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Real Estate

Netherlands
Trends and Developments
Ralph van der Kooi, Maarten Tinnemans,
Marloes Voorrips and Alexandra van der Kruk
Loyens & Loeff

chambers.com

2020

Trends and Developments

Contributed by:
Ralph van der Kooi, Maarten Tinnemans,
Marloes Voorrips and Alexandra van der Kruk
Loyens & Loeff** **see p.7

Market Trends and Developments
The Netherlands plays a competitive role in the world economy, partly due to its favourable economy, political stability, quality of infrastructure and labour market, and its strategic location as gateway (both by sea and air) to the other main European economies. As a consequence, the Dutch real estate market is still considered an interesting investment category and a vibrant sector that is constantly developing.

Residential
House prices have risen strongly in the Netherlands over the past couple of years. The main drivers for these rising prices were low interest rates, the growing deficiency of housing (especially in the country's major cities), the shortage of attractive investment opportunities and the "nitrogen crisis" (see hereafter). This has resulted in a growing number of houses becoming unaffordable for potential starters on the housing market.

Despite the rising prices, both national and foreign investors seemed very much interested in acquisitions of Dutch residential portfolios over the past year. Investors consider an investment in Dutch real estate as a safe investment thanks to the economic, political and social aspects mentioned above. However, the rising prices in the major cities have caused these investors to focus mainly on investment opportunities in the periphery of the major cities.

New foreign investors, representing both private and institutional capital, entered the Dutch residential market last year. A good example was Sweden's Heimstaden, which acquired almost 10,000 residential units at once for a transaction price of around EUR1.4 billion. Through this transaction, Heimstaden became the third-biggest residential real estate investor in the Netherlands.

Another clear trend is the interest by foreign investors in student housing in the main Dutch university cities. Developers of residential real estate have quickly responded to this trend by expanding their focus to the development of student housing in university cities as Amsterdam, Utrecht and Groningen.

On 29 May 2019, the Administrative Jurisdiction Division of the Council of State (ie, the highest Dutch administrative court) rendered a landmark decision in which the Dutch approach to nitrogen deposition was rendered in violation of the EU Habitats Directive. Since this ruling it must be assessed, on a case-by-case basis, whether a (residential) development results in nitrogen deposition that might adversely affect nature conservation areas. As a result, many Dutch residential developments have faced a (temporary) halt or slowdown. In spite of progress being made over the last few months, solutions are still being discussed between governments and involved market parties.

Healthcare
As in many other countries, the number of elderly people in the Netherlands is increasing. Also, elderly people are living longer. This so-called double greying leads to an increasing demand in elderly care, healthcare real estate and life cycle-proof real estate. Dutch healthcare real estate as an investment product is still developing, but market analysts are expecting growing investor appetite in the years ahead.

Offices
The economic growth over the past couple of years and the transformation of office space into other use during and shortly after the financial crisis have caused a steep decrease in vacancies in the office market. Due to good infrastructure, high education levels and high standards of living, the Netherlands and especially Amsterdam are generally considered an attractive place for doing business. Brexit has already caused some companies, as well as the European Medicine Agency, to move to Amsterdam and it is expected that more companies will follow.

The increasing demand for office space in the country's two prime business locations (ie, Amsterdam Zuidas business district and Amsterdam city centre) have caused rents to go up and incentives to be limited. For this reason, some tenants now prefer to move to alternative office locations within Amsterdam, a good example being CBRE, the international real estate adviser, which moved its Amsterdam office from the Zuidas business district to the lesser-known "Schinkel" district last year. Other companies even seem to prefer to move out of Amsterdam for this reason. The upcoming Utrecht Central Station district seems a popular alternative to the country's capital. Vodafone Ziggo was recently welcomed in Utrecht and McDonald's has announced it will follow with its Netherlands head offices in November 2021.

Further, the authors have noticed an increasing demand from tenants for more flexible lease arrangements; for example, providing for co-working spaces or additional services to the office's users. In light of this development, some real estate developers express that they are shifting from pure real estate companies into "tech" companies, a good example being OVG Real Estate, which was recently rebranded as Edge Technologies.

Retail
The ongoing rise of e-commerce is transforming retail real estate markets worldwide, and the Netherlands is no exception. Online shopping is continuing to gain market share at the expense of bricks-and-mortar stores. In less densely populated areas in particular, retail vacancy rates are high and retail space is increasingly being transformed into offices, healthcare facilities, leisure or residential units.

The "A zones" within inner cities remain attractive, offering consumers retail as well as entertainment and other services. Also, shopping centres with a large catchment area and a strong offering of daily groceries continue to attract customers.

Retailers are facing the challenge of finding a successful balance between "clicks and bricks", and the authors expect that transformation of outdated and redundant retail space will gather pace in the coming years.

Logistics
The rise of e-commerce and relatively stable economic conditions have contributed to strong demand in Dutch logistics real estate over the past years (transformation from "shop to shed"), especially in the country's logistics hotspots near the ports and along the southern border. However, the supply of logistics property is increasingly scarce and construction costs are soaring. It is therefore generally expected that pressure on the logistics market will continue to grow, with rising rents as a consequence. However, there is increased public concern about the "boxing" of the Dutch landscape and calls on the Dutch government to restrict and control new logistics developments.

The authors see an increasing interest from investors in rooftop solar projects for logistics properties, generating onsite renewable energy and making efficient use of the often vast rooftop areas.

Hotels
The growth of tourism, both international and domestic, is fuelling the hotel market in the Netherlands. In Amsterdam, occupancy rates and room prices have risen strongly over the past years and there is much demand for new hotels. At the same time, the local authorities are trying to manage mass tourism and limit the development of new hotels in the core of the city centre.

It is generally expected that the investment volume in the Dutch hotel sector will continue to climb in the years ahead. Loyens & Loeff has recently advised AXA on its acquisition of two major hotels in Amsterdam: the DoubleTree by Hilton near Amsterdam Central Station, and the newbuild 650-room Nhow Amsterdam RAI, which is one of the largest hotels in the Benelux.

Legal Trends and Developments
Share deals
A clear trend in Dutch real estate transactions is the increasing number of transactions that are structured as a share deal. The choice for a share deal (instead of an asset deal) is – almost without exemption – made for reasons of tax savings, which can either benefit the seller or the buyer (or both). Most share deals are driven by (significant) savings in corporate income tax, which savings are typically commercially shared between the seller and the buyer (see the section "*Tax Trends and Developments*" below). Specific structuring of transactions can also result in real estate transfer tax exemptions (eg, in the case of multiple purchasers, that each acquires less than a third of the shares) or savings of non-deductible VAT (eg, in the case of newbuild residential real estate). The real estate transfer tax savings or VAT savings can in some cases even cumulate with the corporate income tax advantage.

On the other hand, the authors have noticed that institutional investors still appear to be very much reluctant to share transactions, causing them to miss out on several investment opportunities or forcing them to pay higher prices (in order to make up for a seller's loss of tax advantages). The lack of experience in this field and the higher risk aversion, compared to private capital-based investors, seem to be the main reasons for this.

A real estate-based share deal can generally be considered more complex than a "regular" asset deal, because it requires – apart from real estate law expertise – knowledge in the field of M&A law, accounting principles and tax law. The authors have seen that more specialised law firms (like Loyens & Loeff) jump into this relatively new market, combining their multidisciplinary expertise in these fields of law.

Warranty and indemnity insurance
In recent years, the use of warranty and indemnity insurance has become more popular in the real estate practice. W&I insurance is not only used in share deals, but also in asset deals, and can be a useful tool to optimise the sales process and facilitate a clean exit for the seller.

Current providers of W&I insurance offer policies covering a broad range of seller's warranties, including warranties in respect of title to the property, leased status and disclosed information. Standard exclusions regard warranties with respect to the construction and environmental condition of the property – but sellers are typically not willing to give these warranties anyway.

W&I insurance is usually taken out by the purchaser, but sellers often initiate W&I insurance as part of a sales process. The seller would then inform potential purchasers that it is only prepared to give warranties that are covered by a W&I insurance. This way, the seller prevents lengthy negotiations about warranties and ensures its liability is limited. The purchaser negotiates the extent of the warranties and the limitations of liability with the insurer instead of the seller.

The premium of the W&I insurance depends on the scope of the insured warranties and the limitations of liability. Although premiums are reasonably affordable, a relatively high top-up is payable for coverage of title warranties. Title issues are not considered a material risk in the Netherlands, as parties are able to verify to a great extent title in the Dutch public registers for real estate. Sellers are therefore less hesitant to provide title warranties and purchasers are usually prepared to rely on these Additional W&I coverage for title warranties can then be left out.

In conclusion, if a seller wishes to limit its liability or if parties are keen to expedite the negotiation process, a W&I insurance can be of added value.

"As is where is"

In the current "sellers' market", sellers of real estate are typically reluctant to give extensive warranties. To manage a purchaser's expectations, already in the marketing phase of a sales process, transactions are mostly dubbed "as is where is".

Although this is not a clearly defined term under Dutch law, "as is where is" generally means that a seller is only willing to agree minimal warranties in the sale and purchase agreement, that any implied warranties under Dutch law are excluded and that a purchaser must rely on its own due diligence. The risk that adverse matters (including construction defects and adverse physical and environmental conditions) have not been revealed by the purchaser's investigations is for the purchaser's account, unless these are expressly warranted by the seller.

Even in an "as is where is" transaction, the authors typically see a range of warranties that is considered "minimum". These are warranties on title and authority, and the absence of mortgages and attachments upon transfer. Also basic warranties on rent – eg, that rents have not been transferred or pledged – can be expected, as well as a warranty on information disclosed. The wording, extent and firmness of these warranties can differ. W&I insurance (see above) can be a useful tool to mitigate purchaser's risks in an "as is where is" deal.

In focus: Developments in Residential Lease

Residential rent regulation – an introduction

In the Netherlands, residential rental units are divided into "liberalised units" and "regulated units". For regulated units (which always include non-self-contained units), an extensive set of rent regulation is in place due to mandatory law. For liberalised units, the landlord and tenant are in principle free to agree upon the amount of rent and indexation.

A self-contained unit is considered regulated if the initial rent does not exceed the rent control ceiling (*liberalisatiegrens*). If the initial rent exceeds the rent control ceiling, the unit is in principle considered liberalised. However, tenants may, during the first six months of the lease, request for an assessment of the amount of initial rent by the Rental Committee (ie, an independent committee instituted by the Dutch government), on the basis of a so-called points system that determines whether the initial amount of rent for a specific unit should be regulated and if so, which amount of rent would be reasonable.

The rent control ceiling is set annually by the Dutch government as per January 1st. As of 1 January 2020, the rent control ceiling amounts to EUR737.14 per month.

Trend of urbanisation and housing shortage

Due to the economic growth over the recent years in the Netherlands and a trend of urbanisation, there is currently an imbalance between supply and demand on the residential rental market (see the section "*Market Trends and Developments – Residential*" above). This imbalance is especially present in the regulated and the "mid-market" housing sector (housing with a monthly rent between approximately EUR750 and 1,000).

In order to create more balance on the regulated and mid-market rental housing market, the Dutch government has investigated various new regulations, both on a national and on a local level.

Trends and developments on a national level

On a national level, the government will in the near future amend the above-mentioned "points system". The "points" are attributed based on both the facilities of the unit on the one hand and on the market value of a unit (more specifically: the WOZ value) on the other hand. As market value of housing has kept increasing, the government has announced that the "points" relating to such value shall be limited. It is expected that due to this measure, more units (when leased out anew) become regulated instead of liberalised.

Further, in order to achieve a better distribution of regulated housing, the government intends to introduce legislation that allows for a steeper indexation of rent for households with a middle high or high income that still live in a regulated unit. This should encourage these households to move to a liberalised unit, so the regulated unit becomes available to a household with a lower income.

Trends and developments on a local level

On a local level, the municipalities already have various powers to provide tailor-made measures for the local housing market. With regard to the distribution of housing between prospective tenants, municipalities may order that only tenants with a specific status or household income can obtain a required housing permit (in practice, mostly for regulated and mid-market units) through public law housing regulations (*huisvestingsverordening*).

Further, municipalities have several other authorities by which they can influence the rental market. On the one hand, a municipality may, in its capacity of landowner, issue regulations through civil law, when selling land or issuing new rights of ground lease. These regulations may, for example, require the purchaser to use such land for regulated or mid-market units. On the other hand, the municipality may issue such regulations through the public law zoning plan or through public law building permits that are required for new developments.

As the mid-market sector is considered liberalised, there is no rent regulation possible in this sector based on the national civil tenancy law. In 2019, the government investigated the possibility to grant municipalities the authority to cap initial rents for existing properties in designated areas through their housing regulations. This "emergency button for mid-market rent" (*noodknop middenhuur*) would be a drastic measure and after heavy resistance from various stakeholders, the government has announced that other options to improve the balance in the mid-market sector will currently first be investigated. Whether the "emergency button" regulations will be introduced remains unclear.

Tax Trends and Developments

Corporate income tax in real estate transactions

As the real estate market is moving to the end of the economic cycle and gross initial yields are falling, the upward trend in the real estate market over the last years resulted in significant value increases. These increasing values generally result in corporate income tax due if the real estate is sold. Namely, corporate income tax is due on the difference between the tax book value (generally the acquisition costs minus depreciation expenses) and the sales price. As a result of the value increase over recent years, the amount of corporate income tax due in the case of a direct disposal of the real estate may be significant. Upon a share deal, no corporate income tax is due on the difference between the tax book value and the fair market value of the real estate (being the sales price in the case of an asset deal). The tax claim is deferred to a later date when the real estate is sold. As the buyer acquires an entity with a tax claim, the buyer will generally ask for a discount on the share price. The discount is an outcome of negotiations between parties, although a 50/50 share is often agreed upon in the market.

As such, a share deal generally results in a benefit for both the seller and buyer. Based on the current corporate income tax rates (headline rate of 25%), a 50/50 split would mean the buyer gets a discount on the shares of 50% times 25% of the capital gain (being the difference between the tax book value and the fair market value of the real estate).

Interpretation of abuse

A clear disadvantage of a share deal is that the acquiring (foreign) investor takes over (part of) the investment structure of the seller. This is particularly relevant for the dividend withholding tax that is due on distributions by Dutch entities in abusive situations. In practice, the question of whether an abusive situation is present is mainly relevant for foreign (corporate) investors. The interpretation of abuse has become even more relevant since the European Court of Justice (CJEU) shed more light on the interpretation of abuse in an EU context in February 2019 (the so-called Danish cases). Although the actual impact of the Danish cases in practice is as yet unclear, it seems the CJEU has broadened the EU definition of tax abuse. In order to avoid any discussions with the tax authorities, foreign (corporate) investors increasingly use investment structures in which these discussions are prevented. These alternative investment structures are, for example, an acquisition of real estate by a foreign entity. Any income derived by this foreign entity is normally subject to corporate income tax in the Netherlands. However, the Netherlands is not able to levy dividend withholding tax on distributions by a foreign entity.

Another alternative is to structure the investment in a Dutch Cooperative. Dividends distributed by a Cooperative are currently only subject to dividend withholding tax if the activities of the Cooperative predominantly consist of holding of shares. As such, if the assets of a Cooperative consist of real estate, no dividend withholding tax is due on dividends distributed by this Cooperative. Following these alternative investment structures, there is also an increasing trend in share deals with foreign entities and Cooperatives holding Dutch real estate.

The earnings stripping rule

Another relevant tax development for the real estate market is the earnings stripping rule that applies to financial years starting on or after 1 January 2019. Prior to 1 January 2019, interest paid to third parties and arm's-length intercompany interest was generally deductible from the income derived from real estate and therefore reduced the taxable result and corporate income tax due. The new earnings stripping rule restricts deduction of net interest expenses (intra-group and third party) per taxpayer to the higher of (i) 30% of the EBITDA and (ii) an amount of EUR1,000,000 in financial years starting on or after 1 January 2019. Following the earnings stripping rule, the taxable result and thus corporate income tax due will be higher, which investors should factor in. Besides the impact this is likely to have on prices investors are willing to pay, the earnings stripping rule may also impact the benefit of share deals from a corporate income tax perspective. As non-deductible interest may be (partly) offset against the capital gain realised upon an asset deal, non-deductible interest that has been carried forward is no longer deductible upon a share deal.

Following the potential limitation of deductible interest and the introduction of interest withholding tax for interest payments to low-taxed and blacklisted jurisdictions at a rate of 21.7% (being the main corporate income tax rate as of 2021) as of 1 January 2021, foreign (offshore) investors may consider financing their investment with (more) equity instead of shareholder loans.

COVID-19

This chapter was prepared and describes the trends and developments shortly before the outbreak of COVID-19, which has had a sudden and significant impact on all aspects of people's lives and cast a shadow over the global economy.

Developments in the Dutch real estate sector as a direct result of the pandemic include an increased demand for online shopping at the expense of visits to physical stores, mass remote working and a focus on "de-densification" of office and leisure space. As such, the coronavirus seems to have accelerated some of the trends described in this chapter, whereas other trends are now being scrutinised.

The lasting effects of the outbreak on the Dutch real estate market and on legal and tax developments are currently unclear and difficult to predict. Analysts argue that the Dutch property market fundamentals remain strong and that the impact of the outbreak may be minimal in the long term. However, COVID-19 will undoubtedly change the way we live and work for the foreseeable future.

Contributed by: *Ralph van der Kooi, Maarten Tinnemans, Marloes Voorrips and Alexandra van der Kruk,* ***Loyens & Loeff***

Loyens & Loeff is the logical choice for a legal and tax partner for those who do business in or from the Netherlands, Belgium, Luxembourg and Switzerland, its home markets. The firm is especially praised for its top-tier real estate knowledge. Based on years of experience with various challenging and complex real estate matters, Loyens & Loeff is able to offer its (foreign and domestic) clients indisputable legal solutions, and tailor-made advice on structuring and taxation. The real estate industry group is the largest legal real estate group in the Netherlands (approximately 100 experts). This enables the firm to fulfil all legal and tax needs related to the entire life cycle of real estate.

Authors

Ralph van der Kooi is a deputy civil law notary and senior associate who is a member of the Real Estate practice group. Ralph specialises in real estate law and advises on direct and indirect transactions involving real estate, real estate finance, project development and property law frameworks. Ralph furthermore advises on (re)structuring of real estate funds, combining his expertise in both real estate law and corporate law. He is a lecturer at the NEPROM (Association for Dutch project developers) and the ASRE (Amsterdam School of Real Estate).

Maarten Tinnemans is a deputy civil law notary and senior associate who is a member of the Real Estate practice group. Maarten specialises in the full range of real estate-related transactions. He has considerable experience in acquisitions and disposals of all types of property interests, including controlled auctions, portfolio transactions, sale and lease back, foreclosures, and real estate aspects of corporate and finance transactions. Before joining Loyens & Loeff, Maarten spent 11 years in real estate with another major law firm, based in Amsterdam and subsequently in London. Maarten also gained in-house experience in the legal team of a financial institution.

Marloes Voorrips is an attorney at law who is a senior associate of the Real Estate practice group. Marloes specialises in tenancy law. She advises and litigates mostly in the field of commercial and retail tenancy law. Further, Marloes works in residential real estate transactions with a focus on the regulation of the residential rental market. Marloes regularly publishes about tenancy law and is a member of the leading Dutch journal on commercial tenancy law. She gives lectures about tenancy law to legal professionals and real estate professionals and is a prospective member of the Dutch Association of Lease Lawyers.

Alexandra van der Kruk is a tax adviser and senior associate who is a member of the International Tax practice group. She advises clients mainly on Dutch corporate tax on issues in international structuring and restructuring, private equity, real estate, corporate M&A transactions and financial products. In 2015, she worked at Loyens & Loeff's New York office. Alexandra is a member of the Dutch Association of Tax Advisers.

Loyens & Loeff

Postbus 71170
1008 BD Amsterdam
Nederland

Tel: +31 20 578 57 85
Fax: +31 20 578 58 00
Email: info@loyensloeff.com
Web: loyensloeff.com

LOYENS LOEFF