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# CONTENTS

# Netherlands

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## Overview

The Netherlands is widely recognised as a leading international financial centre and has a mature investment funds industry with an attractive investment environment due to, amongst others, flexible corporate legislation, various tax structuring options, and an extensive network of bilateral investment treaties and tax treaties.

In terms of both fundraising and invested capital, 2020 and 2021 have been successful years for market participants in the Netherlands. The most recent research conducted by the *Nederlandse Vereniging van Participatiemaatschappijen* (the Dutch Association of Private Equity Firms)[1] shows that in 2020 alone, Dutch private equity firms raised around €6.8 billion in new funds, of which approximately €1.6 billion in new funds were raised by Dutch venture capitalists. In 2020, 204 Dutch private equity or venture capital firms managed approximately €33.8 billion (committed capital) in 454 funds, and over €7.5 billion was invested by national and international private equity and venture capital firms in Dutch companies. As a consequence of growing numbers for fundraising and private equity and venture capital investments in the Netherlands, the Dutch fund finance practice also enjoys increased attention, which we do not expect to decline in 2022.

The COVID-19 pandemic did not adversely affect Dutch fund formation and financing practice in 2020 and 2021. We have seen a continued and significant increase in the number of fundraisings, investor appetite and fund financings in the Netherlands. Consequently, we are looking forward to an exciting 2022, which will potentially provide for a great investment environment for fund managers.

In view of the aforementioned relevance of the Dutch fund formation and fund finance market, this chapter seeks to provide further background on the following relevant aspects: (a) fund formation and the most commonly used Dutch fund vehicles; (b) regulation of fundraising and fund managers; (c) fund finance in the Netherlands; (d) structuring the security package; and (e) the year ahead.

## Fund formation and the most commonly used Dutch fund vehicles

A Dutch alternative investment fund (an **AIF**)[2] may be structured in various ways, both as corporate and contractual entities. Corporate entities have legal personality (*rechtspersoonlijkheid*), enabling them to hold legal title to assets, and are governed by mandatory corporate law, whereas contractual entities lack such legal personality and are unable to hold legal title, but enjoy the benefit of more contractual freedom. The most frequently used corporate investment vehicles are the private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*) and the cooperative with excluded liability (*coöperatie met uitgesloten aansprakelijkheid*). Contractual investment vehicles

are most commonly established in the form of a limited partnership (*commanditaire vennootschap*) or a mutual fund (*fonds voor gemene rekening*). The ultimate selection strongly depends on the outcome of relevant tax and legal structuring analyses.

Regardless of whether a contractual or legal entity is selected, an AIF established in the Netherlands should take into account that the European Alternative Investment Fund Managers Directive 2011/61/EU (the **AIFMD**) is applicable and has been implemented into the Dutch Act on Financial Supervision (*Wet op het financieel toezicht*, or the **AFS**). Consequently, the AIFMD and all rules and regulations promulgated thereunder (including Delegated Regulation (EU) 231/2013, the **Delegated Regulation**) must be complied with in the Netherlands by any alternative investment fund manager (an **AIFM**), unless an AIFM can benefit from exemptions (such as, *inter alia*, AIFMs managing AIFs below the Threshold (as defined below)).

In the event that a Dutch licensed AIFM establishes an AIF as a contractual investment vehicle (lacking legal personality), it is – in principle – required under the AFS to also establish a single-purpose corporate entity to hold the assets of one or more of such AIFs set up by the licensed AIFM.

### Regulation of fundraising and fund managers

The management or marketing of AIFs in the Netherlands by 'large' AIFMs triggers the obligation to obtain a licence in the Netherlands, subject to certain exemptions and grandfathering rules. AIFMs are considered 'large' if they, directly or indirectly, manage portfolios of AIFs whose assets under management amount to €500 million or more, or – when open-ended or leveraged – €100 million or more (together, the **Threshold**). An AIFM is deemed to manage an AIF in the Netherlands if such AIFM is established in the Netherlands, or if the AIF managed by it is established in the Netherlands.

Dutch AIFMs that fall below the Threshold may manage and market their AIFs without an AIFMD licence in the Netherlands, provided that:

a) the AIF's units or shares are exclusively offered to professional investors within the meaning of the AFS (*e.g.* banks, insurers, pension funds, brokers, AIFMs, AIFs, or qualifying large corporates); or
b) the AIF's units or shares are offered to fewer than 150 persons, or have a nominal value of, or are offered for a consideration payable per investor of, at least €100,000, provided that a banner or selling legend as to the AIFM's unregulated status (in a predefined size and layout) is printed on the AIF's offering documents; and
c) in each case, the relevant AIFM is registered with the Dutch competent authority, the AFM. The aim of said registration is (amongst others) to ensure that the AFM can assess whether or not the sub-Threshold regime is legitimately relied upon, and to effectively monitor any build-up of systemic risks. Such Dutch AIFMs are required to disclose to the Dutch Central Bank (*De Nederlandsche Bank*), amongst others, information on the main instruments in which the AIFs are trading, the principal exposures, and the most important concentration of the AIFs managed.

Dutch AIFMs that do not require a licence for managing and marketing their AIFs in the Netherlands may voluntarily apply for such licence, provided such AIFM complies with all applicable AIFMD requirements (as implemented into Dutch law). Not many Dutch AIFMs have chosen to apply for an AIFMD licence voluntarily.

Additionally, considering that AIFs making private equity investments are not excluded from the scope of the venture capital regulation (Regulation 345/2013/EC, or **EuVECA**),

EU-based managers of (EU) AIFs that comply with the conditions of EuVECA may benefit from an EU marketing passport as introduced therein. Such passport allows for the marketing of units or shares to potential investors investing at least €100,000 or to investors that are treated as professional clients (within the meaning of Directive 2014/65/EU), in each case provided that they have confirmed their awareness of the risks associated with their investment. Potential investors that do not otherwise qualify as professional investors may opt to be treated as such. Both licensed AIFMs and sub-Threshold AIFMs can benefit from EuVECA: enabling licensed AIFMs to use the EuVECA marketing passport to also market interests to investors that commit to invest at least €100,000 (and not only to professional investors as allowed under Article 32 of the AIFMD). We see that an increasing number of (sub-Threshold) Dutch AIFMs obtain EuVECA labels to benefit from the marketing passport (providing market access in a transparent manner).

Finally, 2021 has also seen two new sets of European laws entering into force that affect how AIFMs can market their AIFs to investors. The first being Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector (the **SFDR**) aimed at prohibiting AIFMs from 'greenwashing' their product through subjecting them to comprehensive disclosure requirements. Both licensed and sub-Threshold AIFMs are required to satisfy the disclosure requirements prescribed by the SFDR. The character of the disclosures that an AIFM is required to make in respect of an AIF depends on how such AIF is categorised (*i.e.* as an AIF promoting environmental or social characteristics, an AIF having a sustainable objective or an AIF that does none of the foregoing). The second being a new set of rules on the cross-border marketing of AIFs, the Cross-Border Distribution Directive (EU) 2019/1160 and the Cross-Border Distribution Regulation (EU) 2019/1156 (together, the **Cross Border Distribution Rules**). On the basis of the Cross Border Distribution Rules, licensed AIFMs and AIFMs managing EuVECA-labelled AIFs can now benefit, for instance, from an EU harmonised pre-marketing regime, additional rules for marketing to retail investors, transparency on cross-border supervision costs and the de-notification process of AIFs marketed under the passport. Under the framework of the Cross Border Distribution Rules, the rules applicable to marketing communications issued by AIFMs in respect of their AIFs are also replaced by new, more comprehensive rules that are supplemented by the European Securities and Markets Authority's Guidelines on marketing communications. Starting February 2022, qualifying AIFMs' marketing communications should comply with these new requirements.

## Fund finance in the Netherlands

With increasing availability of capital for investments and demands for high returns by investors, the need for financing solutions by Dutch AIFMs and AIFs is expected to continue its upturn. Depending on the type of AIF, the need for financing can vary, but is typically limited to (i) the more traditional capital call facilities, and (ii) credit facilities to provide leverage or liquidity for the AIF (often based on the net asset value of investments).

There is limited data publicly available on the use of the various types of fund financing in the Netherlands, which makes it difficult to assess the size of the Dutch fund finance market. In our experience, traditional secured capital call facilities continue to be the main type of financing selected by AIFMs. It has become customary to explicitly refer in the relevant fund documentation to the possibility to take out this type of financing and the creation of security by the AIF on its assets (including receivables that investors owe to the fund). The purpose and use of traditional capital call financings are expected to further expand.

In addition to bridging capital calls, those financing arrangements are also being used to 'bridge' the third-party financing to be arranged for at the level of the portfolio company (*i.e.* at bidco level) and thus speed up acquisition processes.

An important consequence of incurring such leverage at the level of a Dutch AIF is that, depending on the details of the financing, the relevant AIFM managing such AIF may be required to obtain an AIFMD licence in the Netherlands, as further discussed below.

Whether or not an AIF incurs leverage may affect the relevant AIFM's regulatory status (*i.e.* it may lead to a lower Threshold being applied for purposes of determining whether an AIFMD licence is required in the Netherlands). Additionally, if AIFs deploy leverage, the AIFMD (and rules and regulations promulgated thereunder) imposes additional obligations on an AIFM managing such AIF. Consequently, incurring leverage may affect an AIFM.

The term 'leverage' is defined by the AIFMD as any method by which an AIFM increases the exposure of an AIF it manages, whether through borrowing of cash or securities, or leverage embedded in derivative positions, or by any other means.

While determining whether an AIF deploys leverage within the meaning of the AIFMD and when calculating exposure, the Delegated Regulation dictates that AIFs should 'look through' corporate structures. Therefore, exposure that is included in any financial and/or legal structures involving third parties controlled by the relevant AIF, where those structures are specifically set up to increase, directly or indirectly, the exposure at the level of the AIF, should be included in the calculation. However, for AIFs whose core investment policy is to acquire control of non-listed companies or issuers, AIFMs should not include in the calculation any leverage that exists at the level of those non-listed companies and issuers, provided that the relevant AIF does not have to bear potential losses beyond its capital share in the respective company or issuer.

On the other hand, borrowing arrangements entered into by the AIF are excluded under any of the abovementioned methods if these are:

a) temporary in nature; and
b) fully covered by 'capital commitments' from investors (*i.e.* the contractual commitment of an investor to provide the AIF with an agreed amount of investment on demand by the AIFM).

Even though the Delegated Regulation considers in its recitals that revolving credit facilities (**RCFs**) should *not* be considered as being temporary in nature, it is the prevailing view that capital call facilities (by way of an RCF or otherwise) can be structured as being temporary in nature if certain requirements otherwise applicable to non-RCFs are similarly complied with. In order to structure these facilities as temporary in nature, certain features can be implemented, such as: (i) a mandatory clean down to occur once every 12 months (followed by a period during which the facility is not used); or (ii) an obligation to repay each loan, with the proceeds of capital contributions, within 12 months of drawing such loan.

Structuring these capital call facilities as temporary in nature typically fits their purpose, as these facilities are typically utilised to bridge the liquidity gap at the level of the AIF to be funded ultimately out of the proceeds of capital contributions. Such a time gap between inflowing money from investors and outflowing money for investments can be caused by: (a) the period, often 10 business days, it takes before capital drawn by the AIFM is actually contributed to the AIF; (b) the desire of the AIFM to bundle capital calls (so as not to burden the investors with drawdowns of smaller amounts); (c) a defaulting investor not contributing; and (d) the AIFM delaying certain capital calls, as this may boost the internal rate of return for investments in and by the AIF.

## Structuring the security package

Credit facilities to be granted to AIFs can be secured in a variety of ways. For example, security may be granted over the assets in which an AIF would (indirectly) invest. Typically, capital call credit facilities granted to AIFs would be secured by a right of pledge over (i) the bank account (which is considered a receivable on the account bank under Dutch law) on which capital contributions are made by the AIF's investors, and (ii) all receivables or contractual obligations that the investors owe to the AIF, such as the right to make drawdowns from the capital commitments. Pursuant to Dutch law, security over receivables can be established by way of a disclosed right of pledge, or by way of an undisclosed right of pledge.

A disclosed right of pledge is created by way of a security agreement (or notarial deed) and notification of the right of pledge to the relevant debtors of the secured receivables. An undisclosed right of pledge is created either by way of a notarial deed or by way of a security agreement that is registered with the Dutch tax authorities for date-stamping purposes. As an undisclosed right of pledge can only be created over present receivables and future receivables arising from legal relationships existing at the time of creation of such undisclosed right of pledge, it is required to periodically file supplemental security agreements with the Dutch tax authorities to also secure present and future receivables resulting from legal relationships that have been entered into after the date of the initial security agreement (or notarial deed).

With respect to creating a right of pledge over Dutch bank accounts, the applicable general terms and conditions are of relevance. The general terms and conditions used by most Dutch account banks create a first-ranking right of pledge over such bank account for the benefit of the account bank, and state that the bank account cannot be (further) pledged. Consequently, the cooperation of such account bank is required to create a (first-ranking) right of pledge over a Dutch bank account. It is becoming increasingly difficult to convince Dutch account banks to cooperate and consent to the creation of a right of pledge over bank accounts for the benefit of third-party lenders.

With respect to creating a disclosed or undisclosed right of pledge over receivables of the AIF on its investors, choosing one form of pledge over the other depends, to some extent, on whether it is commercially desirable to disclose the right of pledge to the relevant investors, and whether an undisclosed right of pledge is acceptable to the beneficiary of the right of pledge. With pledge notices customary to be sent to investors in key jurisdictions such as Luxembourg, the United Kingdom and the United States, it is becoming more common to notify investors of a right of pledge over the investor receivables in the Netherlands as well. Dutch law allows for sufficient flexibility as to the form of such notification to be made; consequently, such notification can be made by uploading the notice to the AIF's investor portal, making the process of serving notice a fairly effortless procedure.

With respect to creating an undisclosed right of pledge over capital commitments in particular, the question is whether the receivable owed by the investor to the AIF with respect to payment of the capital commitments qualifies as a current receivable, as a future receivable arising from an existing legal relationship, or as an absolute future receivable.

If it must be held that the legal relationship, and thus the receivable arising out of that legal relationship, only comes into existence once the AIFM sends the capital call notice to the relevant investor, then the receivable is an absolute future receivable. This means that, prior to the moment that the AIFM has sent the capital call notice, only a disclosed right of pledge can be created over this receivable. In Dutch literature and case law, the prevailing

view is that the receivable owed by the investor to the AIF qualifies as a future receivable arising from an existing legal relationship, which receivable comes into existence once the AIFM sends the relevant capital call notice to the relevant investor and can also be made subject to an undisclosed right of pledge. However, if the AIFM sends the capital call notice after the pledgor's (the AIF's) bankruptcy, then the receivable comes into existence after such pledgor's bankruptcy and therefore forms part of the pledgor's bankruptcy estate unencumbered by any right of pledge. To overcome this potential problem, a provision could be included in the fund documentation, stating that the parties acknowledge and agree that the receivable arising out of the right to make drawdowns from the capital commitments comes into existence once the fund documentation is entered into and thus constitutes an existing but conditional claim; conditional upon the capital call being made. A right of pledge created over an existing but conditional receivable is also valid if the condition (the capital call) is met after the pledgor's bankruptcy.

However, there is no statutory law or limited case law confirming that such a provision would work to avoid any of the aforementioned issues. To mitigate this risk, the pledgee may request to be granted a direct, independent right to issue capital call notices in default situations. Often, such direct agreement is not (commercially) feasible. Nowadays, we see that fund documentation caters for the possibility for the pledgee to make capital calls by submitting drawdown notices (to avoid the need to arrange this at a later stage via direct agreements, which is often practically and commercially not feasible). Alternatively, the AIFM may grant a power of attorney to the pledgee to issue, in certain default situations, a capital call notice in the AIFM's name to the investors (again, this right is often acknowledged in the fund documentation). However, as a power of attorney is cancelled in the event of bankruptcy of the entity that has granted the power of attorney, the latter option is less favourable to the pledgee.

The pledgee should consider that, in relation to an undisclosed right of pledge, it may only collect on a receivable after the debtor has been notified of such right of pledge. Until notification has been made, the pledgor remains authorised to collect payments and the debtor of the relevant receivable remains authorised to pay to the pledgor.

Both the pledgor and pledgee may notify the debtors. However, unless the pledgor and pledgee have otherwise agreed, the pledgee may only notify the debtors if the pledgor or debtor of the secured claim has failed to, or the pledgee has good reason to believe that the pledgor or debtor of the secured claim will fail to, (properly) perform its obligations owed towards the pledgee.

Another element to take into consideration when structuring the security over the AIF's assets is that receivables and contractual rights may, through a clause in (the general conditions to) the contract from which such receivables or contractual rights arise, be made non-assignable/transferable or 'non-pledgeable'. Depending on the wording of the relevant provision of the contract, such non-assignability clause could have an effect *in rem*, in which case creating a right of pledge over such receivable or right will simply not be possible. The fund documentation should be carefully checked on this.

## The year ahead

As emphasised, 2020 and 2021 have been interesting and important years for Dutch fund formation and fund finance markets. With current national and international political developments confirming and strengthening the Netherlands' position as a mature and well-equipped jurisdiction for funds and investments, we expect that 2022 will be another

important year for the Dutch private equity and venture capital markets. With the Dutch fund finance markets maturing, we expect to see an increase in the diversity and volume of the fund finance products offered in the Netherlands; for example, by an increase in the number of hybrid facilities, general partner solutions and co-investment facilities offered. In view of, amongst other things, the evolving legislation in this respect (such as the SFDR), a key development will likely be the integration of ESG factors in fund facilities, whereby measurable ESG performance indicators can directly impact the applicable interest margin.

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**Endnotes**

1. An interactive graphic providing an overview of the NVP's findings can be found on its website: https://nvp.nl/feiten-cijfers/marktcijfers/ (this reference is accurate on the date of this publication).
2. We note that this chapter does not focus on collective investment undertakings that require a licence pursuant to Article 5 of Directive 2009/65/EC (UCITS).

* * *

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