

Doing Business in The Netherlands

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Arnout Stroeve, Edward de Bock, Rob Havenga,
Weyer VerLoren van Themaat, Bas Le Poole, Dirk Knottenbelt,
Wolter Wefers Bettink and Huib Lebbing
Houthoff Buruma (Lex Mundi Member Firm)

LEGAL SYSTEM

1. What is the legal system (civil law, common law or a mixture of both)?

The Netherlands has a civil law system. The main body of law is the Civil Code.

FOREIGN INVESTMENT

2. Are there any restrictions on foreign investment (including authorisations required by central or local government)?

The government actively encourages foreign investment, although authorisation may be required in certain regulated sectors, such as banking and financial services.

3. Are there any exchange control or currency regulations?

There are no exchange control or foreign currency regulations, except those relating to money laundering.

4. What grants or incentives are available to investors? Are any of these aimed specifically at foreign investors?

A limited number of geographical areas in The Netherlands qualify for EU development grants. Within the framework of the applicable EU regulations on state aid, certain grants and incentives are available on a national level, for example, for research and development, innovation and the environment.

BUSINESS VEHICLES

5. What is the most common form of business vehicle used by foreign companies to conduct business in your jurisdiction? In relation to this vehicle, please provide details on:

- Registration formalities (including timing).
- Minimum (and maximum) share capital.
- Whether shares can be issued for non-cash consideration, such as assets or services (and any formalities).
- Any restrictions on the rights that can attach to shares.
- Any restrictions on foreign shareholders.
- Management structure and any restrictions on foreign managers.
- Directors' liability.
- Parent company liability.
- Reporting requirements (including filing of accounts) and cost of compliance.

The two main ways in which a foreign company can conduct business are through a branch or a subsidiary.

The most common form of business vehicle used by foreign companies is the private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*) (BV).

- **Registration formalities.** The incorporation of a BV must be approved by the Ministry of Justice and requires a notarial deed. The process typically takes about one week, but there is an accelerated procedure that takes 48 hours. All companies must register with the Chamber of Commerce.

- **Share capital.** A BV must have an issued share capital of at least EUR18,000 (about US\$26,321).
- **Non-cash consideration.** Shares can be issued for non-cash consideration. An auditor's statement certifying the minimum value of the non-cash consideration is required.
- **Rights attaching to shares.** There are no restrictions on rights attaching to shares, unless set out in the articles of association.
- **Foreign shareholders.** There are no restrictions on foreign shareholders.
- **Management structure.** The management usually consists of both a management board and a supervisory board. The supervisory board is optional unless the company meets certain criteria. There are no nationality requirements.
- **Directors' liability.** A director can be liable for a serious breach of duty and damage to the company or third parties. There are also certain specific grounds for liability, such as presenting the annual accounts in a misleading way and wrongful trading.
- **Parent company liability.** Generally, a parent company is not liable for the debts of its subsidiary.
- **Reporting requirements.** A company must file certain information with the Chamber of Commerce, including:
 - changes to the articles of association;
 - details of the managing directors;
 - details of share capital;
 - approved annual accounts.

A company must also file an annual corporate income tax return with the tax authorities.

New legislation is expected to be introduced in 2010, which impacts on some of the above subjects.

EMPLOYEES

6. What are the main laws regulating employment relationships?

The main rights of employees in The Netherlands are set out in:

- Statute (including the Dutch Civil Code, the Act on Equal Treatment, the Act on Works Councils, the Working Conditions Act and the Extraordinary Decree on Labour Relations.
- Case law.

- Collective bargaining agreements.
- Individual employment agreements.

Dutch courts generally have jurisdiction, for example:

- If the employer initiates a procedure, the Dutch courts have jurisdiction if the employee lives or primarily works in The Netherlands.
- If the employee initiates a procedure, the Dutch courts have jurisdiction if the employer is based in The Netherlands.

7. Is a written contract of employment required? Are any agreements and/or implied terms likely to govern the employment relationship?

A written contract of employment is not necessary. However, some arrangements between parties do require a written agreement, such as non-compete clauses and clauses relating to penalty payments (for example, for breaching the non-compete clauses). The employer must also confirm in writing certain conditions such as the start date and the employee's salary (*Article 7:655, Dutch Civil Code*).

Collective agreements (between unions and employers) are common in certain sectors, for example, construction, journalism and public transport.

8. Are employees entitled to management representation and/or to be consulted in relation to corporate transactions (such as redundancies and disposals)?

A company must establish a works council if it has 50 or more employees. A works council has a right to advise management on certain management decisions including financial matters and major organisational changes. If the management does not follow this advice, it can result, for example, in a corporate transaction being blocked. Employees are not entitled to board representation.

9. How is the termination of individual employment contracts regulated?

An employer can terminate an employment contract if it obtains a permit from the local employment office (*UWV Werkbedrijf*) and observes the applicable contractual or statutory notice period. The minimum statutory notice period for an employer is one month and rises according to seniority up to a maximum of four months. The statutory notice period for an employee is one month. Contractual notice periods may differ.

A dismissal is considered unfair if it was, for example, on false grounds. Notice cannot be validly given during the employee's illness or to certain employees, such as members of the works council or pregnant women.

An employer can also apply to the court to end the employment contract. If the court ends the employment contract it will, in most cases, award a severance payment based on the cantonal court formula, which takes age, length of service and remuneration into account. In the case of a termination by mutual consent that is started by the employer, the employee remains eligible for social security benefits.

In an urgent case justifying immediate dismissal (such as theft, gross negligence or wilful misconduct), the employer can terminate the employment contract with immediate effect and without a severance payment.

10. Are redundancies/mass layoffs regulated? If so, please give details.

In many redundancy situations, a social plan regulating the consequences of redundancy, is agreed. The courts must, in principle, follow a social plan agreed by the trade unions which sets out, among other things, the date of termination and the amount of severance payments.

If 20 or more employees are to be made redundant in a certain geographical area within a three-month period and the employer wants to terminate the employment agreements by giving notice, the employer must obtain permits from the *UWV Werkbedrijf* before it can give notice to the employees. The *UWV Werkbedrijf* will wait one month before permitting termination. During this time, the employer can negotiate a social plan (with for example, the trade unions).

To avoid any claims for unfair dismissal, redundancy selection must be fair and objectively justifiable. The seniority rule may be applied within several age classes (principle of reflection).

11. Do foreign employees require work permits and/or residency permits? If so, how long does it take to obtain them and how much do they cost?

Non-European Economic Area (EEA) employees (excluding employees of Switzerland but including employees of Romania and Bulgaria) and other foreign employees who already have a residence permit to stay in The Netherlands require work permits. Applications must comply with certain requirements and generally take about five weeks to process. The permit is free.

TAX

12. In relation to employees, what constitutes tax residency in your jurisdiction?

Tax residency is determined according to the facts of each particular case and is based on the centre of an individual's economic and social interests. The most relevant facts and circumstances are the nature and length of stay in The Netherlands and where the family resides.

13. What income tax or social security contributions must the following pay:

- Tax resident employees?
 - Non-tax resident employees?
 - Employers, in relation to their employees?
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Tax resident employees

A resident of The Netherlands is taxed on his worldwide income. Employment salaries and benefits are subject to income tax (Box 1). Employment salaries and benefits are taxed at a rate between 33.5% and 52%, depending on the level of income. National social security contributions are included in the lower two income tax rates of 33.5% and 42%. Income other than employment salaries and benefits is taxed at a different rate under a different tax regime (Box 2 and/or Box 3).

Non-tax resident employees

Non-resident employees in The Netherlands are taxed if and to the extent they have Dutch source income. They can opt to be treated as a resident of The Netherlands for income tax.

If certain conditions are met, inbound expatriates coming to The Netherlands or tax-resident employees leaving The Netherlands can opt for the 30% allowance, which allows 30% of the employment salary to be paid as a tax-free compensation for extraterritorial costs.

Employers

All employment salaries are subject to income tax and social insurance contributions, which the employer should withhold from employment salaries. Every employer must pay employment contributions itself.

14. In relation to business vehicles, what constitutes tax residency in your jurisdiction?

Entities established under Dutch law and non-resident entities that are managed and controlled from The

Netherlands are deemed to be resident in The Netherlands. Entities that are resident in The Netherlands are taxed on their worldwide income.

15. Please give details of the main taxes that potentially apply to a tax resident business vehicle (including rates).

Corporate income tax (CIT)

CIT is levied on income and capital gains at a maximum tax rate of 25.5%. A reduced rate of 20% applies to income up to EUR200,000 (about US\$292,460). There are no provincial or municipal taxes on income. Losses can be carried back for one year and carried forward for nine years. The following entities are subject to CIT:

- Public companies (NVs), private companies (BVs) and open limited partnerships.
- Co-operative societies and other associations based on the co-operative principle.
- Mutual insurance companies and other associations acting as insurance or credit organisations on the principle of mutuality.
- Associations with or without legal personality and foundations to the extent that they conduct a business.
- Funds for joint accounts.
- A number of government-owned companies.

Value added tax (VAT)

VAT applies to the consumption of goods and services in The Netherlands.

Resident companies are considered to be taxable persons if they are entrepreneurs for VAT purposes (*Dutch VAT Act 1968*). If the supplier of goods or services in The Netherlands is a foreign company, it is considered to be an entrepreneur for VAT purposes.

Transfer tax

A 6% transfer tax usually applies to the transfer of property, bare ownership or rights concerning real estate located in The Netherlands. The 6% transfer tax is levied from the acquiring party.

16. How are the activities of non-tax resident business vehicles taxed?

Non-resident companies are subject to corporate income tax only on certain Dutch source income, including:

- Business income from a Dutch permanent establishment or permanent representative.

- Income from real estate located in The Netherlands.
- Income from profit-sharing rights in a Dutch business.
- Income from substantial shareholdings (that is, 5% or more of the nominal paid-up share capital) in a Dutch resident company, which does not qualify as a tax exempt portfolio investment entity, provided the shares held in that company do not form part of the shareholder's enterprise.
- Income from loans to a Dutch resident company if the creditor has a substantial interest in that company and the shares in that company do not form part of an enterprise of the creditor/shareholder.

The above Dutch source income may be limited or exempted under double tax treaties concluded by The Netherlands.

17. Please explain how each of the following is taxed:

- **Dividends paid to foreign corporate shareholders.**
- **Dividends received from foreign companies.**
- **Interest paid to foreign corporate shareholders.**
- **Intellectual property (IP) royalties paid to foreign corporate shareholders.**

■ **Dividends paid.** Dividends paid to foreign corporate shareholders are subject to 15% withholding tax. The statutory 15% rate can be reduced under the provisions of any applicable double tax treaty or Directive 90/435/EEC on the taxation of parent companies and subsidiaries (Parent-Subsidiary Directive). Provided certain conditions are met, co-operatives are not subject to dividend withholding tax.

■ **Dividends received.** Dividends received from foreign companies are exempt from Dutch corporate income tax if the foreign company is a qualifying subsidiary under the Dutch participation exemption. The participation exemption generally applies when both:

- a corporate shareholder owns 5% or more of the nominal paid-up share capital of a foreign company;
- the foreign company does not qualify as a low taxed passive investment subsidiary (*see Question 16*).

■ **Interest paid.** With the exception of interest on certain profit sharing loans, interest is not subject to withholding tax.

■ **IP royalties paid.** These are taxed in the same way as interest paid to foreign corporate shareholders (*see above, Interest paid*), except for the fact that some of the interest deduction restrictions do not apply for royalties.

18. Are there any thin capitalisation rules (restrictions on loans from foreign affiliates)? If so, please give details.

Generally, the Dutch thin capitalisation rules require that a taxpayer is financed with a maximum debt-to-equity ratio of 3:1. If this ratio is exceeded, all or part of the interest paid on inter-company debt is not deductible. If the taxpayer proves that the concern debt-to-equity ratio is higher than the debt-to-equity ratio used by the taxpayer on its own, the taxpayer can apply for the higher concern debt-to-equity ratio. Interest deductions on third-party loans are not affected by the debt-to-equity rules and are fully tax deductible.

19. Must the profits of a foreign subsidiary be imputed to a parent company that is tax resident in your jurisdiction (controlled foreign company rules)?

The Netherlands does not have any specific controlled foreign company rules. However, the participation exemption does not apply in relation to domestic and foreign participations if these participations can be qualified as low taxed passive investment subsidiaries (see *Questions 16 and 17*).

20. Are there any transfer pricing rules? If so, please give details.

Transactions between Dutch companies and their affiliates must be made at arm's length. On the basis of the arm's-length principle, a company should have readily available for inspection either:

- An inter-company pricing policy analysis.
- Relevant back-up documentation demonstrating the arm's-length character of that policy.

21. How are imports and exports taxed?

The Netherlands is part of the customs area of the EU. If goods are imported from non-EU countries to The Netherlands, tax is payable on the value of the goods imported. The rates vary depending on the product. Value is established in accordance with the Customs Valuation Code of the General Agreement on Tariffs and Trade.

Exports are generally exempt from tax.

22. Is there a wide network of double tax treaties? If so, please give details.

The Netherlands has an extensive network of about 100 tax treaties for the avoidance of double taxation with almost all

developed countries in western and eastern Europe, North and South America, Asia and Australia. The Netherlands has also concluded about 100 bilateral investment treaties.

COMPETITION

23. Are restrictive agreements and practices regulated by competition law in your jurisdiction? If so, please give brief details.

Dutch anti-trust provisions mirror the wording and scope of EC competition law.

Restrictive agreements and practices are prohibited if they restrict competition in all, or part of, The Netherlands. Exemptions apply for:

- Agreements and practices covered by EC exemptions.
- *De minimis* agreements.
- Agreements offering temporary protection from competition to undertakings in new shopping centres.
- Certain co-operation agreements in the retail industry.

The Dutch Competition Authority has issued guidelines with respect to certain consortium agreements.

The abuse of a dominant position is also prohibited.

A separate regime exists for books and written music. Resale price maintenance for these works is allowed under certain conditions.

Specific merger rules apply for media and the health sector.

INTELLECTUAL PROPERTY

24. Please outline the main intellectual property rights that are capable of protection in your jurisdiction. In each case, please state:

- **Nature of right.**
- **How protected.**
- **How enforced.**
- **Length of protection.**

Patents

- **Nature of right.** European and Dutch patents are protected under the *Rijksoctrooiwet* 1995 and the European Patent Convention. For an invention to be patentable, it must:

- be new;

- involve an inventive step;
- be capable of industrial application;
- not be specifically excluded from protection.

The patent owner has the exclusive right to, among other things, manufacture, use, bring into circulation, sell, deliver or trade the patented product, or offer, import or stock the product for a third party. The same applies to a patented working method.

- **How protected.** A patent must be registered with The Netherlands Industrial Property Office (IPO) at The Hague to be protected. An application for a European patent can be made either at the IPO or through the European Patent Office. The Netherlands is party to the Patent Cooperation Treaty 1970, through which a national patent can be obtained.
- **How enforced.** Enforcement is through the District Court of The Hague only. An infringer is liable for actual damage caused if he is reasonably aware of the infringement. A range of (provisional) civil measures is available to the patent owner.
- **Length of protection.** Protection lasts for six years without a search report (that is, an examination of the state of the art for the subject matter of the patent) or 20 years with a search report.

Trade marks

- **Nature of right.** Registered trade marks are protected under the Benelux Convention on Intellectual Property. To be registrable, a trade mark must be capable of:
 - graphic representation;
 - distinguishing the goods or services of one undertaking from those of other undertakings.

The trade mark owner has the exclusive right to use the trade mark for the goods and services for which it has been registered and, among other rights, is entitled to oppose the use of the mark for the same or similar goods if there is a risk of confusion.

- **How protected.** A trade mark must be registered with:
 - the IPO or the Benelux Office for Intellectual Property (for a Benelux trade mark);
 - Office for Harmonisation in the Internal Market (OHIM) (for a Community trade mark).
- **How enforced.** Enforcement of Community trade marks is through the District Court of The Hague only. Benelux trade marks can be enforced through any competent court. An infringer is liable for actual damage caused and the trade mark owner and licensee can claim the profits gained by the infringer when using the trade mark in bad faith. A range of

(provisional) measures such as injunctions are available to the trade mark owner.

- **Length of protection.** Protection lasts for ten years and is renewable indefinitely for further ten-year periods.

Registered designs

- **Nature of right.** Registered designs are protected under the Benelux Convention on Intellectual Property. To be registrable, a design must:
 - relate to the appearance of all or part of a product resulting from certain features of the product or its ornamentation;
 - be new (with a grace period of 12 months before the application);
 - have individual character.

The elements necessary for obtaining a technical effect are excluded from protection.

The design owner has the exclusive right to, among other things, use, manufacture, offer, trade, sell, deliver, import, export or stock the design.

- **How protected.** A design must be registered with:
 - the Benelux Office for Intellectual Property (for a Benelux design);
 - the OHIM (for a Community design).
- **How enforced.** The enforcement procedure for registered designs is the same as for trade marks (*see above, Trade marks*).

- **Length of protection.** Protection lasts for five years and is renewable up to a maximum of 25 years.

Unregistered designs

- **Nature of right.** An unregistered design is protected if it is disclosed to the public in such a way that interested parties operating within the EU could reasonably be aware of the design.
- **How protected.** Unregistered designs are protected as a Community right without registration. There is no protection under the Benelux Convention for Intellectual Property.
- **How enforced.** The enforcement procedure of unregistered designs is the same as trade marks (*see above, Trade marks*).
- **Length of protection.** Protection lasts for three years from the first disclosure.

Copyright

- **Nature of right.** Copyright subsists in, among other things, the following original works:

- literature;
- drama;
- music;
- architecture;
- geographical maps;
- photography;
- film;
- art;
- computer program.

The copyright owner has the exclusive right to make public, copy and reproduce the copyrighted work.

- **How protected.** Copyright arises through the creation of a work. No registration is required.
- **How enforced.** Copyright can be enforced before any district court. An infringer is liable for actual damage caused and can claim the profits gained by the infringer when using copyright-protected work. A range of (provisional) measures are available to the copyright owner. Certain acts qualify as crimes under the Penal Code.
- **Length of protection.** Protection lasts for 70 years after the year in which the creator has died, or 70 years from the date of first publication if the creator is not a natural person.

Confidential information

- **Nature of right.** Information is protected if it:
 - is confidential in nature; and
 - was initially communicated in circumstances importing an obligation of confidence, preferably using a confidentiality agreement.
- **How protected.** Confidential information can be protected by contract.
- **How enforced.** Claims pertaining to a breach of confidential information can be enforced before any district court (breach of contract or act of tort). Depending on the legal basis for the action, compensation can be claimed for actual damage caused and a range of (provisional) civil measures are available to the owner of the confidential information.
- **Length of protection.** There is no defined term of protection, but courts only enforce claims pertaining to a breach of confidentiality for as long as the information remains confidential and there is a legitimate interest that requires protection.

Database rights

- **Nature of right.** A database is a collection of independent works, data or other materials arranged in a system-

atic or methodical way and individually accessible by electronic or other means. To be protected, there must have been a substantial investment in obtaining, verifying or presenting the contents of the database.

The database owner has the exclusive right to retrieve and reproduce a substantial part of the database. This may not be circumvented by repeatedly and systematically retrieving or reproducing parts of the database.

- **How protected.** Database rights arise through the database's creation. No registration is required.
- **How enforced.** Database rights can be enforced before any district court. Compensation can be claimed for actual damage caused and a range of (provisional) civil measures are available to the owner of the database rights.
- **Length of protection.** Protection lasts for 15 years from completion of the database. Each time the database is changed substantially, protection is renewed for the revised database for a further 15 years.

Trade names

- **Nature of right.** A trade name is the name, or names, under which a company conducts its business.
- **How protected.** Trade names rights arise automatically when the name is used for a company. No registration is required.
- **How enforced.** Trade name rights can be enforced before any district court. A special procedure to request change of a trade name can be brought before the cantonal section of a district court. An injunction is the main sanction. A range of (provisional) civil measures is available to the rightful user of the trade name.
- **Length of protection.** Protection lasts for as long as the name is actually used to conduct business.

MARKETING AGREEMENTS

25. Are marketing agreements regulated in your jurisdiction? If so, please give brief details in respect of the following arrangements:

- **Agency.**
 - **Distribution.**
 - **Franchising.**
-
- **Agency.** The Civil Code governs commercial agency. A number of the provisions are mandatory and protect agents. The provisions deal particularly with:
 - minimum notice periods for termination;

- termination requirements;
- compensation in the event of irregular termination;
- the calculation of an agent's compensation in the event of irregular termination;
- goodwill compensation.
- **Distribution.** There are no specific laws regulating distribution agreements.
- **Franchising.** There are no specific laws regulating franchises. However, the Dutch concept of reasonableness and equity is often applied by the courts.
- The financial sector (*Code of Conduct for banks and (health) insurance companies, Act on Financial Supervision*).
- The medical sector (*Medical Treatment Contracts Act*).
- The telecommunications sector (*Telecommunications Act 2004*).

PRODUCT LIABILITY

28. Are there any laws regulating product liability and product safety? If so, please give brief details.

The Dutch Civil Code has implemented (*Articles 6:185-193, Dutch Civil Code*):

- Directive 85/374/EEC on liability for defective products (Product Liability Directive).
- Directive 99/34/EC amending the Product Liability Directive.
- Directive 92/59/EEC on general product safety.
- Directive 864/2007/EC regarding the governing law on product liability will be effective from 11 January 2009.

E-COMMERCE

26. Are there any laws regulating e-commerce (such as electronic signatures and distance selling)? If so, please give brief details.

The Civil Code has implemented:

- Directive 99/93/EC on electronic signatures (*Article 3:15a-3:15c, Civil Code*).
- Directive 97/7/EC on distance selling (*Article 7:46a-7:46j, Civil Code*).
- Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (*Article 6:227a-6:227c, Civil Code*).

DATA PROTECTION

27. Are there any data protection laws? If so, please give brief details.

The Data Protection Act 2001 implements Directive 95/46/EC on data protection. It requires data controllers to process data fairly and for legitimate purposes only. It also provides the data subject with a right to access and correct his data. Data processing activities must be notified to the Data Protection Authority and the transfer of personal data to countries outside the EEA is restricted; generally, a permit from the Ministry of Justice is needed for such a transfer. However, according to an amendment expected to come into effect in 2010, parties making use of the Model Contracts for the transfer of personal data to third countries to govern the data transfer will no longer be required to obtain a permit.

There are also laws and codes of conduct for processing data in specific sectors, including:

CONTRIBUTOR DETAILS

Arnout Stroeve, Edward de Bock, Rob Havenga, Weyer VerLoren van Themaat, Bas Le Poole, Dirk Knottenbelt, Wolter Wefers Bettink and Huib Lebbing

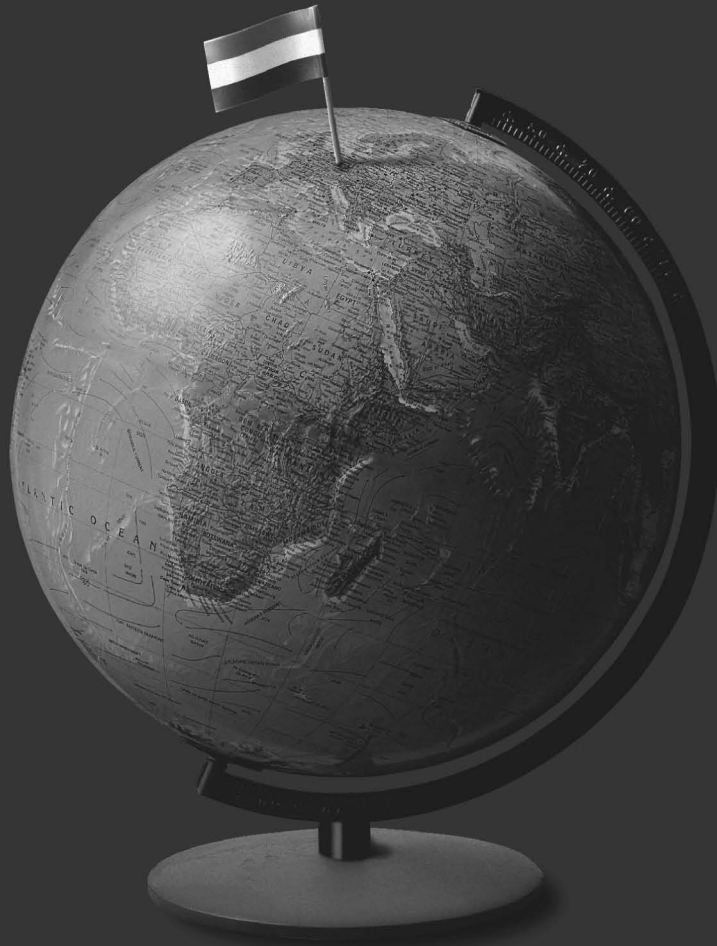
Houthoff Buruma

T +31 20 605 6538
 +31 20 605 6183
 +31 20 605 6537
 +31 20 605 6183
 +31 20 605 6102
 +31 10 217 2472
 +31 20 605 6167
 +31 20 605 6532

F +31 20 605 67 00

E *a.stroeve@houthoff.com*
e.de.bock@houthoff.com
r.havenga@houthoff.com
w.verloren@houthoff.com
b.le.poole@houthoff.com
d.knottenbelt@houthoff.com
w.bettink@houthoff.com
h.lebbing@houthoff.com

W *www.houthoff.com*



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Contact Eddie Meijer, e.meijer@houthoff.com, T + 31 (0)10 217 26 39, or Philippe Creijghton, p.creijghton@houthoff.com, T +31 (0)20 605 63 20.

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www.houthoff.com