recovery writ must be submitted before the date of the formal court appearance. The time period between the service of summons by the bailiff on a defendant and the date of formal court appearance is at least one week.

In case the defendant does not appear in court, the court first verifies whether all the formalities and requirements regarding the content and service of summons have been met. If this is the case, the court grants leave to proceed in default and the court awards the claim unless it is unlawful or unfounded (Section 139 DCCP). The defendant can challenge the default judgement within four weeks after the judgement has been pronounced.

9.3 Litigation in English

In 2016 the District Court of Rotterdam launched a trial period during which it was possible to conduct proceedings in English in certain categories of cases. This possibility has been extended for an undetermined period of time. It concerns cases in the field of sea and transport law or international trade. The maritime chamber of the Rotterdam

District Court specializes in such cases, and it is precisely these cases that often involve international parties. Parties can jointly choose to litigate in English before this court. In addition, the maritime chamber regularly publishes English summaries of judgments.

On 1 January 2019 the Netherlands Commercial Court (**NCC**) and the Netherlands Commercial Court of Appeal (**NCCA**) were established. These courts are located in Amsterdam.

There are several key features worth mentioning about the NCC(A). First of all, the proceedings before the NCC(A) are conducted in English and their judgements are rendered in English. Second, the cases are heard by a three-judge panel that consists of judges who are impartial, independent and experienced in complex international business matters. Third, the NCC(A) provide parties with clear rules on the procedure and with reliable and transparent guidance on procedural matters. Last but not least, the court fees for litigation are considerably cheaper than, for instance, in the UK. The court fees amount to EUR 18,287 for the NCC and EUR 24,382 for the NCCA and summary proceedings cost half that amount. These fees are not related to what the case is about or the amount of money claimed.

A dispute can be submitted to the NCC(A) when the following requirements are met: the NCC(A) has jurisdiction, the parties explicitly agreed in writing that proceedings will be in English before the NCC(A), the action is a civil or commercial matter and it concerns an international dispute.

9.4 Interim Applications

Pretrial proceedings, in which decisions are made regarding procedural points, do not exist in the Dutch judicial system. One exception is the appearance of the parties before the court to investigate whether the parties can solve their dispute outside of court. Preliminary defences are dealt with during the main proceedings; however, they ought to be put forward before the substantive defences. It is possible to request the court to first render a decision regarding the preliminary issues. The court is not obliged to accept such a request.

9.5 Discovery

No discovery procedures comparable to those in common law systems exist. Parties can use Section 843a DCCP to obtain further information of the other party to establish the truth. Pursuant to this section parties may request inspections or copies of certain documents (production of exhibits) from the other party. Cumulative conditions must be satisfied for the request for the production of exhibits. The court can refuse the request pursuant to substantial reasons or if a proper administration of justice can be guaranteed without the requested information. The party owing the documents can propose to initially only provide the documents to the judge. The judge will balance the interests of the claimant against the interests of the refusing party and decide whether, and in which way, the documents must be disclosed.

9.6 Injunctive Relief

A party with a sufficiently urgent interest in injunctive relief may initiate summary proceedings (Section 254 DCCP). An injunction relief for the duration of the dispute may also be requested in already pending proceedings on the merits (Section 223 DCCP).

The requested injunction will be granted if it is sufficiently likely that the court in the proceedings on the merits will come to an identical decision. The injunction applies until a decision is reached in the proceedings on the merits. The range of possible injunctions is broad. For example, the court may order the prejudgement attachments to be lifted, the execution of a ruling to be suspended, or an agreement to be performed.

Because of the urgent nature of summary proceedings, a hearing can take place every day and at any hour, even outside of the courthouse. The judgment can be pronounced immediately after the hearing or in one day in extremely urgent cases.

If eventually the executor does not succeed in the proceedings on the merits, the enforcement of a judgement in summary proceedings might turn out to be unlawful. The executor is liable for the loss suffered by the opposing party as a consequence of the enforcement.

9.7 Trials and Hearings

Since 1 October 2019, the nature of legal proceedings in the Netherlands has changed with a revision of the Dutch Code of Civil Proceedings. Before this revision, legal proceedings were mainly conducted in writing. Now legal proceedings have a stronger oral element and the court has more discretion to guide the proceedings. The court can order oral hearings at every stage of the proceedings (Section 87(1) DCCP).

In principle, court hearings in civil cases are open to the public. Under special circumstances, the court may decide to conduct court hearings behind closed doors. For example, in case of a dispute about trade secrets or if public policy or morality so demands.

The judge has a passive role in determining the scope of the dispute; this is determined by the parties themselves and the claims they bring before the court. This means that the judge may not grant or dismiss a claim outside of the dispute between the parties. On the contrary, during the hearings the judge plays a more active role in establishing the truth.

Judgement is rendered six weeks after the oral hearing. However, it is not uncommon for this period to be extended. In total it may take 12 to 18 months from the moment a writ of summons is issued to obtain a final judgment. This period can be considerably longer if the litigation is continued in writing, if procedural issues are raised, or if further evidence must be taken.

Evidence

It is up to the parties to sufficiently substantiate and prove their claims using any legal means necessary (Section 150 DCCP). In civil lawsuits all forms of evidence are permissible unless the law provides otherwise. It is important to note that the court may disregard evidence if it is submitted to the proceedings too late (Section 87 (6) DCCP). The timing of specific offers of proof or counter-evidence is very precise in Dutch procedural law. In general the court has great discretionary power in the assessment of the evidence. There are some exceptions to this rule. Legally valid deeds and criminal judgments deliver conclusive evidence, while a witness testimony is accorded relatively limited evidentiary value.

9.8 Damages and Judgement

There are various awards available to a successful claimant: e.g. specific performance, damages, an application for an order or injunction, a declaratory decision, rescission or annulment. Final judgments or judgments with immediate effect may be enforced after being served by the bailiff.

Specific performance

In Dutch law, specific performance is the primary remedy against a debtor's breach of contract. This remedy entails the creditor's right to force his debtor to perform the obligations as specified in the contract. It is readily available to creditors and there are few restrictions to it in Dutch law.

Damages

In the Netherlands an award to pay damages is used to bring the aggrieved party in the position it would have been in without the breach of contract or the

wrongful act. It is thus a system of compensatory damages. Punitive damages cannot be claimed. The main rule is that damages are paid with money. However, at the request of the aggrieved party, the court may rule that compensation must take place in another form (Section 6:103 DCC). The court may reduce damages if fairness so requires, but never to an amount lower than the amount of insurance coverage of the party against whom the order has been given (Section 6:110 DCC).

9.9 Appeal

Appeal to the courts of appeal
Appeal is possible against almost all final judgments of the court of first instance. If necessary, the court of appeal will consider the case in full. The court is not bound by the facts established by the court of first instance. It can therefore re-examine both the facts of the case and the rules of law. The appeal can be used to correct inaccuracies in the judgment of the court of first instance and to correct errors made by the parties. This also means that parties may put forward new facts and arguments in appeal.

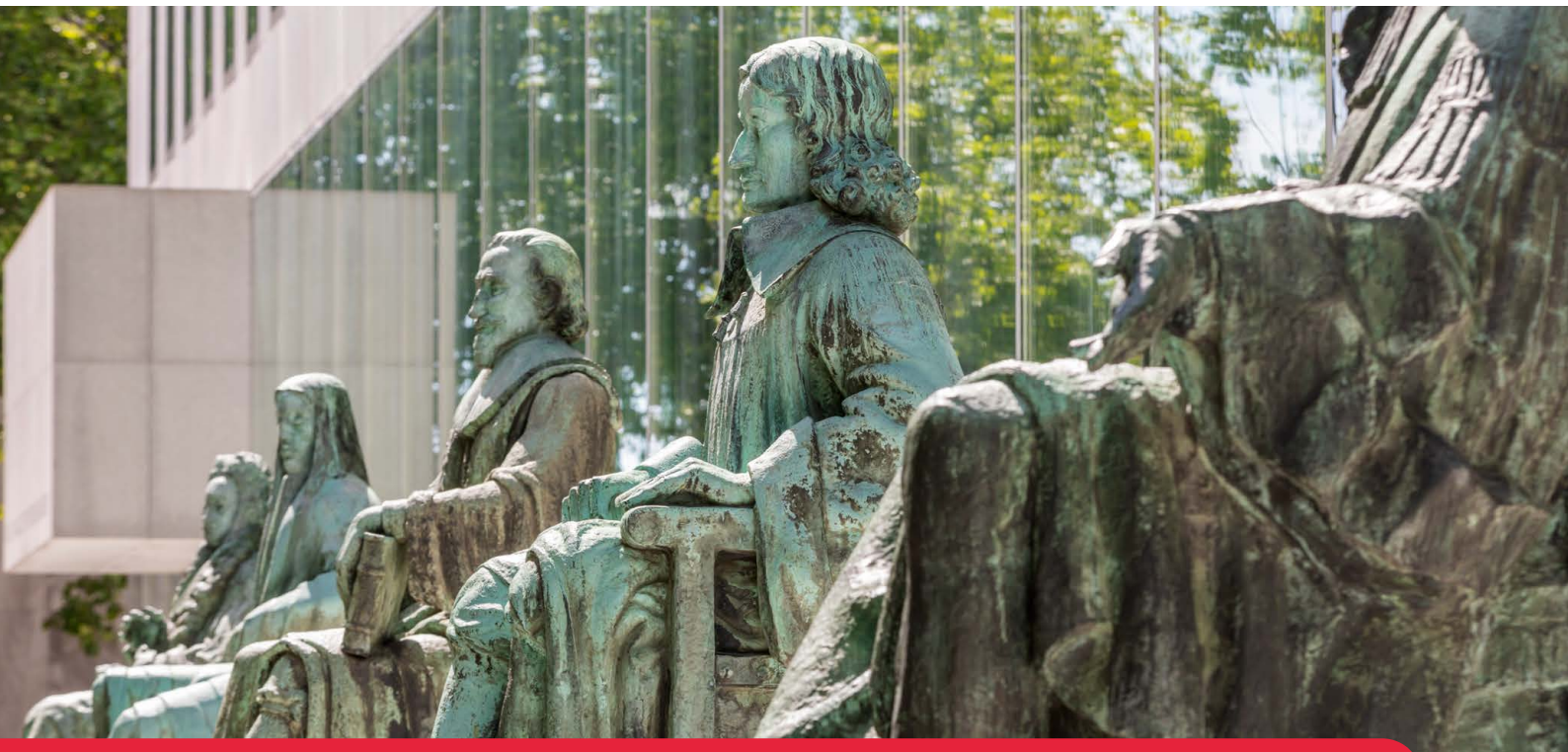
Appeals can be lodged within three months from the day the decision was rendered by serving a notice of appeal on the other party. The claimant does not have to submit the grounds of appeal in the notice of appeal; these can be submitted in a separate statement of appeal. The defendant may lodge a cross-appeal, irrespective of whether the appeal period has already lapsed.

If the court of first instance has misinterpreted the law or the facts, the court of appeal reverses the decision and provides judgement itself, covering all elements of the dispute.

Appeal at the Supreme Court
Appeal in cassation must be filed within three months from the day the decision was rendered by the court of appeal. The notice of appeal must include the arguments of the judgement of the court of appeal against which the objections are raised.

Appeal in cassation can be lodged with the Supreme Court against most decisions of the court of appeal. The Supreme Court does not examine the facts It purely observes whether or not the court of appeal has applied the law correctly. The only complaints that can be raised before the Supreme Court is that the court of appeal has incorrectly interpreted or applied the rules of law, or that the judgment of the court of appeal is incomprehensible in view of what the parties have intended. This also means that new facts and arguments cannot be brought forward in the proceedings before the Supreme Court.

After cassation, the Supreme Court can refer the case to a court of appeal to be dealt with further.



9.10 Costs

In principle parties must pay their own litigation costs. However, the losing party is usually ordered to pay the litigation costs of the prevailing party. The costs that the losing party must pay are based on fixed amounts for certain standard activities but are also dependent on the value of the claim. The actual litigation costs made by the prevailing party are often not fully covered by the amount awarded. It is not possible to start separate proceedings to challenge the amount of the costs; this should be challenged in the ordinary appeal proceedings.

9.11 Collective actions

Dutch procedural law allows injured parties to bundle their claims and initiate a collective action based on Section 3:305a DCC. Under this section, a foundation or association with legal capacity can institute an action aimed at protecting similar interests of other individual persons.

Since 1 January 2020 the Dutch Act on redress of mass damages in a collective action (**WAMCA**) makes it possible for the class members to claim collective damages besides the declaratory judgement of collective responsibility. The new law applies to events that took place on or after 15 November 2016.

9.12 Arbitration

Arbitration cases in the Netherlands are often facilitated by well-organized arbitration institutes. The Netherlands Arbitration Institute (NAI) is the largest arbitration institute and is frequently used. If the arbitration agreement declares that the place of arbitration is in the Netherlands, the arbitration is subject to the Dutch Arbitration Act (**DAA**), which is laid down in book 4 of the DCCP. It is important to note that section 1020 DCCP (3) states that not every legal matter can be the subject of arbitration. For example, matters of public policy, criminal law and intellectual property law cannot be dealt with in arbitration.

Appeal against an arbitral award cannot be lodged with the Dutch civil court, however arbitral appeal is possible if the parties have expressly included this in the arbitration agreement (Section 1061b DCCP).

In specific circumstances and on specific grounds it is possible to revoke or set aside an arbitral award (Section 1068 DCCP, 1065 DCCP). The limitation periods for challenging these awards commence at different times within a period of three months.

The party that wants to enforce the arbitral award has to obtain judicial leave (exequatur) from the provisional relief judge of the competent district court. Such leave has to be requested by submitting an application. Section 1063 DCCP lists certain grounds on which the enforcement of a domestic arbitral award may be refused.

The rules concerning appeal should be noted: appeal against a refusal of leave for enforcement is possible, however it is not possible to appeal a decision granting leave to enforce (Sections 1063(4) and (5) DCCP).

The Netherlands is a party to the New York Convention of 1958. Therefore, the Netherlands cannot impose more onerous conditions for the recognition or enforcement of Convention awards than are imposed on the recognition or enforcement of arbitral awards rendered under Dutch law.

10. Restructuring & Insolvency

The Dutch Bankruptcy Act (**DBA**) provides four different types of corporate restructuring/insolvency proceedings:

i. (provisional and final) suspension of payments (*surseance van betaling*);
ii. bankruptcy (*faillissement*);
iii. (public or undisclosed) Dutch scheme proceeding (*Wet Homologatie Onderhands Akkoord*, **WHOA**).

10.1 Suspension of payments

A suspension of payments is a voluntary reorganization proceeding. The debtor may apply to the court for a suspension of payments if it anticipates that it will be unable to pay its debts as they fall due. Following the application, the court will grant a preliminary suspension. The creditors then vote on the desirability of the suspension, after which the court decides on the final suspension of payments.

In a suspension of payments an attempt will be made to continue the business in a responsible manner, with the aim of continuing the business in the same legal entity. The suspension of payments is meant as a temporary relief against the non-preferred creditors of the debtor.

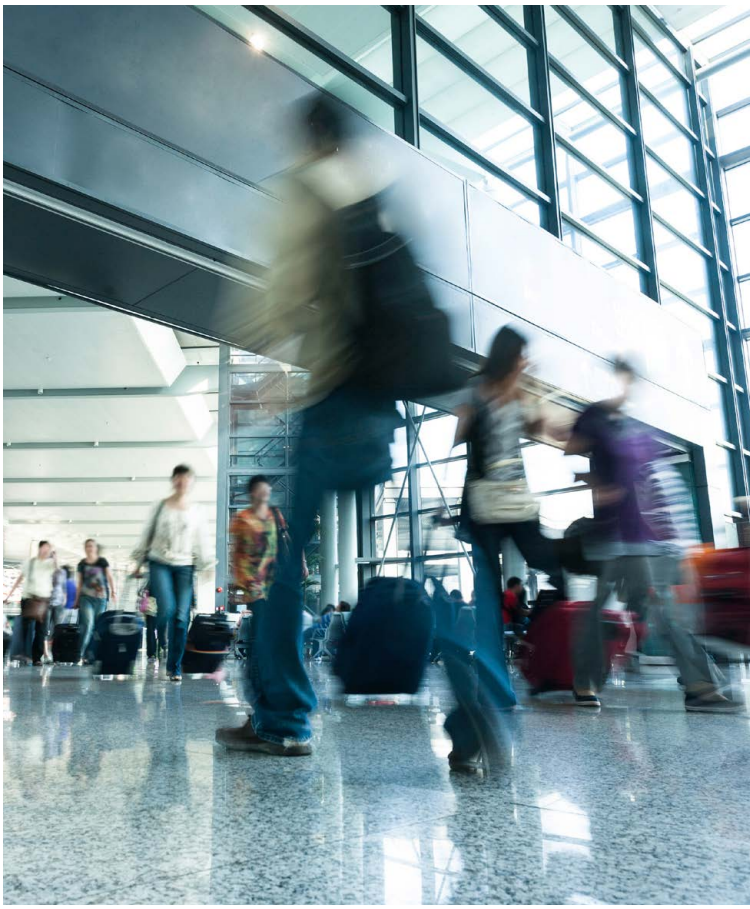
Suspension of payments does not apply to current and upcoming liabilities, nor to existing preferential creditors (such as the Dutch Tax Authorities, institute for employee insurance (**UWV**), employees, pledgees and mortgagees). They can exercise their rights as if there were no suspension of payments.

The court granting the suspension shall appoint an administrator. The administrator, together with the debtor's board, shall manage the company and dispose of the debtor's assets.

Suspension of payments aims to meet a short-term solvable liquidity problem. In a suspension, the debtor's business is maintained. A successful suspension means that the debtor can continue in its current legal form. A court liquidation or a liquidation of assets is thus avoided.

However, a suspension of payments rarely ends successfully. Virtually all suspensions eventually lead to bankruptcy. The underlying reasons are that current liabilities and existing preferential creditors simply have to be paid, the employment-law discharge protection applies in full (and salaries have to be paid in full), and banks and lenders will freeze available credit space and will want to enforce their security rights. Existing suppliers will also no longer want to supply unless they are paid in advance. All taken together, this leads to a paralysis of the business.

Nevertheless, it can sometimes be advisable to opt for a suspension first, because this is usually perceived as less drastic for the outside world and thus provides for a softer landing. During the suspension, a restart can be (further) prepared for a few days in relative peace, which subsequently will take place in the subsequent bankruptcy.



10.2 Bankruptcy

A court declares a debtor bankrupt when there is prima facie evidence that shows that the debtor has ceased paying its debts when due. If a creditor petitions for the debtor's bankruptcy, the creditor has to show summarily evidence of his or her claim against the debtor. Pursuant to the DBA, a debtor has ceased paying its debts when the following criteria are met: (i) there are at least two creditors and at least one of the creditor's claim is due and payable and (ii) the debtor has to have stopped making payments. Under Dutch law, shareholders must instruct the company's management board to file for bankruptcy, unless otherwise agreed or prescribed in the company's articles of association. In addition, it is advisable to also ask the works council for advice regarding the filing of the company's own bankruptcy, but this is not strictly necessary. The court will not reject the own filing if the works council has not been made aware of the own filing of the bankruptcy.

The two main consequences of bankruptcy are that (i) all assets of the debtor are attached, and (ii) only the bankruptcy trustee is left with the power to dispose and manage the company's assets.

The purpose of bankruptcy is to liquidate the debtor's assets and distribute the proceeds to creditors according to the legal order of priority (taking into account, among other things, security interests, preferences, subordination and the value of the claim). Usually, the bankruptcy trustee will try to sell the business of the bankrupt company as a whole: the restart.

The creditors of the company can no longer take recovery and can register their claim with the bankruptcy trustee. Direct recovery from the bankrupt companies is – subject to special privileges such as liens, retention of title, etc. – no longer possible.

In the event of a restart by selling the assets and contracts, the debts/liabilities of the bankrupt company will in principle remain with the bankruptcy trustee. It is generally assumed that the rules of transfer of the business do not apply to 'classic' restart from bankruptcy. The employees working for the bankrupt company are not transferred to the acquiring party by operation of law. Thus, a restart offers an opportunity to take over (only) the healthy parts of the company.

In principle, the 're-starter' is free to choose which employees are offered an employment contract and under which conditions. In doing so, however, one must be mindful of a number of rights that the "purchased" employees can derive from their employment history with the former employer under the doctrine of successive term of employment.

The bankruptcy trustee is charged with the administration and liquidation of the bankrupt's estate. Immediately upon his appointment, the trustee must take any necessary steps to preserve the estate. All creditors' actions and claims are automatically stayed. After consultation with the supervisory judge, the trustee will decide whether or not he will temporarily continue any of the bankrupt's business. This is done only if clearly favourable business prospects exist. If the business activities are not continued, the trustee may sell the assets provided that this does not contravene any special security interests belonging to a creditor. The law provides that realisation of assets takes place by public auction, but that the trustee may realise assets by private contract with the approval of the supervisory judge, which the trustee usually does.

The bankruptcy trustee has special statutory authority to terminate leases and employment contracts. He also has the power to void legal acts if the rights of recourse on the debtor's assets have been prejudiced by legal acts performed by the debtor without obligation, and the right to institute a claim against the directors of a bankrupt company. As a general rule directors of Dutch companies are not liable for the obligations of the company, but if the management board has performed its tasks in an apparently improper manner and this is likely to have been an important cause of the company's bankruptcy, the bankruptcy trustee is able to hold all directors personally liable, on a joint and several basis, for the entire deficit of the bankruptcy (all costs of the bankruptcy and the amount of debt that remains unpaid after liquidation of the assets). Apart from this specific personal liability in bankruptcy, a statutory provision in the Dutch Civil Code gives a more general provision for personal directors' liability vis-à –vis the company in case of improper performance of their tasks; in case of bankruptcy, the trustee may also institute a claim against directors on the basis of this article.

Every three months the trustee must file a public report concerning the debtor's assets and liabilities at the court registry. These public reports are available at the courts and published on the central register.

The bankruptcy trustee is subject to the supervision of the supervisory judge. For certain acts, the trustee needs the authorisation of the supervisory judge, e.g. conducting legal proceedings, terminating employment and rental contracts and realisation of assets by private contract. In certain cases the supervisory judge can, at the request of the debtor or a creditor, order the bankruptcy trustee to perform a specific act or to refrain from performing an intended act. The court has the power to dismiss the bankruptcy trustee at the request of the supervisory judge, a creditor or a debtor.

If desired by the creditors, the court may nominate a committee of creditors to advise the trustee. The trustee, however, is not bound by the committee's recommendations. In practise, the nomination of a creditors' committee is exceptional.

Creditors, not secured by a right of mortgage (*recht van hypotheek*) or pledge (*recht van pand*) or equivalent valid and binding foreign security right, must present their claims in writing to the trustee. A simple letter outlining the claim is sufficient. In most cases a creditors' meeting (*verificatievergadering*) will be held before the court only when the proceeds of the assets exceed the debts of the estate (*boedelschulden*) and the claims of the Dutch Tax Authorities and social security administrations. A creditors' meeting is chaired by the supervisory judge and is attended by the trustee and the debtor. All creditors are entitled to attend the meeting, but this is not mandatory. The purpose of the meeting is either to allow or to challenge the claims and to classify them as preferred or nonpreferred. If a claim is contested, the bankruptcy judge will order that legal proceedings (*renvooiprocedure*) be initiated to determine whether the claim should be accepted.

Creditors' rights

Creditors with insolvency claims are entitled to the proceeds of the realisation of the debtor's assets. Insolvency claims are, as a rule, claims that have arisen before the opening of the proceeding. Certain claims are regarded as claims against the estate (*boedelschulden*). In general, claims which arise as a result of or following a declaration of bankruptcy are considered claims against the estate. Examples of these claims are the costs of the bankruptcy trustee, the costs of liquidating the estate and the wages of employees of the bankrupt company as of the date of the bankruptcy declaration. Claims against the estate have to be satisfied in priority to insolvency claims and need not be submitted in the claims validation procedure.

The leading principle of Dutch bankruptcy law is the so called paritas creditorum which means that all creditors have an equal right to payment and that the proceeds of the bankrupt's estate shall be distributed in proportion to the size of their claims. However, there are two groups of creditors to whom this principle of paritas creditorum does not apply:

a. secured creditors (*separatisten*); and
b. creditors who have a preference by virtue of the Dutch Civil Code or any other relevant act.

Therefore, the paritas creditorum creditors (*concurrente crediteuren*) are those who have an unsecured claim and are not preferred creditors; they share pro rata parte in the amount available to them.

Secured creditors

Secured creditors (*separatisten*) may exclude the collateral from the debtor's estate and execute on their security: in principle the creditor is entitled to prompt foreclosure even if the debtor has been adjudicated bankrupt.

However, the court may, for a period of two months with a possible extension of two months, order a general stay (*afkoelingsperiode*) of all creditors' actions, including foreclosure by secured and privileged creditors.

After or in the absence of a possible stay, a secured creditor, may therefore act "as if there were no bankruptcy". As a result, the trustee is not entitled to retain the encumbered property. Because the secured creditor obtains payment of his claims by executing on the security, he cannot be charged with bankruptcy costs. The automatic stay of all actions against the debtor which results from a declaration of bankruptcy does not apply to secured creditors.

Secured creditors are:

a. creditors who hold a mortgage; and
b. creditors who hold a right of pledge.

The mortgagee and the pledgee are entitled to sell the collateral by public sale or private sale, subject to the consent of the competent court without the cooperation of the bankruptcy trustee. They are further entitled to apply the proceeds of the sold collateral to their claims. Any excess proceeds must be remitted to the trustee.

Preferred creditors

There are two categories of preferred creditors:

a. creditors who have a statutory priority; and
b. creditors who have a non statutory priority.

Preferred creditors are not entitled to initiate foreclosure proceedings as are secured creditors. They are required to present their claims to the trustee and are thereby charged their pro rata share of the costs of the bankruptcy.

Some creditors are in the position of having a right which in fact operates as a priority. The main rights which enable the creditor to enforce a priority are the right of set off (*verrekening*) and the seller's retention of title (*eigendomsvoorbehoud*) and right to recovery (**re***cht van reclame*).

Unsecured creditors

As explained above, the *paritas creditorum* is an underlying principle of Dutch bankruptcy law. Unsecured and non-preferred creditors are paritas creditorum creditors: they do not have any preference and will therefore be paid, if any proceeds of the estate remain, after all other creditors have received payment.

Prepack

Pre-pack proceedings concern a practice developed for undertakings whose bankruptcy is unavoidable. In a pre-pack, a prospective insolvency administrator examines, under the supervision of a prospective supervisory judge, whether a restart of the undertaking is possible following a declaration of bankruptcy. Prepack proceeding currently do not have a statutory footing in Dutch law, but these proceedings have taken place informally. Currently, however, these proceedings are less common, since there is still a debate whether TUPE rules (Transfer of Undertakings (Protection of Employment)) are applicable when an undertaking is transferred in a bankruptcy after prepack proceedings have been followed. When TUPE rules are applicable all employees are transferred by law to the 'new' restarted company while retaining all their rights and obligations.

10.3 WHOA (Dutch scheme proceedings)

The WHOA has introduced a framework in the DBA under which restructuring plans can be implemented outside the formal insolvency proceedings. The moment a debtor (not an insurer or bank) is in a state of imminent insolvency, the debtor may offer to all or some of its creditors or shareholders a (compulsory) restructuring plan to restructure its debts. As soon as the debtor starts preparing a restructuring plan, he must file a so-called start-of-procedure declaration with the clerk of the court. It is also possible to modify or terminate agreements during Dutch scheme proceedings. If the other party does not agree to this, the debtor can terminate the agreement prematurely if the restructuring plan is confirmed by the court and the court authorizes this unilateral termination. If the court allows for termination of the agreements, the debtor's counterparty is entitled to damages. These damages can be included in the restructuring plan. The debtor has the one-off choice whether to prepare a restructuring plan in a public restructuring procedure or in an undisclosed restructuring procedure.

The initiative for a restructuring procedure does not have to come from the debtor. Creditors, shareholders, and employees – through a works council or employee representation – can also request the appointment of a restructuring expert who negotiates and proposes a restructuring plan (thereby acting on behalf of the debtor). The debtor himself can also request for the appointment of a restructuring expert.

It is of importance that the restructuring plan contains all the information that the voting stakeholders need to form an informed opinion on the restructuring plan prior to voting. Under the WHOA, the vote on the restructuring plan takes place in classes. This applies, among other things, that providers of capital are placed in different classes if (i) the rights they have in liquidation of the debtor's assets in bankruptcy, or (ii) the rights they are offered under the restructuring plan, are so different from each other that there is no comparable position.

The WHOA is designed as a framework regulation. Thus, there is much flexibility to reach a restructuring plan, while the involvement of the court is in principle limited until the filing of the petition for the sanctioning/approval by the court (*homologatie*). However, to acquire deal certainty, the debtor or the restructuring expert can, before the restructuring plan is submitted for a vote, request the court to rule on aspects that are important in the context of the restructuring plan. This is known as early court involvement to make binding determinations.

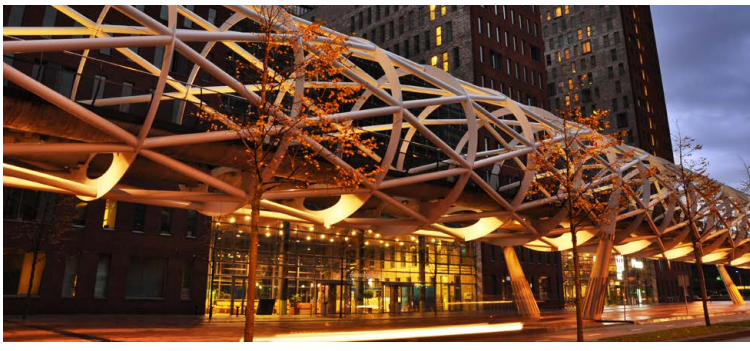
In addition to this, there are more provisions in the WHOA to enable the debtor to reach a restructuring plan. For example, the debtor may request the court to declare a general or limited cooling-off period. With the declaration of such a cooling-off period, the court may appoint an observer to safeguard the interests of creditors or shareholders. Additionally, the offering of a restructuring plan is not a ground for modification of obligations or liabilities to the debtor, for suspension of obligations or liabilities to the debtor or for dissolution of a contract entered into with the debtor. In addition, the creditor risk can be eliminated during a WHOA procedure. There is a statutory provision that stipulates that the court can grant so-called voidance protection. The voidance protection protects certain legal acts that are necessary to continue the business during the restructuring proceedings. These legal acts cannot be voided by a bankruptcy trustee should the debtor go bankrupt in the future.

The debtor may arrange the voting procedure himself, as long as there are at least eight days between offering of the restructuring plan and starting the voting. Voting is done by class. A class of voters has consented to the restructuring plan if the decision to consent has been taken by a group of creditors or shareholders who together represent at least two-thirds of the total amount of creditor's claims or the issued capital of shareholders who have voted within that class. As soon as possible but no later than seven days after the vote, the debtor or restructuring expert shall prepare a voting report.

When at least one class has agreed to the restructuring plan, which usually will be the class that is in the money when the debtor's assets are liquidated, the debtor or the restructuring expert can request the court to confirm/approve the restructuring plan. The court will, as soon as possible, grant the request for confirmation with a reasoned judgement, unless one or more general or additional grounds for refusal arise. The general grounds for refusal relate to the question of whether the decision-making process has been pure and will be assessed by the court on its own initiative. In addition to impurity of the decision-making process, general grounds for refusal are, for example, the absence of imminent insolvency, when one or more creditors are secretly favoured, or the fact that compliance with the restructuring plan is insufficiently guaranteed.

In addition to the general grounds for refusal, the court can also refuse the confirmation if there are additional grounds for refusal. These additional grounds for refusal must be invoked by the creditors entitled to vote. A creditor who has voted against the restructuring plan – even if that creditor is part of the consenting class – can request the court to refuse the confirmation if it appears that this creditor would be worse off on the basis of the restructuring plan than in the event of the liquidation of the debtor's assets in bankruptcy (*best interest of creditors test*). The other additional grounds for refusal can be invoked by dissenting creditors only if they are part of the dissenting class. The most important additional ground for refusal is the *Dutch Absolute Priority Rule*. The *Dutch Absolute Priority Rule* applies when the distribution of the value realized with the restructuring plan deviates from the legal or contractual ranking to the detriment of the dissenting class, unless there are reasonable grounds for such deviation and the interests of the relevant creditor are not harmed as a result.

Once the court confirms the restructuring plan, it becomes binding on the debtor and on all voting creditors and shareholders. It is therefore a forced restructuring plan for the dissenting creditors.



11. About BUREN

About the firm

BUREN is an independent international law firm with a global focus and crossborder transactional expertise. The firm's heritage dates back to 1898.

More than **125 professionals** including 75 lawyers, tax lawyers and civil-law notaries working from our offices in the Netherlands, Luxembourg and China.

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Employment & Benefits
Dispute Resolution
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Private Clients

Added value of BUREN

- One stop shop: integrated legal, notarial and tax departments.
- Full-service firm with a broad sector focus and a multidisciplinary service offering.
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- International reach via a trusted network of top-tier law firms and service providers.
- Equipped for large deals, focusing on personal approach and business insight.
- Outstanding client service and getting things done are our cornerstones.
- Proven success in cross-border transactions.
- Dedicated partner attention.

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- "Very flexible, efficient and transparent. It's a pleasure to work with the firm."
- "Quick to the point and practical advice."
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- "In their practice areas an excellent alternative to the larger international law firms operating in the Netherlands and much more cost-efficient."
- "Impressed with the quality of work, responsiveness and the approach of the team."

CSR

We believe that our success is guided by setting higher standards of corporate social responsibility and our adherence to them. We feel it is our duty to contribute to the well-being of global and local communities through our dedication to pro bono work, volunteering, free lectures, charity and environmental stewardship. BUREN is happy to promote the Netherlands and work together with governmental agencies supporting foreign investors.

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