# THE ASSET MANAGEMENT REVIEW

Sixth Edition

**Editor**
Paul Dickson

THE LAWREVIEWS

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The Asset Management Review
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This article was first published in The Asset Management Review, - Edition 6
(published in Spetember 2017 – editor Paul Dickson)

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk



ISBN 978-1-910813-82-9

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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# ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ADVOKATFIRMAET BA-HR DA

ALLEN & OVERY LLP

APPLEBY

ARTHUR COX

BONELLIEREDE

CYRIL AMARCHAND MANGALDAS

DE PARDIEU BROCAS MAFFEI

FANGDA PARTNERS

HENGELER MUELLER

HENRY DAVIS YORK

KING & SPALDING LLP

LENZ & STAEHELIN

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PINHEIRO NETO ADVOGADOS

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STIKEMAN ELLIOTT LLP

UDO UDOMA & BELO-OSAGIE

URÍA MENÉNDEZ

WMWP RECHTSANWÄLTE

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**Chapter 19**

# NETHERLANDS

*Jochem Kin, Daphne van der Houwen, Naomi Reijn and Ellen Cramer-de Jong*[1]

## I OVERVIEW OF RECENT ACTIVITY

In the Netherlands, asset managers that (1) may be linked to a pension fund, (2) are part of a financial conglomerate or family office, (3) act as managers of undertakings for collective investment in transferable securities (UCITS) (UCITS management company (UCITS ManCo)) or alternative investment funds (AIFs) (AIF managers (AIFMs)) or (4) operate independently, are active in the asset management market. The Netherlands asset management market is stable and permanent from a regulatory, legal and tax perspective. Some recent developments, relating to Brexit, and changes in laws and regulations relevant to the asset management industry, are outlined below.

### i Brexit

Many asset and fund managers are assessing the impact of Brexit. Most of the focus is on UK-based entities, but asset and fund managers targeting the UK market from outside the UK are considering how they can provide services or offer fund participations to UK investors.

### ii Markets in Financial Instruments Directive and Regulation

The Markets in Financial Instruments Directive (MiFID II) will introduce enhanced requirements for asset managers. To the extent UCITS ManCos and AIFMs perform top-up MiFID services, the MiFID II rules as implemented by the Dutch Financial Supervision Act (FSA) and the directly applicable Markets in Financial Instruments Regulation (MiFIR) rules will only apply in relation to these top-up MiFID services. These asset managers have been assessing what impact these rules will have on their business and operating models.

### iii Pension funds

The Netherlands market has seen a consolidation of pension funds. On 1 January 2016, the general pension fund (APF) was introduced by the Dutch Pension Act (DPA) to facilitate this consolidation. The larger Dutch-based asset managers considered the APF to be an opportunity to increase their assets under management and sponsored the establishment of such APF.

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1 Jochem Kin is counsel, Daphne van der Houwen and Naomi Reijn are associates, and Ellen Cramer-de Jong is a partner, at Allen & Overy LLP.

The APF may carry out one or more pension schemes in collectivity circles. It may ring-fence assets and liabilities per collectivity circle, which is the main feature of the APF. Each collectivity circle has its own coverage ratio, premium policy, indexation policy and investment policy.

An APF must have minimum funding that is treated as equity. The minimum funding is set at 0.2 per cent of the assets under management with a minimum of €500,000 and a maximum of €20 million. For the coverage of the liability risk, additional funding of 0.1 per cent of the assets under management will be required unless professional liability insurance is obtained or the risk analysis outcome requires an increase of this minimum funding.

### iv Remuneration management companies of UCITS or AIFs

The Dutch Act on remuneration policies for financial undertakings as included in the FSA (the Remuneration Act) applies to those AIFMs and UCITS ManCos with their seat in the Netherlands. The Remuneration Act may also apply if an AIFM or UCITS ManCo, having its seat outside the Netherlands, is a subsidiary of a financial undertaking with its seat in the Netherlands or is part of a group where the ultimate parent company has its seat in the Netherlands, and where the main activities consist of providing financial services or offering financial products.

With respect to the remuneration of an AIFM and UCITS ManCo, the Remuneration Act, which came into force on 1 January 2015, contains an exception to its 20 per cent bonus cap for AIFMs and UCITS ManCos pursuant to which no bonus cap applies at all. The draft version of the Amendment Act Financial Markets 2018 (the Amendment Act) contains a proposal to include a provision pursuant to which a 100 per cent bonus cap (or, in cases where shareholder approval has been obtained, 200 per cent) applies to all persons working under the supervision of an AIFM or UCITS ManCo that forms part of a Capital Requirements Directive (CRD IV) governed group. The legislator stated in the explanatory statement to the Amendment Act that the introduction of this cap follows on from the EBA Guidelines on remuneration. However, the proposed wording is different from the EBA Guidelines on remuneration, which stipulate that the cap is only applicable to 'identified staff'. The draft Amendment Act has not been adopted by the Dutch parliament yet, and may be revised before implementation. It is envisaged that the Amendment Act will enter into force in the course of 2018.

## II GENERAL INTRODUCTION TO REGULATORY FRAMEWORK

### i Alternative Investment Fund Managers Directive, UCITS and MiFID

The Alternative Investment Fund Managers Directive (AIFMD) is the last major piece of EU law governing the asset management sector. The AIFMD, UCITS Directive and MiFID are very much interconnected, simply because they are regulating the same core activity of asset management. However, their impact on an asset manager depends on how that manager raises its assets under management, whether through directly managing collective investment undertakings (either UCITS or AIFs) or being appointed to provide portfolio management services either to a client who is not a collective investment undertaking or to such an undertaking, but as a delegate of the manager (or sub-manager) of such an undertaking.

Subject to receiving an extension to the relevant existing licence from the Dutch Authority for the Financial Markets (AFM), a UCITS ManCo can manage AIFs (and

must comply with the AIFMD) and an AIFM can manage UCITS (but in doing so must comply with the UCITS Directive). The AIFMD clearly envisages that a single investment management entity in Europe may manage both AIF and UCITS.

As of 3 January 2018, MiFID will be repealed by MiFID II and as of the same date the new MiFIR will apply within the Member States. The AIFMD, UCITS Directive and MiFID have been, and MiFID II will be, transposed into Dutch law via the FSA and secondary legislation.

***AIFMD***

With respect to AIFs and AIFMs, the FSA provides for the full regime pursuant to which a licence is required and the small AIFM regime pursuant to which no licence will be required, although registration and reporting requirements to the Dutch supervisory authorities do apply. In addition, the FSA distinguishes between an offer of participations in AIFs to professional and retail investors.

*Small AIFM regime*

The Small AIFM regime is applicable to small AIFMs that either directly or indirectly, through a company with which the AIFM is linked by common management or control or by a substantive (in)direct holding, manages portfolios of AIFs whose total assets under management, including any assets acquired through use of leverage, do not exceed a threshold of €100 million; or do not exceed a threshold of €500 million when the portfolios of AIFs consist of AIFs that are unleveraged and have no redemption rights exercisable for five years starting from the date of initial investment in each AIF.

The conditions that must be met in order to avoid full application of the FSA are that the AIFM:

*a* is registered with the AFM, the competent supervisory authority;

*b* at the time of registration:
- identifies itself and the AIFs managed by it to the AFM; and
- provides information on the investment strategy of the AIFs managed by it to the AFM; and

*e* regularly provides information to the Dutch Central Bank on the main instruments in which it is trading, the principal exposures and most important concentrations of the AIFs it manages.

The Small AIFM regime is available for Dutch small AIFMs only, provided that the participation rights in the AIFs under their management are solely offered in the Netherlands to professional investors or, if to retail investors, to fewer than 150 persons or in a minimum amount of €100,000 per investor.

The Small AIFM regime as implemented in the Netherlands does not provide for a passport as provided for in Articles 32 and 33 of the AIFMD. This means that AIFMs registered under the Small AIFM regime in the Netherlands are neither able to market AIFs in Member States other than the home Member State nor to manage EU AIFs established in other Member States.

However, Small AIFMs that are registered in accordance with the European venture capital funds (EuVECA) or European social entrepreneurship funds (EuSEF) regulation may

market their VC and SE funds, respectively, in Member States to professional investors and to investors who commit to invest at least €100,000 and who declare that they are aware of the risks attached to the investment.

*Full regime*

AIFMs that cannot or do not wish to benefit from the Small AIFM regime, and to which no exemption applies, must apply for a licence. To obtain a licence, the AIFM must comply with, *inter alia*, the following licence requirements:

*a* the investment strategy, the risk profiles and other characteristics of the AIFM, policies and practices on remuneration, conflict of interest, risk management, liquidity, valuation and accounting, and arrangements made for the delegation and sub-delegation to third parties of functions must be drawn up and approved by the AFM;

*b* the integrity of the day-to-day policymakers, supervisory directors and certain shareholders of the AIFM is beyond doubt and is, as such, screened and approved by the AFM; and

*c* the AFM has established the suitability of the policymakers and supervisory directors.

Ongoing obligations will apply, including, but not limited to, the appointment of a depositary, extensive disclosure requirements regarding the acquisition of listed and non-listed companies having their statutory seat within the European Economic Area (EEA), valuation, risk management and remuneration.

***UCITS***

UCITS V has been implemented in the FSA, and Dutch UCITS, to the extent required, have appointed a depositary.

***MiFID II/MiFIR***

The Dutch MiFID II implementation legislation does not include any gold-plating provisions, although the Dutch legislature indicated in July 2017 that non-EEA investment firms targeting (1) non-professional investors (regardless of whether they have chosen to opt-up to be treated as professional investors) are required to open a Dutch branch when applying for an investment firm licence; and (2) solely professional investors (no opt-up) and eligible counterparties are not required to establish a Dutch branch, but are required to appoint a contact person in the Netherlands, in order to communicate and to transfer data between the non-EEA investment firm and the Dutch regulator in an orderly and efficient manner.

A MiFID firm cannot directly manage a UCITS or an AIF. While a MiFID firm, an UCITS ManCo or an AIFM may all provide the investment management service of portfolio management, only an UCITS ManCo or an AIFM can manage a UCITS or an AIF.

**ii Marketing activities**

***Marketing***

In the Netherlands, marketing is defined as making a sufficiently specific proposal in the pursuit of a profession or business, either directly or indirectly, to enter into a contract regarding any participation rights in a collective investment scheme, or to request or acquire, either directly or indirectly, funds or other goods from a client for participation in a collective

investment scheme. Passive marketing is not caught by the AIFMD or UCITS Directive. Passive marketing of AIFs and UCITS is permitted provided that any reverse enquiry is part of the investor's own exclusive initiative.

As opposed to the insurance mediation directive for insurance policies, the marketing of the investment funds is not expressly governed by a single directive. Rather, the UCITS Directive and the AIFMD have similar regimes, tailored to reflect that an EU-wide distribution passport is available to both types of funds.

***Marketing passport AIFs***

Marketing an EEA AIF with an EEA AIFM into the Netherlands is possible via the AIFMD marketing passport, which applies in respect of professional investors only. EEA AIFMs are authorised to market EEA AIF to retail investors in the Netherlands, subject to prior completion of the AIFMD passport procedure and notification to the AFM pursuant to the retail distribution notification form. In addition to this notification procedure, the EEA AIFM must comply with the top-up regime, which entails, among other things, additional disclosure obligations and, if the AIF is an open-ended fund or issues non-transferable participation rights, the obligation to draw up a key investor information document (KIID). However, neither notification to the AFM pursuant to the retail distribution notification form nor compliance with the top-up regime is required if each participation right has a nominal value of at least €100,000 or if the participation rights on offer can only be acquired for an equivalent of at least €100,000 per investor.

***Private Placement Regime AIFs***

For AIFs where either the AIFM or the AIF has a registered office outside the EEA, the AIFMD marketing passport is not yet available. The marketing of such AIFs must currently be conducted in accordance with the Private Placement Regime in the Netherlands (via Article 36 or 42 of the AIFMD).

For non-EEA AIFMs caught by Article 42 of AIFMD there are two regimes available:

*a* the designated states regime, which is available to fund managers from Guernsey, Jersey and the US and primarily relevant where the marketing is to be directed at investors who are not qualified investors, provided the top-up regime requirements are met; and

*b* the AIFMD third-country regime, which allows for marketing to qualified investors only.

***Marketing passport UCITS***

To actively market or sell UCITS to investors in the Netherlands, it is necessary to complete the notification process. Non-passported UCITS cannot be actively marketed or sold to investors in the Netherlands.

## III COMMON ASSET MANAGEMENT STRUCTURES

In the Netherlands, an investment institution can be structured through vehicles with or without legal personality. Commonly used vehicles with legal personality are the public limited liability company (NV), the private limited liability company (BV) and the cooperative, whereas a limited partnership (CV) and a fund for the joint account of the participants (FGR) are regularly used vehicles without legal personality.

All of these vehicles can be used for structuring both open-ended and closed-ended funds. The choice for a certain type of vehicle is often determined based on the tax aspects of

such vehicle. The different tax regimes that can apply to the different vehicles are set out in Section VII, *infra*. Asset management structures can be divided roughly into tax-transparent and non-transparent structures. Other relevant considerations for choosing a structure are flexibility, statutory restrictions and the preferences of the proposed investors.

### i Tax-transparent structures

The CV and the FGR are used for tax-transparent structures. These vehicles, which are without legal personality, can be considered transparent for tax purposes if certain conditions are met. Both are contractual arrangements and are considered to be very flexible for that reason. Detailed descriptions of the legal aspects of these vehicles are given below.

#### *CV*

Dutch law stipulates some specific provisions applicable to CVs. A CV is a partnership between one or more general partners and one or more limited partners. All assets and liabilities of the CV are held by the general partners (unless a separate custodian is used to hold the assets, something that is mandatory if the fund is regulated under the FSA). Unless otherwise agreed, each general partner is authorised to represent and bind the CV. Regardless of other internal arrangements, each general partner is jointly and severally liable for all obligations of the CV. The liability of limited partners is limited to the amount of their respective capital commitments or, if the limited partnership agreement so stipulates, its capital contributions to the CV. If, however, a limited partner performs acts of management for the CV (directly or by proxy), his or her liability will become unlimited (even if third parties know of his or her status as a limited partner).

#### *FGR*

No specific law applies to an FGR, except for Dutch contractual law. An FGR is a contractual arrangement between the manager and the legal title holder, to which participants to the agreement accede by way of subscribing to the participations. Whether and to what extent the investors are liable shall depend on the terms of the contractual arrangements, which often consist of a set of documents, including in any case the terms and conditions applicable to the FGR and subscription agreements subject to which the investors participate. In case of an FGR, an investor's liability is, in principle, limited, unless the FGR is considered a general partnership, which may be the case in very limited circumstances.

The features of an FGR depend on the contractual arrangements. Typically, the manager and the legal title holder of an FGR are legal entities. The legal title holder acquires the legal ownership of the assets and enters into obligations on behalf and for the benefit of the participants in the FGR.

### ii Non-transparent structures

Both the CV and the FGR can also be used for taxable structures. In that case, their aforementioned legal characteristics remain the same, but the conditions that need to be met to qualify as a tax-transparent vehicle do not apply. The NV, BV and cooperative are all non-transparent vehicles by definition. Detailed descriptions of the legal aspects of these vehicles are given below.

### *NV and BV*

Both of these vehicles have capital that is divided into shares. The minimum capital required upon incorporation of an NV is €45,000. For a BV, no minimum capital upon incorporation applies. Shares have to be issued, but their nominal value can be even lower than €0.01 and can be paid up at a later date. Though the two vehicles have a lot of other similarities, there are important differences, one of which is that less mandatory law applies to a BV, making it a more flexible vehicle than an NV in terms of, for example, its share capital requirements, the allocation of voting rights, prescribing and enforcing certain obligations of shareholders and the reduction of capital, whether through distributions or otherwise. Another difference is that the Dutch legislation applicable to NVs is well equipped for listings of NV shares. Listing BV shares is possible, but such listings have not been tested thoroughly in practice.

Dutch law facilitates a specific type of NV, namely an investment company with variable capital (BMVK). This type of NV provides for more flexibility with regard to the capital of the NV, by giving the management board the authority to issue and repurchase shares (instead of the default statutory arrangements where such powers are attributed to the general meeting of shareholders). An NV must meet certain conditions in order to qualify as a BMVK.

### *Cooperative*

A cooperative (co-op) is a specific form of association under Dutch law, and as such is a corporate vehicle for collaboration between its members. Its statutory object is to cater for the material needs of its members by concluding agreements with its members in the business it conducts or causes to be conducted for the benefit of its members. Statutory provisions on governance and certain rights and obligations of members apply, but a lot of flexibility remains regarding, among other things, arrangements on profit entitlement and distributions. No minimum capital is prescribed. Members of a co-op are not liable for any deficit at the moment it is liquidated, provided that the articles of association of the co-op exclude the members' liability for such deficit. If the articles of association do not exclude liability or maximise it to a certain amount, members are liable for equal shares, unless the articles of association of a co-op provide otherwise. Generally, in practice, all liability of members is excluded when a co-op is used to structure a fund.

## IV MAIN SOURCES OF INVESTMENT

| | 2012 | 2013 | 2014 | 2015 | 2016 |
|---|---|---|---|---|---|
| **Government** | €1,538 | €776 | €704 | €618 | €615 |
| **Monetary financial institutions** | €620 | €703 | €968 | €599 | €585 |
| **Insurers** | €48,404 | €66,326 | €79,069 | €76,703 | €69,799 |
| **Pension funds** | €446,931 | €484,777 | €560,631 | €580,680 | €655,201 |
| **Investment funds** | €28,002 | €24,120 | €27,734 | €25,939 | €27,418 |
| **Other financial institutions** | €1,609 | €1,617 | €3,156 | €3,008 | €3,427 |
| **Non-financial corporations** | €1,849 | €1,310 | €1,355 | €1,453 | €1,451 |
| **Households** | €22,818 | €24,732 | €26,832 | €30,852 | €31,543 |
| **Non-residents** | €10,461 | €11,266 | €15,307 | €11,641 | €11,900 |
| **Total** | €562,231 | €615,625 | €715,756 | €731,493 | €801,939 |

## V KEY TRENDS

In general, asset managers need to deal with pressure on fees and higher costs. Those costs not only relate to compliance with (new) regulatory requirements but also to investments in financial technology and data required to be able to comply with rules and regulations and to stay ahead of new ventures disrupting the asset management industry. Consolidation and reorganisation of asset managers will therefore continue as well as a shift from active to passive products. In the funds industry, we expect a continued focus on alternative asset classes and an increased appetite from Dutch and foreign investors to set up individual mandates with Dutch asset and fund managers to invest in alternative asset classes, such as mortgages. Mortgage funds are the fastest growing type of funds, with €22 billion assets under management in third quarter of 2016.[2]

## VI SECTORAL REGULATION

### i Insurance

As of 1 January 2016, Dutch insurance and reinsurance undertakings (insurers) are subject to (the implementing rules) of the Solvency II Directive.[3]

Pursuant to Solvency II, insurers are obliged to establish technical provisions with respect to all of their insurance and reinsurance obligations towards policyholders and beneficiaries of insurance or reinsurance contracts. The technical provisions must correspond to the current amount insurers would have to pay if they were to transfer their insurance (and reinsurance) obligations immediately to another insurer. The technical provisions must be covered by assets.

Insurers must invest all their assets in accordance with the 'prudent person' principle. This means, *inter alia*, that (1) insurers may only invest in assets and instruments whose risk the insurer can properly identify, measure, monitor, control and report, and appropriately take into account in the assessment of its overall solvency needs, (2) all assets must be invested by insurers in such a manner as to ensure the security, quality, liquidity and profitability of the portfolio as a whole, and (3) assets held to cover the technical provisions shall also be invested in a manner appropriate to the nature and duration of the insurance and reinsurance liabilities. In addition, insurers must ensure that their assets are properly diversified in such a way as to avoid (1) excessive reliance on any particular asset, issuer or group of undertakings, or geographical area and excessive accumulation of risk in the portfolio as a whole, and (2) extensive risk concentration in connection with investments in assets issued by the same issuer or by issuers belonging to the same group. With respect to assets held in respect of life insurance contracts where the investment risk is borne by policyholders, additional prudent person requirements apply.

There are no restrictions with respect to the categories of assets in which insurers may invest. Insurers are also free to make their own investment decisions; they are not subject to any kind of prior approval or systematic notification requirements in this respect. In addition, insurers are not required to invest in assets that are located in an EU Member State.

2 According to the Dutch Central Bank (www.dnb.nl/nieuws/nieuwsoverzicht-en-archief/statistisch-nieuws-2016/nb35).

3 Directive 2009/138/EC.

### ii Pensions

***General***

Dutch pension funds must invest the assets they have under management for future pension benefits. In accordance with the 2003 Institutions for Occupational Retirement Provision (IORP) Directive (2003/41/EC, recently replaced by the IORP II Directive 2016/2341/EC), the DPA stipulates that the investment policy of Dutch pension funds must comply with the prudent person rule and be in the interest of members and beneficiaries. The Financial Framework Decree (the Decree) and the policy rules provide some more details on the general principle, in line with the IORP Directive. Except for investments in affiliated companies, the DPA does not provide for quantitative restrictions for investment in certain assets or asset classes. The Decree and policy rules also provide guidance to both pension funds and asset managers with regard to valuation of assets, alternative investments, integrity, provision of information and outsourcing. For example, the Decree explicitly allows for investment in derivative instruments, insofar as such instruments contribute to a reduction in investment risks or facilitate efficient portfolio management.

A pension fund should establish a strategic investment policy – in accordance with its objectives and policy principles, including its risk attitude – and should include the composition of the intended investment portfolio and a description of the possibilities to deviate from the portfolio. On the basis of the strategic investment policy an investment plan should be defined by the pension fund, including a detailed outline of the level and range per asset class.

***Premium Schemes (Improvements) Act***

As of 1 September 2016, the Premium Schemes (Improvements) Act came into effect. As a result, the legal framework has been changed for the defined-contribution agreement and the agreement to pay a capital sum (premium schemes). The capital that is accrued within the scope of these types of arrangements no longer needs to be converted into a fixed pension benefit (annuity) on the retirement date, but can instead also be used for a (partly) risk-bearing investment during the pay-out phase. Accordingly, a new type of pension benefit is introduced (a variable pension). It is generally expected that continued investments lead to a higher pension outcome compared to the current fixed allowance. However, this also creates more uncertainty regarding the amount of the benefits. The risk-bearing investment during the pay-out phase will require new life cycle investments since the risk in that case will not need to be phased out towards the retirement date.

### iii Real property

No specific asset management rules apply to investments in real property. Some real estate funds fall outside the scope of the AIFMD as they raise debt only and therefore no licence requirement applies. The AFM has published a question-and-answer segment on its website regarding investments in real property (available in Dutch only).

### iv Hedge funds

The AIFMD was originally intended to focus on hedge funds and private equity funds. Any hedge fund qualifying as an AIF will need to comply with the AIFMD as implemented by the FSA. The FSA does not provide for additional rules that apply to hedge funds only.

Some hedge fund managers are operating not as managers but as sub-advisers and are regulated under MiFID. These managers will have to comply with MiFID II and MiFIR as of 3 January 2018, including rules on algorithmic trading.

### v Private equity

The AIFMD imposes obligations on AIFMs that acquire major holdings in or control of certain types of portfolio companies that have their statutory seat in a Member State. These obligations include the notification of acquisition of major holdings and control of non-listed companies, disclosure requirements on the acquisition of control of these companies and issuers, and some specific annual reporting requirements for AIFs exercising control of non-listed companies. The obligations do not apply if the portfolio companies qualify as small or medium-sized enterprises or real estate special purpose vehicles. In addition, the AIFMD imposes some restrictions on asset stripping for AIFs that acquire control over non-listed companies or issuers. These asset stripping rules will be particularly relevant to the buyout industry.

## VII TAX LAW

The choice for a certain fund vehicle is often tax-driven. A fund can be either transparent or non-transparent for Dutch tax purposes. A tax-transparent fund vehicle is not subject to corporate income tax and does not need to withhold dividend tax on distributions to investors. Instead, the investors are taxed as if they had directly held a *pro rata* portion of the investments made by the fund. Non-transparent fund vehicles can be subject to a special regime – either the fiscal investment institutions regime (FBI regime) or the exempt investment institutions regime (VBI regime) – or the regular Dutch corporate income tax regime.

### i Tax-transparent vehicles

The most commonly used tax-transparent fund vehicles are a CV and an FGR. Specific conditions apply for a CV and an FGR to qualify as tax-transparent vehicles. A CV is tax transparent if limited partners can only be admitted or replaced after the prior written consent thereto of all partners. An FGR is tax transparent if the units can only be transferred to (1) the fund itself or (2) a third party with the prior consent of all other participants. A tax-transparent CV and a tax-transparent FGR are not subject to corporate income tax and do not need to withhold dividend tax on profit distributions to investors.

### ii Non-transparent vehicles

#### *Regular regime*

The regular regime by default applies in respect of an NV, a BV, a co-op and non-transparent CVs and FGRs. The corporate income tax rate over the first €200,000 of taxable profit is 20 per cent. The rate over taxable profit in excess of €200,000 is 25 per cent. No distinction is made between capital gains and trading income.

All income and gains received and losses incurred by a taxpayer holding 5 per cent or more of the shares in a qualifying participation are exempt from corporate income tax

(participation exemption). Generally, entities with operational business activities, as well as entities that are taxed at a rate of 10 per cent or more on profit calculated in accordance with Dutch standards, are qualifying participations.

Profit distributions by an NV, a BV or a non-transparent CV or FGR are in principle subject to a standard 15 per cent dividend withholding tax. This rate can be reduced or refunded under applicable tax treaties provided that certain conditions are satisfied. Under Dutch domestic law, a dividend withholding tax exemption may be available; for instance, if the recipient of the profit distribution holds a qualifying participation in the distributing fund vehicle and such recipient is a Dutch or EU resident entity, provided that a number of other conditions are met.

The dividend withholding tax position of co-ops deviates from the above-mentioned type of vehicle as, historically, co-ops were not obliged to withhold dividend tax on profit distributions. This resulted in a strong increase in co-ops being used in fund and holding structures. However, in 2012, the first set of anti-abuse rules was introduced to counter the inappropriate use of co-ops. As of 1 January 2016, these anti-abuse rules were extended to bring the Dutch dividend tax rules in line with anti-abuse measures under the EU Parent-Subsidiary Directive. The most relevant anti-abuse rule is that if the co-op directly or indirectly holds an interest with the main purpose (or one of the main purposes) being to evade dividend withholding tax or foreign tax for another party (an abusive structure), and if there is an artificial arrangement or set of arrangements, the co-op must withhold dividend tax as if it were an NV or a BV. Arrangements are artificial to the extent that they have not been put in place for valid business reasons that reflect economic reality.

In May 2017, there was a consultation in respect of a new set of Dutch dividend withholding tax rules under which co-ops would largely be treated the same as an NV, BV and non-transparent CV and FGR. Depending on the legislative process, new rules might enter into force on 1 January 2018.

***FBI regime***

Under the FBI regime, an NV, BV or non-transparent FGR is taxed at a rate of zero per cent and is thus effectively exempt from corporate income tax. The purpose of this tax facility is to allow the individual shareholders to invest jointly in shares, bonds, real estate property, etc, without triggering higher taxes than if they had made investments directly and individually. A number of conditions apply for a fund entity to be eligible for the FBI regime. For instance, the entity may only carry out passive investment activities, be subject to maximum leverage criteria, be required to distribute (a defined part of) its profits within eight months of each financial year-end and be subject to certain shareholder and participant conditions.

Distributions by a fund entity that applies the FBI regime are subject to 15 per cent dividend withholding tax. As an entity that enjoys the FBI regime is technically subject to tax, albeit at a rate of zero per cent, such entity may be eligible for tax treaty benefits. Typically, specific arrangements have been made between the Netherlands and its treaty partner in this respect, such as the treaties with Switzerland and Canada.

***VBI regime***

An NV or non-transparent FGR may elect to apply the VBI regime, resulting in an exemption from corporate income tax. This election is subject to certain conditions. A fund may elect to claim an exemption from corporate income tax if (1) it is an investment institution as defined in the FSA, (2) the purpose and actual activities of the fund consist solely of passive portfolio

investment activities, (3) it only invests in certain financial instruments and (4) the fund spreads its risks. Further, the fund is obliged upon request to repurchase or pay back shares or interests held by participants at the expense of its assets (open-end fund).

Only passive investments in certain financial instruments are allowed (and therefore no direct investments in, for example, real estate property).

Profit distributions by a fund that applies the VBI regime are not subject to dividend withholding tax. As a fund that applies the VBI regime is tax exempt, such fund is not treated as a resident for tax treaty purposes and will, therefore, not be eligible for a refund or credit of any withheld Dutch dividend tax or any foreign withholding tax, or a reduction in withholding tax at source.

## VIII OUTLOOK

Brexit is likely to be of significant consequence for asset and fund managers who have UK-managed funds (whether AIFs or UCITS) offered into the EU and, in the case of UCITS, the rest of the world; EU AIFs or UCITS managed in the UK and offered into the EU; and for asset and fund managers targeting the UK market. Most asset managers and fund managers will continue to assess the impact Brexit will have on their business model and operations, and to further develop contingency plans. In addition to asset managers, AIFMs and UCITS ManCos providing top-up MiFID services will also have to comply with revised rules once MiFID II, as implemented in the FSA, and MiFIR enter into force. If the amended EuVECA and EuSEF regulations as agreed on by the European Parliament, Council and Commission enter into force, the range of eligible managers will be extended to larger asset managers, and the diversification possibilities offered by VC and SE funds will increase.

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Jochem specialises in corporate tax and international tax law. He focuses on advising international companies on the tax aspects of fund structures, restructurings, financing and acquisitions. Jochem has extensive experience in the tax aspects of setting up fund structures and management participation structures. Jochem graduated from the University of Utrecht in 1999 with a masters degree in corporate and tax law, and joined Allen & Overy in 2002. He was admitted to the Amsterdam Bar in 2003 and is a member of the Dutch Association of Tax Advisers.

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Daphne specialises in financial and commercial litigation, and regularly advises financial institutions on the regulatory and civil law aspects of their activities. Daphne is part of the Financial Markets Regulation Practice of the Amsterdam office. She mainly focuses on banking, insurance and securities law disputes and advises on transactions involving financial supervision aspects. Daphne has particular expertise in the field of conduct supervision and duty of care considerations. Prior to specialising in dispute resolution, Daphne worked in the Amsterdam capital markets practice.

In 2014 Daphne went on secondment for several months at De Nederlandsche Bank. She is a member of the financial markets regulation practice at Allen & Overy's Amsterdam office and publishes regularly on financial law. Daphne is the editorial secretary to *Tijdschrift voor Financieel Recht*, a magazine on financial law.

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Naomi focuses primarily on remuneration within financial institutions and listed companies, from both a regulatory and a transaction perspective. Furthermore, she is experienced in employment law. From August 2015 until December 2015, she was on an in-house client secondment at NLFI, the shareholder of ABN AMRO Bank, SNS, ASR and Propertize. Naomi is part of the financial markets regulation practice group.

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Ellen heads the investment management team at Allen & Overy's Amsterdam office. She has an extensive background in regulatory, securities and corporate law, and her main practice areas are the structuring of investment institutions, the implementation of these structures and advising on investment, custody, AIFMD management and depositary agreements. Ellen advises financial institutions, funds and asset management companies on the regulatory, corporate and securities law aspects of their activities. Furthermore, she advises investors around the world on participating in private equity, infrastructure and other alternative asset class funds. Ellen has published various articles on regulatory issues in the Dutch investment management market. She is a member of the Securities Law Association, board member of the Dutch institution for pension education (IVP) and vice chairman of the supervisory board of Musoni BV, a micro credit institution.

Ellen is ranked as a tier 1 Investment Funds Lawyer in both *The Legal 500* and *Chambers & Partners* 2017 legal directories.

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ISBN 978-1-910813-82-9