The Netherlands

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Introduction

Joint ventures are a common phenomenon in today's commerce and society. They have become an important strategic option for many companies, particularly in a crossborder context. A study from the Mergers and Acquisitions Research Centre at Cass Business School reveals that joint venture activity increases in the recovery period after a major economic downturn by 20 per cent compared with the average.[1]

The term "joint venture" however, has no specific statutory meaning under Dutch law. It describes a commercial arrangement for partial cooperation between two or more economically independent entities. Characteristic of the joint venture partners is that, in addition to the joint venture business, they (independent of each other) engage in other activities. The joint venture partners may even be competitors outside the scope of their joint venture.

Joint ventures often provide an effective route for a company to expand the scope of its customer base by utilizing the partner's strength in different geographic markets. Recently, there has been an increasing preference for joint ventures as a mode of market entry. In the natural resources sector, joint ventures are undertaken for the exploration and development of mutual oil and gas interests.

A joint venture also can be a first step in an eventual full disposal or acquisition of a business with a further tranche of the disposal or acquisition being contemplated for a later time. A last example of a particular driver to form a joint venture is the wish to share the significant financial risks that are involved in undertaking a capital-intensive project with another party. Of course, there can be many commercial objectives driving any particular joint venture.

A joint venture is by its very nature a contractual form of cooperation. As a rule, the agreements reached between the joint venture partners are recorded in a joint venture agreement. The statutory rules of general contract law apply.[2] The relationships between the parties involved will additionally be subject, depending on the structure chosen, to provisions of Dutch company law and/or partnership law as well as tax law and competition law (at both the European and national

1 *Sharing Risk: A Study of Corporate Alliances*, Cass Business School (2009).
2 Civil Code, sections 6:213–279.

levels). The relationships linking the joint venture partners can vary from an exclusively contractual relationship to a corporate structure.

On the one side of the spectrum, where the cooperation is purely contractual, there may well be no pooling of assets used by the partners in the joint venture. Each of the partners is typically taxed separately for the profits derived from the joint venture business. On the other side of the spectrum, the corporate structure typically involves the vesting of all the business activities, assets, and liabilities relating to the joint venture business in a single company (or its subsidiaries).

In more than one respect, the partnership structures lie in between these two extremes; typically, they do not provide legal personality and limited liability, but they may provide tax transparency. The most significant advantage of the incorporation of a joint venture company is the ability of the partners to limit their liability in respect of the risks, losses, and liabilities of the joint venture operations. The other side is that corporate vehicles are often less tax efficient in the context of a joint venture than partnerships.

Joint ventures are a popular form of foreign direct investments. The Netherlands rank first in the world with regard to the level of inward direct investment and second with regard to the level of outward direct investment. This top tier ranking has been published on the International Monetary Fund (IMF) website.[3] At the end of 2016, Dutch enterprises welcomed an inflow of US $4,083,833 million in inward direct investment and invested a total of US $5,093,952 million in associated foreign enterprises.

This represents approximately 13.5 per cent of the total inward direct investment and 16.9 per cent of the total outward direct investment as reported by the participating countries to the IMF. The outward direct investment of the United States ranks first with an outflow of US $5,332,225 million, while the inward direct investment ranks second with an inflow of US $3,725,418 million. For the United Kingdom, these figures amount to US $1,439,067 million outward direct investment and US $1,388,273 million inward direct investment.

The Netherlands is in particular popular as a jurisdiction to locate the joint venture company where the partners are based in different jurisdictions. An important reason for this is the extensive double taxation treaty network and its domestic tax regime. The established body of law and practice as well as the efficient business, legal, and service infrastructure in The Netherlands also is attractive. In addition, the establishment of a joint venture with one or more foreign partners is not subject to any governmental approval.

Finally, The Netherlands' trade and investment policy is among the most open in the world, with combined merchandise exports and imports exceeding GDP. The government of The Netherlands maintains liberal policies towards foreign direct investment and adheres to OECD investment codes. However, a number of strategic sectors have been identified in which private investment, including foreign

3 *See* http:/data.imf.org/CDIS.

investment, may be subject to limitations or conditions; these sectors include transportation, energy, defense and security, finance, postal services, public broadcasting, and media.

Structuring Joint Venture

In General

From a purely legal perspective, a contractual joint venture is the simplest form of association. It represents a commercial arrangement under which the partners agree to associate as independent contractors, rather than as shareholders of a company or partners of a partnership. A common example is the joint venture where two or more contractors combine for the purposes of realizing a particular project in the field of construction or research and development. Such an arrangement usually involves the sharing of risks, costs, and resources, rather than the sharing of net profit or loss. The rights and obligations of the partners are generally between themselves.

The content of their legal relationship will basically derive from the provisions of the joint venture agreement and statutory rules of general contract law. The participant in a purely contractual joint venture will, in principle, not have a statutory liability for the acts and omissions of its co-venturers. In terms of representation, any participant only commits itself. However, an individual participant may be granted a power of attorney to commit any other participant.

The main advantages of a purely contractual joint venture include the lack of formality, the flexibility in amending the terms of the legal relationship and, in general, its tax transparency. The main disadvantages of contractual joint ventures, however, are considered to be the lack of legal personality and identity as well as the lack of a statutory organizational framework. In addition, compared with a corporate or partnership structure, the transfer of the interest of a participant in the joint venture is usually more complex.

Frequently, joint ventures involve some degree of sharing of net profits. If this is the case, the commercial arrangements may evolve into a partnership. Under Dutch law, a contractual arrangement qualifies as a legal partnership if:

- The arrangements are qualified as a collaboration agreement (*samenwerkingsovereenkomst*);
- Contractual equality rather than hierarchy exists between the partners;
- Each of the partners is obliged to make a contribution to the joint venture;
- The joint venture is aimed at the generation of profits (*vermogensrechtelijk voordeel*); and
- The profits are shared by each partner.

If these tests are met, a partnership exists even if the joint venture agreement includes the express declaration of the intention not to create a partnership. If the joint venture qualifies as a partnership and operates a business under a common

name to the outside world, each partner is jointly and severally liable for the debts and obligations of the joint venture. The form of partnership under which each partner has joint and several liabilities for the debts and obligations of the partnership constitutes a general partnership (*vennootschap onder firma*).

In a well-written joint venture agreement, there will be specific provisions dealing with the representative powers of individual partners and others responsible for management to bind the joint venture *vis-à-vis* third parties. Limitations of representative powers need to be registered with the Dutch Commercial Register (*handelsregister*) in order to be effective towards third parties.

A limited partnership (*commanditaire vennootschap*) is a species of the general partnership. At least one of the partners of such a partnership must be a general partner with unlimited liability for the debts and obligations of the partnership. The liability of the other partners (the limited partners) may be limited to the amount contributed by them in cash or kind to the partnership. Furthermore, a limited partner has no authority to bind the limited partnership and cannot take part in the management of the limited partnership without losing the benefit of limited liability.

However, Dutch limited partnership law permits arrangements that enable the limited partners to be involved in certain key decisions on which their approval is required. A further peculiarity of the limited partnership is that the name of the limited partnership may not include the name of a limited partner, again without forfeiting the benefit of limited liability. In the Netherlands, limited partnerships are commonly used within the joint venture context.

In partnership structures, all assets originally contributed and those subsequently acquired in the course of the business are partnership property and are held in accordance with the joint venture agreement. There is no need to draw up a separate partnership agreement. Partnership property will effectively be held by the partner in agreed shares. The partners have extensive freedom in agreeing on how the profits or losses of the joint venture are to be shared. However, no partner may be totally excluded from sharing profits. A general partnership or limited partnership can generally be set up as tax transparent but does not have legal personality under Dutch law, which prevents it from owning assets and contracts in its own right.

The basic choice usually is whether or not to establish a separate legal entity as the vehicle of the joint ventures. For most business joint ventures, a limited-liability company is likely to prove the most appropriate vehicle. As a separate legal entity, the joint venture company can, of course, own assets and contracts. The most significant advantage of a BV (*besloten vennootschap met beperkte aansprakelijkheid*) or NV (*naamloze vennootschap*) is perceived to be the ability of the partners to limit their liability in respect of the debts and liabilities of the joint venture. The partners are in fact the shareholders of the joint venture company.

However, it is unlikely that the shareholders will be able to avoid having to support the joint venture through the provisions of (parent) guarantees and other assurances to third parties. Incorporation of a joint venture in the legal form of a

BV or NV involves formality and the need to file accounts and other information on a regular basis with the Commercial Register. In terms of overall control and financial planning, the corporate structure provides the possibility to create different types of shares as well as the ability to establish the joint venture through a group of companies.

The legal relationship between the partners themselves and between them and the company will primarily be governed by the joint venture agreement and the articles of association of the joint venture company. Depending on the agreed governance structure of the joint venture and the shareholdings of the partners, the company will be a 50/50 joint venture or a company that is to a certain extent controlled by a single shareholder or a group of shareholders.

Detailed provisions in relation to the control of the joint venture business and its management will be set out in the joint venture agreement. This would typically cover the division of powers between the board of the joint venture company, its shareholders, and how control is exercised. In some cases, the joint venture company is a party to the joint venture agreement and in some cases it is not. There are good arguments for either option. If it is a party to the agreement, the joint venture company can directly undertake obligations to observe relevant restrictions or provisions (non-compete undertakings of the partners), which is likely to make enforcement easier.

In addition, a direct right of enforcement against the company may assist where there is judged to be a risk that the managing directors of the joint venture company may not observe constraints or arrangements contractually agreed between the shareholders. Conversely, the partners may prefer that the terms of their joint venture agreement do not involve the joint venture company so that, in the event of disputes or changed circumstances, they can take any wider issue into account without the consent of the joint venture company being required.

The joint venture agreement and the articles of association, together, contain the legal rules governing the partners' ongoing relationship as shareholders of the joint venture company. In practice, it is a point of law how much of the contractual arrangement also should be reflected in the articles of association. Contractual arrangements and provisions laid down in articles of association do not always have the same legal effect.

As an example, the rights and obligations under a joint venture agreement do not automatically apply to a transferee of shares because it is a contract between the existing parties. The rights and obligations under the articles of association, however, do automatically apply to a new shareholder.

Another difference is that a joint venture agreement is a private document (and can be kept secret), while articles of association are subject to public scrutiny pursuant to the filing of this document (in its entirety) with the Commercial Register. A last example relates to the transferability of shares in the joint venture company. Virtually all joint ventures contain provisions on the transfer of shares, and in many corporate joint ventures such transfer is prohibited without the consent of the

other partner or partners, in any event for an initial "lock-up" period. If shares are transferred contrary to a share transfer restriction clause recorded in the joint venture agreement, the transfer is valid, but in breach of a contractual arrangement.

The usual contractual remedies may be applied, including specific performance, but the fact of the matter is that the control over the shares is lost. Share transfers in violation of a share transfer restriction laid down in the articles of association are, on the contrary, not legally valid, which means that the shares were actually not transferred at all. The transferor of the shares simply remains to be the shareholder.

It is of crucial importance to align the joint venture agreement with the articles of association of the joint venture company. In most cases, joint venture agreements are declared to take preference over the articles of association but, under Dutch law, this may not be bullet proof. If the agreement and articles of association deviate, the legal consequence may well be that the articles of association are leading, especially where it concerns clauses that are based on statutory provisions of Dutch company law. However, recent case law shows that a more sophisticated approach is contemplated if all shareholders are a party to the shareholders' agreement.[4]

BVs/NVs

In General

Until 1 October 2012, there were little differences between the legislation regarding Dutch public limited liability companies (*naamloze vennootschappen,* or 'NVs') and Dutch private limited liability companies (*besloten vennootschappen,* or 'BVs'). This changed when the bill for the simplification and flexibilization of the rules on Dutch private limited liability companies (hereafter, the "Flex BV Reform Bill") entered into force on 1 October 2012.

The Flex BV Reform Bill was nothing less than the biggest legislative operation since the introduction of BVs in 1971. It abolished obsolete and inefficient capital maintenance rules and facilitates the tailoring of the internal structure and governance of a BV. Very broadly, the Flex BV Reform Bill enacted a more contractual approach towards the BV and its articles of association. As a result, the articles of association and the joint venture agreement can be aligned to a very large extent that will make the BV a suitable vehicle for almost any joint venture.

Share Capital

Whereas an NV is required to maintain a minimum capital of €45,000, there is no minimum capital requirement for a BV. Hence, a BV is allowed to have an issued share capital of €1. There are mandatory provisions regarding the authorized, issued,

4 Supreme Court, 4 April 2014, JOR 2014/290 (Cancun Holding II); Court of Appeal of Amsterdam, 16 January 2014, JOR 2014/1577 (Kekk/Delfino); Court of Appeal of Amsterdam, 21 January 2014, JOR 2014/158 (De Wildt/RBOC); District Court of The Hague, 1 August 2012, JOR 2012/286 (Vanka-Kawat).

and paid-up capital of an NV, but a BV may voluntarily introduce these in the articles of association. Furthermore, NV legislation requires a bank statement with respect to the contribution on shares in cash as well as an auditor's statement with respect to the contribution on shares in kind. This is not required for the contribution on shares in a BV.

Appointment and Dismissal of Members of Management and Supervisory Board and Shareholder Instructions

The partners usually wish to entrench certain rights relating to the appointment and dismissal of managing directors and/or supervisory directors of "their" joint venture company: each partner wishes to be able to appoint and dismiss its own director.

The right of appointment and dismissal of members of the management and supervisory board of a BV may be granted to the meeting of holders of shares of a specific class or series. This way, each joint venture partner may appoint and dismiss his own board member. The articles of association also can provide that members of the management board may be dismissed by the supervisory board.

If the articles of association provide that directors are appointed pursuant to a binding nomination, it will no longer be necessary to nominate two persons for each vacancy. Furthermore, the articles of association of a BV may allow the partners to give specific instructions to members of the management and supervisory board provided that the instruction is not contrary to the interest of the company (*vennootschappelijke belang*), which includes the interests of the joint venture partners as shareholders.

General Meetings

Shareholder meetings of BVs may be held outside The Netherlands. The minimum period for giving notice for a general meeting of shareholders is eight days for a BV, whereas this is 15 days for an NV. In addition, shareholders of a BV may adopt resolutions without convening a meeting if all shareholders and other persons having the right to attend shareholder meetings consent to this manner of adopting resolutions. In that case, resolutions may be adopted with any majority of votes stipulated in the articles of association.

Non-Voting Shares and Non-Profit Participating Shares

Sometimes, joint venture partners agree that despite additional injections of capital into the joint venture by a specific partner, the voting rights should remain unaltered. In a BV, it is possible to create classes or series of shares with increased voting rights, limited voting rights, or even without any voting rights at all. The same applies to profit rights.

It is not possible, however, to create shares without both voting rights and profit rights. If a class or series of shares with differentiated voting rights has been created, this voting right regime applies to all resolutions of the general meeting

of shareholders. However, the voting rights in a meeting of holders of shares of a specific class or series may vary on a case-by-case basis, i.e. a shareholder could be attributed X [number] votes if it concerns resolution A and Y [number] votes if it concerns resolution B, and so on.

No Cash Traps

As there are no capital maintenance rules for BVs, distributions to the shareholders of a joint venture BV may be made at the expense of the share capital. Distributions to shareholders, such as dividends, repayment of share premium or profit reserves, reductions of capital, or share buy-backs, can be made if the BV upon distribution will be able to continue paying its debts when they become due and to the extent that the BV's assets exceed its mandatory (non-distributable) reserves.

All distributions and repayments are made subject to board approval. It is the task of the members of the management board to assess the company's financial position before deciding on any distribution or repayments. The management board is obliged to refuse approval if it knows or should foresee that the company, pursuant to the distribution or repayment, would not be able to continue paying its debts when they become due. If the company does not meet this test, the members of the management board who knew or should have foreseen this may be jointly and severally liable for the shortfall (plus statutory interest) caused by the distributions to shareholders.

The shareholder who received the distribution and who knew or should have foreseen this also can be liable for the shortfall caused by the distributions for a maximum of the amount received by it (plus statutory interest). Members of the management board who have paid the shortfall will have recourse on the beneficiary of the distributions, i.e. the shareholders. A board member is not liable if he cannot be blamed for the distribution or repayment taking place and took measures to avoid its adverse effect.

Unlike creditors of an NV, creditors of a BV do not have the right to oppose share capital reductions. Share buy backs will, subject to the approval of the management board, be permitted in respect of all shares, except for one share with voting rights. The liability of members of the management board, as described above, applies accordingly.

Financial Assistance and Transactions with Shareholders

The prohibition for a BV to provide financial assistance is abolished. A transaction resulting in financial assistance will, however, remain subject to the general corporate test as to whether the transaction concerned is in the interest of the joint venture BV.

Finally, the *Nachgründung* provision, regulating certain transactions between a BV and its shareholders, has ceased to exist. The acts of management which, under the old rules, were contrary to the provisions of financial assistance and

Nachgründung, are under the new rules generally assessed in view of *ultra vires* provisions, directors' duties, voidable preference (*pauliana*), and tort.

One-Tier Board

The new rules introduced on 1 January 2013 by the Bill on Management and Supervision (hereafter, the "Bill on Management and Supervision") facilitate the creation of a one-tier board in NVs and BVs, including companies subject to labor co-determination rules (*structuurregime*). In order to create a one-tier board, the articles of association must provide that the tasks of the board are divided among one or more non-executive directors and one or more executive directors.

A more detailed division of tasks may be provided in the articles of association, board regulations, or a board resolution. The executive directors may not be allocated the task of chairman of the board, setting the remuneration of executive directors, supervising the board's overall performance, or nominating a director. The management board is entitled to suspend executive directors.

Conflicts of Interest

Under the old rules, a director's conflict of interest may affect the power of directors to represent the company and, therefore, the validity of the transaction. The Bill on Management and Supervision abolished this consequence and focuses on the board's internal decision-making process, similar to the Dutch corporate governance code. If a member of the management board or the supervisory board has a conflict of interest, he must refrain from the deliberations and decision-making on the issue concerned.

If all members of the management board have a conflict of interest, the issue must be resolved by the supervisory board. If there is no supervisory board or if all its members also have a conflict of interest, the issue must be resolved by the shareholders' meeting (unless the articles of association provide otherwise). Non-compliance with the rule leads to the resolution concerned being voidable.

Limitation of Board Membership

The number of memberships of two-tier boards and one-tier boards in large NVs, BVs, and foundations (hereinafter "large entity", as defined *below*) are limited by the Bill on Management and Supervision in the following ways:

- A person cannot be appointed as managing director or executive director if he is a supervisory director or non-executive director in more than two other large entities or he is the chairman of the supervisory board or the one-tier board of another large entity; and
- A person cannot be appointed as supervisory director or non-executive director if he is a supervisory director or non-executive director in more than four other large entities, whereby the position of chairman of the supervisory board or one-tier board counts twice.

These limitations do not apply to advisory positions or to any positions with non-Dutch entities. Any number of supervisory and/or non-executive directorships within a group is counted as one. A large entity is a NV, BV, or foundation which, according to its balance sheet, meets at least two of the following criteria:

- The asset value exceeds €20 million according to the balance sheet;
- The financial year's net turnover exceeds €40 million; or
- The number of employees in the financial year is on average 250 or more, with the proviso that the above calculations must be made on the basis of the consolidated accounts if made up, the limitations only applying to foundations that have a statutory obligation to draw up annual accounts (i.e. most charitable and cultural foundations are excluded), and the limitations not applying to appointments made before the rules entered into force on 1 January 2013 (however, existing appointments must be taken into account when applying the rules to appointments made thereafter).

The limitations only apply if and when an NV, BV, or foundation is a large entity on two subsequent balance sheet dates. For example, if the entity is a large entity on 31 December 2018 and again on 31 December 2019, the rules apply from 31 December 2019. Similarly, the limitations are no longer applicable when the entity has not qualified as a large entity on two subsequent balance sheet dates. If an appointment leads to the maximum permitted number of directorships being exceeded, such appointment is null and void. However, this does not affect the validity of the decisions taken by the board.

Gender Diversity

Management and supervisory boards of NVs and BVs meeting the requirements for large entities need to consist of at least 30 per cent females and of at least 30 per cent males to the extent that the board members are natural persons. The same applies to NVs and BVs that conduct the management of a large company.

Cooperatives

A cooperative (*coöperatie*) may be considered as a legal vehicle for a joint venture. A cooperative does not, by law, have share capital. Instead, joint venture partners in a cooperative are members with membership rights, and the assets of a cooperative are formed through the contributions of its members. However, it is possible to structure the membership rights in a cooperative in such a way that they have similar features as shares of a BV.

The Civil Code[5] states that a cooperative must supply certain material interests of its members through economic interaction between the cooperative and its members. This implies that the purpose of a cooperative is to earn income and/or to save expenses for its members. The cooperative maintains, therefore, a joint

5 Civil Code, section 2:53, paragraph 1.

business for its members. The business activities of a cooperative stem from the economic activities of the members.

In itself, the cooperative has no incentive to maximize profits. A cooperative may be a suitable vehicle for certain specific types of joint ventures, such as research and development projects and joint operating agreements in the oil and gas industries. The key elements of a cooperative are its legal personality, the fact that no incorporation capital is required, and the ability of the members to exclude their liability in respect of the debts and liabilities of the cooperative (UA, or 'excluded liability'). A limiting aspect of the cooperative lies in the fact that its members, in principle, have the freedom to terminate their membership. The Civil Code[6] opens the possibility to impose restrictions regarding the termination of membership on the condition that such restrictions are of importance for safeguarding the continuity of the cooperative enterprise. However, these restrictions may not have the effect that withdrawal is made virtually impossible.

A significant benefit of a cooperative (provided it is properly structured) is that profit distribution to its members are (subject to specific anti-abuse provisions) not subject to Dutch dividend withholding tax (currently with a rate of 15 per cent). This may be an attractive feature in case structuring the joint venture company as a Dutch company with a capital divided into shares (e.g. BV or NV) would give rise to a (residual) Dutch dividend withholding tax exposure (for example, when a joint venture partner is located in an offshore jurisdiction).

However, with the implementation of the European Union (EU) Parent/Subsidiary Directive, the Dutch government introduced a conditional dividend withholding tax liability for cooperatives. As from 1 January 2016, Dutch resident cooperatives are obliged to withhold dividend tax on dividends distributed to their members, if the arrangements are artificial and if the main purpose of the structure is the avoidance of dividend withholding tax or foreign tax. Arrangements are not considered artificial if:

- The direct member of the Dutch cooperative is running an active business and the investment in the Dutch cooperative is attributable to that business;
- The direct member of the Dutch cooperative is the top holding company of the group and as such is performing substantial managerial, strategic, or financial functions for the group; or
- The direct member of the Dutch cooperative provides a "link" between that Dutch cooperative and the top holding company referred to above, and the direct member also has sufficient substance in its home jurisdiction.

EEGs

In the context of a joint venture between companies that are located within the European Economic Area (EEA), consideration may be given to forming the

6 Civil Code, section 2:60.

joint venture as a European Economic Interest Grouping (EEIG). The concept of the EEIG was created with a view to providing a common basis for developing economic activity through joint ventures on a basis which does not rely on the domestic law of any particular member state. As a model for a business joint venture, however, the EEIG has many limitations, which include:

- The purpose of an EEIG may not be to make profits;
- The activity of an EEIG must be ancillary to the economic activities of its members; and
- The members of an EEIG have joint and several liabilities for the debts and obligations of the EEIG. An advantage is that the EEIG is transparent for corporate tax purposes.

SEs

Another European legal form was created by the Counsel of the European communities on 8 October 2001, the *Societas Europaea* (SE). The objective was to create a European company with its own legislative framework. This would allow companies incorporated in the different states of the EEA to merge, and form a holding company or a joint subsidiary while avoiding the legal and practical constrains arising from the existence of 30 different legal systems. However, in practice, the SE must comply with many different regulatory systems.

Thus far, companies have primarily used the SE to create a European identity to set the ground for crossborder restructuring within the group and to determine employee participation. For Dutch tax purposes, the SE has an equal footing with the NV. If an SE is incorporated under the laws of The Netherlands, it is deemed to be a Dutch tax resident and therefore subject to Dutch corporate tax.

The SE also can be tax resident in another jurisdiction under the laws of such jurisdiction, e.g. because of the fact that the SE is effectively managed and controlled out of such jurisdiction. In these situations, applicable tax treaties typically provide that only such other jurisdiction has the right to effectively tax the worldwide profits of the SE.

Choice of Legal Form

In most cases, the choice of legal form will be governed by the following considerations:

- Tax efficiency;
- Limitation of liability;
- Legal personality (the need for a legal entity that owns assets and incurs liabilities in its own right); and
- Desire to trade through a commercial entity acceptable to bankers, employees, and customers.

A number of taxation aspects must be taken into account when forming a joint venture. For example, the concept of fiscal transparency is eminently important to the tax qualification for Dutch or foreign entities. A closer look at the tax aspects of joint ventures concluded that tax transparency for corporate and individual income tax purposes is the dominant criterion when selecting possible legal forms.

In general, the choice of legal form should avoid unnecessary tax costs, enabling the partners to obtain tax value for any (start-up) losses or other expenses and constitute an efficient medium for the flow of profits to the partners. In a crossborder structure there are significant additional tax problems with corporate vehicles.

Losses realized by a corporate entity in one jurisdiction will rarely be capable of offset against profits of a separate corporate entity in another jurisdiction. Conversely, taxes paid on profits earned by a corporate joint venture company may not be fully creditable against taxes payable on distribution of those profits to the joint venture partners. On the other hand, a corporate joint venture may be more efficient if it is profitable, taxpaying, and subject to a lower marginal rate of tax than the joint venture partners.

There may be real advantages in conducting the joint venture operations through a partnership structure which is tax transparent in The Netherlands. As mentioned above, the disadvantages of the Dutch partnership model are the lack of legal personality and the unlimited liability of the partners for the debts and obligations of the partnership.

Conflicting considerations may sometimes be reconciled by the use of hybrid vehicles. A combination of tax transparency and limited liability can be achieved if the partners of a general partnership or the general partner of a limited partnership are limited-liability companies. It is possible that a legal entity can be qualified as transparent for tax purposes in one jurisdiction, while being opaque in another jurisdiction. This "mismatch" can result in issues of double taxation, but it also can result in tax planning opportunities.

For instance, a Dutch limited-liability company can be treated as a partnership for United States federal income tax purposes by a simple election under the United States 'check the box' regulations (unless it is a so-called per se corporation, as is the case with a Dutch NV). Pursuant to the Corporate Tax Act 1969 (*Wet op de vennootschapsbelasting* 1969), corporate taxation is levied on NVs, BVs, cooperatives, and open limited partnerships. Corporate tax is levied on the taxable profits made by a taxable entity in a given year (after deduction of certain losses). The (2018) statutory corporate tax rate is 20 per cent on the first €200,000 of the taxable profits and 25 per cent on taxable profits in excess of €200,000.[7]

A non-transparent entity may only offset its losses retroactively against its taxable profits for the preceding year (carry back) and against its taxable profits

7 Corporate Tax Act 1969, section 22.

for the nine years to come (carry forward).[8] If the joint venture will never be profitable or not profitable within the first nine years of its existence, this (start-up) loss will never be utilized at the level of the joint venture. A "negative tax" refund from the tax authorities in a loss year (i.e. a tax refund without such losses being offset against taxable profits) is not available in The Netherlands.

The relationship between shareholders and companies in Dutch tax law is in essence predominated by the participation exemption.[9] The rationale for the introduction of the participation exemption was the *ne bis in idem* doctrine: the same profits or gains are not subject to taxation more than once at the different levels of a corporate structure. Conversely, loss is not eligible for loss deduction on more than one level.

Pursuant to the Dutch participation exemption, a joint venture company is generally exempt from Dutch corporate tax with respect to all benefits derived from a qualifying participation in a Dutch or foreign subsidiary, including dividends received and capital gains realized (including capital gains as a result of currency exchange rate fluctuations).

However, as from 1 January 2016, the participation exemption is no longer applicable to payments or other forms of remuneration received from a subsidiary to the extent that these payments are legally or *de facto*, directly or indirectly, deductible for corporate income tax purposes at the level of the subsidiary. The participation exemption will generally apply to the shareholding in a subsidiary if the following requirements are cumulatively met:

- The subsidiary has a "capital divided into shares";[10]
- The joint venture company owns at least five per cent of the nominal paid-up share capital of the subsidiary; and
- The subsidiary meets any of the following tests: (a) the joint venture company does not hold its interest in the subsidiary as a portfolio investment, (b) the subsidiary is subject to a tax on profits resulting in a realistic level of tax for Dutch tax purposes, or (c) the assets of the subsidiary, directly or indirectly, do not consist of 50 per cent or more of free passive portfolio investments.

Generally, the test under (a) will be met unless the shares in the subsidiary are held with the aim of obtaining an increase in value and a yield that could be expected in the case of standard active asset management (*normaal vermogensbeheer*). Typically, this test is met in case of a joint venture that owns (directly or indirectly) a subsidiary with active business operations.

8 Corporate Tax Act 1969, section 20, paragraph 2.

9 Corporate Tax Act 1969, section 13.

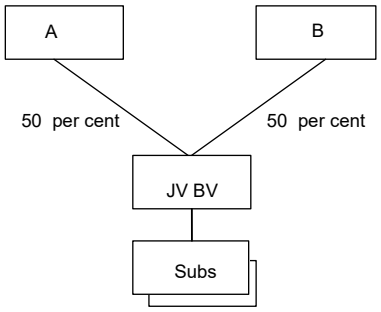
10 Whether or not this is the case is determined on the basis of the articles of association and applicable local company law. Important, albeit not necessarily decisive, is the existence of a proportionate relation between capital contributed, and voting and profit rights.

The advent of the Flex BV Reform Bill has caused some query with respect to the question as to whether the participation exemption also applies with regard to non-profit participating shares.

Based on the participation exemption rules, a qualifying participation exists if the joint venture partners own at least five per cent of the nominal paid-up share capital. The principle behind this is that the joint venture company should be entitled to at least five per cent of the profits of the relevant subsidiary.

However, application of the participation exemption can easily be established by the issuance of non-profit participating shares. The structures which are commonly used in The Netherlands for 50/50 joint ventures are described below, along with the main pros and cons.

Joint venture in the legal form of a BV

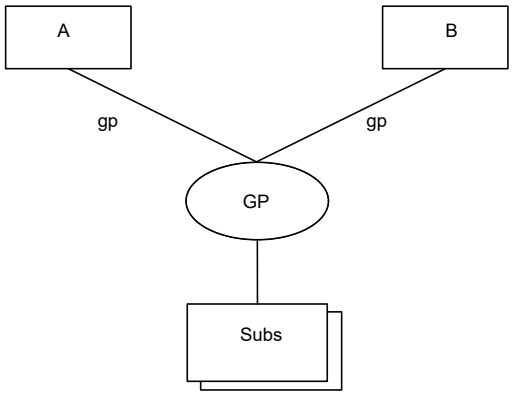


(Figure 1: BV as joint venture vehicle)

The diagram below shows the envisaged joint venture partners A and B, who set up a joint venture BV. If the joint venture partners are individuals instead of legal entities, they can participate through personal holding companies.

The liability of the joint venture partners is, in principle, limited to the value of contributions to the joint venture BV, but any (start-up) losses of the joint venture BV may not be offset against the business income of its shareholders A and B. The reason for this is that the joint venture BV is not tax transparent and can only deduct (start-up) losses against its own business profits.

Joint venture in the legal form of a general partnership



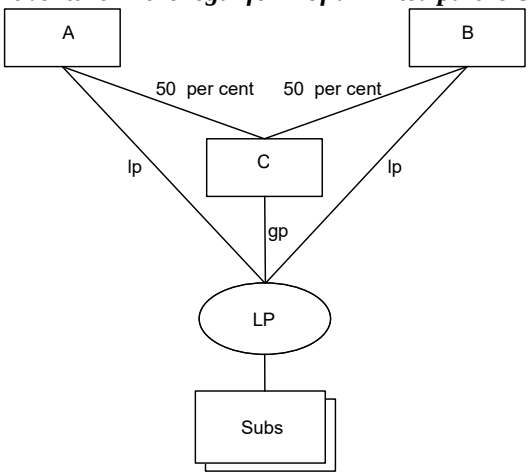
(Figure 2: General partnership as joint venture vehicle)

If the same joint venture partners A and B contribute the business to a general partnership, they are jointly and severally liable for all partnership debts. According to Dutch tax law, the general partnership will in principle be tax transparent for Dutch tax purposes. This means that the profits, losses, assets, and liabilities are directly attributed for tax purposes to the joint venture partners.

If the general partners in the general partnership are limited-liability companies, the business result of the general partnership is subject to Dutch corporate tax at the level of the limited-liability companies proportionate to their interest in the general partnership.

The losses realized at the level of the partnership can directly be offset against the profit of the general partners. The same treatment applies if the partners are individuals although, in that case, the business result of the general partnership is subject to Dutch individual income tax.

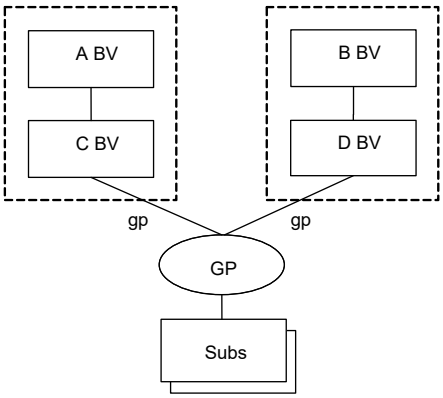
Joint venture in the legal form of a limited partnership



(Figure 3: Limited partnership as joint venture vehicle)

Somewhat similar to the previous structure is the variant in which a 'closed' limited partnership is being used as the joint venture vehicle. Unlike the "open" limited partnership, the profits of a closed limited partnership are, in this example, subject to Dutch corporate tax at the level of the general and limited partners A, B, and C. The (start-up) losses can directly be offset against (other) results of the limited and general partners. In this variant the liability of limited partners is in principle limited to the amount of their contribution to the limited partnership. However, the limited partners can become jointly and severally liable if they take part in the management of the limited partnership.

Joint venture in the legal form of a general partnership combined with a fiscal unity for corporate tax purposes at the level of the partners



(Figure 4: General partnership as joint venture vehicle/fiscal unity at partner level)

In the *above* structure, both joint venture partners (A BV and B BV) have set up 100 per cent subsidiaries, C BV and D BV, respectively, having a very low capital, i.e. €1. Subsequently, C BV and D BV have entered into a general partnership. As a result, the joint venture partners A BV and B BV have protection against the joint and several liabilities for the debts of the general partnership.

The (start-up) losses of the joint venture may not be directly offset against the profits of A BV and B BV. However, if A BV and C BV, respectively, B BV and D BV, form a so-called fiscal unity for Dutch corporate tax purposes, the (start-up) loss of C BV and D BV can effectively be set-off directly against other profits of A BV and B BV, respectively. A fiscal unity between a parent company and one or more subsidiaries is basically a consolidation for Dutch corporate tax purposes, as a result of which these subsidiaries will be disregarded as separate legal entities for Dutch corporate tax purposes.

This means that the assets and liabilities of these subsidiaries — as well as their profits or losses — are deemed to be "absorbed" into the parent company. From a civil law perspective, the parent company and the subsidiaries still remain to exist as separate legal entities. The fiscal unity as facility has several advantages, the most relevant being the following:

- There is the ability to reorganize within the fiscal unity by allocating assets and liabilities at book value to other companies within the fiscal unity; without the existence of the fiscal entity, any transfer of assets could result in a taxable gain for the transferor company of hidden reserves and goodwill;
- There is cross-offsetting of profits and losses of the fiscal unity members; and
- Transactions between the fiscal unity members do not lead to taxable gains subject to certain claw backs if the fiscal unity is deconsolidated after the fact.

In order to form a fiscal unity several conditions must be met[11] including:

- The legal and beneficial ownership of at least 95 per cent of the nominal paid-up share capital of the subsidiary must be owned by the parent company;
- The parent company must be a BV, an NV, a cooperative, or the Dutch branch of a foreign company (such as an AG, SA, or Ltd), whereas the subsidiary may only be a BV or NV; and
- The fiscal/financial year and accounting principles of the parent company and the subsidiary must be the same.

Furthermore, the parent company and its subsidiary or subsidiaries need to reside in The Netherlands for Dutch corporate tax purposes in accordance with Dutch tax law and double-taxation treaties. If non-voting shares are issued to an outside shareholder and these shares give entitlement to the profits of the subsidiary, the fiscal unity will be deconsolidated if the parent company ends up

11 Corporate Tax Act 1969, section 15, paragraph 3.

with an entitlement of less than 95 per cent of the profits and net worth of the subsidiary.

Governing Law and Language

The choice of governing law is always an important topic in international transactions. Even if a detailed contract has been fully drafted with the aim to set out the rights and obligations of the parties, there will often be gaps to be filled. Substantive questions of interpretation can rise. The governing law of the contract, which also will be the law applicable to the substance of disputes, should, therefore, be clearly specified. It is generally desirable to select the law of The Netherlands if the joint venture vehicle is a Dutch entity.

If a Dutch limited-liability company or partnership is established, Dutch law will govern all matters relating to the powers and organizational documents of such a company or partnership. The choice of another law may cause extra complications. In exceptional cases it may be desirable to modify a governing law clause by giving an arbitral tribunal the power to resolve certain disputes *ex aequo et bono*. Under this concept, the tribunal need not apply strict legal rules of interpretation to the obligations of the parties if they consider that a strict legal approach would lead to an inequitable result.

In some cases, the parties may wish that different parts of the joint venture contracts will be governed by different laws. However, it can never be certain that such choice of governing laws will be upheld by the relevant court or arbitral tribunal. Expensive and time-consuming disputes may arise if the issue whether one party may terminate or withhold performance on account of the other party's breach and the underlying contractual obligations is governed by different laws.

Dutch law practitioners tend to see the joint venture agreements as a means to fit the individual legal situation of the partner into a grid of legal rules which consist of the Civil Code, the Commercial Code, and court decisions. They will concentrate on making adjustments to this background law. Dutch joint venture agreements will most likely outline the main obligations of both parties and cover those situations which have in the past proven to be important, in particular where the draftsperson feels that the position of his client is not adequately covered by the background law.

Common Law practitioners, on the other hand, do not see statutes and case law as background law to rely on, but rather as rules which will be incorporated or circumvented, as the case may require. However, the increasing number of international transactions and the influence of common law style techniques have led to increasing similarity in practice and documentation in relation to international joint ventures.

The joint venture agreement or partnership agreement is a private deed and need not be recorded in the Dutch language. However, the deed of incorporation of a BV or NV (including the articles of association) requires a deed executed in the Dutch language before a Dutch civil law notary. However, incorporation may

take place on the basis of a power of attorney. If there is a conflict between any translation of the articles of association and the Dutch original wording, the latter will prevail.

Scope of Business Activity

The description of the scope of business activity is the backbone of any joint venture agreement. It provides a stronger foundation if the joint venture partners agree on the scope of the business objectives before undertaking detailed negotiations on issues of financing, control, and valuation. As mentioned above, a joint venture can be defined as a partial cooperation between independent companies. The partners may, in addition to the joint venture business, also engage in other activities.

Therefore, defining the scope of business has two functions: describing the scope of the business to be undertaken by the joint venture and, at the same time, determining the business arena where the joint venture partners remain autonomous and may even compete with each other. The definition of the scope of business also determines the extent of the loyalty obligations between the joint venture partners and towards the joint venture company.

Another important factor is that the geographical spread of the joint venture activities also should be agreed upon. The description of the business objective affects the applicable regulation of the joint venture under both national and European competition laws. Having said this, the description of the business objective is typically outlined in the joint venture agreement in considerable detail. The motives of the partners for entering into the joint venture are usually recorded in the preamble of the agreement.

The true intentions of the joint venture partners may be clearer from such preamble than from the body of the contract itself. Dutch law courts tend not to apply as literal an approach to contract interpretation as common law courts seem to do. They have a greater readiness to imply terms or fall back on general principles of reasonableness and fairness (*redelijkheid en billijkheid*). Dutch law courts also are willing to investigate more deeply behind the scenes in order to ascertain the true motives and intent of the partners.

How should the business objective of the joint venture be translated into the partnership agreement or articles of association of a cooperative, BV, or NV? According to Dutch law,[12] the purpose of a partnership also defines the powers of representation of the partners. The general rule is that each partner is, by law, authorized to represent the partnership, but only within the scope of the purpose clause as filed with the Commercial Register. If the purpose clause of the partnership is not filed with the Commercial Register, third parties may assume

12 Commercial Code, section 17, paragraph 2.

that each partner has unlimited representative powers. In case of *ultra vires* actions, the partnership is authorized to ratify such acts after the fact.[13]

The purpose clause laid down in the articles of association of a cooperative, BV, or NV has another legal impact. The legal act of a cooperative, BV, or NV may be nullified by the legal entity itself if such act was *ultra vires* and the contract party knew or could have known, without specific investigations in this respect, that the purpose clause was transgressed.[14] Therefore, strictly speaking, the purpose clause of a BV or NV does not limit the representative powers of the members of the board.

Financing Joint Venture

The choice of funding method and capital structure will be particularly influenced by tax considerations, the existing and future capital requirements of the joint venture, and the legal nature of the joint venture vehicle. In some contractual joint ventures, each partner is responsible for bearing its own costs and expenditure without any need to establish joint funding arrangements.

The partners simply agree what initial funding is required and, if appropriate, establish a joint account into which agreed funds are contributed and from which expenditure is paid out. Where subsequent funding of a joint account is required to meet project expenditure, rules for draw down of cash contributions will need to be developed in the joint venture documents. In major project joint ventures, in particular joint operating or development agreements, a specific feature is that the capital investment program may spread over many years and may be unpredictable as to the timing of the cash contributions.

The partners usually agree to an obligation to make cash contributions in proportion to their proportionate interest in the underlying project. In most such joint ventures, sophisticated funding arrangements are agreed upon, starting with a budget approval by a special committee on behalf of the joint venture partners, followed by particular authorities for expenditure established in relation to specific milestones. Subsequently, cash calls are made on all joint venture partners to fund if certain milestones have been reached.

In the case of a partnership, there are generally no fixed rules regarding contribution to capital or its maintenance. Funding by contribution of cash or non-cash assets will be represented by a capital account for each partner in accordance with the partnership agreement. A partner may, under the partnership agreement, be required to inject further funding from time to time in the form of contribution to be credited to the capital account or by making loans to the partnership. Under Dutch law, there are no rules regarding the maintenance or repayment from the partner's capital account. Repayment, therefore, may take place at any time in accordance with the terms of the partnership agreement or by another requisite agreement of the partners.

13 Civil Code, section 3:69.
14 Civil Code, section 2:7.

Corporate joint ventures give rise to a variety of funding methods and practices. The starting point is the capital structure consisting of an equal holding by the partners of ordinary shares in the capital of the joint venture company. Each partner will agree at the outset to pay up these shares (whether or not including share premium). The rights attaching to the shares (e.g. voting rights and profit rights) will usually be the same for each partner.

However, a venture capital or similar finance provider taking equity in the joint venture company may seek special preference rights in relation to dividends and return of capital. This requires the creation of preference shares, cumulative preference shares, or shares without voting rights, which is allowed under Dutch corporate law.

The issue of shares (including shares of a particular class) will often be supplemented by loans from the partners to the joint venture company. The debt/equity ratio for the joint venture company will depend on tax considerations and the influence of market considerations, which may lead to the need to demonstrate a sound shareholder's equity base for the company. In principle, the interest paid on these loans will be deductible at the level of the joint venture company for Dutch tax purposes.

Of course, this is only an advantage if there is tax capacity to actually benefit from the deduction. Interest payments by Dutch BVs or NVs will, in general, qualify for deduction subject to certain restrictions, including if interest payments are at a non-commercial rate or if interest payments are made to 'related parties' (generally, direct or indirect holders of one-third or more of the share capital of the joint venture company). Interest payments to third parties (e.g. banks) are, in principle, fully deductible for Dutch tax purposes, except in specific situations of leveraged acquisitions and certain investments in shares. If loans are raised from the shareholders, an important issue is whether the loan should be subordinated to the rights of third-party providers of debt finance and, if so, the terms of subordination.

If the terms of subordination are satisfactory, third-party lenders will frequently be prepared to regard subordinated loans from partners as equal to equity, which is usually advantageous (e.g. in relation to debt/equity ratios). The joint venture partners may, of course, also seek to raise finance for the joint venture from outside banks or other financing sources. This may take several forms, including bank overdraft facilities for working capital, term loans, venture capital, or project finance. Outside finance will particularly be appropriate where it is intended that the joint venture company should operate in an autonomous manner independent from the joint venture partners.

The joint venture projects which are funded by project finance are frequently referred to as limited recourse or non-recourse finance. The key element of this form of financing is that it does not provide lenders with unrestricted access to the shareholders of the joint venture company. Instead, the lenders must accept a degree of risk: if the joint venture is not successful, they may not recover their

loan in full since their recourse is limited to project assets and revenues of the joint venture company.

As from 2012, the deductibility for Dutch tax purposes of interest paid on third-party loans can be restricted. This limitation only applies if an entity takes up a loan to acquire a Dutch target company and subsequently forms a fiscal unity with the target company or merges into the target company. In these situations, the interest on the bank debt is fully deductible against the profits of the borrowing entity (excluding the profits attributable to the target companies after a legal merger). If, however, the borrowing entity would not have sufficient profits itself, the deductibility of the interest on the acquisition loan may be restricted.

This restriction, however, does not apply for acquisition loans of up to 60 per cent of the acquisition price of the relevant target company (such percentage to be reduced by five per cent each year over a period of seven years to 25 per cent). This means that for an acquisition of €100 million, interest on €60 million would be fully deductible in the first year, interest on €55 million in the second year, and interest on €50 million in the third year. As from the eighth year, interest on €25 million would remain deductible. A €1 million threshold applies, i.e. interest up to €1 million *per annum* is in any event deductible.

Since 1 January 2013, the deductibility of interest on loans (deemed) attributable to an investment in shares in subsidiaries that qualify for the participation exemption may be restricted. For instance, interest expenses that are deemed to be attributable to such participations in excess of €750,000 will not be deductible.

On 5 October 2015, the Organization for Economic Co-operation and Development (OECD) presented the final report on the Base Erosion and Profit Shifting (BEPS) initiatives. This report provides governments with solutions for closing the gaps in existing international rules that allow corporate profits to disappear, or be artificially shifted to low/no tax environments where little or no economic activity takes place. One of the common approaches aims at ensuring that an entity's net interest deductions are directly linked to the taxable income generated by its economic activities and fostering increased coordination of national rules.

The acquisition of participations or capital contributions made into participations during a financial year started before or on 1 January 2006 may be excluded for 90 per cent of the historic cost price of the shares. A second exception is made to the extent acquisitions of (or capital contributions into) participations result in an increase of "genuine operational activities" of the group to which the taxpayer belongs. The application of these exceptions is subject to certain anti-abuse provisions.

If profits are to be extracted by way of dividends, the level of withholding taxes is of primary concern. The European Union (EU) Parent/Subsidiary Directive, as implemented in Dutch law, has eliminated withholding tax on dividends paid by a Dutch joint venture company to companies in another member state if the recipient owns at least five per cent of the shares in the joint venture company.

The Directive assures that inserting an intermediate Dutch holding company in European structures should not impose additional tax costs.

The Dutch participation exemption regime essentially exempts earnings derived from holdings in foreign companies from local taxation. These earnings may be passed through to another member state without additional taxation, and this offers valuable opportunities if a Dutch joint venture company comprises holdings in various European operating companies.

Most joint venture arrangements involve the payment of fees to the partners. This may be for the right to use valuable intellectual property (patents, copyright) or it may be for more intangible but equally valuable rights (the use of a trading or brand name, the right to exploit a franchise, access to consumer lists, or the right to valuable know-how). These arrangements are tax effective if payment is deductible against taxable profits because The Netherlands does not levy withholding tax on royalties and license fees. The use of a Dutch joint venture BV or NV as a royalty of a licensing company can offer a mechanism for both reducing withholding tax (by access to the extensive network of double tax treaties) and deferring payments being taxed in the partner company's home state.

Competition Law

A number of competition law aspects must be taken into account when forming a joint venture. In general, the competition rules issued under the laws of The Netherlands are similar to the rules under European law. The formation of a full-function joint venture constitutes a concentration which must be notified to the Dutch Competition Authority (*Autoriteit Consument en Markt* or *ACM*) if certain turnover thresholds (*see* text, *below*) are met. Full-function joint ventures are joint ventures that perform all the functions of an autonomous economic entity on a lasting basis.

The Dutch concept of full-functionality is identical to the concept of full-functionality in the EU Merger Regulation.[15] A relevant factor for full-functionality is the independent operation of the joint venture. If the joint venture is highly dependent upon its parent companies for its products, the Dutch Competition Authority will generally not consider the joint venture to be a full-function joint venture.

If a full-function joint venture has an EU dimension and, therefore, falls within the jurisdiction of the European Commission under the EU Merger Regulation, the Dutch merger control rules are not applicable and a notification to the Dutch Competition Authority will not be necessary.[16] Full-function joint ventures that do not fall within the jurisdiction of the European Commission and that exceed the following thresholds must be notified to the Dutch Competition Authority by

15 Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L-24, at pp. 1–22.

16 European Union Merger Regulation, section 21, paragraph 3.

the parties acquiring the joint control of the joint venture (i.e. the joint venture partners):

- The combined aggregate worldwide turnover of the partners that form the joint venture exceeds €150,000,000[17] in the previous calendar year; and
- The individual turnover in The Netherlands of two or more partners that form the joint venture amounts to at least €30 million in the previous calendar year.

Full-function joint ventures that fall within the jurisdiction of the Dutch Competition Authority are reviewed to determine whether they significantly impede effective competition on (a part of) the Dutch market, in particular as a result of the creation or strengthening of a dominant position on that market. The cooperative aspects of full-function joint ventures are assessed in line with section 2, paragraph 4, of the EU Merger Regulation.[18]

If a notification to the Dutch Competition Authority is required, this notification can be submitted by the joint venture partners jointly. The parties are free to decide at what point in time they notify. Usually, notification is done at the moment that the intention to form a joint venture is sufficiently concrete so that the required information for the notification is readily available.

The joint venture partners are obliged to suspend the formation of the full-function joint venture until clearance by the Dutch Competition Authority has been obtained or the waiting period within which the Dutch Competition Authority must adopt a decision has passed. In other words, it is not allowed for the joint venture to already start its market-facing activities prior to receiving the necessary clearance.

For activities relating to the setting up of a joint venture that fall short of market-facing conduct, such as the creation or transfer of production assets, carrying out of research and development, hiring of employees, and creation of the joint venture legal entity, it depends on the facts and circumstances of the case whether the Dutch Competition Authority allows these kinds of preparatory activities prior to receiving a clearance decision.

If the full-function joint venture that meets the relevant thresholds (and therefore must be notified to the Dutch Competition Authority) is created and starts its activities without having made such a notification, or prior to receiving a clearance decision, the creation of the joint venture may be invalid. Moreover, the Dutch Competition Authority can impose administrative fines of up to €450,000 or, if that is more, 10 per cent of the turnover (in the preceding fiscal year) of the

17 This is €55,000,000 if the joint venture partners are active in the health care business.

18 It should be determined, in accordance with the criteria of article 101(1) and (3) of the Treaty on the Functioning of the European Union, to what extent the formation of the joint venture has the coordination of the competitive behavior of the joint venture partners as its object or effect.

joint venture partner or partners that failed to notify, and it also can impose periodic penalty payments.

In principle, the Dutch Competition Authority must decide within four weeks upon notification of the joint venture whether the transaction is approved or a license is required (i.e. if a further in-depth investigation by the ACM is necessary). This time limit may be extended if the Dutch Competition Authority requires additional information for the assessment. The Dutch Competition Authority often extends the waiting period in complex cases with substantive competition issues.

A license for the proposed joint venture will be required if the Dutch Competition Authority has reason to believe that the joint venture may significantly impede effective competition on (a part of) the Dutch market. If a license is required, the Dutch Competition Authority must decide within 13 weeks upon the submission of the request for the license (i.e. a more detailed notification of the transaction) whether or not to (conditionally) approve the transaction. If the Dutch Competition Authority requires additional information for the assessment, this time limit also may be extended. During the initial notification period and the period for the license request, the parties are not allowed to implement the joint venture. The concentration is deemed to be cleared if the Dutch Competition Authority fails to act and the waiting periods have passed.

Joint venture agreements often contain so-called 'ancillary restraints', such as non-compete and non-solicitation clauses. Whether these types of ancillary restraints are compatible with Dutch competition law is assessed in accordance with the Ancillary Restraints Notice of the European Commission.[19] Ancillary restraints that are directly related and necessary for the formation of the full-function joint venture are considered justified.[20] Under Dutch merger control rules, the joint venture partners have the possibility to request the Dutch Competition Authority to assess in the merger control decision whether certain contractual provisions qualify as ancillary restraints and whether or not they are justifiable.

Non-full-function joint ventures, i.e. joint ventures that do not perform all the functions of an autonomous economic entity on a lasting basis, are assessed under the general prohibition of restrictive agreements[21] and the prohibition of abuse of dominance,[22] which are modeled on articles 101(1) and 102 of the Treaty on the Functioning of the European Union (TFEU). The assessment of these joint ventures also is similar to the test under the TFEU.

Decisions by the Dutch Competition Authority whether or not to require and/or grant a license for the creation of a joint venture (or for any other concentration) are subject to judicial review by the District Court of Rotterdam, in first instance and on appeal by the Trade and Industry Appeals Tribunal (*College van Beroep*

19 Commission Notice on restrictions directly related and necessary to concentrations (Ancillary restraints notice) of 5 March 2005, OJ C-56, at pp. 24–31.

20 Competition Act, section 10.

21 Competition Act, section 6.

22 Competition Act, section 24.

voor het bedrijfsleven). All other decisions by the Dutch Competition Authority are subject to administrative review by the Dutch Competition Authority itself, before an appeal may be brought before the District Court of Rotterdam or the Trade and Industry Appeals Tribunal.

Formation Agreement

As stated above, the joint venture company may be established in the form of a limited-liability company, a partnership, or a combination thereof. Partnership law is by its nature more flexible than corporate law and therefore may largely enable the parties to tailor the structure of their cooperation to their needs. However, this distinction is not clear-cut.

On the one hand, the governance of a partnership may be modeled as a limited-liability company with a one- or two-tier board; on the other hand, the Flex BV Reform Bill has provided the partners with ample means to tailor the articles of association of the joint venture BV. In some aspects, the Flex BV Reform Bill has made the BV even more flexible than the partnership: a BV may issue shares with no or limited profit rights, but each partner of a partnership must participate in the partnership's profits.

The Dutch courts have ruled that in the absence of a specific provision in a partnership agreement, it is a violation of good faith and the obligation to strive for the achievement of the object of the partnership if a partner competes with any interest of the partnership.[23] A similar non-competition obligation derived from the principle of reasonableness and fairness has been assumed to exist for shareholders of joint venture companies.[24] However, it is advisable to include a well-drafted non-competition covenant in the constitutional documents of the joint venture. As mentioned above, a non-competition provision may be void if it is in violation of antitrust and competition law.

In order to enter into a joint venture, the management board of a Dutch limited-liability company may need the approval of the supervisory board or the shareholders' meeting, depending on the articles of association. In the case of a so-called large company, the approval of the supervisory board is required for the commencement or termination of a major long-lasting participation in another company or partnership or the participation as a fully liable partner in a general or limited partnership. A limited-liability company qualifies as a large company if the following three cumulative tests are met:

- The company's issued capital plus the reserves equal €16 million or more;
- The company or a dependent company (*afhankelijke maatschappij*) has established a works council pursuant to the law; and

23 Supreme Court Judgment (HR), 19 October 1990, NJ 1991, 21 (Koghee/Akkoca).

24 Amsterdam Court of Appeal Judgment (Enterprise Chamber) 16 March 1995, JOR, 1996, 54 (Holstar).

- The company together with its dependent companies normally employ 100 or more persons in The Netherlands.

A dependent company is defined in the law as a legal person in which the company, or any of its dependent companies, solely or jointly and for their own account, contributes half or more of the issued capital and a partnership with a business enterprise registered with the Commercial Register in which the company or a dependent company is a fully-liable partner. A large company must have a supervisory board consisting of at least three members who need to be individuals.

The supervisory board is empowered to appoint, suspend, and remove the members of the management board. The works council must be notified and given the opportunity to render non-binding advice prior to the appointment. The management board must obtain the prior approval of the supervisory board for a number of important actions.[25] The members of the supervisory board of a large company are appointed by the shareholders' meeting on the basis of nominations drawn up by the supervisory board. The works council has the right to make a binding recommendation of one-third of the members of the supervisory board.

Unless the recommended person is unsuitable for the performance of the duties of a supervisory board member or if, as a result of the appointment, the supervisory board will not be appropriately composed, the supervisory board is required to nominate the person recommended by the works council. However, with the prior approval of the supervisory board and the works council, the articles of association of the large company may deviate from the above-mentioned procedure and provide that the shareholders' meeting may appoint, suspend, and dismiss members of the supervisory board without any restrictions.

An exemption from the large company regime exists if the majority of the employees of the company in question and its group companies are employed outside The Netherlands and if at least one-half or more of the issued shares of such company is held by (a) a legal entity (or its dependent companies), the majority of whose employees are employed outside The Netherlands, or (b) one or more legal entities (or their dependent companies) that meet the test referred to under (a), above, pursuant to a so-called mutual cooperation agreement. In this respect, a joint venture agreement generally qualifies as a mutual corporation agreement.

In terms of legal documents required for the formation of the joint venture, no specific rules apply. There are no standard forms published by the Dutch authorities. Joint venture agreements are generally enforceable even if the contractual arrangements are not reflected in the articles of association. Remedies include specific performance and damages.

There may be a preference, however, to lay down certain provisions in the articles of association, for instance, restrictions on transfer of shares are typically included in the articles of association. The main advantage of having these

25 Civil Code, sections 2:164 and 2:274.

restrictions included in the articles of association is that a share transfer in violation of the articles of association is null and void. The same applies to minority protection rights included in the articles of association.

Establishing Corporate Vehicle

The Merger Code 2015 (*SER Fusie gedragsregels 2015*) provides that trade unions should be informed and consulted with respect to mergers or joint ventures which involve companies employing 50 or more employees in The Netherlands, which form part of a group of companies employing more than 50 employees in The Netherlands, or if a collective bargaining agreement stipulated the applicability of the SER Merger Code 2015. The trade unions merely have the right to receive information and to give their views. They do not have a right of veto. If a party entering into a joint venture has established a works council, advice must be sought from such works council prior to agreeing on the terms of the joint venture.

Joint ventures frequently require regulatory approval and it is vital to review at an early stage the likely regulatory impact on a particular joint venture. The section on antitrust and competition law, below, discusses the regulatory impact if effective competition on the Dutch market is impeded in more detail.

Industry-specific approvals may apply for certain regulated businesses. Examples are banking, insurance, financial services, and consumer credit business. Approvals will generally be issued through a licensing procedure. A party entering into a joint venture will, as a commercial matter, wish to consider the impact of the venture on existing contractual arrangements. If existing contracts need to be assigned, the consent of counter parties to relevant contracts will usually be required.

Similarly, even if there is no change in legal identity of the contracting party itself, the setting up of a joint venture may involve a change of control of that party such as to give rise to a right of termination by the counter party under the terms of the relevant contract. Since the so-called declaration of no objection for the incorporation of a Dutch BV or NV was abolished in July 2011, there is no need to obtain approval for any particular joint venture from governmental or other authorities in The Netherlands.

Preparation of Ancillary Documents

Joint ventures call for clear, well-drafted documentation. Apart from the joint venture agreement and the articles of association of the joint venture company, ancillary contracts are equally important for the commercial and legal functioning of the joint venture. These contracts usually involve one or more of the joint venture partners. It may even be the case that a partner plans to make its commercial gain from the joint venture through its remuneration or receipt of goods or services under ancillary contracts rather than through dividends on its shares in the joint venture company.

If the joint venture company is to operate as a manufacturing facility, there will commonly be separate supply agreements between one or more of the joint venture partners and the joint venture company for the supply of goods, components, or

raw materials. If, on the other hand, the joint venture company is established at a distribution center for products manufactured by one of the partners, separate distribution agreements are put in place between the latter and the joint venture company. These contracts give rise to issues common to all supply or distribution contracts within the joint venture context. No particular issues arise in The Netherlands.

Typically, a joint venture will use parent companies' existing technology under license to the joint venture. The owner of such technology will often be unwilling to assign its rights to the joint venture for fear that the adventure will fail. The license is usually granted on arm's-length terms as it may well continue beyond the partners' interests as shareholders in the joint venture company. The consideration for the license will reflect the nature of the joint venture. Royalty on sales of manufactured products will be available in a production joint venture, or for the production element of a full-function joint venture.

In a research and development joint venture, an initial payment may be appropriate. When drafting such licensing agreement, it also can be necessary to consider what to do about new technology coming into possession of the parent company during the term of the joint venture where such technology is of relevance to the joint venture. The transfer of technology to the joint venture company may require review under competition regulations, but in The Netherlands no specific laws exist that regulate the terms on which technology may be licensed to a joint venture company.

A joint venture company has the same statutory obligations towards its employees as any other employer. Generally, The Netherlands has strict employment laws. A so-called works council must be established if the joint venture business employs at least 50 employees in The Netherlands. If a works council has been established, it may have a right to give advice on a proposed appointment or dismissal of a managing director.

In the event of a transfer by a joint venture partner of its business to the joint venture company, the rights and obligations of employment contracts between the transferor and the employees concerned are transferred by operation of law if such transfer qualifies as the transfer of an "economic entity" that retains its identity. In such cases, the works council has a right to give its advice with regard to the transfer of the business. The works council has also a right to give its advice with regard to the financing of such transaction if the business for which the works council was established enters into any financing agreements as borrower or guarantor.

Incentives Available to Foreign Joint Venture Partners

In General

In the Netherlands, there are several tax incentives available to foreign joint venture partners to invest in The Netherlands. As mentioned above, the tax regime in The Netherlands can be considered attractive as a result of:

- The favorable participation exemption regime;
- The fiscal unity regime for Dutch corporate tax purposes;
- The possibility to carry-back/forward tax losses;
- A large tax treaty network typically reducing withholding taxes on dividends, interests, and royalties (for dividends, interest, and royalties often to 0 per cent) in the relevant source jurisdictions;
- The absence of a domestic withholding tax on outbound interest and royalty payments; and
- The possibility to obtain advance tax clearance from the Dutch tax authorities.

Research and Development: Innovation Box and Research and Development Tax Credit

For Dutch joint venture entities, a facility for income from certain research and development projects is available (the "Innovation Box"). The Innovation Box also is available for the Dutch joint venture partners who are engaged as general partners of a general partnership if and to the extent that these partners are subject to Dutch corporate tax.

This facility relating to income derived from intangible assets is an optional system. The joint venture entity must obtain either a patent or a research and development declaration that has been issued by the relevant Dutch authorities. The patent itself can be Dutch or non-Dutch, but it must have been developed by the Dutch joint venture entity (in principle, it does not apply to intangible assets that have been acquired from i.e. another entity). The net profits derived from self-developed intangible assets are subject to an effective corporate tax rate of five per cent.

According to the BEPS initiatives, the only IP assets that may qualify for tax benefits are patents and other IP assets that are functionally equivalent to patents. As a consequence, the Innovation Box will only be available for companies that are large enough to have patentable assets. This contravenes the aim of the Dutch government to make it attractive for small and medium-sized companies to invest in The Netherlands. Nevertheless, it was implemented in Dutch domestic law that the only IP assets that may qualify for tax benefits are patents and certain (physical and technical) research and development works with an S&O ruling (*S&O-verklaring*).

Until 1 January 2016, there were two additional tax incentives for research and development expenses. First, a contribution existed in respect of Dutch wage tax

and social security contributions (*premie volksverzekeringen*) paid for employees directly involved in research and development (*Wet bevordering Speur- en Ontwikkelingswerk*, or "WBSO"). Second, taxpayers could claim an additional deduction for specific research and development costs (*aanvullende aftrek speur- en ontwikkelingswerk*) with an RDA ruling (RDA-*beschikking*).

However, since 1 January 2016, these tax incentives are integrated into one additional tax incentive: the research and development wage tax incentive. Whereas the old wage tax incentive only covered labor costs, the amended research and development wage tax incentive is available for all research and development costs, including labor costs, corporate costs, and other expenses.

The research and development wage tax deduction is available for Dutch joint venture entities as well as for (the Dutch joint venture partners who are engaged as general partners of) a general partnership. In 2018, the research and development wage tax deduction is 32 per cent of the first €350,000 in research and development wage costs and 14 per cent for the remaining research and development wage costs. For startup companies, the reduction of wage tax to be remitted amounts to 40 per cent up to €350,000.

Tax-Free Allowance for Extraterritorial Employees: 30 Per Cent Facility

Employees from another company who come to work in The Netherlands for a Dutch joint venture company or general partnership may be eligible for a special expense allowance scheme, i.e. the 30 per cent facility. The employee must have a specific expertise that is scarce or absent in the job market in The Netherlands. For the evaluation whether an employee possesses such specific expertise, a minimum salary requirement was introduced.

As from 1 January 2018, a salary threshold of €37,296 applies, excluding the 30 per cent tax-free part. In practice, this means that employees can only benefit from this allowance if their remuneration will exceed an amount of €53,280 per year. For employees under the age of 30 who have obtained a master's degree at a foreign university, the minimum required taxable salary (70 per cent) is € 28,350 (which is gross €40,500). In addition, employees must have lived more than 150 kilometers from the Dutch border.[26]

The facility allows the employer (i.e. the joint venture company) to grant a tax-free lump-sum allowance for the extra costs of the employee's stay in The Netherlands (extra territorial costs). This lump-sum allowance amounts to a maximum of 30 per cent of the sum of the wages and the allowance.[27] If the actual costs are higher, they may be reimbursed free of tax under the condition that the authenticity of all costs (including the costs that would be reimbursed under the 30 per cent facility) can be ascertained.

26 In 2015, the European Court of Justice (ECJ) ruled that the 150-kilometer requirement in principle is not against the freedom of movement for workers in the European Union.

27 In order to calculate the maximum allowance, the wage is, therefore, multiplied by 100/70, with the result then multiplied by 30 per cent.

Other Incentives

In addition, Dutch tax law provides for various other (temporary) incentives for joint venture companies or partnerships, including investment deductions, such as the small-scale investment deduction (*kleinschaligheidinvesteringsaftrek*), the energy investment deduction (*energieinvesteringsaftrek*), and the environmental investment deduction (*milieu-investeringsaftrek*).

Subsidy Programs

The Netherlands also offers numerous local and national subsidy programs for companies and non-profit organizations that are, for example, willing to innovate in new products or processes, to invest in energy-saving techniques, to cooperate with undertakings in developing countries, or to reduce emission of harmful substances. Also, in the areas of employment, personnel and training, nature, landscape, and water management, many subsidies are available.

Subsidies are governed by the General Administrative Law Act (*Algemene wet bestuursrecht*) and more specifically by so-called framework acts (*kaderwetten*), which are designed to set out the framework for certain subsidies. When a subsidy is granted for a certain period or project, the subsidy will automatically end when this period has expired or the project has finished, but a subsidy which has been granted for years generally cannot simply be terminated or reduced. This would be contrary to the principle of legal certainty. However, all subsidies should have an end date.[28]

The extent to which a subsidy may be terminated or modified is first determined by the specific subsidy regime and only secondly by the General Administrative Law Act. The subsidy regime determines the degree of policy freedom a governing body has in terminating or reducing a subsidy. In practice, many subsidy regimes do provide for a high degree of policy freedom to the governing body.

The general rules on termination or reduction of the subsidy can be found in the General Administrative Law Act. If, for instance, a subsidy is granted for a certain period of time, the subsidizer is only allowed to terminate or reduce the subsidy before the end date in three cases, namely:

- The grant of the subsidy was incorrect;
- Changed circumstances or revised insights predominantly oppose the continuation of the subsidy; and
- Other cases provided by law.[29]

28 General Administrative Law Act, section 4:32.
29 General Administrative Law Act, section 4:50.

Restrictions on Activities of Foreign Joint Venture Partners

The Dutch government does not place any regulatory restrictions on the activities of the foreign joint venture partner in terms of type of business which may be undertaken, access to and exploitation of locally developed technology and know-how, removal of assets from The Netherlands, or repatriation of profits. However, withholding taxes may apply to dividends paid by a Dutch joint venture company. As mentioned before, limitations or restrictions may apply for investment in strategic sectors, including transportations, energy, defense and security, finance, postal services, public broadcasting, and media.

The domestic dividend withholding tax rate is 15 per cent, but tax treaties generally reduce this tax burden to zero per cent or five per cent for joint venture partners owning more than 10 per cent or 25 per cent of the shares and voting rights; other joint venture partners generally pay 15 per cent. There is a full exemption if the dividends are paid to a qualifying EU parent company that owns at least five per cent of the shares.

If the parent company is resident in an EU member state with which The Netherlands has concluded a tax treaty providing for voting rights as the criterion for benefiting from a reduced dividend withholding tax rate, a shareholding in the Dutch joint venture that represents five per cent or more of the voting rights also qualifies for the EU dividend withholding tax exemption. There are no exchange control regulations and no material restrictions on foreign participation or the duration of a joint venture.

Dispute Resolution

Most joint venture disputes will be resolved commercially without recourse to legal process. In case a dispute cannot be settled by negotiation, litigation in national courts and arbitration are the traditional methods to obtain a formal and binding decision. Having said this, in many joint ventures, dispute resolution mechanisms are embodied in the governance structure of the joint venture itself.

The board of the joint venture company usually has a role in dealing with disputes which cannot be settled at an operational level. The next stage will involve some form of escalation of the dispute to higher levels within the organizations of the joint venture partners. A final step is usually for the dispute to be referred ultimately to the chairmen or chief executives of the joint venture partners. A frequently applied provision is to stipulate in the joint venture agreement the principle that neither partner may proceed by commencing litigation or arbitration until the expiry of a stated period after the dispute has been referred to the chairmen or chief executives of the joint venture partners. However, third-party intervention may be unavoidable at some stage. In these cases, alternative dispute resolution techniques are available, including mediation, mini-trial, and non-binding arbitration.

Especially mediators, coming independently to the problem, can bring additional value by suggesting alternatives that can facilitate the resolution of seemingly

insolvable disputes. However, it is always necessary to provide a mechanism for achieving binding solutions to the dispute either by litigation or through arbitration. In international joint ventures, the national courts of one joint venture partner may not be commercially acceptable; there may be unwillingness to permit disputes to be determined in another partner's home territory. In these instances, the discussions on the methods of dispute resolution often lead to arbitration.

Reference may be made to The Netherlands Arbitration Institute, but also arbitration outside The Netherlands, such as through the International Chamber of Commerce (ICC), the American Arbitration Association (AAA), or the London Court of International Arbitration (LCIA), is acceptable. The Netherlands is a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

A new development is the Netherlands Commercial Court (NCC) which will launch in the second half of 2018. The NCC is a specialized court for efficient dispute resolution in international commercial matters. The working language of the NCC is English.

In relation to dispute settlement, detailed dispute settlement arrangements can be incorporated in the articles of association of the joint venture BV, including the clause that voting and profit rights of a non-complying shareholder are suspended or that he is obliged to transfer his shares. Put-and-call options triggered by non-compliance of a certain shareholder also can be included in the articles of association.

Changes in Law Subsequent to Formation

Dutch law is applied equally to both Dutch and foreign companies. Therefore, subsequent changes in the law will be applicable to both local and foreign companies unless there is a transitional provision that applies. In some cases, it may be desirable to obtain an advance tax ruling from the Dutch tax authorities to avoid or mitigate the effect of subsequent changes in tax law.

Double-Taxation Agreements

In General

The Netherlands has signed approximately 100 treaties for the avoidance of double taxation. The Netherlands has signed double-taxation treaties with Albania, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Bermuda (the agreement applies only to individuals), BES Islands, Brazil, Bulgaria, Canada, China, Croatia, Czech Republic, Denmark, Egypt, Estonia, Ethiopia, Finland, France, Georgia, Germany, Ghana, Greece, Great Britain and Northern Ireland, Hong Kong, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Korea, Kuwait, Latvia, Lithuania, Luxembourg, Macedonia, Malawi, Malaysia, Malta, Mexico, Moldavia, Morocco, The Netherlands Antilles (Aruba, Saint Martin, Curacao), New Zealand,

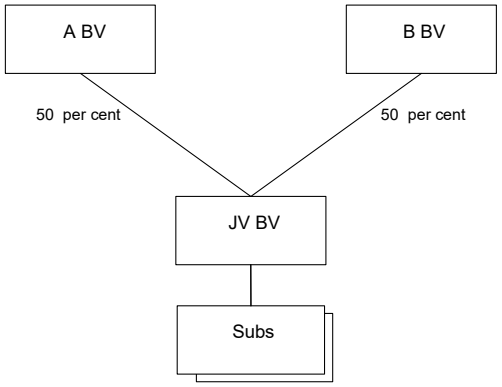
Nigeria, Norway, Oman, Pakistan, Panama, The Philippines, Poland, Portugal, Qatar, Romania, the Russian Federation, Saudi Arabia, Singapore, Slovak Republic, Slovenia, South Africa, South Korea, the former Soviet Union (applicable to successor states: Kyrgyzstan, Tadzhikistan, and Turkmenistan), Spain, Sri Lanka, Surinam, Sweden, Switzerland, Taiwan, Thailand, Tunisia, Turkey, Uganda, Ukraine, the United Arab Emirates, the United States of America, Uzbekistan, Venezuela, Vietnam, former Yugoslavia (applicable to successor states: Bosnia-Herzegovina, Serbia, and Montenegro), Zambia, and Zimbabwe. The double-taxation treaties with Malawi and Mongolia were terminated on 1 January 2014.

Application

The main purpose of double taxation treaties is to avoid or mitigate double taxation. Double taxation can occur if two sovereign states, based on their domestic tax laws, have the right to levy tax over the same object of income (e.g. crossborder investments or distributions). The following illustrates the application of double taxation treaties based on:

- A crossborder joint venture company (BV or general partnership) with Dutch joint venture partners and crossborder operations; and
- A crossborder joint venture company (BV or general partnership) with foreign joint venture partners.

Dutch joint venture BV with Dutch joint venture partners and crossborder operations



(Figure 5: Joint venture BV with Dutch joint venture partners and crossborder operations)

Generally, the double taxation treaties apply to persons who are residents of one (or both) contracting states and to the extent the relevant domestic tax is explicitly mentioned in the double-taxation agreement.[30] The term "resident" means in this case a person who, under the laws of the relevant state, is liable to pay tax therein

30 For example, the double-taxation agreement between Bermuda and The Netherlands does not apply to the (Dutch) Corporate Tax.

by reason of his domicile, residence, place of management, or any other criterion of a similar nature.

Under Dutch corporate tax law, the dividends received by joint venture partners A and B are, in principle, subject to Dutch corporate tax. Accordingly, if the joint venture BV decides to dispose the interest in the foreign subsidiary, any gain will in principle be subject to a statutory Dutch corporate tax rate of 25 per cent. However, in the case at hand, the joint venture partner should typically be able to apply the participation exemption because of their active involvement in the joint venture and the lower-tier subsidiaries.

Under the relevant double-taxation agreement, the dividends, interest, and royalties that are received by the Dutch joint venture BV may be taxed in the state where the joint venture BV is resident (i.e. The Netherlands). Conversely, a gain derived by the joint venture partners from the alienation of the shares in the joint venture BV will, in principle, be taxable only in a state where the joint venture partners are resident.

In some cases, the Dutch joint venture BV can benefit from a foreign tax credit. The credit method usually applies under tax agreements for foreign withholding taxes on income received by the joint venture BV such as dividends, interest, and royalties. In accordance with the 2001 Unilateral Decree on the Avoidance of Double Taxation, the credit method only applies to dividends, interest, and royalties received by the joint venture BV from subsidiaries in designated developing countries.[31]

The withholding tax for which the tax credit is allowed is usually levied on a gross basis and Dutch corporate tax is levied on a net basis. In some cases, the Dutch tax will not be sufficient to provide credit for the tax levied in the country of the foreign subsidiary. This is particularly the case if the participation exemption applies, i.e. in this situation, there will be no tax credit for any foreign withholding taxes on dividend income that falls under the participation exemption.

The exemption method applies to foreign objects of income for Dutch corporate tax purposes. Generally, the foreign objects of income are exempt per individual

31 According to section 2 of the Implementation Decree of the 2001 Unilateral Decree on the Avoidance of Double Taxation, the designated developing countries are: Afghanistan, Algeria, Angola, Belize, Benin, Bhutan, Bolivia, Botswana, Burkina Faso, Burundi, Cambodia, Cameroon, Cap Verde, Central African Republic, Chad, Colombia, Comoros, Republic of Congo, Costa Rica, Cuba, the Democratic Republic of Congo, Djibouti, Dominica, the Dominican Republic, Equator, El Salvador, Equatorial Guinea, Eritrea, Ethiopia, Fiji, Gambia, Georgia, Ghana, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Iran, Iraq, Ivory Coast, Jamaica, Kenya, Kiribati, Laos, Lebanon, Lesotho, Liberia, Madagascar, Maldives, Mali, Marshall Islands, Mauritania, Micronesia, Mozambique, Myanmar, Namibia, Nepal, Nicaragua, Niger, North Korea, the Palau Islands, the territories administered by the Palestinian Authority, Panama, Papua New Guinea, Paraguay, Peru, Ruanda, St. Vincent and the Grenadines, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, Sudan, Swaziland, Syria, Tanzania, Togo, Tonga, Tuvalu, Vanuatu, Western Samoa, and Yemen.

country. The exemption method means that reductions will be granted for Dutch tax relating to foreign income.

The participation exemption and the exemption for business income from foreign permanent establishments (*objectvrijstelling*) in the Corporate Tax Act 1969 are an example of the domestic exemption method.[32] Under the condition that the foreign subsidiary is a transparent entity for Dutch corporate tax purposes, the exemption for business income from foreign permanent establishments will, in principle, apply.

Before 2012, the business income of foreign permanent establishments was effectively included in the taxable income of the Dutch joint venture BV. This entails that the Dutch joint venture BV was subject to tax on its worldwide profits, with a relief of double taxation for profits attributable to its foreign permanent establishment.

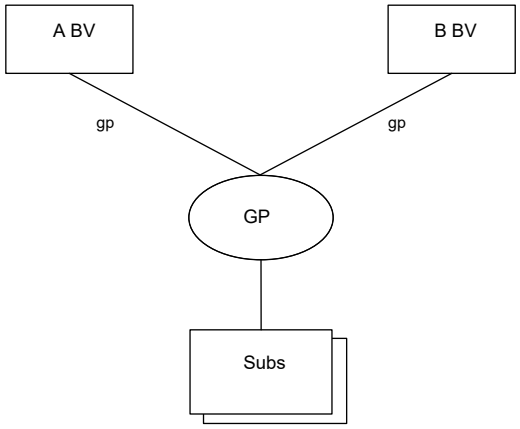
Accordingly, losses attributable to a foreign permanent establishment were effectively fully deductible from Dutch source profits. As per 2012, with the introduction of the exemption for business income from foreign permanent establishments (*objectvrijstelling*), the positive and negative result of the permanent establishment will be eliminated from the income of the Dutch joint venture BV.

Under the new rule, the results of permanent establishments are treated generally in the same manner as if the results were realized by the (non-transparent) foreign subsidiary of the Dutch joint venture BV, i.e. foreign-source losses would no longer effectively be deductible from Dutch-source profits.

If there is no arrangement for avoiding double taxation — and, accordingly, the relevant foreign source income is fully included in the Dutch tax base — foreign taxes may be deducted as costs related to the relevant income. This applies to the year in which the income is received and to the total amount of dividends, royalties, and interest received in that year.

32 Corporate Tax 1969, s 15e.

Joint venture partnership with Dutch joint venture partners and crossborder operations

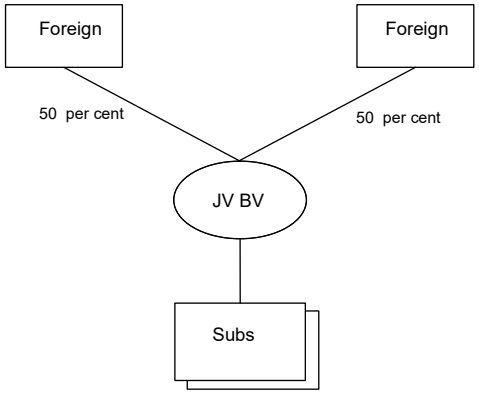


(Figure 6: Joint venture partnership with Dutch joint venture partners and crossborder operations)

In this diagram above, the joint venture partners A and B own their interest in the foreign subsidiaries through a general partnership which is a transparent entity for Dutch tax purposes. The dividends, interest, and royalties paid by the (non-transparent) foreign subsidiaries to the Dutch general partnership will be taxed at the level of joint venture partners A and B and not at the level of the general partnership itself.

The dividends received by joint venture partners A and B are, in principle, subject to a statutory rate of 25 per cent Dutch corporate tax, unless the Dutch joint venture partners are entitled to the participation exemption with respect to their (*pro rata*) interest in the subsidiaries held by the partnership.

Joint venture BV with foreign joint venture partners

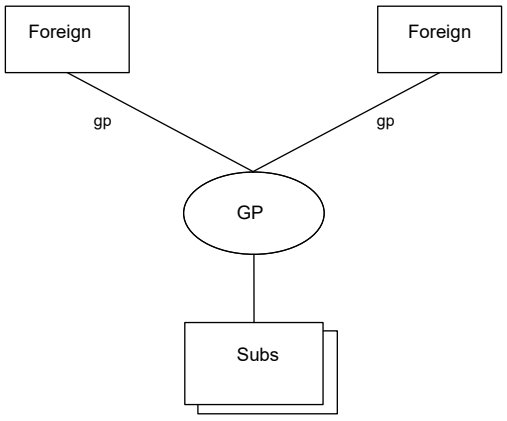


(Figure 7: Joint venture BV with foreign joint venture partners)

In the above example, the Dutch joint venture company is non-transparent for Dutch tax purposes. Accordingly, if it makes a (dividend, interest, or royalty) payment to its foreign joint venture partners, typically, these dividends (but also interest and royalties) may, under the applicable tax treaties, also be taxed in the state of which the joint venture paying the dividends is resident, i.e. The Netherlands, as discussed *above*.

The Netherlands has a domestic withholding tax on dividends of 15 per cent, but no domestic withholding tax on outbound interest and royalty payments. However, applicable tax treaties or domestic dividend withholding tax exemption may provide for a reduced rate of, or exemption of, dividend withholding tax.

Joint venture partnership with foreign joint venture partners



(Figure 8: Joint venture partnership with foreign joint venture partners)

If foreign joint venture partners conduct their interest in the subsidiaries through a general partnership, the general partnership is considered a transparent entity and may be considered a permanent establishment of the foreign joint venture partners for Dutch tax purposes.

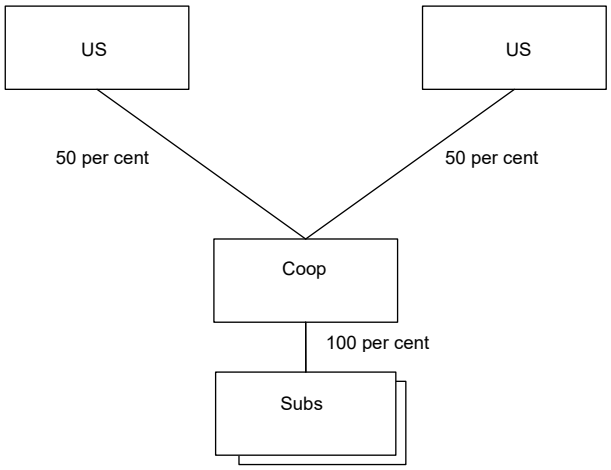
For the purposes of the double-taxation agreements,[33] the term "permanent establishment" means generally the fixed place of business through which the business of an enterprise is wholly or partly carried on.

The term "permanent establishment" includes a place of management, branch, office, workplace, factory or a mine, an oil or gas well, a quarry, or any other place of extraction of natural resources.[34] Whether a general partnership results in a permanent establishment for Dutch tax purposes depends on the facts and circumstances.

33 2010 Model Tax Convention.

34 2010 Model Tax Convention, article 5, paragraphs 1, 2, and 3; 2001 Unilateral Decree on the Avoidance of Double Taxation, article 2.

Joint venture Coop with United States joint venture partners and crossborder operations



(Figure 9: Joint venture coop with United States (non-EU) joint venture partners with crossborder operations)

Dividends distributed to foreign joint venture partners are in principle subject to Dutch dividend withholding tax if the joint venture company is a non-transparent entity and resident in The Netherlands. For EU member states, the Parent/Subsidiary Directive eliminated withholding tax on dividends if the European recipient owns at least five per cent of the shares in the joint venture company. If the foreign joint venture partner is resident outside the EU, applicable tax treaties may provide for a reduced rate or exemption of dividend withholding tax.

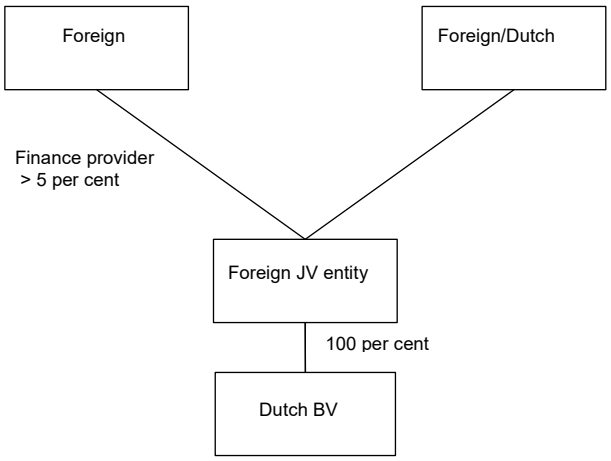
The double-taxation agreement between The Netherlands and the United States stipulates that no dividends will be taxed if the foreign company holds at least 80 per cent of the voting power in the company paying the dividends for at least a 12-month period. This requirement will not be met in case of a 50-50 joint venture.

For this reason, it is attractive for joint venture partners to conduct their interest in a Dutch subsidiary or Dutch joint venture BV through a cooperative. A cooperative is generally exempted from any Dutch dividend withholding tax because it does not, by law, have share capital.

However, the Dutch government introduced a conditional dividend withholding tax liability for cooperatives. As per 1 January 2016, Dutch resident cooperatives will be obliged to withhold tax on dividends distributed to their members, if the arrangements which are put in place are artificial and the main purpose is obtaining a tax advantage.

Arrangements are not considered artificial when there are “valid commercial reasons reflecting economic reality”. This is generally the case if there is sufficient substance at the level of the entity holding the interest in the Dutch cooperative.

Joint venture with a foreign finance provider and crossborder operations



(Figure 10: Joint venture with a foreign finance provider taking equity and crossborder operations)

If one of the joint venture partners is actually a foreign finance provider taking an equity stake of at least five per cent in the joint venture, as pictured above, the dividends received from the Dutch BV by the foreign finance provider are generally subject to Dutch corporate income tax. The reason for this is that the finance provider usually will not have an operational business enterprise to which it can allocate its interest in the Dutch BV or functions as a strategic top holding company or an intermediate holding company with sufficient substance. In these cases, parties may consider a foreign joint venture entity, holding the shares in the Dutch BV or directly in the Dutch subsidiary. By doing so, the foreign investor creates an operational business (the foreign joint venture entity) to which it can allocate its interest in the Dutch BV.

Protection of Foreign Investors

Bilateral Tax Treaties

The Netherlands has concluded approximately 100 bilateral tax treaties to help avoid double taxation. The treaties generally provide for substantial reductions of withholding tax on dividends, interest, and royalties and, as mentioned before, The Netherlands does not withhold any tax on interest and royalty payments leaving The Netherlands. In addition, The Netherlands has created unilateral provisions to mitigate situations of double taxation in which a tax treaty is absent or does not contain a provision with regard to a certain type of income.

Bilateral Investment Treaties

The Netherlands also has entered into approximately 97 investor bilateral investment treaties. In addition to The Netherlands being a favorable holding jurisdiction from a tax perspective, The Netherlands bilateral investment treaties could be an important argument to set up an intermediate holding company in The Netherlands. Bilateral investment treaties establish terms and conditions for the protection of investors of one state and their investments in another state and are generally perceived as a "free insurance" since treaty protection often can be achieved at minimal cost, for example, by interposing a holding company in a jurisdiction that has a favorable BIT with the country in which the investment is made.

The Netherlands bilateral investment treaties generally offer protection for indirect investments made by a Dutch company through local subsidiaries. In addition, The Netherlands has a large number of investor-friendly bilateral investment treaties that offer direct access to international arbitration as opposed to being obliged to exhaust proceedings with a local court first.

Dutch bilateral investment treaties can offer protection to foreign investors on several levels. First, the host state has the obligation to treat foreign investments in a manner that is just, equal, non-discriminatory, and conducive to fostering the promotion of foreign investment. In practice, this means that the same laws apply to all foreign and national undertakings and that they enjoy equal protection and advantages.

The second safeguard a Dutch bilateral investment treaty can provide is that the host state is not allowed to expropriate, nationalize, or take similar measures against investors from the other state, unless the expropriation is in the public interest, not discriminatory, and done for compensation. Such compensation must be equivalent to the fair market value of the investment.

The third safeguard is the national treatment and most-favored nation clause. Dutch investment treaties often require the host state to treat investors from the other state at least as favorably as national investors ("national treatment") and to treat investors from the other state not less favorably than other foreign investors ("most-favored nation treatment"). Finally, Dutch bilateral investment treaties include a commitment by the host state to observe all obligations it has entered into with regard to investments in its territory by investors from the other state.