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The Netherlands

REAL ESTATE

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This country-specific Q&A provides an overview of real estate laws and regulations applicable in The Netherlands.

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THE NETHERLANDS
REAL ESTATE

1. Overview

The Netherlands has a civil law system, and the key real estate-related laws in respect thereof are as follows:

- Civil law: the current Dutch Civil Code (*Burgerlijk Wetboek*) was introduced in 1992 and is divided into nine different 'books', which form a so-called layered structure, whereby general rules are followed by specific rules. In respect of real estate laws, the main books of the Dutch Civil Code are Book 3 (Property Law in General), Book 5 (Rights in Rem) and Book 7 (Particular Contracts, including but not limited to leases).
- Administrative law: the General Administrative Law Act (*Algemene Wet Bestuursrecht*) contains, among other things, general provisions on (the preparation and publication of) decisions (such as permits, levies and fines), objections (*bezwaar*) and appeals (*beroep*).
- Planning/zoning: the Spatial Planning Act (*Wet Ruimtelijke Ordening*) regulates how spatial plans are drawn up in the Netherlands and how these may be amended. The Dutch government, the provinces, and the municipality, have the authority to draw up spatial plans, of which the most important (and legally binding) instrument is the zoning plan (*bestemmingsplan*).
- European law: European directives and framework decisions generally impose obligations on the EU member states and do not (yet) apply directly to citizens: these 'non directly binding European regulations' must be translated into national general binding regulations. In case of regulations and decisions, this is generally not necessary now that they are directly applicable.
- Tax: under the General Administrative Law Act, tax law is part of the administrative law. Under Dutch law, taxes shall be levied on the basis of formal law, which is why there is a separate law for almost every type of taxation, such as the Turnover Tax Act 1968 (*Wet op de omzetbelasting 1968*), Corporate Tax Act 1969 (*Wet op de vennootschapsbelasting 1969*) and the Income Tax Act 2001 (*Wet inkomstenbelasting 2001*).

Please note that, apart from the (written) laws, also jurisprudence and general principles and unwritten laws (*gewoonterecht*) are considered to be sources of law.

2. What is the main legislation relating to real estate ownership?

The main legislation relating to real estate ownership is laid down in the Dutch Civil Code (*Burgerlijk Wetboek*), which provides for regulation on ownership of real estate, limited rights to real estate, and the transfer of ownership and limited rights.

The Land Registry Act (*Kadasterwet*) provides for the registration of land interests and encumbrances.

3. Have any significant new laws which materially impact real estate investors and lenders come into force since December 2022 or are there any major anticipated new laws which are expected to materially impact them in the near future?

From a Dutch tax perspective, the following changes were adopted or announced since December 2022 that may materially impact real estate investors (and lenders):

- The general real estate transfer tax ("**RETT**") rate has been increased to 10.4% on the acquisition of Dutch real estate or the acquisition/increase of a substantial interest in property rich entities, as per 1 January 2023.
- The landlord levy (*verhuurderheffing*) has

been abolished as per 1 January 2023.
- As per 1 January 2024, a conditional withholding tax on dividend and other profit distributions by Dutch resident companies will become effective. Like the existing conditional withholding tax on interests and royalties, the withholding tax applies to distributions made to low-taxing jurisdictions and jurisdictions included on the EU-blacklist, to certain hybrid entities and in certain abusive situations. The withholding tax rate is equal to the highest Dutch corporate tax rate, currently (2023) 25.8%.
- Subject to Dutch Parliament adopting the relevant legislative proposal, the use of the FII regime for direct investments in Dutch real estate will be prohibited as of 1 January 2025 (see Q8 for further information).
- Subject to Dutch Parliament adopting the relevant legislative proposal, the RETT concurrence exemption (*samenloopvrijstelling*) will be abolished in certain share transactions as of 1 January 2025. Under circumstances, RETT would be levied on the acquisition of shares in a company owning Dutch real estate at a newly introduced rate of 4% on the underlying value of certain indirectly acquired Dutch real estate assets, where such an acquisition currently benefits from said exemption. This exemption would continue to be available for acquisitions of shares in companies owning new real estate, where the real estate is and will be used for activities allowing at least 90% VAT recovery in the two years following the acquisition. Grandfathering may apply for pending (development) transactions with an LOI (or similar) date before 19 September 2023, at 15:15 hours, and a closing/transfer date between 1 January 2025 and 1 January 2030.
- Various legislative proposals are pending fundamentally changing the classification and tax treatment of certain Dutch partnerships and other vehicles (as tax transparent or opaque), also impacting the classification of foreign entities. It is recognized that to mitigate unwanted implications following adoption and introduction of these changes, restructurings may be required in practice, also involving real estate investment structures, and as part of these proposals various RETT facilities and exemptions are temporarily made available to facilitate such restructurings. The necessity to restructure should be assessed on a case-by-case basis, but restructurings are expected to take place and will need to be finalized before year end 2024. See Q8 for further information.
- A legislative proposal is expected to be published in 2024 abolishing the €1 million threshold applicable to the earnings stripping rule (the rule limiting interest deductibility for Dutch corporate tax purposes to the higher of €1 million or 20% of a taxpayer's (tax-adjusted) EBITDA) specifically for companies owning real estate and leasing such real estate to third parties. The change is expected to be introduced as per 1 January 2025.

Although there was a notable change in the deal activity within the (commercial) real estate sector in the last year, there was actually a lot happening if we look at the regulatory and legislative movements for the Dutch real estate sector. Several legislative proposals have been introduced by the Dutch Minister for Housing and Spatial Planning to regain control over the Dutch residential real estate sector. We have listed below the key legislative changes for the Dutch real estate sector that could be of interest for real estate investors or lenders:

- **Extension housing valuation system**: A legislative proposal is pending for affordable housing (*Wetsvoorstel Betaalbare Huur)* proposing an extension of the current valuation system for the social housing sector to the mid-rent sector. If this proposal gets accepted, the housing valuation system will apply to housing up to 187 points and a maximum rent of approximately EUR 1123.13 (price index July 2023). The mid-market rentals are currently not regulated in the Netherlands. In short, the proposed legislative changes means that the mid- sector rentals that fall within the scope, will become subject to a maximum rent limit. Although we do not foresee an immediate decrease of the mid-sector rent once the legislative proposal becomes effective, we do note that it is expected in the long run that over 90% of the rental housing stock will be regulated. It should be noted that the Council of State advised on 20 November 2023 that the legislative proposal should be re-assessed for the implications for the housing policy as a whole, as the Council of State is of the opinion that it is unclear whether the proposal will help the house seeker and whether this proposal leads to sufficient affordable rental housing.
- **End of temporary residential leases**: A

legislative proposal for a ban on temporary residential lease agreements (i.e. (*Wetsvoorstel vaste huurcontracten)* is to be expected to enter into force on 1 July 2024. This means that landlords will be no longer allowed to offer their residential tenants a temporary lease agreement (i.e. two year lease term), as a result of which lease agreements for an indefinite term will become the new standard within the Dutch real estate sector.

- **Act on good landlordism**: On 1 July 2023 the Act on good landlordism (*Wet goed verhuurderschap)* has come into force. This Act gives municipalities more opportunities to deal with undesirable rental behaviour, such as housing discrimination, harassment, unreasonable service charges and excessive deposits. In addition to the general rules, municipalities can require a rental license (*verhuurvergunning*). In certain areas it is known that landlords take advantage of the socio-economical vulnerability of tenants, manifesting in excessive rent, overdue maintenance, overcrowding, squalor, discrimination, and harassment. By introducing a rental license, municipalities may impose additional requirements on the landlords in certain areas. Houses for which a rental permit obligation has started to apply do not have to have a rental permit immediately. Landlords will have until 31 December 2023 to apply for the permit.
- **The Environment Act**: As of 1 January 2024 the Environment Act (*Omgevingswet)* will come in full force and effect in the Netherlands. The main purpose of the Environment Act is to simplify existing regulation in respect of residential and business areas in the Netherlands. The Environment Act intends to make it easier for parties to get the required approvals through a digital system in connection with their development projects.
- **Porthos– ruling:** Although this does not consider a (proposed) legislative change, we do believe that the Porthos- ruling Dutch Council of State (*Afdeling bestuursrechtspraak van de Raad van State*) on the 16th of August 2023 is definitely worth mentioning here. The deposition of nitrogen resulting from development is considered as a material issue in the Netherlands. As the so- called nitrogen deposition levels in many areas in the Netherlands have reached a certain level, additional nitrogen deposition is in principle not allowed. The Dutch Council of State reiterated that for any future developments projects it should be individually assessed whether it leads to an increase in nitrogen deposition and has a negative impact on nature preservation areas. The permitting process for development project may delay the project timelines which can affect the revenue projection. It should be noted that in 2023 various other legislative changes relating to real estate were proposed and are currently subject to parliamentary debate. Furthermore, it should be noted that due to the recent elections it is not certain whether the above proposals will stay the same and/or and even go ahead. The above summary is therefore not a complete overview of all legislative proposals made concerning real estate, but those not listed may particularly not be relevant to all lenders and real estate investors generally but rather to specific categories of investors or situations (such as family offices or inheritance tax related matters).

4. How is ownership of real estate proved?

The Land Registry (*Kadaster*) in the Netherlands holds a public register, specifying ownership of real estate. From the Land Registry, against the payment of a minor fee, a copy of the notarial deed can be obtained pursuant to which the owner of land or an asset acquired ownership.

Limited rights on real estate (such as rights of superficies, easements, attachments, mortgage rights and/or qualitative obligations) must be registered with the Land Registry. In addition, information such as the geographical location, details of the title holder and entitlement documents can be accessed via the Land Registry.

5. Are there any restrictions on who can own real estate?

In principle there are no restrictions on who can own real estate, except for persons without legal capacity (*wettelijk onbekwaam*) (i.e. minors and persons subject to a guardianship order (*onder curatele gestelden*), persons that have no power of disposition (*beschikkingsbevoegdheid*) (i.e. due to bankruptcy) or persons that are not authorized to act (*handelingsonbevoegd*). In the context of the acquirement of real estate, prior approval and/or participation may be required (i.e. spouses, joint authorisation, etc.).

6. What types of proprietary interests in real estate can be created?

Full ownership is the most comprehensive property right under Dutch law.

Ground lease (*recht van erfpacht*) allows another party to make use of the relevant real estate owned by another party, for an agreed period of time (which may be indefinite if agreed).

A right of superficies (*opstalrecht*) allows another party to obtain ownership of buildings, structures or plants located in, on or above the relevant real estate owned by another party.

Full ownership, ground lease and building rights can be divided into apartment rights (*appartementsrechten*), by subdividing a building into smaller areas of use, as a result of which, the holder of an apartment right can make exclusive use of its part of the building.

Moreover, ownership of real estate can be encumbered with the limited rights of easement (*erfdienstbaarheid*). An easement requires the owner of real estate to tolerate or refrain from certain acts. An example of an easement is the right of way (*recht van overpad*), e.g. right of an owner of real estate to cross real estate adjacent to its own.

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7. Is ownership of real estate and the buildings on it separate?

In principle, due to accession (*natrekking*) the ownership of land also includes ownership of the buildings constructed thereon. However, it is possible to create a right of superficies (*opstalrecht*) (please see Q6), which enables the holder of this right (i.e. the superficiary) to own the constructed buildings, structures or plantings in, on or above the property owned by another party. The right of superficies must be established by a notarial deed and a copy must be registered at the Land Registry.

8. What are common ownership structures for ownership of commercial real estate?

Common vehicles to hold real estate in the Netherlands include:

- *Limited liability companies*: limited liability companies (including Dutch cooperatives), formed specifically for the purpose of holding the real estate in question, are a common holding structure and may be based in the Netherlands or other jurisdictions (e.g., Luxembourg). Corporate vehicles offer limited liability, which allows investors to ring-fence assets and liabilities, and they can also provide tax advantages for some classes of investors (for instance with respect to application of the participation exemption in share deal exits).
- *Limited liability partnerships*: limited partnerships are also a common holding structure for Dutch real estate. Dutch limited partnerships have no legal personality and are either transparent or opaque for Dutch corporate tax purposes. Dutch limited partnerships are registered in the commercial register and usually have a general partner with unlimited liability which in turn is usually a limited liability company. As outlined in the answer to Q3, changes are expected to enter into force per 1 January 2025 that will classify all Dutch partnerships as transparent for Dutch tax purposes. Consequently, partnerships like non-transparent Dutch limited partnerships (CV) and similar (foreign) vehicles will lose their current tax status. Depending on the circumstances, the use of such vehicles may become less attractive for real estate investments.
- *Fiscal investment institutions*: A Dutch Fiscal investment institution ("**FII**") is formed as a

stock corporation or mutual investment fund with a number of key tax advantages, in particular a corporate tax rate of 0%. However, the tax status of an FII is subject to relatively strict requirements (e.g. minimum distribution and shareholder and maximum leverage requirements), and hence it is often not a suitable investment vehicle for investors other than tax exempt corporates or individuals. As outlined in the answer to Q3, changes to the Dutch rules around FIIs are expected pursuant to which FIIs will as of 1 January 2025 no longer be allowed to directly invest in Dutch real estate, otherwise losing their FII status. However, FIIs can still hold direct investments in real estate outside the Netherlands and indirect investments in Dutch real estate owned by a regular taxpayer.

9. What is the usual legal due diligence process that is undertaken when acquiring commercial real estate?

The required period depends on the type of transaction. Depending on the type of transaction, a legal due diligence typically covers the following aspects:

- corporate analysis of the target companies (in case of a share deal);
- ownership rights;
- lease agreements;
- regulatory (including review of permits and zoning limitations);
- tax; and

A due diligence could also include due diligence by (i) a technical specialist on the state of the property, (ii) an environmental specialist on the permits and the soil, (iii) a financial specialist on the creditworthiness of the selling entities, target companies (in case of a share deal) and on the financial modeling and (iv) an insurance specialist on insurances. A typical due diligence period is 4-6 weeks, depending on the complexity of the transaction and the competitiveness of the process.

10. What legal issues (if any) cannot be covered by usual legal due diligence?

There are land interests that might not be registered in the Land Registry, such as easements which are not formally registered or plots of land which as a consequence of prescription (*verjaring*) are transferred to a different owner. An example is a scenario wherein a person has made daily use of an access road on someone else's private property for a prolonged period of time. Although a formal easement might not be registered, if a landowner has allowed such use for a prolonged period of time, an easement may still be deemed to exist. Please also refer to Q9 for an overview of other advisors which might need to be involved in addition to a legal advisor.

11. What is the usual process for transfer of commercial real estate?

Transaction Steps	Seller	Buyer	Comments
Heads of terms ("HoT")	Prepare and negotiate HoT Collate data room documentation comprising title documents and property information (depending on scope due diligence – see Q9)	Negotiate HoT	Parties may agree whether the HoT are binding or not upon the parties (if not binding an exclusion might be made for agreed exclusivity and confidentiality provisions) Most data rooms are nowadays hosted on virtual data sites · Depending on parties involved: Parties need to provide KYC/AML documentation
Preparation of sale and purchase agreement ("SPA")	Prepare draft property sale and purchase agreement (unless agreed that the Buyer shall make a first draft) Prepare any ancillary documents (e.g. annexes such as rent roll, list of agreements to be transferred etc.) Negotiate SPA and ancillary documents Prepare release mechanism for existing financing and mortgages with financing banks (unless in case of a rollover)	Carry out legal and other due diligence Arrange a property valuation and structural survey if desired Negotiate SPA and ancillary documents Arrange new financing (unless in case of a rollover)	No prescribed form of SPA Under certain circumstances cartel clearance is required
Signing to closing	Satisfy any seller's conditions to closing Obtain redemption statement and release documentation from existing lender Obtain any public law approvals (such as a waiver from the municipality in case the municipality has a right of first refusal pursuant to the Municipalities Preferential Rights Act (*Wet Voorkeursrecht Gemeenten)*	Payment of a deposit if agreed at or shortly following signing (typically 5-10%) Arrange funding including new bank debt	Often a deposit is agreed on signing, which will forfeit if the buyer fails to complete the sale (unless failure was due to the seller) Deposit will typically be paid to notary's escrow account
Closing	Use price to pay off existing debt (through use of purchase price funds) Terminate existing insurances unless it is agreed that these remain in place	Satisfy new lender's loan conditions precedent Pay balance of price (e.g. minus any deposit) Pay RETT to the extent applicable Put new insurances in place	Notarial involvement for the transfer of the properties (in case of an asset deal) or transfer of the shares (in case of a share deal) and the registration thereof
Post-closing	Physical hand-over of property from seller to buyer (keys etc.) True up of property charges and service charges depending on regime agreed in the SPA Send rent authority letter to tenants with new payment instructions (unless property manager remains the same) Transfer tenants' rent deposits from seller to buyer to the extent applicable Hand over other relevant documents		

12. Is it common for real estate transfers

to be effected by way of share transfer as well as asset transfer?

Yes, both deal structures are common. Real estate is commonly held through specially formed entities and there may be a tax advantage to transferring the interests in those entities rather than the underlying real estate. Please see Q8 and Q17 for further details in this respect.

13. On the sale of freehold interests in land does the benefit of any occupational leases and income automatically transfer?

Under Dutch law, with the transfer of the interests in land, the owner's rights and obligations are also transferred to the new owner. This means that the new owner is obligated to provide enjoyment (*huurgenot*) under an existing lease agreement and the new owner will be entitled to the income resulting from the lease agreement (please see below for an exception). So, as a general rule of Dutch law, sale does not affect lease. Therefore, the tenant will not suffer any disadvantage as a result of the transfer of the property to another owner. The 'sale does not affect lease-principle applies accordingly in case the landlord establishes a limited right in favour of a third party while a lease agreement has already been concluded, in which case the limited owner will have to respect the existing lease agreement.

There are exceptions to almost each general rule. For example, rent instalments that were already due and payable at the time of transfer will have to be paid to the former landlord, unless they have been assigned (*gecedeerd*) by the former landlord to the new landlord, in which case the tenant must have been informed.

14. What common rights, interests and burdens can be created or attach over real estate and how are these protected?

The Dutch Civil Code (*Burgerlijk Wetboek*) distinguishes between rights in rem (*zakelijke rechten*) and personal rights (*persoonlijke rechten*). Rights in rem concern absolute rights enforceable against any third party and continue even if the property has passed into the hands of third parties. In contrast, personal rights are rights which can only be exercised in relation to the contracting party or parties (so particular legal subject(s)) and which therefore do not automatically transfer with the sale of immovable property. Personal rights on real estate are not registered with the Land Registry.

Apart from ownership, the Dutch Civil Code (*Burgerlijk Wetboek*) acknowledges the following rights on property:

- right of superficies (*opstalrecht*), which allows another party to obtain ownership of buildings, structures or plants located in, on or above the relevant real estate;
- ground lease (*recht van erfpacht*), which allows another party to make use of the relevant real estate;
- easement (*erfdienstbaarheid*), which entails an encumbrance imposed upon the relevant real estate and in favour of another immovable property;
- usufruct (*vruchtgebruik*), which allows another party to make use of the real estate in question and enjoy its fruits; and
- mortgage (*hypotheekrecht*).

These limited rights must be established by notarial deed and have to be registered in the Land Registry in order to make their existence known to the public. This protects the limited rights by preventing third parties from being unaware of the existence of the rights and from invoking good faith.

As a rule, the oldest right prevails. After the owner has established a limited right on the property, its ownership will be encumbered with a limited right, which means that the owner is unable to transfer the property without the encumbrance in question, or to establish another limited right on the property which would interfere with the previously established limited right.

To make a personal right transfer with the transfer of real estate, one can make use of a perpetual clause (*kettingbeding*) or a qualitative obligation (*kwalitatieve verplichting*). The transfer by means of a perpetual clause implies that any contract of sale of the immovable property in question must contain this clause. A qualitative obligation requires a notarial deed and shall be registered in the Land Registry. The obligation is binding on anyone acquiring the property, but it only concerns obligations to *tolerate* or *refrain* from acts relating to the property.

In addition, an (purchase) option right can be attached to real estate, which concerns an irrevocable offer of sale. Should the holder of an option right want to buy the immovable property, he/she only needs to indicate that he/she wishes to exercise its option right.

Real estate may also be subject to a pre-emption right, which, in case the property owner decides on selling the property, implies the obligation of the owner to offer it to a certain party first. An example is the pre-emption right on land that the national government, the provinces or

the municipalities may have under the Municipalities Preferential Rights Act (*Wet voorkeursrecht gemeenten*).

Nationally listed buildings (*rijksmonumenten*) may also entail special burdens, such as the obligation to obtain a special environmental permit prior to commencement of maintenance or restoration works.

15. Are split legal and beneficial ownership of real estate (i.e. trust structures) recognised

The Dutch Civil Code (*Burgerlijk Wetboek*) does not make a distinction between beneficial or economic ownership of real estate. However, from a Dutch tax perspective, split legal and beneficial ownership are recognized. For example, for corporate tax purposes, the holder of legal title is not necessarily the beneficial owner (e.g., in the case of certain fund structures where title is held by a foundation, but the fund investors are beneficial owners). Beneficial (or economic) ownership is also recognized for Dutch RETT purposes. For RETT purposes, a split legal and beneficial ownership can again be relevant in certain fund structures (or also in for example limited partnership structures) but beneficial/economic ownership transfers are also possible where certain arrangements are put in place giving a person who is not the holder of the legal title certain rights to a property that can be construed as a transfer of beneficial/economic ownership (as defined in the Dutch RETT Act (*Wet op belastingen van rechtsverkeer*)).

16. Is public disclosure of the ultimate beneficial owners of real estate required?

As a result of European anti-money laundering and counter terrorist financing legislation, as of 27 September 2020, a special register has been set up to ensure clarity on the ultimate beneficial owner (UBO) of a company or legal entity established in the Netherlands. The UBO register cannot be accessed through the Land Registry, but is part of the trade register and is managed by the Chamber of Commerce (*Kamer van Koophandel*) in accordance with the Money Laundering and Terrorist Financing Act (*Wet ter voorkoming van witwassen en financierng van terrorisme*) and the Commercial Register Act (*Handelsregisterwet 2007*).

Organizations that must register UBOs include common vehicles to hold real estate, including but not limited to, non-listed private limited companies (*B.V.'s*) and public liability companies (*N.V.'s*), other legal entities, such as foundations (*stichtingen*) and cooperatives (*cooperatives*), and partnerships (*personenvennootschappen*). Exemptions are made for, among others, legal persons governed by public law, certain historical legal entities, one-man businesses (*eenmanszaken*) and listed companies incorporated in the Netherlands (as well as their 100% subsidiaries). Also trusts and similar legal arrangements need to register their relevant UBOs.

Details of the UBO that are publicly available include the name, date of birth, country of residence and nationality, and the nature and percentage of the UBO's interest in the entity. Other information, such as the UBO's date of birth, address, ID document, citizen service and tax numbers, as well as documents concerning the precise contents of the ultimate beneficial ownership, will be not publicly available, but can be accessed by the competent authorities and the Financial Intelligence Unit (*Financiële Inlichtingen Eenheid*). Retrieving the data from the register is subject to a fee.

17. What are the main taxes associated with commercial real estate ownership and transfer of commercial real estate?

Ownership: Property tax (*Onroerende zaakbelasting*) and certain property related charges (sewage and waterboard charges) are payable to municipalities or waterboards. Tax rates vary depending on where the property is situated as these taxes and charges are levied locally. Taxes are generally levied by reference to a "market value" (*woz-waarde*) of the property assessed annually by the local authorities.

Direct taxes: Corporate tax applies to the taxable net income derived from the real estate (irrespective of whether such income is rent or a capital gain). Currently (2023), the Dutch corporate tax rate is 19% for the first EUR 200,000 of net income and 25.8% on net income in excess of EUR 200,000.

Indirect taxes: In general, leasing of real estate is VAT exempt. However, subject to certain conditions (especially the condition that the tenant must use the real estate almost exclusively for VAT taxable supplies), a landlord and tenant can jointly elect for application of VAT on rent of commercial real estate, which generally enables the landlord to recover input VAT.

Taxes on asset sales are:

Real Estate Transfer Tax (RETT): The acquisition of (certain rights to) real estate situated in the Netherlands, including commercial real estate, is in principle subject to 10.4% Dutch RETT, with the exception of residential properties acquired by the actual residents (2%).

Generally speaking, RETT is levied by reference to the higher of the consideration paid for the acquisition of the real estate and its fair market value. Certain adjustments to the taxable base are required to be made under the relevant law, which can especially be relevant (and have an increasing factor) in the case of certain rights related to real estate such as rights of ground lease (*erfpachtrecht*) or rights of superficies (*opstalrecht*).

Exemptions and/or reductions may apply, e.g., if in respect of the relevant real estate Dutch RETT has been paid in relation to a previous acquisition of the same asset (e.g., by the seller) in the period of 6 months before the acquisition, or in respect of real estate assets that are newly constructed or still under construction (i.e., unused or within 6 months from first use). Also, under circumstances and subject to anti-abuse rules, transfers within a group can be exempt.

Furthermore, the acquisition of shares in a company the assets of which consist for 30% or more of Dutch real estate may in principle also be subject to RETT, depending on the total amount of acquired shares (including shares already held) by the relevant acquirer (together with related parties). As outlined in more detail in the answer to Q3, a legislative proposal is pending that introduces a new 4% RETT rate for certain share acquisitions that would currently qualify for a RETT exemption.

Value Added Tax (VAT): The Dutch general VAT rate is currently 21%. The sale of real estate that (i) qualifies as building land, (ii) is under construction or (iii) is newly constructed (and within two years of its first use/occupation) is generally subject to VAT by operation of law. In other cases, the transfer of Dutch real estate should generally be exempt from VAT, unless the seller and buyer jointly elect to apply VAT on the transfer. Such election is subject to certain conditions, especially the condition that the buyer must use the real estate almost exclusively for VAT taxable supplies. A transfer of Dutch real estate may also qualify as a VAT-free 'transfer of a going concern', which may typically be the case if a leased property is transferred together with the lease contract(s) and the buyer continues to operate the property.

Capital Gains Tax: Dutch corporate tax rules do not make a distinction between capital gains and ordinary (rental) income. Both are taxed at the prevailing corporate tax rates; see above under *Direct taxes*.

18. What are common terms of commercial leases and are there regulatory controls on the terms of leases?

Dutch tenancy law is governed by Book 7 of the Dutch Civil Code.

Under Dutch law, business premises are divided in so-called (i) "290-business premises" (article 7:290 Dutch Civil Code), such as retail space, hotels and restaurants, and (ii) "230a-business premises" (article 7:230a Dutch Civil Code), such as office space, warehouses and commercial space. Both are regulated in a different manner.

In the Netherlands, the Real Estate Council (*Raad voor Onroerende Zaken*, "**ROZ**") has drafted various model lease agreements (both for residential, "290-business premises" and "230a-business premises"). These ROZ models are often used.

These are a few key aspects of commercial leases:

Lease term: the duration of a lease agreement can be agreed for an indefinite period or for a fixed period, after which the agreement will be extended for new periods of fixed duration or for an indefinite period, unless notice of termination is given.

In case the lease concerns "290-business premises", the initial lease term shall in principle be set at five years, which thereafter shall be extended for another five years. The tenant can terminate at the end of the first five-year period and at the end of the ten-year period. The landlord has more limited termination rights and a different regime (with no extension mechanism prescribed by law) applies if the parties agree to an initial term of less than two years.

Rent: parties are free to agree upon the amount of rent and indexation thereof and on the payment for service costs (whereby triple net leases can be agreed as well). It is common to include an indexation clause, as a result of which the rent is indexed annually and in accordance with the Consumer Price Index (CPI) as published by Statistics Netherlands (*Centraal Bureau voor de Statistiek*). In respect of commercial leases, a landlord may provide for rent incentives such as a rent-free period or fit-out contributions. Contrary to the lease of "290-business premises" (where each party may ask for an adjustment of the rent based on market circumstances every five years), the statutory regime with respect to "230a-business premises" does not offer legal possibilities for an interim rent review during the term of the contract.

Extension and termination: For both "290-business premises" and "230a-business premises", the landlord has limited termination rights depending on the type of

lease.

According to Dutch mandatory law for "290-business premises", after the lapse of the first five-year period the lease agreement cannot be terminated by the landlord except on limited grounds, notwithstanding what was agreed in the lease agreement. One of these limited grounds is when landlord urgently needs the leased premises for its own use or when the tenant has not acted as a good tenant. After ten years, the landlord may also terminate if its interests for termination can be considered more important than the interests of the tenant to continue the lease. The landlord must ask the court to terminate, if the tenant does not agree.

For "230a-business premises", protection of the tenant applies against eviction. If a landlord wishes to terminate such lease, it must give the tenant a written notice of eviction. Termination and notice of eviction often take place at the same time. The obligation to vacate the leased premises is suspended by law for two months. In those two months the tenant may request the court (*kantonrechter*) to further suspend this obligation with a maximum period of one year. On the tenant's request, this term may be extended twice, each time with a maximum period of one year.

Permitted use: Without the landlord's prior written consent, the tenant is not permitted to use the leased property for any purpose other than that agreed between the parties. In general, and in accordance with the ROZ general terms and conditions, the landlord is responsible for obtaining any required permits, exemptions and approvals for the intended use of the rented property (unless otherwise agreed).

Maintenance and repair: According to Dutch law, a tenant is obliged to take care of minor maintenance and day-to-day repairs, for example the maintenance of technical installations, the replacement of bulbs, locks, taps and glass, and the painting of the interior of the premises. The landlord is obliged to perform extensive and constructive maintenance and major repairs. As this is not mandatory law, the parties may deviate contractually. Furthermore, the landlord is obliged to restore defects (*gebreken*) (excluding defects which are attributable to the tenant) that prevent the tenant from having the undisturbed enjoyment of the lease. The tenant is obliged to cooperate with urgent maintenance works to and – in some cases – renovations of the leased property. However, note that the right to undistributed enjoyment of the leased property remains unaffected, so a (temporary) reduction of rent of other compensation may be due in such a case.

VAT: Under Dutch law, the lease of real estate is in principle exempt from VAT. Parties, however, often opt for a lease subject to VAT as this may be beneficial for both parties and if not, parties agree upon a fee/compensation in that respect.

Service charges: The lease agreement often provides for a clause regarding the goods and services to be provided by or on behalf of the landlord. The landlord will charge the tenant for the costs associated with the aforementioned services, plus a surcharge for administration costs. This is subject to a system of advance payments and settlements because the costs usually only become known afterwards. A different system may be agreed (such as triple net).

Subletting: As a rule, the ROZ model lease (and the relating general terms and conditions) stipulate that sub-lease is only permitted with the landlord's prior written approval. Please note that the landlord may not unreasonably withhold its approval. Parties may agree otherwise.

Security: Security deposits are not regulated by Dutch law. It is common for the tenant to provide the landlord with a bank guarantee or deposit.

19. How are use, planning and zoning restrictions on real estate regulated?

The Spatial Planning Act (*Wet ruimtelijke ordening*) sets out the framework for the establishment, adoption and/or amendment of spatial plans. Please also see the reference to the Environmental Act in Q3 that will come in full force and effect as of 1 January 2024. The national government, provinces and municipalities have the authority to draw up spatial plans, of which the zoning plan is the most important (legally binding) instrument. A zoning plan is the central instrument of government to designate the allowed use of land and to impose restrictions to the building on the land. In the Netherlands, zoning plans are adopted by the municipal council (*gemeenteraad*) and must be updated within 10 years.

The Environmental Permitting (General Provisions) Act (*Wet algemene bepalingen omgevingsrecht*) regulates the integrated environmental permit (*omgevingsvergunning*) and makes it possible to grant a single permit for various activities such as construction, housing, monuments, spatial planning, nature and the environment. Under the Environmental Permitting (General Provisions) Act, the Municipal Executive is authorized to decide on the application for an integrated environmental permit.

As stated in Q14, real estate may also be subject to restrictions, such as a pre-emption right on land that the

national government, the provinces or the municipalities may own. In addition, conditions may be attached to the issue of leasehold (*erfpachtuitgifte*) and/or private agreements with the municipality.

20. Who can be liable for environmental contamination on real estate?

As a general rule, the polluter is responsible for environmental contamination on real estate. However, after a period of 30 years, or in the event that the polluter cannot be identified, the owner of the land may be held responsible for such pollution, regardless of whether the environmental contamination can be attributed to the owner. Should that not be possible, then the government should act as a safety net.

Under the Soil Protection Act (*Wet bodembescherming*) any person carrying out operations on or in the soil and who is aware or could reasonably have been expected to be responsible for contamination or deterioration of the soil as a result of those operations, shall be required to take all reasonable measures to prevent such contamination or deterioration or, if such contamination or deterioration occurs, to reduce and to reverse the contamination, deterioration and/or its direct consequences as far as possible. Any person carrying out operations on or in the soil who becomes aware of any contamination or deterioration of the soil caused by its operations shall, as soon as possible, report the contamination or deterioration to the Provincial Executive (*Gedeputeerde Staten*) of the province in which it occurs, indicating any measures intended to be taken or already taken.

In respect of the polluted land or the location where the immediate consequences occur, the Provincial States (*Gedeputeerde Staten*) may order (i) further investigations to be carried out or (ii) in the event of a major pollution incident, temporary security measures to be taken. These orders may only be given to a person who has a right in *rem* (*zakelijk recht*) or a personal right (*persoonlijk recht*) on that land and who has or has had the right to use it in the exercise of its business.

Furthermore, the Provincial States (*Gedeputeerde Staten*) may order either:

i) the person by whose actions an investigation or a serious pollution incident has been caused, or

ii) the owner or leaseholder (*erfpachter*) of the property on whose territory the pollution or its direct consequences occur,

to carry out further investigations or, in the case of a serious pollution incident, to carry out remediation investigations, to rehabilitate the soil, or to take any other specified measures.

Except for temporary security measures, a remediation order shall not be issued to the owner or the leaseholder (*erfpachter*) if he/she can prove that (i) during the period in which the pollution was caused, he/she has not had a lasting legal relationship with the person(s) causing the pollution, (ii) he/she has not been directly or indirectly involved in causing the pollution, and/or (iii) he/she was not aware, or could not reasonably have been aware, of the pollution at the time when the relevant right was acquired.

21. Are buildings legally required to have their energy performance assessed and in what (if any) situations do minimum energy performance levels need to be met?

For most buildings, such as housing and office building, it is legally required to have their energy performance assessed upon sale, rental and completion. Since 1 January 2023 office space needs to have at least an energy label C but this requirement is not applicable, amongst others, if the office space is <50% of the total usable area of the building, the usable area of the office space and its ancillary functions in the building is <100 sq. m or the measures required to achieve energy label C have a payback period of more than 10 years.

The EPC label will become even stricter by 2030. The target for 2030 for (existing) buildings will be at least average label A. It should be noted that it is not a legal requirement for office buildings to have an energy label A by 2030. Furthermore, Dutch companies that use more than 50,000 kilowatt hours of electricity or 25,000 cubic meters of natural gas or equivalent per year, are obliged to take energy-saving measures with a payback period of 5 years or less. In addition to the energy-saving measures obligation, any company that is subject to said energy-saving measures has an obligation to inform the Netherlands Enterprise Agency (*Rijksdienst voor Ondernemend Nederland)* on the energy-saving measures taken by its company. For more details on the energy-saving measures and information requirement we refer to the website of RvO.

22. Is expropriation of real estate possible?

Yes, under the Expropriation Law (*Onteigeningswet*) expropriation of real estate in the public interest is possible. Expropriation is only possible if the government can demonstrate that such expropriation serves the

public interest and that such public interest cannot be realised without expropriation. Expropriation is only allowed under strict legal conditions, as ownership is considered to be a fundamental right. If the real estate is encumbered with a limited right, this limited right can be expropriated separately.

Transfer of ownership to the government by expropriation is only possible if an amicable agreement (*minddelijke schikking*) could not be realised. The expropriating party will sue the owner in court by a Royal Decree (*Koninklijk Besluit*). The owner is entitled to compensation for its loss of entitlement.

23. Is it possible to create mortgages over real estate and how are these protected and enforced?

A mortgage over real estate is created by notarial deed, which deed will need to be recorded in the public registers.

In principle mortgage rights will be enforced by public auction (*openbare verkoop*) of the property However, a private sale (*onderhandse verkoop*) at the request of the mortgagee or the mortgage lender and with the consent of the court is also possible.

Mortgage holders receive special protection in case of bankruptcy: they can exercise their mortgage right as secured creditors (*separatist*), in the same way as they could have done if the bankruptcy had not taken place.

24. Are there material registration costs associated with the creation of mortgages over real estate?

A right of mortgage over real estate can only be established by way of execution of a notarial deed of creation of a right of mortgage and the registration of the true copy of such deed in the public registers. The execution of the deed of mortgage in front of a Dutch civil law notary (*notaris*) will trigger legal fees for the services of the notary. Such legal fees also include the costs incurred by the notary for the checks at the Land Registry with regard to the relevant parcels of land. After the execution of the deed of establishment of the right of mortgage, the true copy of the deed will be registered with the Land Registry, which will trigger registration costs (EUR 137.50 per deed).

The creation of mortgages over Dutch real estate is not subject to Dutch stamp duties or similar Dutch taxes.

25. Is it possible to create a trust structure for mortgage security over real estate?

There is no concept of trust in Dutch law, but foreign trusts are recognized as legally valid.

Security in the Netherlands in favour of several parties is arranged by means of a so-called parallel debt structure. In the case of parallel debt, typically an individual, independent claim of one particular legal entity (the "**Security Agent**") on the debtor is created, which amount is equal to the amounts of the claims of the other financiers. In the event of payment to the Security Agent or to the other financiers, the corresponding claim on the other financiers or the Security Agent is reduced by the amount of that payment.

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